

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"

Applicants

**FACTUM OF AURELIUS CAPITAL MANAGEMENT, LP and COLUMBUS
HILL CAPITAL MANAGEMENT, L.P.**

April 30, 2010

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**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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Last updated on February 8, 2010**

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Applicants

**FACTUM OF AURELIUS CAPITAL MANAGEMENT, LP and COLUMBUS
HILL CAPITAL MANAGEMENT, L.P.**

PART I OVERVIEW

1. The Applicants have brought a motion for an order sanctioning the Joint Plan of Reorganization for Smurfit-Stone Container Corporation and its Debtor Subsidiaries and Plan of Compromise and Arrangement for Smurfit-Stone Container Canada Inc. ("**SSC Canada**") and Affiliated Canadian Debtors as modified by technical modifications dated April 13, 2010 (the "**Plan**"), including the transactions contemplated by the Asset Purchase Agreement (as defined therein) (the "**Sanction Motion**").

2. It is premature for this Honourable Court to sanction the Plan at this time given that amendments to the Plan continue to be made. Further, the schedule for the U.S. confirmation hearing requires final written submissions to be delivered by May 18, 2010.

Accordingly, it is unlikely that the Plan will be confirmed (if it is confirmed) any earlier than the end of May.

3. On April 26, 2010, Aurelius Capital Management, LP and Columbus Hill Capital Management, L.P. (the “Fund Managers”) filed a notice of objection to the Sanction Motion on the basis that the Plan is not fair, reasonable or equitable.

4. There are two issues to be resolved before the Plan is sanctioned. These are issues that the Applicants can and should resolve consensually in order that the Plan is fair, reasonable and equitable.

5. First, the Applicants provide in section 3.8.6 of the Plan that Finance II will be entitled to a distribution in accordance with an appellate court’s order should the Fund Managers be successful in having the Stone FinCo II Intercompany Claim (as defined below) declared a debt provable in bankruptcy subsequent to the Effective Date (as defined in the Plan). However, the Applicants have not provided for a reserve that would ensure that the Applicants have the financial means to comply with this provision of the Plan after the Effective Date. Surely, if the Plan is being put forward in good faith, this issue can be easily resolved.

6. Second, the discharge, release, injunction and exculpation provisions of the Plan inappropriately encompass claims by and against Finance II, including its officers and directors. Since Finance II rejected the Plan, Finance II and its officers and directors should neither give nor receive the benefit of any releases, injunctions or exculpations

pursuant to the Plan. Assuming the good faith of the Applicants, this issue can easily be dealt with on consent by way of clarifying provisions in the Sanction Order. At the confirmation hearing before the U.S. Court, counsel to the Applicants advised that the Plan would be amended to delete any such releases. The Applicants' U.S. Counsel delivered a draft further amended plan to the Fund Managers U.S. Counsel on April 29, 2010 which appears to address a number of these issues, although it is unclear which Plan this Honourable Court is being asked to sanction.

7. Nothing in the Fund Managers' objections prevents the Applicants from emerging with a proper reserve to ensure the Applicants can comply with section 3.8.6. Any suggestion to the contrary is wrong.

8. The creation of a reserve to permit the Applicants to comply with section 3.8.6 of the Plan is not only consistent with the Plan but also does not require the Applicants to expend any monies beyond those already committed under the Plan. The issue is whether Finance II is entitled to share in the fixed SSC Canada Distribution Pool (as defined in the Plan) with the other unsecured creditors of SSC Canada.

PART II FACTS

9. SSC Canada and Finance II Stone Container Finance Company of Canada II ("**Finance II**") are among the applicants to a proceeding commenced on January 26, 2009 under the CCAA (the "**CCAA Applicants**"). SSC Canada and Finance II are also among the entities that filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States *Bankruptcy Code*.

10. By motion returnable December 11, 2009, the CCAA Applicants sought the adjudication of whether the nature of a loan from Finance II to its sister company, SSC Canada, under a U.S. \$200,000,000 loan agreement (the “**Stone FinCo II Intercompany Claim**”) was debt or equity (the “**Characterization Issue**”). Finance II had raised the US\$200,000,000 in the public debt market by issuing certain notes (the “**Notes**”), the majority of which are held by the Fund Managers.

11. At the return of the motion in respect of the Characterization Issue, the Fund Managers sought the appointment of independent counsel for Finance II and an adjournment as a result of multiple conflicts of interest of the directors of Finance II and counsel to the CCAA applicants. On December 11, 2009 the Fund Managers’ motion was dismissed from the bench with reasons to follow (the “**Representation Order**”).

12. On January 28, 2010, the Honourable Justice Pepall released her reasons with respect to the Characterization Issue and held that although the Stone FinCo II Intercompany Claim was a debt claim, it was not a debt provable in bankruptcy within the meaning of the CCAA as it was not recoverable by legal process; and that the Stone FinCo II Intercompany Claim did not rank *pari passu* with unsecured debt claims against SCC Canada and such claim should be valued at zero (the “**Characterization Order**”).

13. The Fund Managers sought leave to appeal of both the Representation Order and the Characterization Order to the Ontario Court of Appeal. Leave to appeal was denied by the Court of Appeal on March 9, 2010. The Fund Managers have sought leave to appeal to the Supreme Court of Canada from the dismissal of the Fund Managers’

motions for leave to appeal by the Ontario Court of Appeal, and, if leave to appeal is granted, an Order either declaring that the Stone FinCo II Intercompany Claim is a debt provable in bankruptcy, or remitting the issue for a new hearing with independent counsel. The applications for leave to appeal are presently outstanding.

14. On February 10, 2010, the Honourable Justice Pepall made an order in these proceedings, *inter alia* approving the filing of the Plan and providing for the calling of a meeting of creditors to vote on the Plan (the “**Plan Filing and Meeting Order**”). Terms not otherwise defined herein have the meaning ascribed to them in the Plan Filing and Meeting Order.

The Creditors’ Meeting

15. On March 30, 2010, counsel for the Applicants and counsel for the Fund Managers advised this Honourable Court that the Fund Managers were seeking leave to appeal to the Supreme Court of Canada.

16. In accordance with the Plan Filing and Meeting Order, a meeting of creditors was held to vote on the Plan on April 6, 2010 (the “**Creditors’ Meeting**”).

Fifteenth Report of Deloitte & Touche Inc. in its capacity as Monitor (the “Monitor”) dated April 13, 2010 (the “Fifteenth Report” at para 7.

17. At the Creditors’ Meeting, prior to the commencement of voting of creditors, the Monitor reported to the assembled creditors that “Aurelius Capital Management, LP and Columbus Hill Capital Management, LP ... were pursuing a claim by Stone Container

Finance Company of Canada II ... against SSC Canada in the Chapter 11 cases and still had appeal rights available to them in Canada". After this statement by the Monitor at the Meeting, Andrew Hatnay, counsel for certain creditors of SSC Canada, inquired whether the Fund Managers had sought leave to appeal to the Supreme Court of Canada with respect to the Ontario Court of Appeal's denial of leave to appeal of the decision of Justice Pepall with respect to the claim by Finance II against SSC Canada. Both the Monitor and Canadian counsel to the Fund Managers, confirmed that the Fund Managers were seeking leave to appeal.

Appendix B to the Fifteenth Report at, Minutes of the Meeting of Creditors of SSC Canada et al. at p.2.

18. The Affected Unsecured Creditors of SSC Canada and Smurfit-MBI voted to accept the Plan. The Affected Unsecured Creditors of Finance II voted to reject the Plan.

Fifteenth Report at para 28.

Treatment of Stone FinCo II Intercompany Claim

19. With respect to the treatment of the Stone FinCo II Intercompany Claim by Finance II against SSC Canada, for which leave to appeal is currently sought by the Fund Managers, section 3.8.6 of the Plan provides:

(b) Treatment: Stone FinCo II, as the Holder of the Stone FinCo II Intercompany Claim, shall not be entitled to receive any distributions on account of such Claim under the Plan, and the Stone FinCo II Intercompany Claim shall be deemed settled, cancelled and extinguished on the Effective Date; **provided, however, that if the Canadian appeals court subsequently determines that the Stone FinCo II Intercompany Claim should be treated as a debt provable in bankruptcy**, then (x) the Stone FinCo II Intercompany Claim shall be treated as an Allowed Intercompany Claim against SSC Canada if the Class of

General Unsecured Claims against either SSC Canada or Smurfit-MBI rejects the Plan or (y) **if the Classes of General Unsecured Claims against SSC Canada and Smurfit-MBI accept the Plan, the Stone FinCo II Intercompany Claim shall be entitled to such distribution that the applicable court determines should be made on account of such Claim.** (emphasis added)

The Plan at section 3.8.6.

Treatment of Finance II's Directors and Officers

20. Although Finance II rejected the Plan, because of the inclusion of Finance II in various definitions under the Plan, the relief requested by the Applicants on the Sanction Motion impacts the rights and liabilities of Finance II, its officers and its directors. For example, by including Finance II in the definition of Affiliate, Related Persons and Released Parties, many sections of the Plan appear to release claims against Finance II and its officers and directors even though Finance II voted to reject the Plan.

The Plan at sections 1.1.14, 1.1.197, 1.1.198

21. In response to concerns raised by the Fund Managers' U.S. Counsel regarding the inappropriate inclusion of Finance II and its officers and directors in various release, injunction and exculpation provisions under the Plan, the Applicants' U.S. Counsel agreed to amend the Plan to remove references to Finance II in certain sections of the Plan and to clarify that no relief applies to Finance II and its directors and officers. On April 29, 2010, the Applicants' U.S. Counsel provided a further amended draft of the Plan to the Fund Managers' U.S. Counsel which appears to address a number, but not all of these concerns.

PART III ISSUES

22. There are two issues for consideration by the Court on this motion:
- (a) Have the Applicants made adequate provision in the Plan to be able to comply with and fulfill their obligations under section 3.8.6?
 - (b) Can and should this Court sanction the Plan to the extent it affects the rights of Finance II after the creditors of Finance II have rejected the Plan?

PART IV LAW AND ARGUMENT

Test for Sanctioning

23. Section 6 of the CCAA provides that a Court may sanction a plan of compromise or arrangement if it has been approved by the requisite majority of the creditors.

Section 6 of the CCAA.

24. This Court has held that the test to be applied by the Court in exercising its discretion to sanction and approve a plan of compromise or arrangement is:

“1. There must be strict compliance with all statutory requirements;

2. All materials filed and procedures carried out must be examined to determine if anything has been done [or purported to have been done] that is not authorized by the CCAA.

3. The plan must be fair and reasonable.”

ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp. (2008) 42 C.B.R. (5th) 260 (Ont. S.C.J. Commercial List) at para 3. affirmed by (2008) 296 D.L.R. (4th) 135 (Ontario C.A.).

(Olympia & York Developments Ltd. Re (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.))

25. In this respect, the Plan has not been approved by the requisite majority of creditors of Finance II and thus can not be sanctioned with respect to Finance II. For the Plan to be sanctioned, the Plan cannot address Finance II as anything other than an ordinary unsecured creditor of SSC Canada. Further, the Plan cannot provide for any releases of any of Finance II's claims or of Finance II's directors and officers.

26. To sanction the Plan with respect to SSC Canada in a manner that releases, enjoins or exculpates claims by or against Finance II or its directors or officers is not permitted, nor is it fair or reasonable.

Have the Applicants Demonstrated a Means of Complying with Section 3.8.6

27. Paragraph 42 of the Applicants' factum is wrong. The Stone FinCo II Intercompany Claim is not an "Intercompany Claim" that the "Debtors" can agree to waive, settle, cancel or extinguish. "Intercompany Claim" is defined in section 1.1.138 as being "a claim of one Debtor against another Debtor". However, Finance II is not a "Debtor." Accordingly, the Stone FinCo II Intercompany Claim must therefore be a General Unsecured Claim which is entitled to its *pro rata* of distribution from the SSC Canada Distribution Pool.

Section 3.8.5(b) of the Plan

Section 4.2.1(b)(i) of the Plan

Section 4.2.1(c) of the Plan

Section 4.4.1 of the Plan

28. The foregoing interpretation is entirely consistent with section 3.8.6 of the Plan. Since Finance II is no longer a proponent of the Plan, it would be neither fair nor

reasonable for the Stone FinCo II Intercompany Claim to be released or compromised without any consideration.

29. Section 3.8.6 of the Plan provides that if subsequent to the Effective Date, the “Canadian appeal court subsequently determines that the Stone FinCo II Intercompany Claim shall be treated as a debt provable in bankruptcy” and “if the Classes of General Unsecured Claims against SSC Canada and Smurfit-MBI accept the Plan”, then the “Stone FinCo II Intercompany Claim shall be entitled to such distribution that the applicable court determines should be made on account of such Claim”.

Section 3.8.6 of the Plan.

30. As the classes of General Unsecured Claims against SSC Canada and Smurfit-BMI have voted to accept the Plan, by its terms the Plan provides that if the Supreme Court of Canada finds that the Stone FinCo II Intercompany Claim is a debt provable in bankruptcy, Finance II will be entitled to receive such a distribution as the applicable court determines is appropriate.

31. If a complete distribution of funds to the General Unsecured Claims against SSC Canada is made prior to a final determination of the Fund Managers’ appeal with respect to the Stone FinCo II Intercompany Claim the Applicants will not be able to fulfill their Obligations under section 3.8.6 of the Plan. It is common practice to reserve amounts from a distribution pending final determination of claims and is in fact what is statutorily required under the *Bankruptcy and Insolvency Act* in similar situations.

See section 148(2) of the BIA.

32. The issue of whether or not the Fund Managers sought a stay of the Characterization Order is irrelevant. The Plan specifically provides for the possibility that a final determination on appeal might occur subsequent to the Effective Date of the Plan. No stay is required to preserve the Stone FinCo II Intercompany Claim.

33. The issue is whether the Applicants should be permitted to fully distribute the SSC Canada Distribution Pool prior to the final determination on appeal. To do so, without any provision for the fulfillment of the Applicants' obligations under section 3.8.6 of the Plan would render the rights provided under that section illusory.

34. In any event, the irreparable harm to Finance II would only occur (or be threatened) if this Plan is sanctioned without a reserve or other provision to ensure compliance with section 3.8.6 and not earlier.

Finance II and its directors and officers should not receive the benefit of any releases, exculpations or injunctions under the Plan

35. The creditors of Finance II voted to reject the Plan. The Applicants' request with respect to Finance II in the Sanction Motion is to discharge the Monitor and to terminate the stay of proceedings in respect of Finance II. Finance II's participation in these CCAA proceedings has been fruitless.

36. The Fund Managers and others have claims against Finance II and its officers and directors which relate both to the circumstances surrounding the Stone FinCo II Intercompany Claim and the failure to act in the interests of Finance II.

37. The current version of the Plan impermissibly affects Finance II and its officers and directors. For example it appears to have Finance II release its claims against other parties and its officers and directors and enjoins Finance II's claims against them. No consideration at all is provided for these releases and the creditors of Finance II have voted against the Plan.

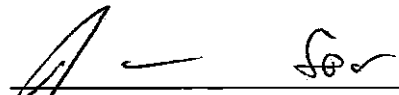
38. Although the Applicants' U.S. Counsel appears to have recognized the problem and provided a further revised draft Plan on April 29, 2010 which appears to eliminate releases for directors and officers of Finance II, these technical amendments to the revised Plan have not been filed with the U.S. Court or this Honourable Court. Given the changes occurring to the Plan, and the fact that it is unlikely to be confirmed by the U.S. Court before the end of May, it is not clear why the Canadian Court is being asked to sanction the Plan at this time. The first possible date that the Plan can be confirmed by the U.S. Court is May 18, 2010, the date on which final written submissions are due. Further, a reserve hearing is scheduled for May 10, 2010 which among other things will address reserves for the Stone FinCo II Intercompany Claim and the claim of Finance II for contributions under the Companies Act (Nova Scotia).

39. Section 6 of the CCAA provides that a Court may only sanction a plan of compromise or arrangement once it has been approved by the requisite majorities. As the Plan has not been approved by the requisite majority of Finance II's creditors, it can not be sanctioned by this Court in a way that compromises or affects the claims by or against Finance II or its directors and officers.

PART IV ORDER REQUESTED

40. In the absence of any other provision to ensure that the Applicants will be able to meet their obligation under section 3.8.6 of the Plan, the Fund Managers request an order requiring that an amount equal to Finance II's *pro rata* share of the SSC Canada Distribution Pool (reflecting a general unsecured claim in the amount of U.S. \$200 million) be reserved from a distribution to be made under the Plan to the Unsecured Creditors of SSC Canada pending resolution of the Fund Managers' applications for leave to appeal, and appeal, if any, granted. The Fund Managers also request that this Honourable Court not sanction the Plan to the extent that the rights and liabilities of Finance II are affected by the Plan or to the extent it releases Finance II or its officers and directors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Neil S. Rabinovitch
of counsel to the Fund Managers



Jane Dietrich
of counsel to the Fund Managers

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"**Case References**

1. *ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.* (2008) 42 C.B.R. (5th) 260 (Ont. S.C.J. Commercial List) affirmed by (2008) 296 D.L.R. (4th) 135 (Ontario C.A.)

2. *Olympia & York Developments Ltd. Re* (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.)

SCHEDULE "C"

Statutory References

Companies' Creditors Arrangement Act (R.S., 1985, c. C-36), as amended

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

...

Court may give directions

7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

Bankruptcy and Insolvency Act (R.S., 1985, c. B-3), as amended

Trustee to pay dividends as required

148. (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, from time to time as required by the inspectors, declare and distribute dividends among the unsecured creditors entitled thereto.

Disputed claims

(2) Where the validity of any claim has not been determined, the trustee shall retain sufficient funds to provide for payment thereof in the event that the claim is admitted.

No action for dividend

(3) No action for a dividend lies against the trustee, but, if the trustee refuses or fails to pay any dividend after having been directed to do so by the inspectors, the court may, on the application of any creditor, order him to pay it, and also to pay personally interest thereon for the time that it is withheld and the costs of the application.

R.S., c. B-3, s. 119.

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. 8-3, 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"
Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF AURELIUS CAPITAL
MANAGEMENT, LP and COLUMBUS HILL
CAPITAL MANAGEMENT, L.P.**

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