

**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

Court File No. CV-11-431153-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known  
as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT  
POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E.  
HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY  
(BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES  
(CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC  
DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC.,  
MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON  
PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL  
LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of  
America Securities LLC)

Defendants

**FACTUM OF THE DEALERS  
Dealer Settlement Approval Motion, Returnable May 11, 2015**

April 23, 2015

**Torys LLP**

79 Wellington St. W., 30th Floor  
Box 270, TD South Tower  
Toronto, Ontario M5K 1N2  
Fax: 416.865.7380

John Fabello (LSUC #: 35449W)  
Tel: 416.865.8228

David Bish (LSUC #: 41629A)  
Tel: 416.865.7353

Lawyers for the Dealers

**TO : THE ATTACHED SERVICE LIST**

**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

**SERVICE LIST  
(as at April 2015)**

<b>TO: BENNETT JONES LLP</b> 3400 One First Canadian Place, P.O. Box 130 Toronto, Ontario M5X 1A4	<b>AND GOWLING LAFLEUR HENDERSON LLP</b> <b>TO:</b> 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, Ontario M5X 1G5
Robert W. Staley Tel: 416.777.4857 Fax: 416.863.1716 Email: staleyr@bennettjones.com	Derrick Tay Tel: 416.369.7330 Fax: 416.862.7661 Email: derrick.tay@gowlings.com
Kevin Zych Tel: 416.777.5738 Email: zychk@bennettjones.com	Clifton Prophet Tel: 416.862.3509 Email: clifton.prophet@gowlings.com
Derek J. Bell Tel: 416.777.4638 Email: belld@bennettjones.com	Jennifer Stam Tel: 416.862.5697 Email: jennifer.stam@gowlings.com
Raj S. Sahni Tel: 416.777.4804 Email: sahnir@bennettjones.com	Ava Kim Tel: 416.862.3560 Email: ava.kim@gowlings.com
Jonathan Bell Tel: 416.777.6511 Email: bellj@bennettjones.com	Lawyers for the Monitor
Sean Zweig Tel: 416.777.6254 Email: zweigs@bennettjones.com	
Lawyers for the Applicant, Sino-Forest Corporation	

AND **FTI CONSULTING CANADA INC.**  
TO: T-D Waterhouse Tower  
79 Wellington Street West  
Toronto-Dominion Centre, Suite 2010,  
P.O. Box 104  
Toronto, Ontario M5K 1G8

Greg Watson  
Tel: 416.649.8100  
Fax: 416.649.8101  
Email: greg.watson@fticonsulting.com

Jodi Porepa  
Tel: 416.649.8070  
Email: Jodi.porepa@fticonsulting.com

Monitor

AND **BAKER MCKENZIE LLP**  
TO: Brookfield Place  
2100-181 Bay Street  
Toronto, Ontario M5J 2T3

John Pirie  
Tel: 416.865.2325  
Fax: 416.863.6275  
Email: john.pirie@bakermckenzie.com

David Gadsden  
Tel: 416.865.6983  
Email: david.gadsden@bakermckenzie.com

Lawyers for Poyry (Beijing) Consulting  
Company Limited

AND **AFFLECK GREENE MCMURTY LLP**  
TO: 365 Bay Street, Suite 200  
Toronto, Ontario M5H 2V1

Peter Greene  
Tel: 416.360.2800  
Fax: 416.360.8767  
Email: pgreene@agmlawyers.com

Kenneth Dekker  
Tel: 416.360.6902  
Fax: 416.360.5960  
Email: kdekker@agmlawyers.com

David Villaincourt  
Tel: 416.360.8100  
Fax: 416.360.5960  
Email: dvillaincourt@agmlawyers.com

Lawyers for BDO

AND **TORYS LLP**  
TO: 79 Wellington Street West  
Suite 3000, Box 270  
Toronto-Dominion Centre  
Toronto, Ontario M5K 1N2

John Fabello  
Tel: 416.865.8228  
Fax: 416.865.7380  
Email: jfabello@torys.com

David Bish  
Tel: 416.865.7353  
Email: dbish@torys.com

Andrew Gray  
Tel: 416.865.7630  
Email: agray@torys.com

Lawyers for the Underwriters named in Class  
Actions

AND **LINKLATERS LLP**  
TO: 10<sup>th</sup> Floor, Alexandra House  
18 Chater Road  
Hong Kong China

Melvin Sng  
Tel: 852 2901 5234  
Fax: 852 2810 8133  
Email: Melvin.Sng@linklaters.com

Lawyers for Sino-Forest Corporation (Hong Kong)

AND **GOODMANS LLP**  
TO: 333 Bay Street, Suite 3400  
Toronto, Ontario M5H 2S7

Benjamin Zarnett  
Tel: 416.597.4204  
Fax: 416.979.1234  
Email: bzarnett@goodmans.ca

Robert Chadwick  
Tel: 416.597.4285  
Email: rchadwick@goodmans.ca

Brendan O'Neill  
Tel: 416.979.2211  
Email: boneill@goodmans.ca

Caroline Descours  
Tel: 416.597.6275  
Email: cdescours@goodmans.ca

Lawyers for Ad Hoc Committee of Bondholders

AND **MERCHANT LAW GROUP LLP**  
TO: Saskatchewan Drive Plaza  
100-2401 Saskatchewan Drive  
Regina, Saskatchewan S4P 4H8

E.F. Anthony Merchant, Q.C.  
Tel: 306.359.7777  
Fax: 306.522.3299  
Email: tmerchant@merchantlaw.com

Lawyers for the Plaintiffs re Saskatchewan action

AND **ONTARIO SECURITIES COMMISSION**  
TO: Suite 1900, 20 Queen Street West  
Toronto, Ontario M5H 3S8

Hugh Craig  
Senior Litigation Counsel  
Tel: 416.593.8259  
Email: hcraig@osc.gov.on.ca

AND **OSLER, HOSKIN & HARCOURT LLP**

TO: 1 First Canadian Place  
100 King Street West  
Suite 6100, P.O. Box 50  
Toronto, Ontario M5X 1B8

Larry Lowenstein  
Tel: 416.862.6454  
Fax: 416.862.6666  
Email: llowenstein@osler.com

Edward Sellers  
Tel: 416.862.5959  
Email: esellers@osler.com

Geoffrey Grove  
Tel: (416) 862-4264  
Email: ggrove@osler.com

Lawyers for the Board of Directors of Sino-  
Forest Corporation

AND **SISKINDS LLP**

TO: 680 Waterloo Street  
P.O. Box 2520  
London, Ontario N6A 3V8

A. Dimitri Lascaris  
Tel: 519.660.7844  
Fax: 519.672.6065  
Email: dimitri.lascaris@siskinds.com

Charles M. Wright  
Tel: 519.660.7753  
Email: Charles.wright@siskinds.com

Lawyers for an Ad Hoc Committee of  
Purchasers of the Applicant's Securities,  
including the Representative Plaintiffs in the  
Ontario Class Action against the Applicant

AND **COHEN MILSTEIN SELLERS & TOLL  
PLC**

TO: 1100 New York, Ave., N.W.  
West Tower, Suite 500  
Washington, D.C. 20005

Steven J. Toll  
Tel: 202.408.4600  
Fax: 202.408.4699  
Email: stoll@cohenmilstein.com

Matthew B. Kaplan  
Tel: 202.408.4600  
Email: mkaplan@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed Class  
re New York action

AND **KOSKIE MINSKY LLP**

TO: 20 Queen Street West, Suite 900  
Toronto, Ontario M5H 3R3

Kirk M. Baert  
Tel: 416.595.2117  
Fax: 416.204.2899  
Email: kbaert@kmlaw.ca

Jonathan Ptak  
Tel: 416.595.2149  
Fax: 416.204.2903  
Email: jptak@kmlaw.ca

Garth Myers  
Tel: 416.595.2102  
Fax: 416.977.3316  
Email: gmyers@kmlaw.ca

Lawyers for an Ad Hoc Committee of Purchasers  
of the Applicant's Securities, including the  
Representative Plaintiffs in the Ontario Class  
Action against the Applicant

AND **COHEN MILSTEIN SELLERS & TOLL**  
TO: **PLC**  
88 Pine Street, 14th Floor  
New York, NY 10005

Richard S. Speirs  
Tel: 212.838.7797  
Fax: 212.838.7745  
Email: rspeirs@cohenmilstein.com

Stefanie Ramirez  
Tel: 202.408.4600  
Email: sramirez@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed  
Class re New York action

AND **THOMPSON HINE LLP**  
TO: 335 Madison Avenue – 12th Floor  
New York, New York 10017-4611

Yesenia D. Batista  
Tel: 212.908.3912  
Fax: 212.344.6101  
Email: yesenia.batista@thompsonhine.com

Irving Apar  
Tel: 212.908.3964  
Email: irving.apar@thompsonhine.com

Curtis L. Tuggle  
3900 Key Center, 127 Public Square  
Cleveland, Ohio 44114  
Tel: 216.566.5904  
Fax: 216.566.5800  
Email: Curtis.tuggle@thompsonhine.com

Lawyers for Senior Note Indenture Trustee

AND **LAW DEBENTURE TRUST COMPANY OF**  
TO: **NEW YORK**  
400 Madison Avenue – 4th Floor  
New York, New York 10017

James D. Heaney  
Tel: 646-747-1252  
Fax: 212-750-1361  
Email: james.heaney@lawdeb.com

Senior Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: Global Corporate Trust  
101 Barclay Street – 4th Floor East  
New York, New York 10286

David M. Kerr, Vice President  
Tel: 212.815.5650  
Fax: 732.667.9322  
Email: david.m.kerr@bnymellon.com

Convertible Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: 320 Bay Street, 11th Floor  
Toronto, Ontario M5H 4A6

George Bragg  
Tel: 416.933.8505  
Fax: 416.360.1711 / 416.360.1737  
Email: George.bragg@bnymellon.com

Convertible Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: 12/F Three Pacific Place  
1 Queen's Road East, Hong Kong

Marelize Coetzee, Vice President  
Relationship Manager, Default Administration  
Group – APAC  
Tel: 852.2840.6626  
Mobile: 852.9538.5010  
Email: marelize.coetzee@bnymellon.com

Grace Lau  
Email: grace.lau@bnymellon.com

Convertible Note Indenture Trustee

AND **LINKLATERS LLP**  
TO: 10th Floor, Alexandra House  
18 Chater Road  
Hong Kong China

Hyung Ahn  
Tel: 852 2842 4199  
Fax: 852 2810 8133  
Email: hyung.ahn@linklaters.com

Samantha Kim  
Tel: 852.2842 4197  
Email: Samantha.Kim@Linklaters.com

Jon Gray  
Tel: 852.2842.4188  
Email: Jon.Gray@linklaters.com

Lawyers for Sino-Forest Corporation (U.S.)

AND **APPLEBY GLOBAL**  
TO: Jayla Place, Wickham's Cay 1  
P.O. Box 3190, Road Town  
Tortola VG1110 BVI

Eliot Simpson  
Tel: 284.852.5321  
Fax: 284.494.7279  
Email: esimpson@applebyglobal.com

Andrew Willins  
Tel: 284 852 5323  
Email: awillins@applebyglobal.com

Andrew Jowett  
Tel: 284 852 5316  
Email: ajowett@applebyglobal.com

Lawyers for Sino-Forest Corporation (BVI)

AND **KING AND WOOD MALLESONS**  
TO: 9th Floor, Hutchison House  
Central, Hong Kong Island  
Hong Kong (SAR)

Helena Huang  
Tel: 852.2848.4848  
Email: Helena.huang@kingandwood.com

Tata Sun  
Tel: 852.2848.4848  
Email: tata.sun@kingandwood.com

Lawyers for Sino-Forest Corporation (PRC)

AND **THORNTON GROUT FINNIGAN LLP**  
TO: Suite 3200, 100 Wellington Street West  
P. O. Box 329, Toronto-Dominion Centre  
Toronto, Ontario M5K 1K7

James H. Grout  
Tel: 416.304.0557  
Fax: 416.304.1313  
Email: jgrout@tgf.ca

Lawyers for the Ontario Securities Commission



AND **McCARTHY TETRAULT LLP**  
TO: Suite 2500, 1000 De La Gauchetiere St. West  
Montreal, Québec, H3B 0A2

Alain N. Tardif  
Tel: 514.397.4274  
Fax : 514.875.6246  
Email: atardif@mccarthy.ca

Mason Poplaw  
Tel: 514.397.4155  
Email: mpoplaw@mccarthy.ca

Céline Legendre  
Tel: 514.397.7848  
Email: clegendre@mccarthy.ca

Lawyers for Ernst & Young LLP

AND **CHAITONS LLP**  
TO: 5000 Yonge Street, 10th Floor  
Toronto, Ontario M2N 7E9

Harvey G. Chaiton  
Tel: 416.218.1129  
Fax: 416.218.1849  
Email: Harvey@chaitons.com

Lawyers for the Law Debenture Trust  
Company of New York

AND **RUETER SCARGALL BENNETT LLP**  
TO: 250 Yonge Street  
Suite 2200  
Toronto, Ontario M5B 2L7

Robert Rueter  
Tel: 416.869-3363  
Email: robert.rueter@rslawyers.com

Sara J. Erskine  
Tel: 416.597-5408  
Email: sara.erskine@rslawyers.com

Jason Beitchman  
Tel: 416.597.5416  
Email: Jason.beitchman@rslawyers.com

Lawyers for Allan Chan

AND **PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**  
TO: 155 Wellington Street, 35th Floor  
Toronto, Ontario M5V 3H1

Ken Rosenberg  
Tel: 416.646.4304  
Fax: 416.646.4301  
Email: ken.rosenberg@paliareroland.com

Massimo (Max) Starnino  
Tel: 416.646.7431  
Email: max.starnino@paliareroland.com

Lawyers for an Ad Hoc Committee of Purchasers  
of the Applicant's Securities, including the  
Representative Plaintiffs in the Ontario Class  
Action against the Applicant

AND **ERNST & YOUNG LLP**  
TO: 222 Bay Street, P.O. Box 251  
Toronto, Ontario M5K 1J7

Mike P. Dean  
Tel: 416-943-2134  
Fax: 416-943-3300  
Email: Mike.P.Dean@ca.ey.com

AND **FASKEN MARTINEAU LLP**  
TO: 333 Bay Street, Suite 2400,  
Bay-Adelaide Centre, Box 20  
Toronto, Ontario M5H 2T6

Stuart Brotman  
Tel: 416.865.5419  
Fax: 416.364.7813  
Email: sbrotman@fasken.com

Conor O'Neill  
Tel: 416 865 4517  
Email: coneill@fasken.com

Canadian Lawyers for the Convertible Note  
Indenture Trustee (The Bank of New York  
Mellon)

AND **LAPOINTE ROSENSTEIN MARCHAND**

TO: **MELANÇON, S.E.N.C.R.L.**  
1250, boul. René-Lévesque Ouest, bureau  
1400

Montréal (Québec) Canada H3B 5E9

Bernard Gravel  
Tel: 514.925.6382  
Fax: 514.925.5082  
Email: bernard.gravel@lrmm.com

Bruno Floriani  
Tel: 514.925.6310  
Email: bruno.floriani@lrmm.com

Québec counsel for Pöyry (Beijing)  
Consulting Company Ltd.

AND **DAVIS LLP**

TO: 1 First Canadian Place, Suite 6000  
PO Box 367

100 King Street West  
Toronto, Ontario M5X 1E2  
Susan E. Friedman  
Tel: 416.365.3503  
Fax: 416.777.7415  
Email: sfriedman@davis.ca

Bruce Darlington  
Tel: 416.365.3529  
Fax: 416.369.5210  
Email: bdarlington@davis.ca

Brandon Barnes  
Tel: 416.365.3429  
Fax: 416.369.5241  
Email: bbarnes@davis.ca

Lawyers for Kai Kat Poon

AND **CLYDE & COMPANY**

TO: 390 Bay Street, Suite 800  
Toronto, Ontario M5H 2Y2

Mary Margaret Fox  
Tel: 416.366.4555  
Fax: 416.366.6110  
Email: marymargaret.fox@clydeco.ca

Paul Emerson  
Tel: 416.366.4555  
Email: paul.emerson@clydeco.ca

Lawyers for ACE INA Insurance and Chubb  
Insurance Company of Canada

AND **RICKETTS, HARRIS LLP**

TO: Suite 816, 181 University Ave  
Toronto ON M5H 2X7

Gary H. Luftspring  
Tel: 647.288.3362  
Fax: 647.260.2220  
Email: GLuftspring@rickettsharris.com

Lawyers for Travelers Insurance Company of  
Canada

## PART I – OVERVIEW

1. This factum is filed by the Dealers<sup>1</sup> in support of the plaintiffs' motion seeking approval of the Dealers' Settlement pursuant to the *Class Proceedings Act*, the *Companies' Creditors Arrangement Act* ("CCAA") and the Plan of Sino-Forest approved by this Court in the within CCAA proceedings.<sup>2</sup> This factum is limited to addressing the position on the motion taken by Cosimo Borrelli, the Litigation Trustee, seeking to hold up the approval of the Dealers' Settlement.

2. The Dealers have agreed to pay \$32.5 million to former Sino-Forest securityholders, subject to certain conditions being satisfied. One of the conditions is that the Dealers' Settlement is a Named Third Party Settlement under the Plan and that the Dealers receive a Named Third Party Defendant Release. It is also a term of the Dealers' Settlement that the Dealers will not pay anything more than \$32.5 million, including specifically that they will not pay anything to the Litigation Trustee. These provisions in the Minutes of Settlement are complementary and consistent with the terms of the Plan.

3. Among other things, the Plan compromised and released various claims and rights of the Dealers, with no distribution (i.e. cash, securities, etc.) to the Dealers in respect of same under the Plan. The Dealers agreed to vote in favour of the Plan and consented to the Sanction Order in exchange for certain concessions and non-monetary consideration granted to the Dealers, including on the basis (among other things) that they were released from all claims conveyed to the Litigation Trustee excepting claims of fraud and criminal conduct, which are not alleged.

4. These terms of the Plan were the result of hard-bargaining among the parties, including the Dealers (which ongoing negotiations with the Dealers resulted in two adjournments to the scheduled meeting of creditors to vote on the Plan). This was reported on by the Monitor in its Supplemental Report to the Thirteenth Report dated December 4, 2012, in which it reported at

---

<sup>1</sup> The Dealers are Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

<sup>2</sup> Unless otherwise defined, capitalized terms used in the factum have the meanings attributed to them in the Minutes of Settlement (Compendium of the Dealers, Tab 1) or the Plan (Compendium of the Dealers, Tab 2).

paragraph 4: “As result of numerous negotiations which have occurred since the October 19 Plan was filed, a number of changes to the Plan have been agreed upon.”

5. The Monitor went on to summarize at paragraph 6 those changes to the Plan negotiated with the Dealers, including in paragraph 6(c): “All Causes of Action against the Underwriters by the Company or the Trustees are deemed to be Excluded Litigation Trust Claims.”

6. Under the Plan, the Dealers’ Settlement and related release must be “acceptable” to the Litigation Trustee.<sup>3</sup> The only reasonable purpose of this provision of the Plan is to ensure that the only right the Litigation Trustee could conceivably assert against the Dealers – to assert an action for fraud or criminal conduct – is not unreasonably compromised. The Litigation Trustee has no claims against the Dealers (let alone any claim for fraud or criminal conduct) and he has conceded that. Mr. Borrelli therefore has no basis to assert that the Dealers’ Settlement is not “acceptable”. It appears, therefore, that Mr. Borrelli’s opposition to the Dealers’ Settlement must be based on no more than a desire to extract a payment for the Litigation Trust in exchange for the Dealers receiving a Named Third Party Defendant Release. However, the Dealers already paid for this release when the Plan was approved.

7. The Court can dismiss the Litigation Trustee’s opposition to the plaintiffs’ motion simply by enforcing the terms of the Plan. In addition, the Litigation Trustee’s failure to concede that the Dealers’ Settlement is acceptable is unreasonable and the Court can hold that the settlement is acceptable based on the application of contract principles to the Plan. The Court can also deem the acceptability of the settlement based on the jurisdiction provided under the CCAA.

## **PART II – FACTS**

8. The Dealers highlight below only those facts relevant to the Litigation Trustee’s position seeking to hold up the approval of the Dealers’ Settlement.

### **The Dealers and the Plan**

9. At the time the Plan was negotiated, the Dealers had valuable rights of indemnification against Sino-Forest and its subsidiaries in respect of claims in the Class Actions made by certain

---

<sup>3</sup> The Litigation Trustee does not have a “consent” or veto right (as exists in other parts of the Plan) but something less, akin to a right to be consulted and offer an assessment of the adequacy of the settlement and release within the context of the Plan and the extremely limited interest the Litigation Trustee may have in a settlement.

Noteholders.<sup>4</sup> The Dealers nonetheless agreed to vote in favour of the Plan and consented to the granting of the Sanction Order in respect of the Plan. The Dealers' vote and consent was based (among other things) on the following features of the Plan, which they negotiated:<sup>5</sup>

- (a) The Dealers were released from Litigation Trust Claims, and therefore faced no litigation opposite the Litigation Trustee, subject only to claims for fraud or criminal conduct (which are not alleged).<sup>6</sup>
- (b) Litigation Trust Claims exclude Causes of Action (other than claims for fraud or criminal conduct) against the Dealers by Sino-Forest or the Litigation Trustee (on behalf of the Noteholders) and all such Causes of Action were deemed to be Excluded Litigation Trust Claims that were fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.<sup>7</sup>
- (c) The Dealers, together with their respective present and former affiliates, partners, associates, employees, servants, agents, contractors, directors, officers, insurers and successors, administrators, heirs and assigns are Named Third Party Defendants.<sup>8</sup>
- (d) Upon delivery of a Monitor's Named Third Party Settlement Certificate and to the extent provided for by the terms of the applicable Named Third Party Defendant Release, the applicable Causes of Action against the applicable Named Third Party Defendant shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against the applicable Named Third Party Defendant.<sup>9</sup>

---

<sup>4</sup> These were rights of indemnification unrelated to indemnification claims that were found to be equity claims – they were claims (a) against subsidiaries of Sino-Forest and not the CCAA applicant and (b) in respect of Notes and not common shares of Sino-Forest.

<sup>5</sup> See: Factum of the Dealers filed in connection with the motion seeking the Sanction Order, Compendium of the Dealers, Tab 3.

<sup>6</sup> See: Plan, s. 7.1, Compendium of the Dealers, Tab 2.

<sup>7</sup> See: Plan, s. 4.12(b) of the Plan, Compendium of the Dealers, Tab 2.

<sup>8</sup> See: Plan, Definition of "Third Party Defendants" and Schedule "A", Compendium of the Dealers, Tab 2.

<sup>9</sup> See: Plan, s. 4.12(b) and (c), Compendium of the Dealers, Tab 2.

10. It was on the basis of receiving the consideration and protection set out above that the Dealers voted in favour of the Plan and consented to the granting of the Sanction Order. The Sanction Order, in turn, includes at paragraph 32(h) the release of the Excluded Litigation Trust Claims.

### **The Dealers' Settlement**

11. As set out in the motion record and factum of Class Counsel, in 2014 the Dealers negotiated a comprehensive settlement with Class Counsel. The terms of the Dealers' Settlement are contained in the Minutes of Settlement. The features of the Minutes of Settlement relevant to the Litigation Trustee's position on this motion are:

- (a) The Dealers have agreed to pay \$32.5 million to resolve all liability and potential liability relating in any way whatsoever to their involvement with Sino-Forest, without admission of liability.
- (b) It is a condition of the Dealers' Settlement that the Dealers receive a Named Third Party Defendant Release in accordance with the Plan.
- (c) The Dealers will not pay any more than \$32.5 million in connection with the Dealers' Settlement.<sup>10</sup>

12. As a consequence of these terms of the Dealers' Settlement, the Dealers' Settlement and related release must be "acceptable" to the Litigation Trustee, failing which the conditions to the Dealers' Settlement will not be met and the former securityholders of Sino-Forest will not receive any distribution in connection with the Dealers' Settlement. The former securityholders who will be negatively affected by this outcome include former Noteholders who are beneficiaries of the Litigation Trust.

### **The Litigation Trustee's Position**

13. Following the execution of the Minutes of Settlement, counsel for the Dealers wrote to counsel for Mr. Borrelli to request the consent of the Litigation Trustee.<sup>11</sup> As set out in that letter, the Litigation Trustee's non-opposition should have been provided immediately in light of

---

<sup>10</sup> See: Minutes of Settlement, ss. 2, 6, Dealers Compendium, Tab 1.

<sup>11</sup> See: Letter from Andrew Gray to Robert Staley, dated January 8, 2015, Compendium of the Dealers, Tab 4.

the terms of the Plan: claims against the Dealers other than claims for fraud and criminal conduct had been released, the Litigation Trust never had the right to assert claims against the Dealers other than in those narrow circumstances and there were no claims against the Dealers for fraud or criminal conduct in any event.

14. In response, the Litigation Trustee conceded that he has no claims against the Dealers but nonetheless refused to provide his consent to the Dealers obtaining the Named Third Party Defendant Release.<sup>12</sup> Mr. Borrelli's position seeking to hold up the Dealers' Settlement appears to be no more than an attempt to extract a payment in connection with his right to assess the acceptability of the Dealers receiving the Named Third Party Defendant Release, a release the Dealers paid for when the Plan was approved by this Court.

### **PART III – LAW & ARGUMENT**

15. The position of the Litigation Trustee is contrary to the terms of the Plan. The Court should dismiss the Litigation Trustee's objection on that basis, order that the Dealers are entitled to a Named Third Party Defendant Release and approve the Dealers' Settlement.

16. In addition, where a contract like the Plan includes a provision granting a party discretionary power, the discretion conferred on that party must be exercised reasonably. This is particularly true of a person such as a litigation trustee appointed by the Court pursuant to a court process. Where the party fails to meet that standard, the court can deem his acceptance. Furthermore, under the CCAA the court also has the jurisdiction to deem a party's acceptance, irrespective of the nature of the basis for the consent being withheld. On the basis of either contract principles or pursuant to the jurisdiction of the Court under the CCAA, the Court in this case can deem that the Dealers' Settlement is "acceptable" to the Litigation Trustee.

#### **The Litigation Trustee Does not Have a Veto Right**

17. Unlike other provisions of the Plan that prescribe a "consent" right or requirement<sup>13</sup>, the Litigation Trustee only has the right to assess whether any Named Third Party Defendant

---

<sup>12</sup> See: Letter from Robert Staley to Andrew Gray, dated January 16, 2015, Compendium of the Dealers, Tab 5.

<sup>13</sup> See, for example, the following provisions of the Plan: s. 4.12(c), page 38; ss. 5.2(b)(ii)(A),(B), pages 42-43; ss. 8.2(r),(w), pages 67-68; s. 10.1, pages 76-77; s. 11.2(a), page 78, Compendium of the Dealers, Tab 2.

Settlement and Named Third Party Release is “acceptable”.<sup>14</sup> “Acceptable” has been defined variously as “pleasing, welcome, tolerable” and “suitable...adequate; satisfactory.”<sup>15</sup> The Litigation Trustee’s right to determine the acceptability of the Dealers’ Settlement and related release is limited and circumscribed by the only interest he could conceivably have in the settlement, which is a cause of action in fraud against the Dealers. No such cause of action has been asserted, nor is there one. The Dealers’ Settlement must therefore be “acceptable” to the Litigation Trustee. The Litigation Trustee’s refusal to concede the point cannot be elevated to a *de facto* veto to prevent the approval of a settlement that is otherwise acceptable to and supported by those who have a legitimate and direct interest in it.

18. There is a clear distinction in the Plan between a right to “consent” and a right to determine that something is “acceptable”. The terms are not used interchangeably, as is apparent from the below provisions relating to the Litigation Trustees’ rights with respect to Named Third Party Defendant Settlements and Named Third Party Defendant Releases:

**“Named Third Party Defendant Settlement”** means a binding settlement between any applicable Named Third Party Defendant and ... (i) the plaintiffs in any of the Class Actions... provided that, in each case, such settlement must be acceptable to SFC (if on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date) and the Litigation Trustee (if after the Plan Implementation Date), and provided further that such settlement shall affect the plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.

...

**“Named Third Party Defendant Release”** means a release of any applicable Named Third Party Defendant agreed to pursuant to a Named Third Party Defendant Settlement and approved pursuant to a Named Third Party Defendant Settlement Order, provided that such release must be acceptable to SFC (if on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date) and the Litigation Trustee (if after the Plan Implementation Date), and provided further that such release shall not affect the plaintiffs in

---

<sup>14</sup> See: Plan, s. 1.1, pages 17-18, Compendium of the Dealers, Tab 2.

<sup>15</sup> *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 O.R. (3d) 257 (C.A.) at para. 80, Authorities of the Dealers, Tab 1; *R. v. Seaway Gas & Fuel Ltd.* (2000), 47 O.R. (3d) 458 (C.A.) at para. 28, Authorities of the Dealers, Tab 2.



the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.<sup>16</sup>

19. It is clear based on the language of the Plan, as set out above, that the Litigation Trustee is not required and does not have the right to consent to the Dealers' Settlement. Accordingly, the Litigation Trustee should not be permitted to effectively veto the Dealers' Settlement.

**The Litigation Trustee's Position Is Contrary to the Terms of the Plan**

20. As set out in Part II, the Dealers voted in favour of the Plan and consented to the Sanction Order approving the Plan on the basis that they were released from claims that would otherwise have been conveyed to the Litigation Trustee, except for claims relating to fraud or criminal conduct, which are not alleged. The Sanction Order expressly gives effect to this release in paragraph 32(h). Obtaining this release was part of a bargain struck by the Dealers in connection with the negotiation of the Plan.

21. The mechanism in the Plan that requires that the Litigation Trustee accept that a party receiving a Named Third Party Defendant Release was meaningful in the context of the settlement involving David Horsley. The Litigation Trustee may have had claims against Mr. Horsley, and Mr. Borrelli's acceptance of a release that affected the claims of the Litigation Trustee made sense and was no mere formality. That is not the case in respect of the Dealers. Because the Litigation Trustee has no claims against the Dealers, the Plan mechanism is just a formality and the Litigation Trustee's effort to hold up the approval of the Dealers' Settlement by withholding his acceptance is contrary to the Plan. Because the release of the Litigation Trustee's claims against the Dealers in the Plan was part of a bargain struck by the Dealers when it voted in favour of the Plan and consented to the Sanction Order, it is troubling that Mr. Borrelli is not merely taking a position contrary to the terms of the Plan but that he is doing so in order to seek some sort of payment.

22. Ordering Mr. Borrelli to accept the Dealers receiving a Named Third Party Defendant Release (or deeming such acceptance to have been affirmed) gives effect to the terms of the Plan and protects the rights of the Dealers in respect of the Plan.

---

<sup>16</sup> See: Plan, s. 1.1, pages 17-18, Compendium of the Dealers, Tab 2.

### **Discretionary Power May Not Be Withheld Unreasonably**

23. Although it is not necessary given the power of the Court to order Mr. Borrelli to comply with the terms of the Plan, contract law also provides a basis for overcoming Mr. Borrelli's hold up effort as it allows the Court to deem his acceptance.

24. A contracting party has a duty to exercise a discretionary power in good faith. The courts repeatedly recognize, as a fundamental principle of contractual performance, that a party's discretion is not unlimited. Rather, it is "subject to a requirement of honesty and good faith."<sup>17</sup> Recently, the Supreme Court of Canada confirmed that the duty of good faith – including good faith performance of contracts – is a general organizing principle of contract law in Canada.<sup>18</sup> The principle of good faith means that parties must perform their contractual duties honestly and reasonably.<sup>19</sup>

25. It is clearly unreasonable for Mr. Borrelli to deliberately obstruct the terms and intents of the Plan, without any principled basis for doing so, and in an effort to seek some sort of windfall for the Litigation Trust. As such, he is in breach of his obligations to perform his obligations in good faith. In the circumstances, the Court can deem Mr. Borrelli's acceptance to the Dealers' receiving a Named Third Party Defendant Release.

### **The CCAA Allows the Court to Compel Consent**

26. In the context of the CCAA, courts have deemed a party's consent pursuant to an agreement irrespective of considerations of good faith and reasonableness.

27. In *Hayes Forest Services Ltd., Re*, a landlord refused to consent to the assignment of a lease and the court had to consider whether it had the power to compel consent even where the landlord was not being unreasonable. The Court concluded that it did have this power, relying on an earlier decision of Mr. Justice Spence:

I am satisfied that the CCAA Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium, supra*, Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new

---

<sup>17</sup> Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham: LexisNexis Canada, 2012) at 332-333 citing *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 at para. 18(C.A.); Authorities of the Dealers, Tabs 3 and 4.

<sup>18</sup> *Bhasin v. Hrynew*, 2014 SCC 71 at para. 33, Authorities of the Dealers, Tab 5.

<sup>19</sup> *Bhasin v. Hrynew, supra*, at para. 63, Authorities of the Dealers, Tab 5.

corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the CCAA Order in place, Spence J. concluded that there could be no assignment but that the CCAA Order affords "... a context in which the court has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium, supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.<sup>20</sup>

28. The CCAA, therefore, also provides the basis for the Court to compel Mr. Borrelli to provide his acceptance to the Dealers receiving a Named Third Party Defendant Release, irrespective of the unreasonableness of his position.

#### **PART IV – ORDER SOUGHT**

29. In light of all of the above, the Dealers respectfully request an order approving the Dealers' Settlement, the Claims and Distribution Protocol, and the appointment of the administrator.

---

<sup>20</sup> *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169 at para. 31 citing *Playdium Entertainment Corp. Re*, [2001] O.J. No. 4252 (Ont. Sup. Ct.), Authorities of the Dealers, Tabs 6 and 7. See, also: *Backbay Retailing Corp., Re*, 2008 BCSC 1876, Authorities of the Dealers, Tab 8.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

A handwritten signature in blue ink, appearing to be 'John Fabello', is written over a horizontal line.

John Fabello

A handwritten signature in black ink, appearing to be 'David Bish', is written over a horizontal line.

David Bish

Lawyers for the Dealers

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

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

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA et al.  
SINO-FOREST CORPORATION et al.

Court File No. CV-11-431153-00CP

Plaintiffs

Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE DEALERS  
Dealer Settlement Approval Motion, Returnable  
May 11, 2015**

**Torys LLP**

79 Wellington St. W., 30th Floor  
Box 270, TD South Tower  
Toronto, Ontario M5K 1N2  
Fax: 416.865.7380

John Fabello (LSUC #: 35449W)  
Tel: 416.865.8228

David Bish (LSUC #: 41629A)  
Tel: 416.865.7353

Lawyers for the Dealers