EXHIBIT A

Court File No. CV-09-7966-00CL

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 THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

FACTUM OF THE APPLICANTS
(returnable October 7, 2009)

October 5, 2009

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TO: SERVICE LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

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FACTUM OF THE APPLICANTS
(returnable October 7, 2009)

PART I - INTRODUCTION

Overview

1. The Applicants and Partnerships are proceeding in good faith and with due diligence, enjoy a good liquidity position and are working to develop a restructuring plan in conjunction with the other members of the Smurfit-Stone group also in chapter 11 proceedings before the bankruptcy court in the United States.

2. Anticipating that whatever plan is ultimately proposed will not satisfy them, the holders of the majority of the senior notes issued by Stone Container Finance Company of Canada II ("**Finance II**") nevertheless ask this Court to remove Finance II from CCAA protection and instead appoint a Canadian trustee in bankruptcy.

3. Lifting the stay to appoint a trustee at this stage is premature and unnecessarily risks prejudice to the cross-border insolvency proceedings and the Applicants' and Partnerships' ability to develop a restructuring plan.

4. Consistent with the purposes of the CCAA, the Applicants and Partnerships should be entitled to seek approval of a restructuring plan unless that plan is "doomed to fail". The Court cannot assume that a plan is doomed to fail based on the Noteholders' ungrounded concerns about conflicts between the various Applicants and Partnerships or their current expectation that they will not be satisfied by the plan ultimately presented. The Court cannot make such an assumption before a plan is tabled and in the absence of any evidence, particularly when it is unclear at this stage whether Finance II even has a claim entitling it to vote on any plan or any interest adverse to those of the other Applicants and Partnerships.

5. The Noteholders are not being prejudiced by waiting for a plan to be proposed in the absence of a trustee in bankruptcy. Finance II's only assets, notably its right to pursue its intercompany claims in the CCAA and chapter 11 proceedings, have already been preserved. Furthermore, the Noteholders' indenture trustee already sits as an *ex officio* member of the statutory unsecured creditors' committee, which has standing to represent the interests of unsecured creditors by participating in both the CCAA proceeding and in the U.S. Bankruptcy Proceedings.

6. The appointment of a trustee in bankruptcy will, however, risk real prejudice to the Applicants and Partnerships over and above the considerable expense entailed

by the moving parties' proposal, as it constitutes an event of default under the DIP Facility and could upset the Applicants' tax structure and therefore its ability to emerge successfully from CCAA protection.

Basis for Arguing the Motion

7. The Applicants and Partnerships accept that the present motion will be argued as though it had been heard immediately prior to the stay extension motion heard September 25, 2009; and that the stay extension granted on September 25, 2009 is subject to, and without prejudice to, the rights and interests of the Noteholders on the present motion.

PART II - FACTS

Applicants and Partnerships Proceed in Good Faith

8. Smurfit-Stone Container Corporation, Smurfit-Stone Container Enterprises, Inc. ("**SSCE**"), the Applicants and Partnerships listed on Schedules "A" and "B" hereto and the other members of the Smurfit Group listed on Schedule "C" hereto (together with the Applicants and Partnerships, the "**U.S. Debtors**") filed a voluntary petition for relief from their creditors under title 11 of chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1532 (the "**U.S. Bankruptcy Proceedings**") on January 26, 2009. Later that day, SSC Canada and the other Applicants and Partnerships were granted protection from their creditors pursuant to the *Companies'*

Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "**CCAA Proceedings**").

> Affidavit of Dean Jones, sworn September 21, 2009 ("**Jones Affidavit**"), at paras. 3 and 4, Responding Motion Record of the Applicants ("**Responding Motion Record**"), Tab 1, p. 2.

9. The U.S. Bankruptcy Proceedings and the CCAA Proceedings are ongoing. Since filing for insolvency protection, the Applicants and Partnerships have worked diligently to stabilize their operations and have acted in good faith and with due diligence. The Applicants and Partnerships have engaged in a number of restructuring efforts, including securing the DIP Facility (defined below) and negotiating the sale of non-core assets, including the timberlands described in the Fifth Report of the Monitor and the Pontiac, New Richmond and Bathurst mills. In addition, the Applicants and Partnerships have engaged in ongoing discussions regarding their potential tax liabilities with taxation authorities at the Federal and Provincial level.

> First Report of the Monitor dated February 23, 2009 at paras. 65 and 66; Third Report of the Monitor dated April 26, 2009 at paras. 61 and 62; Fourth Report of the Monitor dated June 23, 2009 at paras. 72 and 73; Fifth Report of the Monitor dated August 12, 2009; and Sixth Report of the Monitor dated September 22, 2009 ("**Sixth Report**") at paras. 15, 23, 60, 72 to 74 and 67

10. The Applicants and Partnerships have sufficient cash (together with the DIP Facility) to carry on operations through to at least December 24, 2009.

> Sixth Report at para. 23

Nature of Finance II's Claim Has Not Been Determined

11. The moving parties, Aurelius Capital Management, LP ("**Aurelius**") and Columbus Hill Capital Management, L.P. ("**Columbus**" and, together with Aurelius, the "**Fund Managers**"), manage funds that hold a majority (but not all) of the 7.375% Senior Notes due July 15, 2014 (the "**Senior Notes**") issued by Finance II.

Affidavit of Dan Gropper, sworn September 14, 2009 (the "**Gropper Affidavit**") at para. 17, Motion Record of the Moving Parties, Tab 2, p. 14

12. Finance II is both an Applicant in the CCAA Proceedings and a U.S. Debtor in the U.S. Bankruptcy Proceedings.

Jones Affidavit at para. 5, Responding Motion Record, Tab 1, p. 3

13. Finance II is not an operating company and carries on no trade. It is a special purpose financing entity subject to a series of complementary agreements designed to facilitate tax efficient financing, each of which was entered into at the same time in 2004. Under the terms of those agreements,

(a) Finance II issued Senior Notes in the principal aggregate amount of US$200 million pursuant to a trust indenture.

(b) Finance II made an unsecured advance of the US$200 million to SSC Canada. SSC Canada agreed to repay the outstanding balance of the advance in 2014, subject to certain events of default, including insolvency.

(c) SSC Canada's U.S. parent, SSCE, agreed to provide SSC Canada with the cash to repay the US$200 million advance by purchasing Class A Shares in SSC Canada pursuant to a Forward Purchase Agreement. Finance II is not a party to that agreement.

(d) SSCE and Finance II also entered into a Subscription Agreement that would provide Finance II with the cash to pay interest on the Senior Notes. The Subscription Agreement provides that SSCE would subscribe for a common share of Finance II at a price of US$7,375,000 every six months until 2014.

Trust Indenture, Loan Agreement, Forward Purchase Agreement and Subscription Agreement, Exhibits D to G to the Jones Affidavit, respectively, Responding Motion Record, Tab 1D to 1G

Gropper Affidavit at paras. 9 and 12, Motion Record of the Moving Parties, Tab 2, p. 12

14. Finance II's claim against SSC Canada has a number of distinct features characteristic of an equity investment, including the following:

- Since SSC Canada has filed for protection under the CCAA and chapter 11 of the *United States Bankruptcy Code* (constituting an event of default under the terms of the US$200 million advance), Finance II is only entitled to be repaid through the issuance Class B Shares of SSC Canada, and not in cash; and

- SSC Canada was only ever required to pay interest under the Loan Agreement by issuing Class C Shares.

Loan Agreement at sections 3.6.2 and 7.2, Exhibit E to the Jones Affidavit, Responding Motion Record, Tab 1E, pp. 341 to 343

15. The question of whether SSC Canada's obligations to Finance II are properly characterized as debt or equity is a threshold issue that will determine whether Finance II will have any practical interest in SSC Canada. No determination of the nature of its claim has yet been made.

16. Even if SSC Canada's obligations to Finance II are characterized as debt, no determination has been made as to how Finance II should exercise its voting rights in relation to the other intercompany creditors. The development of a plan has not proceeded to the point where it is possible to state what the disposition of such claim might be.

17. Not only is it speculative to say whether Finance II has an interest in SSC Canada, it is also unclear how significant any such interest may be. Any claim of Finance II against SSC Canada (even if classified as debt) would be unsecured and would therefore rank behind approximately $400 million in secured debt, including direct borrowings under the pre-filing credit facility and the DIP Facility.

> Affidavit of Dean Jones, sworn January 25, 2009, at para. 69, Exhibit A to the Jones Affidavit, Responding Motion Record, Tab 1A, p. 33
>
> DIP Facility, Exhibit B to the Jones Affidavit, Responding Motion Record, Tab 1B
>
> Sixth Report at paras. 54 and 55

Finance II's Claims Are Preserved

18. As a special purpose entity, Finance II's only assets are its intercompany claim against SSC Canada and the Class C Shares of SSC Canada already received as interest, described above, together with any intercompany Contribution Claim (defined below). Finance II's ability to assert its intercompany claims has been preserved and, to date, no steps have been taken in the CCAA Proceedings or the U.S. Bankruptcy Proceedings to object to or disallow any intercompany claims,

including any claims that Finance II may have against SSC Canada or SSCE. In particular:

> Gropper Affidavit at para. 12, Motion Record of the Moving Parties, Tab 2, p. 12

(a) The Claims Procedure Order of Mme. Justice Pepall dated June 25, 2009 provides that intercompany claims constitute "Excluded Claims" and that Proofs of Claim need not be filed in respect of Excluded Claims;

> Claims Procedure Order dated June 25, 2009 at paras. 1(r) and 1(v), Exhibit I to the Jones Affidavit, Responding Motion Record, Tab 1I, pp. 374 and 375

(b) The U.S. Bar Date Order provides that any "Debtor asserting a claim against another Debtor" is not required to file a Proof of Claim in the U.S. Bankruptcy Proceedings; and

> U.S. Bar Date Order dated August 17, 2009 at para. (k), Exhibit J to the Jones Affidavit, Responding Motion Record, Tab 1J, p. 392

(c) The U.S. Court has ordered that any claim of Finance II against SSCE pursuant to section 135 of the *Companies Act (Nova Scotia)* for contribution to Finance II for amounts sufficient to satisfy claims against Finance II relating to the Senior Notes (referenced in the Gropper Affidavit as the "**Contribution Claim**") would constitute "a Debtor asserting a claim against another Debtor" and no proof of claim is required to be filed in respect thereof.

> Order Resolving Motion of Certain Noteholders and Clarifying Bar Date with Respect to Intercompany Claims at para. 1, Exhibit K to the Jones Affidavit, Responding Motion Record, Tab 1K, p. 398

Noteholders Are Represented by the Indenture Trustee and the UCC

19. The interests of the holders of the Senior Notes (the "**Noteholders**") are already represented in the U.S. Bankruptcy Proceedings. Specifically, Manufacturers and Traders Trust Company ("**M&T**") acts as the indenture trustee for the Senior Notes.

Motion for Order Directing Appointment of Manufacturers and Traders Trust Company as Indenture Trustee to the Official Committee of Unsecured Creditors, Exhibit L to the Jones Affidavit, Responding Motion Record, Tab 1L, p. 399

20. M&T is an *ex officio* member of the statutory committee of unsecured creditors in the U.S. Bankruptcy Proceedings (the "**UCC**"). The Cross-Border Protocol approved by this Honourable Court in March 2009 provides that the UCC has the right and standing to appear and be heard in either this Court or the U.S. Court to the same extent as creditors and other interested parties domiciled in the forum country.

Jones Affidavit at para. 9, Responding Motion Record, Tab 1, p. 4

Cross-Border Insolvency Protocol at para. 16, attached to the Cross-Border Protocol Order of Mme. Justice Pepall dated March 12, 2009, Exhibit H to the Jones Affidavit, Responding Motion Record, Tab 1H, p. 365

21. Pursuant to the Trust Indenture, the indenture trustee has the ability to pursue any available remedy to collect on the Senior Notes, subject to the direction of a majority of Noteholders (i.e., the Fund Managers), including by filing proofs of claim. The Noteholders may not themselves institute proceedings or appoint a receiver or trustee unless, amongst other things, they have made such request of the indenture trustee and have been refused.

Trust Indenture at sections 6.03, 6.05, 6.06, 6.08, 6.09, Exhibit D to the Jones Affidavit, Responding Motion Record, Tab 1D, pp. 315-317

22. The Fund Managers have not demonstrated compliance with the requirements of the trust indenture in bringing the present motion.

23. There is no evidence on the record that the indenture trustee, acting on behalf of all Noteholders, has been denied any requested information from Finance II or the other Applicants and Partnerships or that any of its rights as an *ex officio* member of the UCC have not been respected. Furthermore, contrary to the impression sought to be created by the Gropper Affidavit, the Applicants and Partnerships have responded to information requests directly from the Fund Managers in the United States through U.S. counsel.

24. In particular, in response to a request from U.S. counsel to the Fund Managers, Sidley Austin LLP, counsel to the U.S. Debtors, wrote to advise that "we are prepared to work with you and the Noteholders to provide appropriate information in a timely fashion", but asked that such requests be coordinated with those of the indenture trustee and that a confidentiality agreement be negotiated, as necessary.

> Letter dated August 28, 2009, Exhibit M to the Jones Affidavit, Responding Motion Record, Tab 1M, pp. 406 and 407

25. Certain of the information requested has now been provided even without a confidentiality agreement by way of exhibit to the affidavit of Dean Jones sworn in response to the present motion.

> Loan Agreement and Forward Purchase Agreement, Exhibits E and F to the Jones Affidavit, respectively, Responding Motion Record, Tabs 1E and 1F, pp. 340 and 347

Potential Prejudice to the Applicants and Partnerships

26. Finance II is a "Canadian Guarantor" and a "Loan Party" under the credit agreement negotiated in advance of the Initial Order to, amongst other things, finance the Applicants' and Partnerships' post-filing working capital requirements (the "**DIP Facility**").

> DIP Facility at Article 1 ("Definitions"), Exhibit B to the Jones Affidavit, Responding Motion Record, Tab 1B, pp. 72 and 93

27. The relief sought by the Fund Managers would constitute an event of default under the DIP Facility. Subsection 7.1(f) of the DIP Facility provides that it is an "Event of Default" if "a trustee in bankruptcy, receiver, interim receiver, receiver and manager or official with similar powers shall be appointed with respect to any Canadian Loan Party or its assets". Such an Event of Default allows for the termination of the commitments under the DIP Facility and a declaration that the outstanding amounts thereunder are due and payable forthwith.

> DIP Facility, sections 7.1, Exhibit B to the Jones Affidavit, Responding Motion Record, Tab 1B, p. 178 (subsection (f)) and 181

28. Termination of the DIP Facility would be prejudicial to the Applicants' and Partnerships' efforts to restructure. The Applicants and Partnerships continue to rely upon the DIP Facility and the Applicants and Partnerships forecast draws on the revolving portion of the DIP Facility in the net amount of $29.4 million during the next three months.

> Sixth Report at paras. 54 and 55

29. In addition, assigning Finance II into bankruptcy could negatively impact, or delay, the development of a Plan. As discussed above and in the Sixth Report of the Monitor, in order to develop a Plan, the Applicants and Partnerships have engaged, and continue to engage, in discussions with the Canadian tax authorities about the quantum of their claims against the Applicants and Partnerships. At this stage in the process, it is premature to speculate as to what impact a bankruptcy of Finance II would have upon the restructuring of the Applicants and Partnerships beyond noting that removal of Finance II from the restructuring process may impact a rather complex tax structure.

30. The Monitor states in its Seventh Report:

> At a minimum, assigning Finance II into bankruptcy would disrupt the consolidated, cross-border restructuring efforts being undertaken by Smurfit-Stone for the benefit of all of its stakeholders.
>
> The Monitor is of the view that, having regard to the interests of all stakeholders, such a disruption is not warranted, especially at this stage of the Proceedings.
>
> Seventh Report of the Monitor dated October 2, 2009 at paras. 24 and 25

PART III - ISSUES AND THE LAW

Issues

31. There are two principal issues on this motion:

(a) First, whether the interests of the other Applicants and Partnerships must necessarily conflict with the interests of Finance II such that a conflict of interest is created for the directors of Finance II, the Monitor and Stikeman Elliott LLP; and

(b) Second, whether the stay should be lifted at this time to appoint a trustee in bankruptcy in respect of Finance II.

No Evidence of Presumed Conflict

32. Apart from a series of self-serving statements in the Gropper Affidavit about the beliefs of the moving parties and certain allegations that information requests went unanswered (addressed above), the Fund Managers have not adduced any evidence that the Monitor or Finance II's directors have actually failed to take Finance II's interests into account during the pendency of the CCAA proceedings.

33. In large CCAA proceedings involving corporate groups, intercompany claims almost always exist. Those proceedings are not undone because of presumed conflicts of interest on the basis of those claims and the applicants' differing creditor pools. Rather, as described below, it is the Court's prerogative to consider the efforts of the group as a whole to reorganize its business and maximize the value of its estate. To that end, pursuant to section 11.7 of the CCAA and paragraphs 23 and 24 of the Initial Order, the Monitor was appointed as an officer of the Court to, amongst other things, advise the applicants and Partnerships in the development of the Plan,

assist with the holding and administering of creditors' meetings for voting on the Plan, and consider and, if deemed advisable, prepare a report and assessment of the Plan.

34. At this stage, there is simply no reason to believe that the Monitor, Finance II's directors and the other Applicants and Partnerships are trying to do anything other than maximize the value of the group as a whole. By contrast, there is ample evidence that the Applicants and Partnerships are taking positive steps in furtherance of their restructuring, including by analyzing and repudiating contracts and disposing of non-core assets.

35. In the absence of concrete evidence that activities have resulted from bias, the Court will not infer a conflict or breach of duty in a cross-border insolvency on the basis that the various estates are being jointly administered. In *Re Livent*, although the U.S. trustee had already formed the unsecured creditors' committee to represent all creditors, North York Performing Arts ("**North York**") moved for the appointment of a representative to represent the interests of creditors of Livent Inc. who were not also creditors of any of the United States debtors. North York alleged that the UCC was in an impossible conflict of interest in representing both creditors who have a claim against one estate only and creditors that have a claim against more than one estate. North York also alleged that the creditors of Livent Inc. were not adequately represented on the UCC, which is presumably not argued in the

present case (as the indenture trustee was appointed to the UCC by agreement). Ground J. rejected North York's argument and dismissed its motion, holding:

> There is no evidence before this court of any action taken by the UCC which was prejudicial to the creditors of Livent Inc. only, of any complaint to the UCC with respect to any action or position taken by it or any failure of the UCC to respond to any complaint to, or request for information from, the UCC. It is clear from the material before this court that the UCC has a fiduciary duty to all creditors represented by it and there is no evidence of any breach of such duty. There is, however, evidence that UCC has taken steps to oppose any partial distribution to C.I.B.C. and is pursuing litigation to seek equitable subordination of the claims of C.I.B.C. to rank behind all unsecured creditors. Such actions will clearly benefit all creditors represented by it, including creditors of Livent Inc. only.
>
> *Re Livent Inc.*, [2000] O.J. No. 1481 at paras. 3 to 7 (S.C.J.)

36. Similarly, a CCAA court will not order the removal of directors based solely on a risk of anticipated bias or misconduct.

> *Re Stelco*, [2005] O.J. No. 1171 at para. 61 (C.A.)

37. In any event, as described above and in more detail below, no determination has yet been made as to the nature of the claim that Finance II has in the CCAA Proceedings, in particular whether its claim constitutes debt or equity. Accordingly, it is unclear whether Finance II's interests are actually capable of coming into conflict with those of the other Applicants and Partnerships.

Appointment of a Trustee in Bankruptcy

Purpose of the CCAA

38. Unlike the case of a motion to extend a stay brought by the Applicants or a motion to lift the stay under the *Bankruptcy and Insolvency Act*, there is no statutory test under the CCAA to guide the Court in lifting the stay and appointing a trustee in bankruptcy. Instead, the Court must look to the purposes underlying the CCAA and the particular facts.

39. The purpose of the CCAA is well-known to this Honourable Court, involving a broad balancing of stakeholder interests. A stay of proceedings holds creditors at bay while the company attempts to negotiate an acceptable restructuring plan with its creditors. That restraining power extends to conduct that could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. Proposing a restructuring plan gives the debtor a way out of financial difficulties short of bankruptcy, and the CCAA thereby recognizes that the interests of most parties will be best served by the survival of the debtor corporation.

> *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 at 309 (Ont. Gen. Div.).
>
> *Re Stelco Inc.*, [2005] O.J. No. 1171 at paras. 36 and 44 (C.A.)
>
> *Re Canadian Airlines*, [2000] A.J. No. 1692 at para. 19 (Q.B.), citing to *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.)

40. The Court's jurisdiction is not limited to preserving the status quo, but is intended to facilitate a restructuring. As Gibbs J.A. held in *Hongkong Bank v. Chef Ready Foods*:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business..... **When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.** Obviously, time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.
>
> *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 at para. 10 (B.C.C.A.), cited in *Re Stelco Inc.*, [2005] O.J. No. 4733 at para. 18 (C.A.)

41. The goals of the CCAA apply not only to individual companies, but to interdependent corporate groups operating as a single enterprise, particularly when the treatment of the corporate group as an integrated system will result in greater value. The Court is "required in [its] supervisory role under the CCAA to consider the implications of the corporate group's cross-border reorganization efforts as a whole".

> *Re SemCanada Crude Co.*, [2009] A.J. No. 129 at para. 29 (Q.B.)
>
> *Re Calpine Canada Energy Ltd.*, [2006] A.J. No. 412 at para. 32 (Q.B.)

42. As Gibbs J.A. observed in *Hongkong Bank v. Chef Ready Foods*, the corollary of the CCAA's objective of promoting the development of a restructuring plan is that

the stay of proceedings may be terminated when the debtor's attempt at a plan of arrangement is doomed to fail. The stay may also be lifted in other, limited circumstances, such as in cases of severe prejudice to the creditor where there is an absence of prejudice to the debtor and the positions of other creditors, or where the stay must be lifted to preserve a creditor's rights or assets.

Re Canadian Airlines, [2000] A.J. No. 1692 at para. 20 (Q.B.)

Hongkong Bank v. Chef Ready Foods (1990), 4 C.B.R. (3d) 311 at para. 10 (B.C.C.A.), cited in *Re Stelco Inc.*, [2005] O.J. No. 4733 at para. 18 (C.A.)

43. The burden of proof in setting aside a CCAA stay by establishing that any plan of arrangement is "doomed to failure" rests on the moving party wishing to have CCAA proceedings terminated. To succeed, the moving party must at least show that there is no reasonable chance that any plan would be accepted.

Re Rio Nevada Energy Inc., [2000] A.J. No. 1596, at paras. 12 and 17 (Q.B.)

44. In most cases, courts have refused to accept creditors' submissions that they would veto any plan of arrangement proposed by the debtor company as being dispositive of whether the plan is "doomed to fail". There almost always remains a possibility of negotiating a successful plan even when only weeks remain until the plan is subjected to a vote; and, in any event, the impact on other stakeholders must be considered.

45. For example, in *Re Sharp-Rite Technologies Ltd.*, several secured creditors of the companies under CCAA protection sought to have the order granting the stay set aside and converting the CCAA proceeding to a bankruptcy. The secured creditor

argued that any compromise or arrangement was doomed to failure as the secured creditor would have control over its class of creditors and under no circumstance would vote in favour of any plan proposed. The British Columbia Supreme Court refused to terminate the CCAA proceeding, holding instead:

> This "predetermined position" of RoyNat must be viewed with some scepticism. RoyNat's discussions with the company and the Monitor, both prior to and after the Initial Order, belies this adamant view. No definitive plan for compromise or arrangement has been proposed.
>
> When a plan of compromise or arrangement is proposed it is doubtful that RoyNat will vote other than in its best commercial interest gauged at that time. I would expect, for example, any proposal of payment in full, or substantially in full, would most likely be enthusiastically supported. Commercial reality may dictate an even lesser recovery.
>
> *Re Sharp-Rite Technologies Ltd.*, [2000] B.C.J. No. 135 at paras. 27-28 (S.C.)

46. The B.C. Court of Appeal held in *Asset Engineering*:

> As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the CCAA, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor.... [citations omitted]
>
> *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, [2009] B.C.J. No. 1255 at para. 27 (C.A.)

47. Similarly, in *Re Canadian Airlines*, the Court held:

> In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.
>
> *Re Canadian Airlines*, [2000] A.J. No. 1692 at para. 26 (Q.B.)
>
> See, however, *Elan Corp. v. Comiskey*, [1990] O.J. No. 2180 (C.A.)

Appointment of a Trustee in Bankruptcy Is Premature

48. As described above, it is the CCAA's clear objective to allow the Applicants and Partnerships to pursue a restructuring plan with the assistance of the Monitor.

49. The Fund Managers have adduced no evidence that the Applicants and Partnerships are not working on a restructuring plan in good faith for the benefit of all stakeholders, including Finance II and the Noteholders, or that the Noteholders' interests aren't being taken into account.

50. There is also no reason to believe that any Plan that is proposed is "doomed to fail", as it is too early to determine whether such a Plan will be acceptable to the Noteholders. Even the threat of a veto is insufficient to lift the stay in order to appoint a trustee in bankruptcy when reaction to the plan is unknown, particularly

when it is still undetermined as to whether Finance II would even have such a veto (or is more properly classified as an equity holder).

Prejudice to the Noteholders Is Speculative

51. As noted above, the Fund Managers presume prejudice, arguing that the Monitor and the officers and directors of Finance II cannot possibly represent the interests of both Finance II and the other Applicants and Partnerships. The Fund Managers therefore seek the appointment of a trustee to advocate Finance II's interests to the exclusion of all others. However, as described above, the Fund Managers have provided no actual reason to believe that the Monitor, Finance II's directors or even the other Applicants and Partnerships are not working to develop a restructuring plan to maximize the value of the group. To the extent that the Noteholders require an advocate, they have one in the indenture trustee and the UCC and there is no evidence that their interests are not being represented.

52. In this case, it is premature to assume that an acceptable plan cannot be developed with the assistance of the Monitor, as has been done in many other cases. Unlike many similar situations, the Fund Managers have not even advised that they will vote down any Plan over which they have a veto. Indeed, it is even too early to tell whether Finance II will have a veto, or is even a creditor whose interests can be advocated, as opposed to a holder of an equity interest, or whether Finance II will have a material interest in SSC Canada.

53. In the interim, Finance II's rights to advance its intercompany claims have been preserved. There is no evidence that its rights are being eroded or that they are being severely prejudiced by the continuation of the CCAA stay while a Plan is developed. It remains open to the Applicants and Partnerships to negotiate with the Fund Managers in the development of a Plan and the indenture trustee continues to sit as an *ex officio* member of the UCC.

Prejudice to the Applicants and Partnerships Is Real

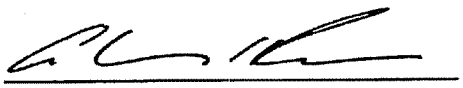
54. The situation is admittedly complicated by the fact that Finance II is not itself a going concern with an ongoing business and its own employees. However, the Court must take into account the interests of other stakeholders, including the other Applicants and Partnerships and the other U.S. Debtors and their constituents, with an eye to the successful restructuring of the whole. The risk of prejudice to the Applicants and Partnerships and their affiliates under chapter 11 protection in the United States Bankruptcy Court is real, and is not limited to the administrative burden and expense associated with the appointment of a trustee in bankruptcy (i.e., "strangulation of the company by professionals"). There is a real risk of interference in the development of the restructuring plan and the success of these proceedings and the U.S. Bankruptcy Proceedings through default under the DIP Facility and upsetting the Smurfit-Stone group's tax structure that already presents one of the significant hurdles to emergence.

PART IV - ORDER REQUESTED

That the Fund Managers' motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 5, 2009



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SCHEDULE "A"

Smurfit-Stone Container Canada Inc.

3083527 Nova Scotia Company

MBI Limited/Limitée

639647 British Columbia Ltd.

B.C. Shipper Supplies Ltd.

Specialty Containers Inc.

605681 N. B. Inc.

Francobec Company

Stone Container Finance Company of Canada II

SCHEDULE "B"

Smurfit-MBI

SLP Finance General Partnership

SCHEDULE "C"

Smurfit-Stone Container Canada Inc.

3083527 Nova Scotia Company

MBI Limited/Limitée

639647 British Columbia Ltd.

B.C. Shipper Supplies Ltd.

Specialty Containers Inc.

605681 N. B. Inc.

Francobec Company

Stone Container Finance Company of Canada II

Smurfit-MBI

SLP Finance General Partnership

Smurfit-Stone Container Corporation

Smurfit-Stone Container Enterprises, Inc.

Lot 24D Redevelopment Corporation

Atlanta & St. Andrews Bay Railroad Co.

Cameo Container Corporation

Stone International Services Corporation

Calpine Corrugated LLC

Stone Global, Inc.

Stone Connecticut Paperboard Properties, Inc.

Smurfit-Stone Puerto Rico, Inc.

Smurfit Newsprint Corporation

SLP Finance I, Inc.

SLP Finance II, Inc.

SMBI Inc.

SCHEDULE "D"
LIST OF AUTHORITIES

1. *Livent Inc. (Re)*, [2000] O.J. No. 1481 (S.C.J.)
2. *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.)
3. *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.)
4. *Canadian Airlines (Re)*, [2000] A.J. No. 1692 (Q.B.)
5. *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)
6. *SemCanada Crude Co. (Re)*, [2009] A.J. No. 129 (Q.B.)
7. *Calpine Canada Energy Ltd. (Re)*, [2006] A.J. No. 412 (Q.B.)
8. *Rio Nevada Energy Inc. (Re)*, [2000] A.J. No. 1596 (Q.B.)
9. *Sharp-Rite Technologies Ltd. (Re)*, [2000] B.C.J. No. 135 (B.C. S.C.)
10. *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, [2009] B.C.J. No. 1355 (C.A.)
11. *Elan Corp. v. Comiskey*, [1990] O.J. 2180 (C.A.)

SCHEDULE "E"
RELEVANT STATUTES

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

Subsections 11(4) and (6)

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Section 69.4

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

Court File No. CV-09-7966-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36
AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS (RETURNABLE OCTOBER 7, 2009)

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