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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS
Ernst & Young LLP Settlement – Approval of Claims and Distribution Protocol
(Motion Returnable December 13, 2013)

November 29, 2013

Siskinds LLP
680 Waterloo Street, Box 2520
London, ON N6A 3V8

A. Dimitri Lascaris (LSUC#: 50074A)
Tel: (519) 660-7844
Fax: (519) 660-7845

Daniel E. H. Bach (LSUC#: 52087E)
Tel.: (416) 362-8334
Fax: (416) 362-2610

Koskie Minsky LLP
900-20 Queen Street West, Box 52
Toronto, ON M5H 3R3

Jonathan Ptak (LSUC#: 45773F)
Tel: (416) 595-2149
Fax: (416) 204-2903

Jonathan Bida (LSUC#: 54211D)
Tel: (416) 595-2072
Fax: (416) 204-2907

Paliare Roland Rosenberg Rothstein LLP
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Ken Rosenberg (LSUC#: 21101H)
Massimo Starnino (LSUC#: 41048G)
Tel: (416) 646-4300
Fax: (416) 646-4301

Lawyers for the plaintiffs and CCAA
Representative Counsel

TO: **THE ATTACHED SERVICE LIST**

TABLE OF CONTENTS

PART I. OVERVIEW OF THE MOTION

1. The plaintiffs bring this motion for an order approving the proposed Claims and Distribution Protocol. The proposed protocol sets out the process for the allocation and distribution the net proceeds of the settlement with Ernst & Young LLP ("E&Y").

2. On March 20, 2012, this court approved the E&Y settlement and established a settlement trust for the settlement proceeds. Paragraph 4 of the settlement approval order appointed the plaintiffs as representatives of persons that purchased Sino-Forest securities ("Securities Claimants") for the purposes of the settlement. Paragraph 5 appointed Koskie Minsky LLP and Siskinds LLP (together "Canadian Class Counsel"), along with insolvency counsel Paliare Roland Rosenberg Rothstein LLP, as counsel for the Securities Claimants. Paragraph 17 of the settlement approval order stated that Canadian Class Counsel and insolvency counsel are to establish a process for the allocation and distribution of the net settlement proceeds among Securities Claimants and that such process shall be approved by this court (the "Claims and Distribution Protocol").[1]

3. The proposed Claims and Distribution Protocol should be approved. It provides a fair and reasonable process for the allocation and distribution of the settlement proceeds.

4. Securities Claimants (subject to certain exceptions) would participate in a claims process to receive compensation from the settlement. Compensation would be based on (a) the losses suffered by each claimant attributable to the alleged misrepresentations; and (b) the strength of different types of claims that the claimant advances against E&Y. This means that persons with

---

[1] Affidavit of Charles M. Wright, sworn November 4, 2013 (the "*Wright Affidavit*") at para 8, Plaintiffs' Motion Record, Tab 8.

stronger claims would receive more on a per-dollar-of-loss basis than persons with weaker claims. This approach reflects the risks of different claims.[2] Ontario and U.S. courts, in approving plans of distribution, have found that distinguishing between different types of claimants is reasonable and appropriate.

5. The exceptions to the claims process are for (a) Noteholders (as defined in the Sino-Forest plan of compromise and restructuring) whose interests are represented by counsel to the Initial Consenting Noteholders and who will receive a fixed payment of $5 million in aggregate; (b) persons excluded from compensation by section 18 of the settlement approval order; and (c) persons with no claim against E&Y.[3]

PART II. THE FACTS

6. These proceedings relate to the demise of Sino-Forest Corporation ("Sino") following the publication of allegations on June 2, 2011 that the company was a massive Ponzi scheme and that its public disclosures contained misrepresentations regarding its business and affairs.[4]

7. On July 20, 2011, this action was commenced against Sino, E&Y and other defendants in Ontario under the *Class Proceedings Act, 1992*. Class proceedings were also commenced in Québec and New York.[5]

---

[2] Affidavit of Joseph Mancinelli sworn October 2, 2013 at paras.13-15, Plaintiffs' Motion Record, Tab 4; Affidavit of Michael Gallagher sworn October 30, 2013 at para. 5, Plaintiffs' Motion Record, Tab 3; Affidavit of David Grant sworn November 14, 2013 at para. 3, Plaintiffs' Motion Record, Tab 2; Affidavit of Robert Wong sworn November 6, 2013 at para. 8, Plaintiffs' Motion Record, Tab 7; Affidavit of Richard Grottheim sworn November 13, 2013 at para. 4, Plaintiffs' Motion Record, Tab 5.

[3] *Wright Affidavit* at paras 12, 13 and 18, Plaintiffs' Motion Record, Tab 8.

[4] *Wright Affidavit* at para 2, Plaintiffs' Motion Record, Tab 8.

[5] *Wright Affidavit* at paras 4 and 9, Plaintiffs' Motion Record, Tab 8.

8. On March 30, 2012, Sino applied for and was granted protection from its creditors pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*").[6]

9. In November 2012, a settlement was reached with E&Y. The settlement provides for payment of $117 million in full settlement of all claims that relate to Sino as against E&Y, Ernst & Young Global Limited, and their affiliates.[7]

10. On March 20, 2013, this Court approved the settlement. The settlement approval order provides that the net settlement proceeds (net of class counsel fees and other expenses) shall be distributed among Securities Claimants, excluding the defendants and their affiliates.[8]

PART III. ISSUES AND THE LAW

11. The proposed Claims and Distribution Protocol should be approved. It provides a fair and reasonable process for the allocation and distribution of the net settlement proceeds.

12. In the context of Canadian insolvencies and class proceedings, the test for approval of a plan of distribution is in essence the same: the plan must be fair and reasonable.[9]

---

[6] *Wright Affidavit* at para 5, Plaintiffs' Motion Record, Tab 8.

[7] *Wright Affidavit* at para 6, Plaintiffs' Motion Record, Tab 8.

[8] *Wright Affidavit* at para 7, Plaintiffs' Motion Record, Tab 8. The net settlement proceeds is the amount remaining from the $117 million settlement after payment of administration and notice costs, class counsel fees and expenses as approved by the Court and payment to Claims Funding International ("CFI") in accordance with the funding order of Perell J. dated March 17, 2012.

[9] A plan of compromise under the *CCAA* is sanctioned where (a) there is compliance with all statutory requirements and previous orders; (b) nothing has been done that is not authorized by the *CCAA*; and (c) the plan is fair and reasonable. (*Sino-Forest Corporation (Re)*, 2012 ONSC 7050 at para. 51, Plaintiffs' Authorities Tab 1.) In class proceedings, a plan of distribution is approved "if in all the circumstances, the plan of distribution is fair, reasonable, and in the best interests of the class." (*Zaniewicz v. Zungui Haixi Corp.* 2013 ONSC 5490 at para 59, Plaintiffs' Authorities, Tab 2.)

13. A similar test applies in the United States; the plan must be "fair and adequate".[10] As with the approval of settlements, "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."[11]

14. Justice Perell has described Canadian Class Counsel as "competent, experienced, and veteran class action law firms." Siskinds LLP has "a long and distinguished history at the class actions bar, being class counsel in the first action certified as a class action" in Ontario, "and it has almost a monopoly on securities class actions." Similarly, Koskie Minsky LLP has a "well-established and prominent class actions practice, having been counsel in every sort of class proceeding, several of them being landmark cases."[12]

15. The proposed Claims and Distribution Protocol comes with the recommendation of "senior lawyers with considerable experience and proficiency in class actions and securities litigation" and, as discussed below, meets the criteria for approval.

A. Overview of the Proposed Claims and Distribution Protocol

16. The proposed Claims and Distribution Protocol creates a claims-based process for Securities Claimants (subject to exceptions) to seek compensation from the settlement fund.

17. The Claims and Distribution Protocol is designed to provide compensation based on the strength of each category of claims against E&Y. Thus, a claim for purchases with fewer

---

[10] "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized – namely, it must be fair and adequate." *In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005), Plaintiffs' Authorities, Tab 3.

[11] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005), Plaintiffs' Authorities, Tab 3.

[12] *Smith v Sino-Forest Corp.*, 2012 ONSC 24 at paras 4, 77, 79, and 81, Plaintiffs' Authorities, Tab 4.

litigation challenges would receive more on a per dollar-of-loss basis than a claim for purchases with greater litigation challenges.[13]

18. For example, a claim under the *Securities Act*'s primary market provisions (Part XXIII) offers recovery to primary market purchasers with fewer of the limitations applicable to claims of a secondary market purchaser under Part XXIII.1. For instance, a Part XXIII.1 claim against and auditor is generally subject to a liability limit. In this case, that liability limit could have been less than $10 million in aggregate. Accordingly, a claim for purchases of Sino shares in the June 2009 or December 2009 prospectus offerings (primary market) should be allocated more for each dollar-of-loss than a claim for purchases on the secondary market in the same period.[14]

19. Ontario courts, in approving plans of distribution, have found that distinguishing between different types claimants is reasonable and appropriate. For example, in *Gould v BMO Nesbitt Burns Inc.*, Justice Cullity (as he then was) approved of a plan of distribution where there were discounts for the claims of secondary market purchasers "to reflect increased certification and substantive litigation risks affecting their claims".[15]

20. U.S. court have also approved of this approach to distribution: "a reasonable plan may consider the relative strength and values of different categories of claim."[16] Particularly "in the case of a large class action the apportionment of a settlement can never be tailored to the rights

---

[13] *Wright Affidavit* at para 14, Plaintiffs' Motion Record, Tab 8.

[14] *Wright Affidavit* at para 15, Plaintiffs' Motion Record, Tab 8; *Securities Act*, R.S.O. 1990, c. S.5, s. 138.1 ("liability limit"), 138.7.

[15] *Gould v BMO Nesbitt Burns Inc.*, [2007] O.J. No. 1095 at paras 19-23 (S.C.J.), Plaintiffs' Authorities, Tab 5; *Zaniewicz v. Zungui Haizi Corp.*, 2013 ONSC 5490 at paras. 60-90, Plaintiffs' Authorities, Tab 2.

[16] *In re IMAX*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012), Plaintiffs' Authorities, Tab 6.

of each plaintiff with mathematical precision,"[17] and "[e]xactitude is not required in allocating consideration to the class, provided that the overall result is fair, reasonable and adequate."[18] Broad classifications may be used to promote the goals of efficiency, ease of administration, and conservation of resources.[19]

(1) Process For Filing and Assessing Claims

(a) Calculating Losses – paras 10(a)-(c) of the Protocol

21. Each claimant will file a claim with the details of their trading in Sino securities. The claims administrator will use this information to determine the claimant's loss from the acquisition of Sino securities. In developing this part of the protocol, Canadian Class Counsel received advice from an economist, Frank Torchio of Forensic Economics, relating to the calculation of losses for securities purchasers.[20]

22. To determine the claimant's losses, the adjusted cost base ("ACB") of the claimant's securities must first be determined. This is done by applying the "first-in first-out" methodology

---

[17] *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), Plaintiffs' Authorities, Tab 7A, *aff'd*, 117 F.3d 721 (2d Cir. 1997), Plaintiffs' Authorities, Tab 7B.

[18] *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 430 (S.D.N.Y. 2007), Plaintiffs' Authorities, Tab 8.

[19] *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 135 (S.D.N.Y. 1997), Plaintiffs' Authorities, Tab 7A *aff'd*, 117 F.3d 721 (2d Cir. 1997) Plaintiffs' Authorities, Tab 7B: ("Efficiency, ease of administration and conservation of public and private resources are highly relevant to the reasonableness of a settlement, particularly where, as here, the issues are complex, the outcome of the litigation unclear, and the class large. Based on the extensive record in this case, a pro rata distribution of the Settlement on the basis of Recognized Loss will provide a straightforward and equitable nexus for allocation and will avoid a costly, speculative and bootless comparison of the merits of the Class Members' claims. Accordingly, the Plan of Allocation is fair and reasonable and is approved.") (internal citations omitted)

[20] *Wright Affidavit*, paras 21-22, Plaintiffs' Motion Record, Tab 8. Mr. Torchio has expertise in financial valuations, financial-economic analysis and analysis of the response of stock prices to public information in securities fraud lawsuits. Mr. Torchio advised on how to determine which securities are deemed sold in a given period and on the use of netting, whereby losses are offset by profits of sales of securities during the period when such securities were inflated.

("FIFO") to the securities on a per-security, per account basis.[21] The FIFO methodology is widely accepted and is mandated by International Financial Reporting Standards ("IFRS").[22] The use of FIFO has been approved in plans of allocation in Ontario and the United States.[23]

23. The securities would then be divided into the different categories as set out in paragraph 10(e) of the Claims and Distribution Protocol. For each category of securities held by a claimant, the losses for those purchases are calculated as follows:[24]

Time of Sale of Securities	**Damages**
Sold before June 2, 2011	No damages
Sold from June 3 to August 25, 2011	(#of securities sold) X (ACB - Sale Price)
Sold or held after August 25, 2011	
Shares	(#of shares sold or held) X (ACB per share - CAD$1.40)
2013 Notes	(#of notes sold or held) X (ACB per note - USD$283)
2014 Notes	(#of notes sold or held) X (ACB per note - USD$276.20)
2016 Notes	(#of notes sold or held) X (ACB per note - USD$283)
2017 Notes	(#of notes sold or held) X (ACB per note - USD$289.80)

24. For securities sold or held after August 25, 2011, the loss per security is calculated by subtracting the holding price of the securities as of August 26, 2011 (as estimated by Forensic Economics).[25]

---

[21] *Wright Affidavit*, para 24, Plaintiffs' Motion Record, Tab 8. FIFO is the method applied to the holdings of securities claimants that made multiple purchases or sales, such that the sales of securities will be matched, in chronological order, first against securities first purchased.

[22] As set out in International Accounting Standard 2 – Inventories, IFRS, paras 25, 27, Plaintiffs' Authorities, Tab 9.

[23] For example, see plans of allocation approved in *Dobbie v. Arctic Glacier*, order dated June 1, 2012 (File No. 59725), Plaintiffs' Authorities, Tab 10, *McKenna v Gammon Gold*, order dated December 4, 2012 (File No. 08-36143600CP) Plaintiffs' Authorities, Tab 11, *Zaniewicz v. Zungui Haixi Corp.*, order dated August 26, 2013 (File No. CV-11-436360-00CP), Plaintiffs' Authorities, Tab 12, and *Metzler Investment GmbH v. Gildan Activewear Inc.*, order dated February 18, 2011 (File No. 58574CP), Plaintiffs' Authorities, Tab 13, U.S. courts have also accepted the use of FIFO as a method of calculating securities losses in a plan of allocation: *In Re AOL Time Warner, Inc. Securities and "ERISA" Litigation*, 2006 U.S. Dist. LEXIS 17588, 59-62, Plaintiffs' Authorities, Tab 14.

[24] *Wright Affidavit*, para 25, Plaintiffs' Motion Record, Tab 8.

(b) Offset Profits and Compensable Damages – para 10(d) of the Protocol

25. If a claimant sold a portion of his, her or its securities before June 2, 2011 (the date that the Muddy Waters report was released), that claimant may have inadvertently profited from the alleged misconduct at Sino. In order to remove the impact of these sales, profits attributable to the artificial inflation of such securities ("Offset Profits") will be offset by subtracting them from the claimant's losses for those securities held after June 2, 2011.[26]

26. The artificial inflation for the purpose of calculating Offset Profits will be determined by Frank Torchio of Forensic Economics in consultation with Canadian Class Counsel.[27] Only securities acquired after March 19, 2007 will be subject to this procedure.

27. For each category of securities purchased, the claimant's losses are reduced by subtracting the claimant's Offset Profits to determine the "Compensable Damages".

(c) Risk Adjusted Damages and Compensable Loss– paras 10(e)-(f) of the Protocol

28. There are six categories of purchases with sub-categories, each with its own "risk adjustment factor."[28] The rationale for the different risk adjustment factors are explained in section (B), below.

29. The Compensable Damages for each category of securities will be multiplied by the applicable risk adjustment factor in paragraph 10(e) of the Claims and Distribution Protocol to arrive at the "Risk Adjusted Damages" for each category of securities.

---

[25] *Wright Affidavit*, para 25, Plaintiffs' Motion Record, Tab 8.

[26] *Wright Affidavit*, para 26, Plaintiffs' Motion Record, Tab 8.

[27] *Wright Affidavit*, para 26, Plaintiffs' Motion Record, Tab 8.

[28] The Protocol, para 10(e), sets out the different categories and risk adjustment factors for those categories.

30. The claims administrator will then sum the Risk Adjusted Damages for each category of securities to determine the claimant's "Compensable Loss."

(d) Pro Rata Allocation of Funds – paras 11-12 of the Protocol

31. Upon the determination of all claimants' Compensable Losses and payment to the Noteholders described below, the claims administrator will allocate the net settlement proceeds on a *pro rata* basis based upon each claimant's Compensable Loss, subject to the following:

(a) Claimant's whose Compensable Loss is less than $5.00 will not be paid out, as it will likely cost more than $5.00 to process the claims.[29] Such amounts shall instead be allocated *pro rata* to other eligible claimants.

(b) All claimants, other than class members of the U.S. class action that are not members of the Ontario or Québec class actions, will have 5% of their allocation reserved for payment to Claims Funding International ("CFI"), up to an aggregate maximum of $5,000,0000.[30]

(c) The claims administrator will make payment to claimants by either bank transfer or by cheque. If a claimant does not cash a cheque within 6 months after the date of the cheque, the claimant shall forfeit the right to compensation and the funds shall be treated as set out in section (e) below.

(e) Remaining Amounts – paras 13-14 of the Protocol

32. If any amounts remain after payments to claimants have been made and all other financial commitments have been met, then the remaining amount will be held in the Settlement Trust (as

---

[29] *Wright Affidavit*, para 61, Plaintiffs' Motion Record, Tab 8.

[30] This payment is made pursuant to the order of Justice Perell dated May 17, 2012, Exhibit E to the *Wright Affidavit*, Plaintiffs' Motion Record, Tab 8(E), The order approved a funding agreement between the plaintiffs and CFI. The funding agreement provides that CFI would pay $50,000 towards disbursements and indemnify the plaintiffs in the event of any adverse costs in the Ontario action. In return, if there is a settlement or judgment, CFI is reimbursed for disbursements paid and receives 5% of the net proceeds of the settlement or judgment, up to a maximum of $5 million if arrived at before the filing of the pre-trial brief. The entitlement increases to 7% with a $10 million maximum if there is a settlement or judgment on or after the filing of the pre-trial brief.

The exact amount of payment to CFI would be determined once the claims administrator has determined the net settlement fund to be distributed among Securities Claimants. Canadian Class Counsel anticipates that the payment to CFI will be less than $5 million: *Wright Affidavit*, paras 64-66, Plaintiffs' Motion Record, Tab 8.

defined in the E&Y settlement approval order) and paid out for the purposes of future disbursements in the Ontario, Québec or U.S. class actions.

(2) Exceptions to the Claims Process

(a) Payment of $5 Million for the Benefit of Noteholders

33. Noteholder claims are dealt with separately from other claims in the Claims and Distribution Protocol. The protocol provides for a payment of $5 million for the benefit of Noteholders. This amount was reached with the agreement of counsel for the Initial Consenting Noteholders[31] during the insolvency proceedings.[32]

34. This amount for the Noteholders is based on a number of factors, including (a) Canadian Class Counsel's view that it is equivalent to or less than what Canadian Class Counsel believed the Noteholders would likely have received from the claims process; (b) the unique position of Noteholders as the largest group of unsecured creditors in the Sino insolvency; and (c) the fact that the Noteholders were major beneficiaries of the Litigation Trust[33] in respect of claims that Sino had against E&Y, and may have received compensation from the Litigation Trust for those claims in the absence of the settlement. In particular, the Litigation Trust was created under the Plan and was assigned litigation claims that Sino had against E&Y and other parties. The Noteholders are major beneficiaries of the Litigation Trust. Those claims were compromised when the settlement was incorporated in to the Plan.[34]

---

[31] As defined in the Plan of Compromise and Reorganization of Sino under the *CCAA* dated December 3, 2012 at 14 (the "Plan"), Plaintiffs' Motion Record, Tab 10, Schedule A.

[32] *Wright Affidavit*, para 12, Plaintiffs' Motion Record, Tab 8.

[33] As defined in the Plan at 16, Plaintiffs' Motion Record, Tab 10, Schedule A.

[34] *Wright Affidavit*, para 13, Plaintiffs' Motion Record, Tab 8.

(b) The Defendants, Their Affiliates and Related Persons

35. The defendants in the class actions, along with their affiliates or any related persons, are excluded from the claims process. Specifically, it excludes

> a claim by or on behalf of any person or entity that is as of the date of the EY Settlement Approval Order a named defendant to any of the Class Actions (as defined in the Plan), Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung and their past and present subsidiaries, affiliates officers, directors, senior employees, partners, legal representatives heirs predecessors, successors and assigns, and any individual who is a member of the immediate family of Allen T.Y. Chan a.k.a. Tak Yuen 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, Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung.[35]

36. This exclusion is consistent[36] with the exclusion for such persons in paragraph 18 of the settlement approval order:

> **THIS COURT ORDERS** that notwithstanding paragraph 17 above, the following Securities Claimants shall not be entitled to any allocation or distribution of the Settlement Fund: any Person or entity that is as at the date of this order a named defendant to any of the Class Actions (as defined in the Plan) and their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of the following Persons: Allen T.Y, Chan a.k.a. Tak Yuen Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Boland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung. For greater certainty, the Ernst & Young Release shall apply to the Securities Claimants described above.[37]

---

[35] Claims Procedure Order dated May 14, 2012, Plaintiffs' Motion Record, Tab 9.

[36] There is a small difference in language between the settlement approval order and the Claims and Distribution Protocol. Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung are specifically named in the Claims and Distribution Protocol, but not specifically named in the settlement approval order. This difference is immaterial because (a) these persons were already excluded as "past ... senior employees" of Sino-Forest; and (b) their family members are excluded by the settlement approval order and it is illogical to exclude their family and not them.

[37] Order of Morawetz J. dated March 20, 213 (E&Y Settlement Approval), Plaintiffs' Motion Record, Tab 11.

(c) Other Exclusions from the Claims Process

37. The Claims and Distribution Protocol excludes persons without claims from the claims process. There are three such exclusions:

(a) Claims for purchases in the June 2007 offering of shares or any earlier offering other than the May 2004 offering are excluded;

(b) Claims for purchases in any note offering that occurred before the offering for the notes on August 17, 2004 are excluded; and

(c) Any person who purchased Sino securities after August 25, 2011 is excluded.

38. Purchasers in the June 2007 share offering are excluded because E&Y was not involved in the June 2007 offering and thus cannot be held liable for offerings in which it played no part. The only other share offering of which Canadian Class Counsel is aware was in October 1996. Sino had issued warrants at $1.25 under a private placement and released a prospectus so that Sino could issue a share for each warrant exercised without additional consideration. This price of $1.25 is less than the lowest price for Sino shares after the alleged misrepresentations were revealed.[38]

39. Purchasers in pre-2004 note offerings (to the extent there are any) are excluded because the only notes that were still outstanding as of June 2, 2011 were the 2011, 2013, 2014, 2016 and 2017 Notes. Earlier notes would have been sold or matured before June 2, 2011 and suffered no damages. In any event, Canadian Class Counsel is not aware of note offerings before August 2004.[39]

---

[38] *Wright Affidavit* at footnote 3, Plaintiffs' Motion Record, Tab 8.

[39] *Wright Affidavit* at footnote 4, Plaintiffs' Motion Record, Tab 8.

40. Purchasers after August 25, 2011 are excluded because Sino's securities were cease traded on August 26, 2011 and the Ontario Securities Commission made adverse findings regarding Sino's public disclosure. The cease trade order states:

> 12. Sino-Forest, through its subsidiaries, appears to have engaged in significant non-arm's length transactions which may have been contrary to Ontario securities laws and the public interest;
>
> 13. Sino-Forest and certain of its officers and directors appear to have misrepresented some of its revenue and/or exaggerated some of its timber holdings by providing information to the public in documents required to be filed or furnished under Ontario securities laws which may have been false or misleading in a material respect contrary to section 122 or 126.2 of the Act and contrary to the public interest;
>
> 14. Sino-Forest and certain of its officers and directors including Chan appear to be engaging or participating in acts, practices or a course of conduct related to its securities which it and/or they know or reasonably ought to know perpetuate a fraud on any person or company contrary to section 126.1 of the Act and contrary to the public interest;[40]

41. These findings undermine any reliance on Sino's public disclosure. Thus, purchasers after August 25, 2011 likely have no claim against E&Y for alleged misrepresentations (all of which occurred before June 2, 2011).[41]

42. Further, as far as Canadian Class Counsel are aware, such purchasers did not file a claim in respect of misrepresentations in the *CCAA* process and thus their claims would be barred by the Claims Procedure Order.[42] Paragraph 17 of the Claims Procedure Order states that

> THIS COURT ORDERS that any Person that does not file a Proof of Claim as provided for herein such that the Proof of Claim is received by the Monitor on or before the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, (a) shall be and is hereby forever barred from making or enforcing such Claim

---

[40] Ontario Securities Commission, Cease Trade Order dated August 26, 2011, Plaintiffs' Authorities, Tab 15.

[41] *Wright Affidavit* at footnote 5, Plaintiffs' Motion Record, Tab 8.

[42] *Wright Affidavit* at footnote 5, Plaintiffs' Motion Record, Tab 8.

against the Applicant and all such Claims shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such Claim as against any other Person who could claim contribution or indemnity from the Applicant; (c) shall not be entitled to vote such Claim at the Creditors' Meeting in respect of the Plan or to receive distribution thereunder in respect of such Claim; and (d) shall not be entitled to any further notice in, and shall not be entitled to participate as a Claimant or creditor in, the CCAA Proceedings in respect of such Claim.[43]

B. Rationale for the Risk Adjustment Factors

43. The Claims and Distribution Protocol sets out six categories of Sino securities:

(a) Primary market share purchases (pursuant to a prospectus) in June 2009 and December 2009;

(b) Secondary market share purchases between March 19, 2007 and August 26, 2011;

(c) Pre-March 2007 share purchases;

(d) Primary market note purchases (pursuant to an offering memorandum) for the 2013, 2014, 2016 and 2017 notes;

(e) Secondary market purchasers for the 2013, 2014, 2016 and 2017 notes; and

(f) Any purchases of the 2011 notes.

44. Each of the above categories has sub-categories to address the different risks facing different types of claims. Each sub-category is assigned a risk adjustment factor for the purposes of the Claims and Distribution Protocol.[44]

(1) Primary Market Share Purchases (June 2009 and December 2009 Prospectuses)

45. Claimants who acquired Sino shares pursuant to the June 2009 or December 2009 prospectuses had the strongest claims against E&Y. Accordingly, those claims are assigned a

---

[43] Order of Morawetz J. dated May 14, 2012 re (Claims Procedure), Plaintiffs' Motion Record, Tab 9.

[44] *Wright Affidavit*, para 27, Plaintiffs' Motion Record, Tab 8.

risk adjustment factor of 1.0, which means that no discount is being applied to those claims relative to other claims.[45]

46. Claimants who acquired shares in these two offerings have a claim under s. 130 of the *Securities Act*. To succeed on a claim under s. 130, a claimant would only have to establish that there was a misrepresentation in the relevant part of the prospectus at issue, subject to a statutory defence where E&Y could establish it conducted a reasonable investigation to satisfy itself that there was no misrepresentation.[46]

47. The right of action under s. 130 is not subject to a liability limit or a leave requirement, nor are there any limitation period issues relating to those claims (as with claims under Part XXIII.1, discussed below). Further, none of the issues relating to common law negligent misrepresentation, such as the requirement to establish a duty of care or reliance (discussed below), are applicable to the s. 130 claims.[47]

(2) Secondary Market Share Purchases (March 2007 to August 2011)

48. Claimants who acquired shares in the secondary market have two separate rights of action against E&Y: (i) the statutory right of action pursuant to Part XXIII.1 of the *Securities Act*; and (ii) a right of action in common law negligent misrepresentation.

49. Each of these rights of action faces certain obstacles.

---

[45] *Wright Affidavit*, para 28, Plaintiffs' Motion Record, Tab 8.

[46] *Wright Affidavit*, para 28, Plaintiffs' Motion Record, Tab 8; *Securities Act*, R.S.O. 1990, c. S.5, s. 130 (1)(d), (4)(a).

[47] *Wright Affidavit*, para 28, Plaintiffs' Motion Record, Tab 8.

50. Part XXIII.1 of the *Securities Act* provides a right of action against an expert such as E&Y where an issuer's disclosure documents contain a misrepresentation attributable to the expert. If such a misrepresentation is found to exist, the burden shifts to the defendant to prove that it had no reasonable grounds to believe that the document contained a misrepresentation. The right of action under Part XXIII.1 does not require a plaintiff to prove reliance on the misrepresentation.

51. However, claims under Part XXIII.1 are subject to liability limits. The liability of experts such as E&Y is capped at a maximum of $1 million per misrepresentation. In this case, it is possible the liability limit of E&Y could have been less than $10 million in the aggregate.[48]

52. Claims for common law negligent misrepresentation are not subject to a liability limit. However, two potential hurdles exist regarding those claims: (i) establishing a duty of care; and (ii) certification of a negligent misrepresentation claim.

53. In *Hercules Managements v Ernst & Young LLP*, the Supreme Court of Canada determined that the auditor of a private company's financial statements did not owe a duty of care to persons purchasing shares of that company. Accordingly, purchasers of Sino securities relying on common law negligent misrepresentation would have had to distinguish *Hercules* to establish liability against E&Y.[49]

54. Negligent misrepresentation claims also encounter unique challenges in the class proceeding context. Negligent misrepresentation claims may require each plaintiff to prove

---

[48] *Wright Affidavit*, para 15, Plaintiffs' Motion Record, Tab 8; *Securities Act*, R.S.O. 1990, c. S.5, 138.1 ("liability limit"), 138.7.

[49] *Wright Affidavit*, para 33(b), Plaintiffs' Motion Record, Tab 8; *Hercules Managements v Ernst & Young*, [1997] 2 S.C.R. 165, Plaintiffs Authorities, Tab 16.

reliance on the misrepresentation. Some courts have refused certification of negligent misrepresentation claims on the basis of this requirement, and thus there exists a possibility that the plaintiffs may have been unsuccessful in having the negligent misrepresentation claims certified.[50] Further, even if such claims were certified, a claimant may have encountered difficulties in establishing his, her or its reliance upon E&Y's alleged misrepresentations.

55. The secondary market purchases between March 19, 2007 and August 26, 2011 are divided in the following sub-categories, reflecting the different challenges for these claims:

(a) Purchases between March 19, 2007 and March 17, 2008;

(b) Purchases in Canadian market or by a Canadian resident, divided into the following time periods: (i) March 18, 2008 to August 11, 2008, (ii) August 12, 2008 to June 2, 2011; and (iii) June 3, 2011 to August 25, 2011; and

(c) Purchases in the United States over-the-counter ("OTC") market between March 18, 2008 and August 25, 2011.

(a) Purchases between March 19, 2007 and March 17, 2008

56. Claims against E&Y for share purchases in the secondary market between March 19, 2007 and March 17, 2008 faced considerable hurdles to success. The risk adjustment factor for these claims is 0.10.[51]

57. March 19, 2007 is the first day of the class periods in the Ontario, Québec and U.S. class action and thus claims for purchases on or after March 19, 2007 were included in the proofs of claim filed by Canadian Class Counsel and U.S. class counsel.[52]

---

[50] *Wright Affidavit*, para 33(c), Plaintiffs' Motion Record, Tab 8; For example, *McKenna v Gammon Gold,* 2010 ONSC 1591 at paras 135-163, Plaintiffs Authorities, Tab 17.

[51] *Wright Affidavit*, para 30, Plaintiffs' Motion Record, Tab 8;

[52] Fresh As Amended Statement of Claim, para. 1(n), Exhibit A to the *Wright Affidavit*, Plaintiffs' Motion Record, Tab 8(A);

58. March 17, 2008 is significant because it is the day before E&Y's 2007 audit report on March 18, 2008 (which had been E&Y's first audit report since 2004). Any purchasers before March 18, 2008 could not advance a claim for alleged misrepresentations that occurred after they already purchased Sino securities. Instead, claims for purchases before March 18, 2008 relate to alleged misrepresentations by E&Y in its audit reports for the years ending 2000, 2001, 2002 and 2003. The allegations against E&Y in the Ontario, Québec, and U.S. class actions relate primarily to the 2007 to 2011 time period.[53]

59. The claims of these purchases also face other risks under both Ontario and U.S. law.

60. For the Canadian claims, E&Y would likely have argued that the Part XXIII.1 claims are time barred, as they are subject to a three-year absolute limitation period and more than three years had passed before any of the class actions were commenced.[54]

61. For U.S. claims, there are different challenges, the most significant being that the plaintiffs must prove *scienter*, or fraudulent intent to establish liability.[55]

(b) Purchases in a Canadian market or by a Canadian resident between March 2008 and August 2011

62. Claims for purchases on a Canadian market or by Canadian residents[56] are included in the Ontario and Québec class actions. These purchases are divided into three date ranges to reflect the varying risks faced for claims arising from purchases in these different periods: (a) March 18,

---

[53] *Wright Affidavit*, para 31, Plaintiffs' Motion Record, Tab 8.

[54] *Wright Affidavit*, para 33(a), Plaintiffs' Motion Record, Tab 8. *Securities Act*, s. 138.14.

[55] *Wright Affidavit*, para 34, Plaintiffs' Motion Record, Tab 8.

[56] This refers to any person or entity that is currently resident in Canada, or was resident in Canada at the time that the shares were acquired.

2008 to August 11, 2008; (b) August 12, 2008 to June 2, 2011; and (c) June 3, 2011 to August 25, 2011. These are respectively assigned risk adjustment factors of 0.30, 0.45 and 0.15 (increased to 0.25 if the claimant had filed a *CCAA* claim).

63. The risk weightings for the first two time periods differ because of the potential application of a limitation period to Part XXIII.1 claims. However, the difference is not as significant as it might have been had there been no common law claims advanced. There is no distinction for the negligent misrepresentation component of their claims as the limitation period for common law claims is based on discoverability.[57]

64. As discussed above, s.138.14 of the *Securities Act* prescribes a 3-year limitation period for actions brought under Part XXIII.1. The limitation begins to run from the date of the alleged misrepresentation. The Ontario action was commenced in July 2011, and thus the 3-year limitation period could potentially apply to all misrepresentations before July 2008. Accordingly, it is possible that claims against E&Y for alleged misrepresentations occurring more than three years before the class proceedings were commenced are time barred (i.e. claims for misrepresentations on or before August 11, 2008). Claims for share purchases during this time period are assigned a risk adjustment factor of 0.30.[58]

65. The next date range is for purchases from August 12, 2008 to June 2, 2011. These purchases occurred less than three years before the Ontario action was commenced and do not

---

[57] *Wright Affidavit*, para 36, Plaintiffs' Motion Record, Tab 8; *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4, Plaintiffs' Factum, Schedule B.

[58] *Wright Affidavit*, para 37 and footnote 6, Plaintiffs' Motion Record, Tab 8. August 11, 2008 is chosen because the limitation period depends on the date of the issuance of the document containing the misrepresentation, not the date of purchase, and the first alleged misrepresentation was contained in a document filed August 12, 2008.

face the same limitation period challenges as the claims based on earlier purchases. As a result, these claims are assigned a risk adjustment factor of 0.45.[59]

66. The final time period for purchases in a Canadian market or by a Canadian resident is for purchases occurring from June 3, 2011 to August 25, 2011. Claims for shares acquired in this time period are not included in the Ontario or Québec class actions and thus are not included in the proofs of claim filed by Canadian Class Counsel. There were very few *CCAA* claims filed on behalf of such purchases. Thus, most of these claims face the claims bar in the Claims Procedure Order.[60]

67. Further, these claims are for purchases that occurred after the allegations of fraud first arose against Sino. Accordingly, these were higher-risk purchases and it is possible that E&Y would be able to establish that it is not liable to a group of purchasers who E&Y would have argued had assumed and accepted the risk that there were misrepresentations in Sino's disclosure documents.[61]

---

[59] *Wright Affidavit*, para 39 and footnote 7, Plaintiffs' Motion Record, Tab 8. It is possible for some of these post-July 2008 claims (for purchases from August 12, 2008 to March 15, 2009) that the limitation period would still run and bar the claims as a result of the Ontario Court of Appeal's decision in *Sharma v Timminco Ltd.*, 2012 ONCA 107, Plaintiffs' Authorities, Tab 18. In *Timminco*, the Court of Appeal determined that the 3-year limitation period continues to run for Part XXIII.1 claims even after a class proceeding is commenced. There is a leave requirement for these claims and the Court of Appeal read the limitation period provision in Part XXIII.1 as requiring leave before the limitation period is suspended. Thus, the limitation period for August 2008 to March 2009 claims may have expired during the course of the litigation. However, it is Canadian Class Counsel's view that all of the post-July 2008 claims will ultimately proceed. The court may be able to rely on common law doctrines such as special circumstances or *nunc pro tunc* to relieve from the strict application of the 3-year limitation period. The availability of the common law doctrines along with the correctness of *Timminco* itself were recently considered in the Court of Appeal before a 5-judge panel, although a decision has not yet been released.

Part XXIII.1 claims for purchases in March 2009 forward face no limitation period issues as the parties entered into a tolling agreement that prevents the expiry of the limitation period for purchases in this date range.

[60] *Wright Affidavit*, para 40, Plaintiffs' Motion Record, Tab 8.

[61] *Wright Affidavit*, para 41, Plaintiffs' Motion Record, Tab 8. E&Y is not alleged to have made misrepresentations after June 2, 2011.

68. These claims are thus assigned a risk adjustment factor of 0.15. The factor is increased to 0.25 if the claimant filed a claim in the *CCAA* proceeding. As discussed below, under U.S. law, claims for post-June 2, 2011 share purchases are treated identically to pre-June 2, 2011 purchases. This is based on the U.S. "fraud-on-the-market" theory. This theory has had mixed reception in Canada at the pleadings stage and no Canadian court has considered it at trial. The case law in Canada is undeveloped on this issue and therefore it is unknown at this time whether the U.S. approach would be applied to misrepresentation claims in Ontario.

(c) Purchases in the U.S. over-the-counter market (March 2008 to August 2011)

69. Claims arising from share purchases in the OTC market are treated differently from purchases in a Canadian market or by a Canadian resident. These claims were advanced only in the U.S. class action and U.S. law likely applies to these claims. The risk adjustment factors for these claims were developed with the assistance and concurrence of Cohen Milstein, class counsel in the U.S. class action.[62]

70. Misrepresentation claims faced their own challenges under U.S. law, the most significant being the need to prove the defendants acted with *scienter*, or fraudulent intent.[63]

71. In addition, claims against auditors face unique challenges. For example, in *Longtop Fin. Tech. Ltd. Sec. Litig.*, a U.S. district court dismissed securities law claims against Deloitte arising out of its audit of Longtop Financial, a Chinese information technology company. The court held that "[i]n order for a complaint founded on the theory that an auditor should have uncovered red flags to survive a motion to dismiss, the red flags must be 'so obvious that knowledge of

---

[62] *Wright Affidavit*, para 42, Plaintiffs' Motion Record, Tab 8.

[63] *Wright Affidavit*, para 42, Plaintiffs' Motion Record, Tab 8.

them by the auditor can be presumed.'" The alleged red flags in *Longtop* were held to have fallen short of this standard, and there is a risk that the red flags alleged in the U.S. action would fall short too.[64]

72. These U.S. claims are divided into two time periods: (i) purchases from March 19, 2007 to March 17, 2008; and (ii) purchases from March 18, 2008 to August 25, 2011. The former group is assigned a risk adjustment factor of 0.10 and is discussed at paragraphs 56-61 above.

73. The latter group of purchases is assigned a risk adjustment factor of 0.35. These claims for pre- and post-June 2, 2011 purchases are treated identically within this category, unlike the Canadian claims. The allegations in the U.S. class action are on behalf of investors who acquired Sino securities between March 19, 2007 and August 26, 2011. Liability under section 10(b) and Rule 10b-5 is premised on the "fraud-on-the-market" theory of liability.

74. Under U.S. law, it is "clear" that investors who purchased Sino securities during the entire U.S. class period (pre and post-June 2, 2011) could assert successfully that the initial accusations of fraud on June 2, 2011 were only partially corrective, and that they therefore purchased Sino securities at inflated prices, albeit at prices that were less inflated than the prices paid by those who purchased before the making of the initial allegations of fraud.[65]

75. The Muddy Waters report made allegations but did not disclose the full extent of the alleged fraud or cause the withdrawal of Sino's financial statements or auditors' report. In fact, Sino aggressively denied the Muddy Waters allegations as soon as they were published, and

---

[64] *Wright Affidavit*, para 43, Plaintiffs' Motion Record, Tab 8.

[65] *Wright Affidavit*, para 46, Plaintiffs' Motion Record, Tab 8.

thereafter sought to refute those allegations. Up to and through August 26, 2011, Sino's audited financial statements were not withdrawn, it did not admit to any fraudulent conduct, and E&Y did not withdraw its audit opinion on the company's financial statements until 2012. Sino's debt continued to carry ratings of B+ until August 23, 2011, and this rating demonstrated that the partial disclosures issued prior to August 23, 2011 were insufficient to reveal the entire fraud.[66]

(3) Share Purchases before March 19, 2007 (Primary or Secondary Market)

76. These claims against E&Y were unlikely to succeed.

77. Claims against E&Y for purchases before March 19, 2007 faced the same challenges as claims for purchases between March 19, 2007 and March 28, 2008: (a) there may be no statutory claims available; (b) common law claims faced challenges regarding duty of care (*Hercules Managements*) and there may be reliance issues at certification and beyond; and (c) these claims against E&Y are based on the 2000-2003 audits, which would have become somewhat stale by March 2007.[67]

78. Further, these claims were not included in any proof of claim of which Canadian Class Counsel is aware. Therefore, they are subject to the claims bar in the Claims Procedure Order unless individual proofs of claim were filed. Accordingly, in the absence of an individual claim, the risk adjustment factor is 0.01. The risk adjustment factor is increased to 0.10 if the claimant filed a proof of claim in the *CCAA* proceeding.[68]

---

[66] *Wright Affidavit*, para 47, Plaintiffs' Motion Record, Tab 8.

[67] *Wright Affidavit*, para 49, Plaintiffs' Motion Record, Tab 8.

[68] *Wright Affidavit*, para 50, Plaintiffs' Motion Record, Tab 8.

(4) Primary Market Purchases of 2013, 2014, 2016, 2017 Notes

79. These are claims for purchases of Sino notes by way of offering memorandum. The below categories only apply to the claims of former noteholders.[69]

80. The primary market note claims are divided into three sub-categories:

(a) Purchases of the 2013, 2014, 2016 or 2017 notes in a distribution in Canada or by a Canadian resident;

(b) Other purchases of the 2017 notes; and

(c) Other purchases of 2013, 2014 or 2016 notes.

81. Primary market claims against E&Y for notes face greater hurdles than the primary market claims for shares. Unlike the claims for shares purchased pursuant to a prospectus, there is no statutory claim in Ontario against an auditor for purchases of securities by way of offering memorandum. These claims are therefore dependent on Ontario common law claims or claims under U.S. law, which generally require proof of fraud.[70]

82. The first two categories of purchases were included in either the U.S. class action or in the Ontario and Québec class actions. A *CCAA* proof of claim was filed for these claims. The Canadian claims for purchases of the 2013, 2014, 2016 or 2017 notes have a risk adjustment factor of 0.15. The non-Canadian (i.e. U.S.) claims for purchases of the 2017 notes have a risk

---

[69] As discussed at paragraphs 33-34 above, if the Claims and Distribution Protocol is approved, the Noteholders would receive compensation of $5 million and would not participate in the claims process. Noteholders are defined in the Plan as "the beneficial owners of Notes as of the Distribution Record Date and, as the context requires, the registered holders of Notes as of the Distribution Record Date..." The Plan at 19, Plaintiffs' Motion Record, Tab 10, Schedule A.

[70] *Wright Affidavit*, para 53, Plaintiffs' Motion Record, Tab 8.

adjustment factor of 0.10. This difference in risk adjustment reflects the different risks for advancing claims in U.S. and Canada, including class certification issues.[71]

83. The third category of purchases was not included in the Ontario, Québec or U.S. class actions, and no claim was filed on their behalf. A claimant would have faced the claims bar unless there was an individual *CCAA* proof of claim filed. These claims are assigned a risk adjustment factor of 0.01, increased to 0.10 if an individual claim was filed.[72]

(5) Secondary Market Purchases of 2013, 2014, 2016 or 2017 Notes

84. Purchases of notes on the secondary market are divided into two sub-categories

(a) Purchases of 2013, 2014, 2016 or 2017 notes in a Canadian market or by a Canadian resident, divided into the following time periods: (i) July 17, 2008 to August 11, 2008; (ii) August 12, 2008 to June 2, 2011; and (iii) June 3, 2011 to August 25, 2011; and

(b) Other purchases of 2013, 2014, 2016 or 2017 notes.

(a) Purchases in a Canadian market or by a Canadian resident

85. The first category of claims (except for claims for purchases between June 3, 2011 and August 25, 2011) are included in the Ontario and Québec class actions. Part XXIII.1 statutory claims are advanced for these purchases, along with Ontario common law claims and U.S. law claims. They are subject to the same challenges as secondary market share purchases because of the three year limitation period for Part XXIII.1 claims. Accordingly, the first two time periods for these pre-June 2011 claims are respectively assigned risk adjustment factors of 0.20 and 0.35.

---

[71] *Wright Affidavit*, para 54, Plaintiffs' Motion Record, Tab 8.

[72] *Wright Affidavit*, para 55, Plaintiffs' Motion Record, Tab 8.

These figures are lower than the concordant figures for share purchasers due to the additional risks faced by note purchasers.[73]

86. Purchases of the notes after June 2, 2011 in a Canadian market or by a Canadian resident are not included in the Ontario, Québec or U.S. class actions. No *CCAA* claims were filed for these claims and they were also high-risk purchases because they occurred after the allegations of fraud against Sino first surfaced. They are assigned a risk adjustment factor of 0.15. The factor is increased to 0.25 if the claimant filed an individual claim in the *CCAA* proceeding.[74]

(b) all other secondary market purchases of 2013, 2014, 2016 and 2017 notes

87. Claims for all other purchases of 2013, 2014, 2016 and 2017 notes from March 19, 2007 to August 25, 2011 are included in the U.S. class action. They advance U.S. law claims, which require proof of *scienter*, and are assigned risk adjustment factors of 0.25.[75]

(6) Purchases of 2011 Notes

88. Purchases of the 2011 notes are assigned a risk adjustment factor of 0.01. They are not included in any of the Ontario, Québec or U.S. class actions, no *CCAA* claim was filed on their behalf (of which Canadian Class Counsel is aware) and these claims are based on alleged misrepresentations in E&Y's 2000-2003 audits. These claims face significant limitation period issues and pre-date the statutory claim under the *Securities Act*.[76]

---

[73] *Wright Affidavit*, para 57, Plaintiffs' Motion Record, Tab 8. The first date range begins on July 17, 2008, because that is the date of the offering for the 2013 notes and there could not have been trading before it.

[74] *Wright Affidavit*, paras 57, Plaintiffs' Motion Record, Tab 8.

[75] *Wright Affidavit*, para 59, Plaintiffs' Motion Record, Tab 8.

[76] *Wright Affidavit*, para 60, Plaintiffs' Motion Record, Tab 8.

C. Objections Received

89. To date, Canadian Class Counsel has received 14 objections to the proposed Claims and Distribution Protocol.[77] Four of the objections provide no reason. Three of the objections do not provide relevant criticism, focussing on irrelevant matters such as the other defendants have not agreed to settle, the Ontario Securities Commission is ineffective or the settlement approval order ought not to have been made. The remaining seven objections relate to the Claims and Distribution Protocol. One objection states all settlement proceeds should go to the Noteholders before any equity claimant is paid. One objection states the opposite, that Noteholders should not be entitled to any compensation because they already received Newco shares. This same objection also states that post-June 2, 2011 purchasers who filed a *CCAA* proof of claim should not receive greater compensation than those who did not file a proof of claim and generally criticizes the Claims Procedure Order. Three objections state that post-June 2, 2011 should not receive less than pre-June 2, 2011 purchasers or the discount should not be as great and that damages should be calculated differently where shares were held after August 25, 2011. Two objections incorrectly assert that claims for purchases before 2007 are not entitled to compensation.[78]

90. As discussed above, Canadian Class Counsel had considered these types of concerns in designing the Claims and Distribution Protocol. Canadian Class Counsel endeavoured to balance the competing interests of Securities Claimants. For instance, the Claims and Distribution Protocol awards compensation to persons who did not file a proof of claim even where the

---

[77] A copy of notices of objections will be filed in advance of the motion in a supplementary motion record. Note: there were 13 objection forms received that do not indicate any objection to the claims process or fee request.

[78] Such purchasers are entitled to compensation as a pre-March 2007 share purchaser, subject to their having compensable damages and the $5 limit for compensation.

Claims Procedure Order would have barred such claims. However, in fairness to other Securities Claimants, the claims of those that did not file a proof of claim are discounted to reflect the fact that the Claims Procedure Order would be a legal obstacle to such claims.

PART IV. ORDER REQUESTED

91. The plaintiffs respectfully request an order approving the proposed Claims and Distribution Protocol.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 29, 2013

A. Dimitri Lascaris / Daniel Bach

Kirk M. Baert / Jonathan Ptak / Jonathan Bida

Ken Rosenberg / Massimo Starnino

Lawyers for the plaintiffs and CCAA Representative Counsel

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Sino-Forest Corporation (Re)*, 2012 ONSC 7050
2. *Zaniewicz v. Zungui Haixi Corp.* 2013 ONSC 5490
3. *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)
4. *Smith v Sino-Forest Corp.*, 2012 ONSC 24
5. *Gould v BMO Nesbitt Burns Inc.*, [2007] O.J. No. 1095
6. *In re IMAX*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012)

7A. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997)

7B. *In re PaineWebber Ltd. P'ships Litig.*, 117 F.3d 721 (2d Cir. 1997)

8. *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 430 (S.D.N.Y. 2007)
9. International Accounting Standard 2 – Inventories, IFRS
10. *Dobbie v. Arctic Glacier,* order dated June 1, 2012 (File No. 59725)
11. *McKenna v Gammon Gold*, order dated December 4, 2012 (File No. 08-36143600CP)
12. *Zaniewicz v. Zungui Haixi Corp.,* order dated August 26, 2013 (File No. CV-11-436360-00CP)
13. *Metzler Investment GmbH v. Gildan Activewear Inc.*, order February 18, 2011 (File No. 58574CP)
14. *In Re AOL Time Warner, Inc. Securities and "ERISA" Litigation*, 2006 U.S. Dist. LEXIS 17588
15. Ontario Securities Commission Cease Trade Order dated August 26, 2011
16. *Hercules Managements v Ernst & Young*, [1997] 2 SCR 165
17. *McKenna v Gammon Gold,* 2010 ONSC 1591
18. *Sharma v Timminco Ltd.*, 2012 ONCA 107

SCHEDULE "B"
RELEVANT STATUTES

Securities Act R.S.O. 1990, c. S.5

PART XXIII
CIVIL LIABILITY

Liability for misrepresentation in prospectus

130. (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

(a) the issuer or a selling security holder on whose behalf the distribution is made;

(b) each underwriter of the securities who is required to sign the certificate required by section 59;

(c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;

(d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and

(e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter.

Defence

(2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation.

Idem

(3) No person or company, other than the issuer or selling security holder, is liable under subsection (1) if he, she or it proves,

(a) that the prospectus or the amendment to the prospectus was filed without his, her or its knowledge or consent, and that, on becoming aware of its filing, he, she or it forthwith gave reasonable general notice that it was so filed;

(b) that, after the issue of a receipt for the prospectus and before the purchase of the securities by the purchaser, on becoming aware of any misrepresentation in the prospectus or an amendment to the prospectus he, she or it withdrew the consent thereto and gave reasonable general notice of such withdrawal and the reason therefor;

(c) that, with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he, she or it had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the prospectus

or the amendment to the prospectus did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert but that contains a misrepresentation attributable to failure to represent fairly his, her or its report, opinion or statement as an expert,

(i) the person or company had, after reasonable investigation, reasonable grounds to believe and did believe that such part of the prospectus or the amendment to the prospectus fairly represented his, her or its report, opinion or statement, or

(ii) on becoming aware that such part of the prospectus or the amendment to the prospectus did not fairly represent his, her or its report, opinion or statement as an expert, he, she or it forthwith advised the Commission and gave reasonable general notice that such use had been made and that he, she or it would not be responsible for that part of the prospectus or the amendment to the prospectus; or

(e) that, with respect to a false statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document, and he, she or it had reasonable grounds to believe and did believe that the statement was true.

Idem

(4) No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation.

Idem

(5) No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus not purporting to be made on the authority of an expert and not purporting to be a copy of or an extract from a report, opinion or statement of an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation.

Limitation re underwriters

(6) No underwriter is liable for more than the total public offering price represented by the portion of the distribution underwritten by the underwriter.

Limitation in action for damages

(7) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of such damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon.

Joint and several liability
(8) All or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable.

Limitation re amount recoverable
(9) In no case shall the amount recoverable under this section exceed the price at which the securities were offered to the public.

No derogation of rights
(10) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

Liability for misrepresentation in offering memorandum
130.1 (1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.
2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company.

Defence
(2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation.

Limitation in action for damages
(3) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of the damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon.

Joint and several liability
(4) Subject to subsection (5), all or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment, unless the court rules that, in all the circumstances of the case, to permit recovery of the contribution would not be just and equitable.

Same
(5) Despite subsection (4), an issuer shall not be liable where it is not receiving any proceeds from the distribution of the securities being distributed and the misrepresentation was not based on information provided by the issuer, unless the misrepresentation,

(a) was based on information that was previously publicly disclosed by the issuer;

(b) was a misrepresentation at the time of its previous public disclosure; and

(c) was not subsequently publicly corrected or superseded by the issuer prior to the completion of the distribution of the securities being distributed.

Limitation re amount recoverable
(6) In no case shall the amount recoverable under this section exceed the price at which the securities were offered.

No derogation of rights
(7) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

Application
(8) This section applies only with respect to an offering memorandum which has been furnished to a prospective purchaser in connection with a distribution of a security under an exemption from section 53 of the Act that is specified in the regulations for the purposes of this section.

PART XXIII.1
CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

INTERPRETATION AND APPLICATION

Definitions
138.1 In this Part,

"compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded;

"core document" means,

(a) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements and an interim financial report of the responsible issuer, where used in relation to,

(i) a director of a responsible issuer who is not also an officer of the responsible issuer,

(ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or

(iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

(b) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, an interim financial report and a material change report required by subsection 75 (2) or the regulations of the responsible issuer, where used in relation to,

(i) a responsible issuer or an officer of the responsible issuer,

(ii) an investment fund manager, where the responsible issuer is an investment fund, or

(iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or

(c) such other documents as may be prescribed by regulation for the purposes of this definition;

"document" means any written communication, including a communication prepared and transmitted only in electronic form,

(a) that is required to be filed with the Commission, or

(b) that is not required to be filed with the Commission and,

(i) that is filed with the Commission,

(ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any exchange or quotation and trade reporting system under its by-laws, rules or regulations, or

(iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer;

"expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization;

"failure to make timely disclosure" means a failure to disclose a material change in the manner and at the time required under this Act or the regulations;

"influential person" means, in respect of a responsible issuer,

(a) a control person,

(b) a promoter,

(c) an insider who is not a director or officer of the responsible issuer, or

(d) an investment fund manager, if the responsible issuer is an investment fund;

"issuer's security" means a security of a responsible issuer and includes a security,

(a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and

(b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer;

"liability limit" means,

(a) in the case of a responsible issuer, the greater of,

(i) 5 per cent of its market capitalization (as such term is defined in the regulations), and

(ii) $1 million,

(b) in the case of a director or officer of a responsible issuer, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates,

(c) in the case of an influential person who is not an individual, the greater of,

(i) 5 per cent of its market capitalization (as defined in the regulations), and

(ii) $1 million,

(d) in the case of an influential person who is an individual, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,

(e) in the case of a director or officer of an influential person, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the director's or officer's compensation from the influential person and its affiliates,

(f) in the case of an expert, the greater of,

(i) $1 million, and

(ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and

(g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the person's compensation from the responsible issuer and its affiliates;

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and financial performance of a responsible issuer as required under Ontario securities law;

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed;

"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or an exchange or to otherwise make available to the public;

"responsible issuer" means,

(a) a reporting issuer, or

(b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded;

"trading day" means a day during which the principal market (as defined in the regulations) for the security is open for trading.

Application

138.2 This Part does not apply to,

(a) the purchase of a security offered by a prospectus during the period of distribution;

(b) the acquisition of an issuer's security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;

(c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or

(d) such other transactions or class of transactions as may be prescribed by regulation.

LIABILITY

Liability for secondary market disclosure
Documents released by responsible issuer
138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Public oral statements by responsible issuer
(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

Multiple misrepresentations

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

Burden of proof and defences

Non-core documents and public oral statements

138.4 (1) In an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

(a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;

(b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

Same

(2) A plaintiff is not required to prove any of the matters set out in subsection (1) in an action under section 138.3 in relation to an expert.

Failure to make timely disclosure

(3) In an action under section 138.3 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company,

(a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;

(b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

Same

(4) A plaintiff is not required to prove any of the matters set out in subsection (3) in an action under section 138.3 in relation to,

(a) a responsible issuer;

(b) an officer of a responsible issuer;

(c) an investment fund manager; or

(d) an officer of an investment fund manager.

Knowledge of the misrepresentation or material change

(5) A person or company is not liable in an action under section 138.3 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security,

(a) with knowledge that the document or public oral statement contained a misrepresentation; or

(b) with knowledge of the material change.

Reasonable investigation

(6) A person or company is not liable in an action under section 138.3 in relation to,

(a) a misrepresentation if that person or company proves that,

(i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and

(ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or

(b) a failure to make timely disclosure if that person or company proves that,

(i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and

(ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

Factors to be considered by court

(7) In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross misconduct under subsection (1) or (3), the court shall consider all relevant circumstances, including,

(a) the nature of the responsible issuer;

(b) the knowledge, experience and function of the person or company;

(c) the office held, if the person was an officer;

(d) the presence or absence of another relationship with the responsible issuer, if the person was a director;

(e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;

(f) the reasonableness of reliance by the person or company on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;

(g) the period within which disclosure was required to be made under the applicable law;

(h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;

(i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;

(j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and

(k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.

Confidential disclosure

(8) A person or company is not liable in an action under section 138.3 in respect of a failure to make timely disclosure if,

(a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3) or the regulations;

(b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;

(c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;

(d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation; and

(e) where the material change became publicly known in a manner other than the manner required under this Act or the regulations, the responsible issuer promptly disclosed the material change in the manner required under this Act or the regulations.

Forward-looking information

(9) A person or company is not liable in an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves all of the following things:

1. The document or public oral statement containing the forward-looking information contained, proximate to that information,

   i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and

   ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

Same

(9.1) The person or company shall be deemed to have satisfied the requirements of paragraph 1 of subsection (9) with respect to a public oral statement containing forward-looking information if the person who made the public oral statement,

(a) made a cautionary statement that the oral statement contains forward-looking information;

(b) stated that,

(i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and

(ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and

(c) stated that additional information about,

(i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and

(ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,

is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document.

Same

(9.2) For the purposes of clause (9.1) (c), a document filed with the Commission or otherwise generally disclosed shall be deemed to be readily available.

Exception

(10) Subsection (9) does not relieve a person or company of liability respecting forward-looking information in a financial statement required to be filed under this Act or the regulations or forward-looking information in a document released in connection with an initial public offering.

Expert report, statement or opinion

(11) A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

(a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and

(b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (11).

Same

(12) An expert is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made.

Release of documents
(13) A person or company is not liable in an action under section 138.3 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document, the person or company did not know and had no reasonable grounds to believe that the document would be released.

Derivative information
(14) A person or company is not liable in an action under section 138.3 for a misrepresentation in a document or a public oral statement, if the person or company proves that,

(a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or an exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;

(b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and

(c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

Where corrective action taken
(15) A person or company, other than the responsible issuer, is not liable in an action under section 138.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and, if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act or the regulations,

(a) the person or company promptly notified the board of directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and

(b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act or the regulations was made by the responsible issuer within two business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission of the misrepresentation or failure to make timely disclosure.

DAMAGES

Assessment of damages
138.5 (1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.

2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,

   i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and

   ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

      A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

      B. if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

   i. if the issuer's securities trade on a published market, the trading price of the issuer' securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

   ii. if there is no published market, the amount that the court considers just.

Same

(2) Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.

2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,

i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and

ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

B. if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

ii. if there is no published market, then the amount that the court considers just.

Same

(3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

Proportionate liability

138.6 (1) In an action under section 138.3, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant shall be liable, subject to the limits set out in subsection 138.7 (1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

Same

(2) Despite subsection (1), where, in an action under section 138.3 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

Same
(3) Each defendant in respect of whom the court has made a determination under subsection (2) is jointly and severally liable with each other defendant in respect of whom the court has made a determination under subsection (2).

Same
(4) Any defendant against whom recovery is obtained under subsection (2) is entitled to claim contribution from any other defendant who is found liable in the action.

Limits on damages
138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

(a) the aggregate damages assessed against the person or company in the action; and

(b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

Same
(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

PROCEDURAL MATTERS

Leave to proceed
138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Same
(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same
(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

Copies to be sent to the Commission
(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed.

Requirement to provide notice
(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant.

Same, appeal of leave decision
(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

Notice

138.9 (1) A person or company that has been granted leave to commence an action under section 138.3 shall,

(a) promptly issue a news release disclosing that leave has been granted to commence an action under section 138.3;

(b) send a written notice to the Commission within seven days, together with a copy of the news release;

(c) send a copy of the statement of claim or other originating document to the Commission when filed; and

(d) provide the Commission with notice in writing of the date on which the trial of the action is scheduled to proceed, at the same time such notice is given to each defendant.

Appeal

(2) If any party to an action under section 138.3 appeals the decision of the court,

(a) each party shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

Restriction on discontinuation, etc., of action

138.10 An action under section 138.3 shall not be discontinued, abandoned or settled without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the action, the court shall consider, among other things, whether there are any other actions outstanding under section 138.3 or under comparable legislation in other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

Costs

138.11 Despite the *Courts of Justice Act* and the *Class Proceedings Act, 1992*, the prevailing party in an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

Power of the Commission

138.12 The Commission may intervene in an action under section 138.3, in an application for leave to commence the action under section 138.8 and in any appeal from the decision of the court in the action or with respect to whether leave is granted to commence the action.

No derogation from other rights

138.13 The right of action for damages and the defences to an action under section 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

Limitation period

138.14 No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

Limitations Act, 2002, S.O. 2002, c. 24 Sched. B

BASIC LIMITATION PERIOD

Basic limitation period
4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery
5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Proceeding commenced at Toronto

FACTUM OF THE PLAINTIFFS
(Claims And Distribution Protocol Approval, returnable December 13, 2013)

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Kirk Baert (LSUC# 30942O)
Jonathan Ptak (LSUC#: 45773F)
Jonathan Bida (LSUC#: 54211D)

Tel: (416) 595-2117 / Fax: (416) 204-2889

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8

A. Dimitri Lascaris (LSUC#: 50074A)
Daniel Bach(LSUC#: 52087E)

Tel: (519) 660-7844 / Fax: (519) 660-7845

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Ken Rosenberg (LSUC#: 21101H)
Massimo Starnino (LSUC#: 41048G)

Tel: (416) 646-4300 / Fax: (416) 646-4301

Lawyers for the plaintiffs and CCAA Representative Counsel