

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 351 OF 2001

IN THE MATTER OF THE COMPANIES LAW (2001 SECOND REVISION)

AND IN THE MATTER OF THE INSOLVENCY RULES 1986,

AND IN THE MATTER OF GRAPHON (CHINA) LTD.

PETITION

To The Grand Court

The petition of GraphOn Corporation ("GraphOn") of 400 Cochrane Circle, Morgan Hill, CA 95037, USA shows that:

1. GraphOn (China) Ltd. (the "Company") is a Cayman Islands exempted company which was incorporated under the Companies Law CAP. 22 on 2<sup>nd</sup> March, 2000. The Company's registered office is at the offices of Maples and Calder, PO Box 309GT, Grand Cayman, Cayman Islands.
2. The authorised share capital of the Company is US\$75,000 divided into 7,500,000 Common Shares of a nominal or par value of US\$0.01 each ("Common Shares"). The shares of the Company are held 50% each by GraphOn and Tianjin Development Holdings Limited ("Tianjin").
3. The objects for which the Company were established are unrestricted.
4. The Company was formed as a joint venture vehicle intended to be used to pursue the marketing and distribution of GraphOn's software product "Bridges" in the People's Republic of China, Hong Kong, Macao and Taiwan (collectively defined as the "Territory" in the Subscription and Shareholders' Agreement between GraphOn, Tianjin and the Company dated 8<sup>th</sup> March 2000: the "Shareholders' Agreement") and, subject to achievement of success in relation to the sale of Bridges in the PRC, to otherwise develop software technology for the Chinese market as agreed by the shareholders.

5. GraphOn and Tianjin jointly organised the Company and entered into various agreements on 8<sup>th</sup> March 2000 after extensive negotiations with the benefit of legal counsel for each party, namely the Shareholders' Agreement, a Technology License Agreement, a Management Contract and a Technology Services Agreement (collectively referred to as the "Agreements").
6. The sole legitimate purpose and objective of the Company was to distribute GraphOn's software product "Bridges" in greater China pursuant to an exclusive license granted to the Company. The licence was subject to a number of performance conditions which the Company has not been able to fulfil due to a deadlock between its shareholders and directors.
7. The Company's Business Objectives, as defined in the Shareholders' Agreement are to:
  - (i) Market GraphOn and its Products in the Territory; and
  - (ii) Become GraphOn's exclusive Distributor of the Products in the Territory; and
  - (iii) Perform such other functions as are ancillary to the marketing and distribution of the Products in the Territory; and
  - (iv) Subject to Board approval and performance of the primary objectives set forth in (i)-(iii) above, independently developing technology products.
8. **There is no reasonable prospect that the Company may attain its Business Objectives. In fact, the Company cannot carry out any business at all at present either at Board level or at shareholder level due to a deadlock.**
9. The composition of the Board of Directors of the Company is four directors. Pursuant to Clause 3.2 of the Shareholders Agreement each of GraphOn and Tianjin are entitled to appoint two directors of the Board of the Company. All decisions affecting the Company are required to be taken by majority vote of the Board of Directors. The practical effect of this is that unless both shareholders are in total agreement over any decision of the Board, no business can be carried out on behalf of the Company.

10. As at the date of presentation of this Petition, the assets of the Company are believed to include a credit balance of approximately US\$1,894,756 in an account in the name of the Company with Standard Chartered Bank, Landmark Branch, in Hong Kong. By Board resolution on 22<sup>nd</sup> March 2000, it was agreed that “the signatories on the [Company’s] bank account(s) shall consist of both GraphOn and Tianjin representatives and that, until such time as the Board shall determine otherwise when professional management have been retained, two signatures shall be required to draw Company funds, one signature each from a GraphOn representative and Tianjin representative”.
11. Deadlock was intentionally crafted into the Agreements so that any action fundamental to the Company’s business would be required to be either unanimously approved by the Board or shareholders or no decisions would be carried against the wishes of the dissenting directors or shareholders.
12. Almost immediately following the execution of the Agreements and before any real business had been carried out by the Company, GraphOn and Tianjin encountered several disagreements as to the interpretation of the Shareholders Agreement, in respect of which Tianjin requested several major amendment to be made to the Agreement, to which GraphOn did not agree.

In particular:

- (i) Tianjin sought to re-negotiate the royalty rates for the software products intended to be marketed in greater China pursuant to the Agreements with GraphOn. These had been the subject of intense negotiations right up to date of the execution of the Agreements;
  - (ii) Tianjin requested that GraphOn absorb certain VAT taxes that the Agreements provided instead for GraphOn China to absorb; and
  - (iii) Tianjin demanded that GraphOn reduce the royalty rate from \$50 per end user license or 50% of the sales price for all end user licenses to \$20 per end user license.
13. On 1<sup>st</sup> September 2000, the Company employed Danny So as Chief Executive Officer with the unanimous consent of the Board of Directors and the two shareholders. Mr.

So had responsibility, *inter alia*, for the preparation of a business plan intended to enable the Company to meet the objectives for which it was set up. Such business plan was only to be approved and adopted by the Company by unanimous vote of the Board of Directors. Mr. So. presented more than one version of a business plan to the Board for approval. The Board was unable to agree on any business plan proposed by Mr. So primarily because they could not fix the costs of the Company unless the royalty rate was agreed and abided by. By about 20<sup>th</sup> December 2000, the last of several attempts at agreeing a business plan for the Company failed.

14. On 23<sup>rd</sup> December 2000, Mr. So was purportedly dismissed on behalf of the Company by Tianjin without the necessary approval of the Board of directors of the Company. Subsequently, exchanges of correspondence passed between GraphOn and Tianjin recording their disagreement over the unilateral and unauthorised dismissal of Mr. So. The shareholders have not yet managed to reach agreement on this point and Mr. So's situation remains uncertain. No new CEO has been appointed because of the deadlock. While this remains the case, and the parties remain deadlocked it is doubtful that a business plan for the Company can be finalised and approved by the Board; it is also unlikely that any expenses can be agreed and, consequently, that the Company will be in any position to commence business.
15. Whilst the directors are unable to agree, *inter alia*, on a business plan; the appointment of a CEO; the terms upon which they purported to bind each other and the Company in the Agreements, the Company remains deadlocked and unable to carry on any business. **Consequently the substratum of the Company is lost.**
16. The provisions requiring decisions of the shareholders' and directors to be unanimous were incorporated on the basis of the "personal" relationship between GraphOn and Tianjin and the confidence and trust they each placed in the other in connection with the decision making process of the Company. Both shareholders were clearly intending to participate fully in the business of the Company deliberately incorporated and the Agreements provisions that could only work if there was such participation and total trust and cooperation between them. The parties also intended their business relationship to remain personal, between them and the Agreements incorporated provisions restricting the sale or transfer of shares in the Company. As a result of the

re-negotiations sought by Tianjin so soon after the execution of the Agreements and several unilateral and unauthorised actions that Tianjin has taken purportedly on behalf of the Company (see paragraphs 17-22 below), **the relationship between the Shareholders and directors has irretrievably broken down.** GraphOn has lost its trust in Tianjin with the result that they are presently communicating through lawyers.

17. **Tianjin has been guilty of misconduct in its dealings with GraphOn and the Company.** Shortly after execution of the Agreements, Tianjin pressed for the Company's offices to be based in Tianjin, a PRC port facility several hours drive from Beijing and the principal home of Tianjin's PRC operations. It had been GraphOn's expectation that the Company would open offices in Beijing in one of the tax-incentivized industrial areas designated for high technology. It was also proposed by Tianjin that the legal form of the Company's business in the PRC be conducted through a wholly-foreign-owned enterprise ("WFOE"), a particular legal vehicle in the PRC, and that the WFOE be organised and approved in Tianjin. GraphOn believed that the WFOE should be established in Beijing, a focal point of high technology business in the PRC, rather than the port city of Tianjin.
18. Over a period of months Tianjin began to transfer staff and costs from its own Tianjin-based businesses to the account of the Company and caused the Company to lease space from Tianjin in Tianjin and otherwise incur expenses. Many of the actions taken by Tianjin were not approved by the Board (nor even considered by the Board as a whole) before they were taken nor were GraphOn or the directors it appointed to the Board subsequently apprised of the actions taken.
19. During the tenure of Mr. Danny So as CEO of the Company, it was apparent that Mr. So was frustrated that Tianjin would "order" him to take certain actions in relation to the Company and its business without reference to the views of GraphOn, both in GraphOn's capacity as shareholder with two directors on the Board and as licensor of the software products licensed to the Company. Mr. So, apparently believing that the shareholders had equal interest and representation in the Company, kept GraphOn informed of events in the PRC and that he was being asked by Tianjin to take certain actions to the exclusion of GraphOn.

20. On 23<sup>rd</sup> December 2000, representatives of Tianjin unilaterally dismissed Mr. So without notice to GraphOn or any opportunity to challenge or question the grounds for Mr. So's termination. Tianjin claim to have sent notice to GraphOn on the same day but it was not received by GraphOn. In any event, given that the PRC is 15-16 hours ahead of U.S. Pacific Time, even if Tianjin had sent notice to GraphOn on the 23<sup>rd</sup> December (PRC time), it would be evening or night in the U.S. and there would be no opportunity for GraphOn to object or otherwise take action. The dismissal of Mr. So was therefore without notice and unauthorised.
21. The decision to terminate a chief executive of the Company is a decision requiring the unanimous consent of the shareholders (or their representatives to the Board). The failure to secure the consent of GraphOn or even notify GraphOn or its representatives prior to Mr. So's termination was a breach of the Shareholders Agreement by Tianjin. It was further not effected in a proper and lawful fashion and exposed the Company to risk of liability for wrongful termination and otherwise. GraphOn informed Tianjin that it was in breach of the letter and spirit of the Shareholders Agreement and Mr. So's employment agreement. Tianjin failed to give any rational justification for the termination of Mr. So who, from GraphOn's perspective, was performing his duties well and faithfully. In order to mitigate potential damages of the Company for the wrongful termination of Mr. So (as Mr. So was continuously pressing GraphOn for a response as to his status), GraphOn, with notice to Tianjin, continued to pay the salary of Mr. So on the Company's behalf.
22. GraphOn immediately challenged the action of Tianjin in firing the CEO and demanded that he be reinstated. Tianjin refused, without assigning any reason for the dismissal and an uncomfortable stalemate resulted. GraphOn then demanded that all activities of the Company be suspended and that Tianjin cease and desist from taking actions in relation to the Company, including incurring expenses in the name of the Company or with the expectation of reimbursement from the Company. At the time, there was approximately US\$105,000 in funds that had been advanced to Tianjin and have not been fully accounted for. Although Tianjin initially indicated that it would cease operations, it is apparent from subsequent communications and from expenditure of Company monies advanced to Tianjin that it did not cease operations as agreed.

23. **Tianjin and GraphOn agree in principle that the Company ought to be wound up.**
24. Over the several months that followed the unilateral termination of Mr. So's employment by Tianjin, the parties had a constant dialogue directly and indirectly through counsel regarding a means to make progress towards a viable business or a winding up of the Company. Although GraphOn and Tianjin are agreed on the basic notion that the Company should be wound up and the shareholders' cooperation ended, Tianjin refuses to wind up the Company without GraphOn's agreement to be bound by certain restrictive covenants concerning GraphOn conducting business on its own in the PRC. The Shareholders Agreement in fact set forth certain restrictive covenants in favour of the Company in the event that GraphOn ceased to be a shareholder in the Company, but it was and is GraphOn's belief that such covenants obviously anticipate the continued existence of the Company and its business, that such covenants are meaningless and moot in the absence of the existence of the Company and that there is no basis for such covenants to run in favour of Tianjin. Nevertheless, Tianjin insists that GraphOn be prohibited from approaching certain PRC customer prospects which GraphOn suggests are the "top ten revenue customers of the Company" (notwithstanding that the Company never earned revenue from a single customer) and that GraphOn be prohibited from soliciting or hiring any current or former employee of the Company, including the former CEO fired by Tianjin.
25. **The Company is unable to carry on business.** In fact, the Company has no business to conduct because its business was exclusively to distribute the Bridges software product licensed to it by GraphOn in greater China. Tianjin's refusal to allow the Company to honour its commitments in the Technology License Agreement and Shareholders Agreement placed the Company in breach of its obligations thereunder and the Company's right to license and distribute the said software products were terminated as a result. The facts are that: (a) the Company never returned a copy of the localised version of the software products to GraphOn; (b) the Company wrongfully claimed ownership in the localised version of the software products; (c) the Company was in breach of its Technology License Agreement *inter alia* for repudiating the royalty and failing to produce a business plan with sales projections; (d) due to such

breach the license of the Company to use, sell or distribute the Software was terminated; and (e) the Company never sold a single product.

26. As is clear from the above, shortly after execution of the Agreements and before the Company really got off the ground, it became apparent that GraphOn's and Tianjin's agendas for the Company were considerably different and that there is no reasonable prospect that the parties will fulfil each others' expectations in connection with the Company.
27. Each of **GraphOn and Tianjin have agreed in communications between counsel and otherwise that the "best way forward" is to wind up and dissolve the Company.** What GraphOn and Tianjin have not been able to settle are details of each party's expenses incurred on behalf of the Company which are to be reimbursed and the authority under which such expenses were incurred and, most importantly, Tianjin's insistence on applying restrictive covenants on GraphOn doing business in the PRC. As a result of the directors' and shareholders' failure to agree on the latter issues, the Company is unable to pass a resolution for a voluntary winding up.
28. **In the circumstances, it is just and equitable that the Company be wound up by the Court.**
29. Messrs. G. James Cleaver and Matthew Finbarr O'Driscoll and/or Stephen Yiu Keung Liu of Ernst & Young Cayman and Hong Kong respectively have confirmed their willingness to be appointed as joint official liquidators of the Company for a remuneration based on the following hourly rates:

	<u>Cayman</u>	<u>Hong Kong</u>
Partner	US\$425.00	HK\$6,000
Principal	---	HK\$4,500
Senior Manager	US\$330.00	HK\$3,500
Managers	US\$280.00	HK\$2,400 - \$3,100
Senior Accountants	\$160.00	HK\$1,400 - \$1,800
Staff Accountants	---	HK\$600 - \$1,000
Administrative assistant	\$92.00	HK\$420

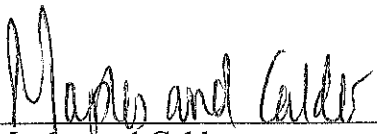
	<u>Cayman</u>	<u>Hong Kong</u>
Trainees	---	HK\$350
Administrative Personnel	---	HK\$500 - \$600

YOUR PETITIONER THEREFORE HUMBLY PRAYS THAT:

1. the Company be wound up by the Court under the provisions of the Companies Law (2001 Second Revision).
2. G. James Cleaver of Ernst & Young, PO Box 510GT, Grand Cayman and Matthew Finbarr O'Driscoll and/or Stephen Yiu Keung Liu of Ernst & Young be appointed Joint Official Liquidators of the Company and that their remuneration be approved at the rates stated.
3. Such other Order may be made as the Court thinks fit.

AND your Petitioner will ever pray etc.

Dated the 8<sup>th</sup> day of June 2001

  
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 Maples and Calder

**NOTE:** This Petition is intended to be served on (1) GraphOn Corporation; and (2) Tianjin Distribution and Development Ltd. directly

This Petition was presented by Maples and Calder, attorneys-at-law for GraphOn Corporation whose address for service is Uglan House, PO Box 309GT, Grand Cayman, Cayman Islands, BWI (278933-01/ALP)

**ENDORSEMENT**

This Petition having been presented to the Court on 8<sup>th</sup> June 2001 will be heard at the Grand Court of the Cayman Islands on the 28 day of AUGUST 2001, <sup>at 10 a.m.</sup> or as soon thereafter as the petition can be heard.