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

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

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

RESPONDING FACTUM OF THE APPLICANT, SINO-FOREST CORPORATION

(Lift Stay Motion returnable April 20, 2012)

Dated: April 19, 2012

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TO: THE SERVICE LIST

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I. OVERVIEW

1. The class action plaintiffs have sought a motion to lift the stay of proceedings ordered by this Honourable Court on March 30, 2012, as later extended, to permit them to proceed with two motions before Justice Perell relating to (a) a proposed settlement with Poyry (Beijing) Consulting Company Limited ("Poyry") and (b) funding for the class action.

2. The debtor, Sino-Forest Corporation ("Sino-Forest" or the "Company") does not intend to participate in either of those motions in the class action and as such takes no position with respect to the substance of the lift stay motion before the Court, other than as set out below, and subject to a reservation of rights to any position on any future lift stay motion. For this reason, and this reason only, the Company has not engaged on the merits of the allegations contained in

exhibits to an affidavit of one of the class counsel lawyers (which exhibits are affidavits to be used in a motion returnable in late 2012 if the class proceeding is not stayed entirely). As such allegations go to the heart of the class action, it is respectfully submitted that this Court should not engage in any fact-finding with respect to those assertions made in exhibits to a lawyer's affidavit (which the lawyer does not even seek to admit as hearsay).

3. There is, however, one substantive issue on this motion to which the Company objects. In connection with the Poyry settlement, class counsel is seeking additional relief that would require actions by the Company, with respect to the provision of a list of beneficial shareholders.

4. There is no basis rooted in the CCAA or the purposes underlying that statute that would justify lifting the stay for these purposes. To the contrary, the stated purpose for seeking the information is allegedly to identify Sino-Forest stakeholders, which is what the Applicant would be doing in a claims procedure order. Moreover, the plaintiffs cannot satisfy the "heavy onus" for lifting the stay when the evidence clearly shows that Sino-Forest could not even comply with the order that class counsel seeks.

5. There is no dispute that the class action is stayed as against the Company and its directors and officers. The purposes of that stay is (a) to allow management to focus on restructuring, which it has been diligently pursuing since the Initial Order was granted, and (b) to ensure that no individual stakeholder gets a "leg up" on others during the period of time while the debtor seeks to make a restructuring proposal. While that process is underway, it is not appropriate to have the debtor's time and resources diverted, particularly where there is little if anything to be served by such diversion.

II. FACTS

6. By Statement of Claim as amended and filed on January 26, 2012, the Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong have asserted a number of claims against the Applicant and several other parties.

> Statement of Claim dated January 26, 2012, Exhibit "B" to the Affidavit of Daniel Bach sworn April 11, 2012 (the "Bach Affidavit"), Motion Record of the Moving Parties (the "Motion Record"), Tab 2(B).

7. In connection with that class action, the plaintiffs have filed voluminous materials in connection with an application for leave to commence a secondary market claim under Part XXIII.1 of the *Securities Act* and for certification of the class proceeding. Pursuant to a schedule set by Justice Perell in case managing that proceeding prior to the issuance of the stay of proceedings in this case, the defendants' responses to that affidavit material were due on June 11, 2012 and cross-examinations were to be completed by September 14, 2012.

> Reasons of Justice Perell dated March 26, 2012, Exhibit "G" to the Bach Affidavit, Motion Record Tab 2(G)

8. Therefore, importantly, notwithstanding the submissions in the Moving Parties' factum that the allegations in the class proceeding are "supported" by various evidence, that evidence has (a) not been ruled as admissible; (b) not been responded to yet; and (c) not tested with cross-examination yet. Moreover, these affidavits are not even tendered as evidence in this motion, but rather find themselves in the record as exhibits to the affidavit of Daniel Bach, an associate at Siskinds LLP, who does not (and cannot, given the *Rules*) testify that he believes them to be true.

As such, these documents and the allegations contained therein should be viewed as nothing more than background for what will undoubtedly be a heated contest with respect to the shareholder claim.

9. In the present case, the Moving Parties seek an order lifting the stay to permit them to proceed with two motions: (a) a motion to approve a settlement of the Ontario class action with Poyry and a parallel motion in the corresponding class action brought in the Quebec Superior Court (the "Poyry Settlement Motions"); and (b) a motion to approve a litigation indemnity agreement, scheduled for May 17, 2012.

> Notice of Motion, paras. 2(a) and (b), Motion Record Tab 1, pp. 1-2.

10. Sino-Forest does not intend to participate in either of those motions, except in one respect where it would be required to. In the Ontario Poyry Settlement Motion, the class plaintiffs are seeking the following relief:

> (a) an order certifying this section as a class proceeding for the purposes of settlement, pursuant to the *Class Proceedings Act, 1992*, S. O. 1992, c. 6, against the Defendant Poyry (Beijing) Consulting Company Limited only;
>
> [...]
>
> **(e) an order requiring the defendant Sino-Forest Corporation to deliver to the plaintiffs within ten days a list of the names and addresses of known beneficial owners of Sino-Forest securities as of June 2, 2011;**
>
> (f) an order approving and directing the dissemination and publication of the notice of settlement approval hearing in respect of a proposed settlement between the plaintiffs and Poyry (Beijing) Consulting Company Limited ("Poyry");
>
> [...]

> Notice of Motion in Poyry Settlement Motion, Tab 1 to the Motion Record on Poyry Settlement, Exhibit "E" to the Bach Affidavit (on disk), Motion Record Tab 2(E) [emphasis added]

11. The settlement with Poyry is essentially a credit-for-cooperation style settlement, where Poyry pays no amounts to the class members but agrees to cooperate with them. These types of "some-but-not-all" settlements or "cooperation" settlements are not uncommon in other types of class actions, but it is fairly novel in a securities class action. As such, there is no prototypical "notice" provision in a "some-but-not-all" settlement in the securities context.

> *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.J.)
>
> *Airia Brands Inc. v. Air Canada*, [2011] O.J. No 4787 (S.C.J.) at paras. 22, 25, 28, 34

12. The relief sought from Justice Perell on May 17, 2012 is not to approve the settlement, but rather, to set the stage for some future motion (by appointing the plaintiffs as representative plaintiffs for the purpose of the class action and certifying the claim against Poyry). The relief sought is simply to provide notice of the fact of a settlement hearing (including how class members can opt out of the proceeding) relating to Poyry to be heard sometime in the future.

Sino-Forest Cannot Provide a List of Beneficial Shareholders

13. Sino-Forest's transfer agent is Valiant Trust Company ("Valiant"), who likely could provide a list of *registered* shareholders at any point in time. However, CDS & Co. and its nominee (collectively, "CDS") are the registered holders of more than 97% of the issued and outstanding shares of Sino-Forest. As such, a list of registered shareholders would not be meaningful.

Affidavit of W. Judson Martin, sworn April 18, 2012 (the "Martin Affidavit"), Motion Record of the Applicant (Motion to Expand Monitor's Powers) ("Sino-Forest Record"), Tab 2, para. 20

14. Shares held by CDS are beneficially owned (through their brokers) by persons who have designated themselves as either "Objecting Beneficial Owners" ("OBOs") or "Non-Objecting Beneficial Owners" ("NOBOs"). OBOs are persons who object to having their personal information shared with the issuer, whereas NOBOs do not. Sino-Forest is unable to obtain a list of the personal information of OBOs at any time. With respect to NOBOs, such information would be obtained from Broadridge Financial Solutions Inc. ("Broadridge"), which is the company that Sino-Forest uses with respect to tracking and communicating with its beneficial shareholders. Broadridge can produce a list of NOBOs upon request at any date subsequent to the date of the request, but does not maintain historical data beyond three months. As a result, the only information that can be obtained from Broadridge is current information.

Martin Affidavit, Sino-Forest Record, Tab 2, para. 21

15. The only possible historical information that could exist would be if anyone at Sino-Forest still had the last list of NOBOs used for Sino-Forest's last annual general meeting, which list had a record date of April 29, 2011. Such a list would not have been meaningful for purposes of determining shareholders as at June 2, 2011, because 64 million shares (approximately 30% of the float of shares) traded in that time period. Moreover, the significant majority of shares are beneficially owned by OBOs – as of April 29, 2011, Sino-Forest had 34,177 beneficial shareholders, and of those, only 9,316 were NOBOs.

Martin Affidavit, Sino-Forest Record, Tab 2, para. 21

16. Notwithstanding the defects inherent in such a list, Sino-Forest still made further enquiry. Based on those enquiries, Sino-Forest has determined that even that list – as at April 29, 2011 – does not exist. Sino-Forest used Broadridge for its mailings in 2011, and as such the list was never provided to Sino-Forest. Broadridge purges its data after three months have passed. Therefore, even the historical, incomplete and inaccurate list as at April 29, 2011 is not available.

Martin Affidavit #2, Sino-Forest Supplemental Record, Tab 1

17. The present shareholder list is useless for the purposes of determining shareholders as at June 2, 2011. Almost 698 million shares have traded from June 2, 2011 to the date when the shares were cease traded – roughly three times the total float of shares issued and outstanding.

Martin Affidavit #2, Sino-Forest Supplemental Record, Tab 1

18. Accordingly, Sino-Forest is incapable of complying with any order requiring them to produce a shareholder list as at June 2, 2011, other than the list of registered shareholders as described above. Class counsel's assertion in their factum that "we expect that this information is available from SFC's transfer agent" is simply wrong.

Martin Affidavit, Sino-Forest Record, Tab 2, para. 21

Moving Parties' Factum, para. 44

III. LAW AND ARGUMENT

A. Lift Stays

19. A stay of proceedings is at the core of a CCAA proceeding, whereby all creditors are effectively required to put their "pens down" while the debtor makes an effort to make a proposal to its creditors to restructure its debt. The stay of proceedings is the key tool that is designed to

ensure that the *status quo* is maintained during the restructuring efforts. It further prevents "manouevers for positioning" among creditors and prevents one creditor from getting a "leg up" on others. The Court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring.

> *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 (Q.B.) at paras. 17-19
>
> *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.) at para. 36
>
> *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (C.A.) at 4, cited in *Stelco Inc. (Re)*, [2005] O.J. No. 4733 (C.A.) at para. 18

20. The caselaw relied upon by the plaintiffs relating to section 106 of the *Courts of Justice Act* is inapposite. Different considerations apply with CCAA stays of proceeding, given their central role in maintaining the *status quo*.

21. Lifting a stay is a discretionary decision. By lifting the stay, the court is not preserving the *status quo* and keeping all stakeholders equal, but rather, allowing one stakeholder to advance a claim while all others are stayed. As a result, the party seeking a lift stay faces "a very heavy onus" in obtaining a lift stay.

> *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 (S.C.J.). at para. 32, per Pepall J. as she then was

22. In considering whether to grant a lift stay, the Court should consider whether there are sound reasons for lifting the stay consistent with the objectives of the CCAA, including considering the balance of convenience, relative prejudice to the parties and where relevant, the merits of the proposed action.

Canwest Global, supra at para. 32

Bank of Montreal v. NFC Acquisition GP Inc., [2012] O.J. No. 785 (S.C.J.) at para. 11

23. The following factors, set out first by Professor R.H. McLaren but adopted by this Honourable Court on a number of occasions, have been identified in determining whether or not to grant a lift stay:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

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

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

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

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

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

Canwest Global, supra at para. 33

NFC Acquisition, supra at para. 11

24. The Court regularly denies applications to lift stays of proceedings, particularly where the creditor or other stakeholder seeks to have their claims adjudicated in class proceedings or would gain an advantage over other creditors generally in the CCAA proceedings. Except in circumstances where it can be clearly demonstrated that the claim can be dealt with more expeditiously than through a claims process, such motions are usually dismissed.

> *Canadian Red Cross Society, Re*, 1999 CarswellOnt 3234 (S.C.J.)
>
> *Air Canada (Re)*, [2004] O.J. No. 527 (S.C.J.)

B. The Lift Stay Should Not Be Granted to Affect the Debtor

25. The Moving Parties have not submitted any rationales for lifting the stay to affect the debtor which are in any way consistent with the CCAA. It is telling that virtually all of the factors considered by the courts in prior lift stay motions bear no relationship at all to the Moving Parties:

(a) No plan of arrangement has been proposed yet in this three-week old CCAA proceeding, and there is no allegation nor basis to believe that any such plan would be likely to fail;

(b) There is no allegation, let alone proof, that the stay creates any hardship on the Moving Parties;

(c) The Moving Parties have not shown any necessity for payment, where the creditors' financial problems are created by the order or where the failure to pay

the creditor would cause it to close and thus jeopardize the debtor company's existence;

(d) The Moving Parties do not need to protect a right that would be lost by the passing of time;

(e) It cannot be said that the debtor is no closer to a proposal than at the commencement of the stay period "after the lapse of a significant time period." It has been three weeks;

(f) The Moving Parties do not have a secured loan that will become unsecured through the passage of time; and

(g) The Moving Parties do not have some right that existed prior to the stay that needs to be perfected.

26. The only basis for this relief is set out at paragraph 44 of class counsel's factum, which states:

> [W]e believe that identifying the members of the Class and running the opt-out period for the Class is an important exercise even for these CCAA proceedings. It is obviously beneficial to understand who the affected stakeholders are for the purposes of these proceedings. The certification and optout process pertaining to the Pöyry Settlement will determine precisely what claims form part of the class proceeding because anyone who does not opt out will be bound by subsequent court orders approving settlements in the Ontario Class Action.
>
> Moving Parties' Factum, para. 44

C. Sino-Forest Cannot Comply

31. Moreover, the class plaintiffs should not be allowed to lift the stay to pursue relief that cannot be fulfilled. Put another way, it is not in the "interests of justice" to lift the stay to require the debtor to expend time and resources to litigate an issue when it is clear that the debtor cannot comply with the relief sought.

32. In the present case, the class plaintiffs sought in their notice of motion an order requiring Sino-Forest to produce a list of beneficial shareholders as at June 2, 2011. That relief cannot be fulfilled in any way. In this country, shareholders can designate themselves as Objecting Beneficial Owners, and when they do, their personal information is not provided to the issuer. In this case, more than 72% of the shareholders have so designated. The list simply cannot be provided.

33. Moreover, even if the plaintiffs were to scale back the relief they sought to only obtain information regarding NOBOs, the Applicant also can do nothing to assist. It has no ability to produce a list of NOBO shareholders as at June 2, 2011. All it can do is produce a current list of shareholders, but this is entirely useless for the stated purposes, because 283% of the issued and outstanding shares traded between June 2, 2011 and today.

34. The Court cannot order a party to do the impossible.

> *Nations Petroleum Co. v. Beeston*, [2010] A.J. No. 1244 (Q.B.) at para. 45
>
> *Metro Waste Paper Recovery Inc. v. Richter and Partners Inc.*, [1997] O.J. No. 3525 (Gen. Div.) at para. 1
>
> *Bell Expressvu Limited Partnership v. Morgan*, [2008] O.J. No. 1144 (S.C.J.) at para. 23

35. It is submitted that it is not in the interests of justice to lift the stay for the singular purpose of requiring Sino-Forest to brief another judge in another proceeding about why it should not be ordered to do the impossible.

36. Given the "heavy onus" on the Moving Parties to justify a lift stay, it is submitted that the Moving Parties must at the minimum be able to show this Honourable Court that compliance is possible. That is not the case here.

37. The plaintiffs have not sought alternative relief in the Poyry Settlement Motion to obtain any list other than a list identifying beneficial owners as at June 2, 2011, and there is no evidence upon which the plaintiffs could assert that such a list would meaningfully assist the notice process (and given the limited utility and potential other uses for such information,[1] such evidence would need to be cross-examined if it were tendered). It is clear that in order to reach shareholders, the plaintiffs will have to use one of the other mechanisms for notifying the class, such as newspapers and the Internet. These are mechanisms that will not affect the debtor nor interfere with the restructuring process that it is diligently pursuing.

IV. ORDER REQUESTED

38. As such, the Applicant asks that class counsel's motion for a lift stay be denied insofar as the Poyry motion requires the Applicant to respond to the class action at this time. In practical

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[1] It might be noted that the process by which a shareholder can obtain a NOBO list is prescribed by National Instrument 54-101, and Form 54-101F9 sets out the form of undertaking (which expressly limits the uses for NOBO lists), which has not been provided by the plaintiffs. See NI 54-101, s. 6.1(2).

terms, this would take the form of a proviso to the relief sought, which proviso the Applicant respectfully requests:

> THIS COURT ORDERS that the motions to lift the stay of proceedings herein to permit the Poyry Settlement Motion and the Funding Motion to proceed is granted, except as it relates to section 2(e) of the Notice of Motion dated April 2, 2012, which seeks specific relief against the Applicant, which relief continues to be stayed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DEREK J. BELL

Lawyers for Sino-Forest Corporation

SCHEDULE "A" – AUTHORITIES CITED

1. *Ontario New Home Warranty Program v. Chevron Chemical Co.,* [1999] O.J. No. 2245 (S.C.J.)
2. *Airia Brands Inc. v. Air Canada,* [2011] O.J. No 4787 (S.C.J.)
3. *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 (Q.B.)
4. *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.)
5. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (C.A.)
6. *Stelco Inc. (Re)*, [2005] O.J. No. 4733 (C.A.)
7. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 (S.C.J.)
8. *Bank of Montreal v. NFC Acquisition GP Inc.*, [2012] O.J. No. 785 (S.C.J.)
9. *Canadian Red Cross Society, Re*, 1999 CarswellOnt 3234 (S.C.J.)
10. *Air Canada (Re)*, [2004] O.J. No. 527 (S.C.J.)
11. *Nations Petroleum Co. v. Beeston*, [2010] A.J. No. 1244 (Q.B.)
12. *Metro Waste Paper Recovery Inc. v. Richter and Partners Inc.*, [1997] O.J. No. 3525 (Gen. Div.)
13. *Bell Expressvu Limited Partnership v. Morgan*, [2008] O.J. No. 1144 (S.C.J.)

COURTS OF JUSTICE ACT, R.S.O. 1990, CHAPTER C.43

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

NATIONAL INSTRUMENT 54-101
COMMUNICATION WITH BENEFICIAL OWNERS OF SECURITIES OF A REPORTING ISSUER

...

PART 6 - OTHER PERSONS OR COMPANIES

6.1 Requests for NOBO Lists from a Reporting Issuer

(1) A person or company may request from a reporting issuer the most recently prepared NOBO list, for any proximate intermediary holding securities of the reporting issuer, that is in the reporting issuer's possession.

(2) A request for a NOBO list under this section shall be accompanied by an undertaking in the form of Form 54-101F9 of the person or company making the request.

(3) The person or company making a request under subsection (1) shall pay a fee to the reporting issuer for preparing the NOBO list for sending under this section.

(4) A reporting issuer shall send any NOBO list requested under this section, within ten days of receipt of both the request and the fee for preparing the list for sending under this section.

(5) A reporting issuer shall delete from any NOBO list sent under this section any reference to FINS numbers referred to in any form and any other information that would identify the intermediary through which a NOBO holds securities.

PART 7 - USE OF NOBO LIST AND INDIRECT SENDING OF MATERIALS

7.1 Use of NOBO List

No reporting issuer or other person or company shall use a NOBO list or a report prepared under section 5.3 relating to the reporting issuer and obtained under this Instrument, except in connection with:

(a) sending securityholder materials to NOBOs in accordance with this Instrument;

(b) an effort to influence the voting of securityholders of the reporting issuer;

(c) an offer to acquire securities of the reporting issuer; or

(d) any other matter relating to the affairs of the reporting issuer.

7.2 Indirect Sending of Materials

No person or company other than the reporting issuer shall send any materials indirectly to beneficial owners of a reporting issuer under section 2.12 of this Instrument except in connection with:

(a) an effort to influence the voting of securityholders of the reporting issuer;

(b) an offer to acquire securities of the reporting issuer; or

(c) any other matter relating to the affairs of the reporting issuer.

...

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