This is Exhibit B referred to in the affidavit of Dania Jemec sworn before me, this April day of 22 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE
	)	
MR. JUSTICE MORAWETZ	)	20TH DAY OF MARCH, 2013

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND 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

ORDER

THIS MOTION made by the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the plaintiffs in the action commenced against Sino-Forest Corporation ("Sino-Forest" or the "Applicant") in the Ontario Superior Court of Justice, bearing (Toronto) Court File No. CV-11-431153-00CP (the "Ontario Plaintiffs" and the "Ontario Class Action", respectively), in their own and proposed representative capacities, for an order giving effect to the Ernst & Young Release and the Ernst & Young Settlement (as defined in the Plan of Compromise and Reorganization of the Applicant under the *Companies' Creditors Arrangement Act* ("CCAA") dated December 3, 2012 (the "Plan") and as provided for in section 11.1 of the Plan, such Plan having been approved by this Honourable Court by Order dated December 10, 2012 (the "Sanction Order")), was heard on February 4, 2013 at the Court House, 330 University Avenue, Toronto, Ontario.

WHEREAS the Ontario Plaintiffs and Ernst & Young (as defined in the Plan) entered into Minutes of Settlement dated November 29, 2012.

AND WHEREAS this Honourable Court issued the Sanction Order approving the Plan containing the framework and providing for the implementation of the Ernst & Young Settlement and the Ernst & Young Release, upon further notice and approval;

AND WHEREAS the Supervising CCAA Judge in this proceeding, the Honourable Justice Morawetz, was designated on December 13, 2012 by Regional Senior Justice Then to hear this motion for settlement approval pursuant to both the CCAA and the *Class Proceedings Act, 1992*;

AND WHEREAS this Honourable Court approved the form of notice and the plan for distribution of the notice to any Person with an Ernst & Young Claim, as defined in the Plan, of this settlement approval motion by Order dated December 21, 2012 (the "Notice Order");

AND ON READING the Ontario Plaintiffs' Motion Record, including the affidavit and supplemental affidavit of Charles Wright, counsel to the plaintiffs, and the exhibits thereto, the affidavit of Joe Redshaw and the exhibits thereto, the affidavit of Frank C. Torchio and the exhibits thereto, the affidavit of Serge Kalloghlian and the exhibits thereto, the affidavit of Adam

Pritchard and the exhibits thereto, and on reading the affidavit of Mike P. Dean and the exhibits thereto, and on reading the affidavit of Judson Martin and the exhibits thereto and on reading the Responding Motion Record of the Objectors to this motion (Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc, Gestion Férique and Montrusco Bolton Investments) including the affidavits of Eric J. Adelson and the exhibits thereto, Daniel Simard and the exhibits thereto and Tanya J. Jemec, and the exhibits thereto, and on reading the Responding Motion Record of Poyry (Beijing) Consulting Company Limited including the affidavit of Christina Doria, and on reading the Fourteenth Report, the Supplement to the Fourteenth Report and the Fifteenth Report of FTI Consulting Canada Inc., in its capacity as Monitor of the Applicant (in such capacity, the "Monitor") dated January 22 and 28, 2013 and February 1, 2013 including any notices of objection received, and on reading such other material, filed, and on hearing the submissions of counsel for the Ontario Plaintiffs, Ernst & Young LLP, the Ad Hoc Committee of Sino-Forest Noteholders, the Applicant, the Objectors to this motion, Derek Lam and Senith Vel Kanagaratnam, the Underwriters, (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)), BDO Limited, the Monitor and those other parties present, no one appearing for any other party although duly served and such other notice as required by the Notice Order,

Sufficiency of Service and Definitions

1. **THIS COURT ORDERS** that the time for service and manner of service of the Notice of Motion and the Motion Record and the Fourteenth Report, the Supplement to the Fourteenth Report and the Fifteenth Report of the Monitor on any Person are, respectively, hereby abridged and validated, and any further service thereof is hereby dispensed with so that this Motion was properly returnable February 4, 2013 in both proceedings set out in the styles of cause hereof.

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this order shall have the meanings attributed to those terms in the Plan.

3. **THIS COURT FINDS** that all applicable parties have adhered to, and acted in accordance with, the Notice Order and that the procedures provided in the Notice Order have provided good and sufficient notice of the hearing of this Motion, and that all Persons shall be and are hereby forever barred from objecting to the Ernst & Young Settlement or the Ernst & Young Release.

Representation

4. **THIS COURT ORDERS** that Ontario Plaintiffs are hereby recognized and appointed as representatives on behalf of those Persons described in **Appendix "A"** hereto (collectively, the "Securities Claimants") in these insolvency proceedings in respect of the Applicant (the "CCAA Proceedings") and in the Ontario Class Action, for the purposes of and as contemplated by section 11.1 of the Plan, and more particularly the Ernst & Young Settlement and the Ernst & Young Release.

5. **THIS COURT ORDERS** that Koskie Minsky LLP, Siskinds LLP and Paliare Roland Rosenberg Rothstein LLP are hereby recognized and appointed as counsel for the Securities Claimants for all purposes in these proceedings and as contemplated by section 11.1 of the Plan, and more particularly the Ernst & Young Settlement and the Ernst & Young Release ("CCAA Representative Counsel").

6. **THIS COURT ORDERS** that the steps taken by CCAA Representative Counsel pursuant to the Orders of this Court dated May 8, 2012 (the "Claims Procedure Order") and July 25, 2012 (the "Mediation Order") are hereby approved, authorized and validated as of the date thereof and that CCAA Representative Counsel is and was authorized to negotiate and support the Plan on behalf of the Securities Claimants, to negotiate the Ernst & Young Settlement, to bring this motion before this Honourable Court to approve the Ernst & Young Settlement and the Ernst & Young Release and to take any other necessary steps to effectuate and implement the Ernst & Young Settlement and the Ernst & Young Release,

including bringing any necessary motion before the court, and as contemplated by section 11.1 of the Plan.

Approval of the Settlement & Release

7. **THIS COURT DECLARES** that the Ernst & Young Settlement and the Ernst & Young Release are fair and reasonable in all the circumstances and for the purposes of both proceedings.

8. **THIS COURT ORDERS** that the Ernst & Young Settlement and the Ernst & Young Release be and hereby are approved for all purposes and as contemplated by s. 11.1 of the Plan and paragraph 40 of the Sanction Order and shall be implemented in accordance with their terms, this Order, the Plan and the Sanction Order.

9. **THIS COURT ORDERS** that this Order, the Ernst & Young Settlement and the Ernst & Young Release are binding upon each and every Person or entity having an Ernst & Young Claim, including those Persons who are under disability, and any requirements of rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 are dispensed with in respect of the Ontario Class Action.

Payment, Release, Discharge and Channelling

10. **THIS COURT ORDERS** that upon satisfaction of all the conditions specified in section 11.1(a) of the Plan, Ernst & Young shall pay CDN $117,000,000 (the "Settlement Fund") into the Settlement Trust (as defined in paragraph 16 below) less any amounts paid in advance as set out in paragraph 15 of this order or the Notice Order.

11. **THIS COURT ORDERS** that upon receipt of a certificate from Ernst & Young confirming it has paid the Settlement Fund to the Settlement Trust in accordance with the Ernst & Young Settlement as contemplated by paragraph 10 of this Order and upon receipt of a certificate from the trustee of the Settlement Trust confirming receipt of such Settlement Fund, the Monitor shall deliver to Ernst & Young the Monitor's Ernst & Young Settlement Certificate (as defined in the Plan) substantially in the form attached hereto as **Appendix**

"B". The Monitor shall thereafter file the Monitor's Ernst & Young Settlement Certificate with the Court.

12. **THIS COURT ORDERS** that pursuant to the provisions of section 11.1(b) of the Plan,

a. upon receipt by the Settlement Trust of the Settlement Fund, all Ernst & Young Claims, including but not limited to the claims of the Securities Claimants, shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against Ernst & Young in accordance with section 11.1(b) of the Plan;

b. on the Ernst & Young Settlement Date, section 7.3 of the Plan shall apply to Ernst & Young and the Ernst & Young Claims *mutatis mutandis*;

c. upon receipt by the Settlement Trust of the Settlement Fund, none of the plaintiffs in the Class Actions or any other actions in which the Ernst & Young Claims could have been asserted shall be permitted to claim from any of the other defendants that portion of any damages, restitutionary award or disgorgement of profits that corresponds with the liability of Ernst & Young, proven at trial or otherwise, that is the subject of the Ernst & Young Settlement ("Ernst & Young's Proportionate Liability");

d. upon receipt by the Settlement Trust of the Settlement Fund, Ernst & Young shall have no obligation to participate in and shall not be compelled to participate in any disputes about the allocation of the Settlement Fund from the Settlement Trust and any and all Ernst & Young Claims shall be irrevocably channeled to the Settlement Fund held in the Settlement Trust in accordance with paragraphs 16 and 17 of this order and the Claims and Distribution Protocol defined below and forever discharged and released against Ernst & Young in accordance with paragraph 12(a) of this order, regardless of whether the Claims and Distribution Protocol is finalized as at the Ernst & Young Settlement Date;

e. on the Ernst & Young Settlement Date, all Class Actions, as defined in the Plan, including the Ontario Class Action shall be permanently stayed as against Ernst & Young; and

f. on the Ernst & Young Settlement Date, the Ontario Class Action shall be dismissed against Ernst & Young.

13. **THIS COURT ORDERS** that on the Ernst & Young Settlement Date, any and all claims which Ernst & Young may have had against any other current or former defendant, or any affiliate thereof, in the Ontario Class Action, or against any other current or former defendant, or any affiliate thereof, in any Class Actions in a jurisdiction in which this order has been recognized by a final order of a court of competent jurisdiction and not subject to further appeal, any other current or former defendant's insurers, or any affiliates thereof, or any other Persons who may claim over against the other current or former defendants, or any affiliate thereof, or the other current or former defendants' insurers, or any affiliate thereof, in respect of contribution, indemnity or other claims over which relate to the allegations made in the Class Actions, are hereby fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished.

14. **THIS COURT ORDERS** that nothing in this order shall fetter the discretion of any court to determine Ernst & Young's Proportionate Liability at the trial or other disposition of an action for the purposes of paragraph 12(c) above, whether or not Ernst & Young appears at the trial or other disposition (which, subject to further order of the Court, Ernst & Young has no obligation to do) and Ernst & Young's Proportionate Liability shall be determined as if Ernst & Young were a party to the action and any determination by the court in respect of Ernst & Young's Proportionate Liability shall only apply in that action to the proportionate liability of the remaining defendants in those proceedings and shall not be binding on Ernst & Young for any purpose whatsoever and shall not constitute a finding against Ernst & Young for any purpose in any other proceeding.

15. **THIS COURT ORDERS** that the Ontario Plaintiffs shall incur and pay notice and administration costs that are incurred in advance of the Ernst & Young Settlement Date, as a

result of an order of this Honourable Court, up to a maximum of the first $200,000 thereof (the "Initial Plaintiffs' Costs"), which costs are to be immediately reimbursed from the Settlement Fund after the Ernst & Young Settlement Date. Ernst & Young shall incur and pay such notice and administration costs which are incurred in advance of the Ernst & Young Settlement Date, as a result of an order of this Honourable Court, over and above the Initial Plaintiffs' Costs up to a maximum of a further $200,000 (the "Initial Ernst & Young Costs"). Should any costs in excess of the cumulative amount of the Initial Plaintiffs' Costs and the Initial Ernst & Young Costs, being a total of $400,000, in respect of notice and administration as ordered by this Honourable Court be incurred prior to the Ernst & Young Settlement Date, such amounts are to be borne equally between the Ontario Plaintiffs and Ernst & Young. All amounts paid by the Ontario Plaintiffs and Ernst & Young as provided herein are to be deducted from or reimbursed from the Settlement Fund after the Ernst & Young Settlement Date. Should the settlement not proceed, the Ontario Plaintiffs and Ernst & Young shall each bear their respective costs paid to that time.

Establishment of the Settlement Trust

16. **THIS COURT ORDERS** that a trust (the "Settlement Trust") shall be established under which a claims administrator, to be appointed by CCAA Representative Counsel with the consent of the Monitor or with approval of the court, shall be the trustee for the purpose of holding and distributing the Settlement Fund and administering the Settlement Trust.

17. **THIS COURT ORDERS** that after payment of class counsel fees, disbursements and taxes (including, without limitation, notice and administration costs and payments to Claims Funding International) and upon the approval of a Claims and Distribution Protocol, defined below, the entire balance of the Settlement Fund shall, subject to paragraph 18 below, be distributed to or for the benefit of the Securities Claimants for their claims against Ernst & Young, in accordance with a process for allocation and distribution among Securities Claimants, such process to be established by CCAA Representative Counsel and approved by further order of this court (the "Claims and Distribution Protocol").

18. **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.

19. **THIS COURT ORDERS** that the fees and costs of the claims administrator and CCAA Representative Counsel shall be paid out of the Settlement Trust, and for such purpose, the claims administrator and the CCAA Representative Counsel may apply to the court to fix such fees and costs in accordance with the laws of Ontario governing the payment of counsel's fees and costs in class proceedings.

Recognition, Enforcement and Further Assistance

20. **THIS COURT ORDERS** that the Court in the CCAA proceedings shall retain an ongoing supervisory role for the purposes of implementing, administering and enforcing the Ernst & Young Settlement and the Ernst & Young Release and matters related to the Settlement Trust including any disputes about the allocation of the Settlement Fund from the Settlement Trust. Any disputes arising with respect to the performance or effect of, or any other aspect of, the Ernst & Young Settlement and the Ernst & Young Release shall be determined by the court, and that, except with leave of the court first obtained, no Person or party shall commence or continue any proceeding or enforcement process in any other court or tribunal, with respect to the performance or effect of, or any other aspect of the Ernst & Young Settlement and the Ernst & Young Release.

21. **THIS COURT ORDERS** that the Ontario Plaintiffs and Ernst & Young with the assistance of the Monitor, shall use all reasonable efforts to obtain all court approvals and orders necessary for the implementation of the Ernst & Young Settlement and the Ernst & Young Release and shall take such additional steps and execute such additional agreements and

documents as may be necessary or desirable for the completion of the transactions contemplated by the Ernst & Young Settlement, the Ernst & Young Release and this order.

22. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States or elsewhere, to give effect to this order and to assist the Applicant, the Monitor, the CCAA Representative Counsel and Ernst & Young LLP and their respective agents in carrying out the terms of this order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant, the Monitor as an officer of this Court, the CCAA Representative Counsel and Ernst &Young LLP, as may be necessary or desirable to give effect to this order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant, the Monitor, the CCAA Representative Counsel and Ernst & Young LLP and their respective agents in carrying out the terms of this order.

23. **THIS COURT ORDERS** that each of the Applicant, the Monitor, CCAA Representative Counsel and Ernst & Young LLP be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this order, or any further order as may be required, and for assistance in carrying out the terms of such orders.

24. **THIS COURT ORDERS** that the running of time for the purposes of the Ernst & Young Claims asserted in the Ontario Class Action, including statutory claims for which the Ontario Plaintiffs have sought leave pursuant to Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S-5 and the concordant provisions of the securities legislation in all other provinces and territories of Canada, shall be suspended as of the date of this order until further order of this CCAA Court.

25. **THIS COURT ORDERS** that in the event that the Ernst & Young Settlement is not completed in accordance with its terms, the Ernst & Young Settlement and paragraphs 7-14 and 16-19 of this order shall become null and void and are without prejudice to the rights of the parties in the Ontario Class Action or in any proceedings and any agreement between the

parties incorporated into this order shall be deemed in the Ontario Class Action and in any proceedings to have been made without prejudice.

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MAR 2 8 2013

Morawetz, J.

APPENDIX "A" TO SETTLEMENT APPROVAL ORDER
DEFINITION OF SECURITIES CLAIMANTS

"Securities Claimants" are all Persons and entities, wherever they may reside, who acquired any securities of Sino-Forest Corporation including securities acquired in the primary, secondary and over-the-counter markets.

For the purpose of the foregoing,

"Securities" means common shares, notes or other securities defined in the *Securities Act*, R.S.O. 1990, c. S.5, as amended.

APPENDIX "B" TO SETTLEMENT APPROVAL ORDER
MONITOR'S ERNST & YOUNG SETTLEMENT CERTIFICATE

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 COMPROMISE AND 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

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Order of the Court dated March 20, 2013 (the "Ernst & Young Settlement Approval Order") which, *inter alia*, approved the Ernst & Young Settlement and the Ernst & Young Release and established the Settlement Trust (as those terms are defined in the plan of compromise and reorganization dated December 3, 2012 (as the same may be amended, revised or supplemented in accordance with its terms, the "Plan") of Sino-Forest Corporation ("SFC"), as approved by the Court pursuant to an Order dated December 10, 2012).

Pursuant to section 11.1 of the Plan and paragraph 11 of the Ernst & Young Settlement Approval Order, FTI Consulting Canada Inc. (the "Monitor") in its capacity as Court-appointed Monitor of SFC delivers to Ernst & Young LLP this certificate and hereby certifies that:

1. Ernst & Young has confirmed that the settlement amount has been paid to the Settlement Trust in accordance with the Ernst & Young Settlement;

2. [redacted], being the trustee of the Settlement Trust has confirmed that such settlement amount has been received by the Settlement Trust; and

3. The Ernst & Young Release is in full force and effect in accordance with the Plan.

DATED at Toronto this ___ day of _____, 2013.

FTI CONSULTING CANADA INC. solely in its capacity as Monitor of Sino-Forest Corporation and not in its personal capacity

_____

Name:
Title:

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

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA. et al.

Plaintiffs

SINO-FOREST CORPORATION, et al.

Defendants

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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LAWYERS FOR AN AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES

This is Exhibit C referred to in the affidavit of Tanya Pemec sworn before me, this 22 day of April 2013

A COMMISSIONER FOR TAKING AFFIDAVITS

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 20TH DAY OF
	)	
MR. JUSTICE MORAWETZ	)	MARCH, 2013

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

B E T W E E N :

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRY, 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

ORDER

THIS MOTION made by Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc.,

Gestion Férique and Montrusco Bolton Investments (the "Objectors") for an order that the Objectors are not bound by the Order of the Honourable Justice Morawetz dated March 20, 2013 approving and giving effect to the Ernst & Young Release and the Ernst & Young Settlement (as defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("Sino-Forest" and the "Applicant") under the *Companies' Creditors Arrangement Act* dated December 3, 2012 (the "Plan") and as provided for in section 11.1 of the Plan) and recognizing and appointing the Ad Hoc Committee of the Purchasers of the Applicant's Securities, including the plaintiffs in the action commenced against Sino-Forest in the Ontario Superior Court of Justice bearing (Toronto) Court File No. CV-11-431153-00CP (the "Ontario Plaintiffs") as representatives in these proceedings.

AND ON READING the Ontario Plaintiffs' Motion Record, including the affidavit of and supplemental affidavit of Charles Wright, counsel to the plaintiffs, and the exhibits thereto, the affidavit of Joe Redshaw and exhibits thereto, the affidavit of Frank C. Torchio and the exhibits thereto, the affidavit of Serge Kalloghlian and exhibits thereto, the affidavit of Adam Pritchard and the exhibits thereto, and the affidavit of Mike P. Dean and exhibits thereto, and the affidavit of Judson Martin and the exhibits thereto and the Responding Motion Record of the Objectors including the affidavits of Eric J. Adelson and exhibits thereto, Daniel Simard and exhibits thereto and Tanya J. Jemec and the exhibits thereto, and on reading the Responding Motion Record of Pöyry (Beijing) Consulting Company Limited including the affidavit of Christina Doria, and on reading the Fourteenth Report, the supplement to the Fourteenth Report and the Fifteenth Report of FTI Consulting Canada Inc., in its capacity as Monitor of the Applicant (in such capacity, the "Monitor") dated January 22 and 28, 2013 and February 1, 2013 including any notices of objection received, and on reading such other material, filed, and on hearing the submissions of counsel for the Ontario Plaintiffs, Ernst & Young LLP, the Ad Hoc Committee of Sino-Forest Noteholders, the Applicant, the Objectors to this motion, Derek Lam and Senith Vel Kanagaratnam, the Underwriters (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)), BDO Limited, the Monitor and those other parties present, no one appearing for any other party although duly served and such other notice as required by the Notice Order,

1. **THIS COURT ORDERS** that the motion of the Objectors is dismissed.

Morawetz, J.

A-K Fedson, Registrar
Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO.
LE / DANS LE REGISTRE NO.

APR 0 3 2013

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

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

Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al
Plaintiffs

- and –

SINO-FOREST CORPORATION, et al

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

ORDER

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This is Exhibit D referred to in the
affidavit of Tonya Jemec
sworn before me, this April
day of 22 20 13.

A COMMISSIONER FOR TAKING AFFIDAVITS

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 COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

FACTUM OF
INVESCO CANADA LTD.
NORTHWEST & ETHICAL INVESTMENTS L.P., and
COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

(Motion for Sanction Order returnable December 7 & 10 2012)

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TO: THE SERVICE LIST

Part I – FACTUAL BACKGROUND

1. Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc. (the "Funds") object to the proposed Sanction Order in this proceeding, which would approve the Plan of Compromise and Reorganization, as amended and dated December 3, 2012 (the "Plan"), for Sino-Forest Corporation ("Sino-Forest").

2. Sino-Forest had become well known as the largest forestry company in Canada, with extensive operations in China, headquarters in Ontario, and a listing on the Toronto Stock Exchange ("TSX"). Its market capitalization in early 2011 was approximately $6.2 billion.

3. The Funds are institutional public and private equity funds that purchased securities of Sino-Forest and held them on June 2, 2011, the date on which a securities analyst by the name of Muddy Waters LLC published a report asserting that Sino-Forest was a "near total fraud." In response to the report, shares of Sino-Forest stock collapsed from $18.21 to $5.23 over the course of two days, and trading was halted, resulting in large losses for holders of the stock at that time, including the Investors. The value of Sino-Forest notes was also decimated.

4. Later in 2011, several investors who had suffered losses commenced class actions in Ontario, Quebec and New York against Sino-Forest, many of its directors and officers, its auditors during the relevant years (Ernst & Young LLP and BDO Limited, who had issued clean audit opinions on the company's financial statements), thirteen underwriters of company securities offerings, and other experts, for misrepresenting the condition of the company. On January 6, 2012 Justice Paul Perell of the Ontario Superior Court of

Justice granted carriage of the Ontario Class Action to the law firms of Koskie Minsky LLP and Siskinds LLP ("Class Counsel") in *Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, Court File No. CV-11-431153-00CP (the "Class Action"), and stayed the other Ontario class actions that had been filed. [1]

5. In the decision granting carriage, Justice Perell specifically noted that the large institutional putative class members did not require the class action structure and were prime candidates to opt out of the class proceeding allowing them to pursue the defendants to obtain compensation for their respective members.[2]

6. The proposed plaintiff class in the Class Action consists of all persons and entities, wherever they may reside who acquired Sino-Forest's securities by distribution in Canada or on the TSX or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino Forest's securities who are resident of Canada or were resident of Canada at the time of acquisition from March 19, 2007 to and including June 2, 2011, except for excluded persons related to Sino-Forest.

7. The Funds fall within the class definition. However, the class has not been certified, and investors have not yet been afforded their statutory right to exclude themselves (opt out) from the Class Action if and when it is certified.

8. On March 30, 2012, Sino-Forest applied for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("*CCAA*"). A stay of proceedings was imposed, essentially preventing the Class Action from moving forward. On May 9, 2012, Sino-Forest's common shares were delisted from the TSX.

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[1] *Smith v. Sino-Forest Corp.*, 2012 ONSC 24, [2012] O.J. No. 88 (S.C.J.).
[2] *Smith v. Sino-Forest Corp.*, 2012 ONSC 24, [2012] O.J. No. 88 at para. 280 (S.C.J.).

9. To date the Monitor has issued thirteen reports on to its investigation into Sino-Forest and its subsidiaries. The Sixth Report noted the Monitor's inability to verify Sino-Forest's operations, assets, and receivables in any meaningful way. In particular, the Monitor stated it had been unable to verify more than 8% of Sino-Forest's reported net stocked forests. The Monitor noted that three of Sino-Forest's important purchasing agents ("authorized intermediaries"), which owed the company some $504 million in receivables, had de-registered themselves in the People's Republic of China.[3]

10. Sino-Forest filed its initial Plan of Compromise and Reorganization in this proceeding on August 27, 2012. The Plan has been modified several times, including on October 19, 2012, November 28, 2012, and finally on the date of the creditors' meeting, this past Monday, December 3, 2012. The prior versions of the Plan contained fairly standard provisions that all claims against the company and certain officers and directors would be barred except claims related to s. 5.1(2) of the *CCAA*, to fraud, conspiracy and insured claims. But there had been no provisions barring claims against, or providing releases in favour of, other "Third Party Defendants" -- i.e., Ernst & Young LLP, BDO Limited, the underwriters, certain experts, and other directors and officers who may have been involved in fraud.

11. The most recent (December 3, 2012) version of the Plan changed that. For the first time in the *CCAA* proceedings, the Plan contained, in the new Article 11, specific provisions for proposed settlement of claims against a Third Party Defendant, Ernst & Young LLP and certain related entities ("E&Y"), and also provided a structure for settlement of claims against other Third Party Defendants. None of the moving parties

[3] Third Report of the Monitor dated May 25, 2012 at paras. 58, 86.

released the E&Y settlement agreement, but they did describe the amount -- $117 million, to be paid by E&Y into a Settlement Trust -- as unprecedented in Canada.

12. Also on December 3, 2012, a meeting of creditors was held to consider the Plan. It has been reported that a large majority of creditors approved the Plan.

13. Also on December 3, 2012, the Ontario Securities Commission ("OSC") issued a Statement of Allegations against Ernst & Young LLP, alleging that it had had failed to perform its audit work on Sino-Forest's financial statements in accordance with Generally Accepted Auditing Standards, in violation of ss. 78(2), 78(3) and 122(1)(b) of the Ontario *Securities Act*, R.S.O. 1990, c. S-5, as amended. A hearing on those allegations is scheduled for early January 2013.

14. On Tuesday, December 4, 2012, the Monitor issued a Supplemental Report to the Thirteenth Report of the Monitor ("Supplemental Report"), reporting on recent events, including the proposed E&Y settlement. The Monitor reported that the Sanction Hearing would only consider the "framework" pursuant to which a release of the E&Y claims under the Plan would happen if several conditions were met.[4] The Supplemental Report did not elucidate how the proposed settlement with E&Y was to be effectuated, including whether Investors would have the right to opt-out from the settlement, and whether approval of the Class Action Court was required.

15. After requests to counsel for many parties to the Plan, Funds' counsel received a copy of the Minutes of Settlement for the E&Y settlement on Wednesday evening, December 5, 2012. The Minutes of Settlement propose that the settlement is to be approved and implemented in the Sino-Forest *CCAA* proceedings and is conditional upon

[4] Supplemental Report to the Thirteenth Report of the Monitor dated December 4, 2012 at para. 7(d).

full and final releases and claims bar orders that extinguish all claims against E&Y without opt-outs.

16. Schedule B of the Minutes of Settlement purports to require certification and settlement approval in the Class Action along with opt-out rights which would be approved by the Class Action case management judge. A Court hearing on certification and settlement approval and opt-out rights are a meaningless exercise in light of the proposed release and claims bar sought to be sanctioned in the *CCAA* Plan. If the Plan is sanctioned, any investors who opt out of the Class Action would be forever precluded from pursuing their individual claims against E&Y.[5]

17. Counsel for E&Y informed the Funds' counsel that the parties had decided to exclude any request to this Court for approval of the E&Y settlement itself from the motion for approval of the Sanction Order and Plan, scheduled to be heard on Friday, December 7, and Monday, December 10, 2012. However, the Court is still asked to sanction the framework for the releases provided in the Plan.

Part II -- STRUCTURE OF RELEASES AND APPROVALS

18. Article 11.2 of the Plan would, if approved, establishes an open-ended mechanism for Eligible Third Party Defendants, defined to include the 11 underwriters named as defendants in the Class Action, BDO Limited, and/or E&Y (if its proposed settlement is not already concluded), to enter into a "Named Third Party Defendant Settlement" with "one or more of (i) counsel to the plaintiffs in any of the Class Actions..."[6]

[5] Investors would similarly lose any opt-out rights and be forever precluded from pursuing their individual claims against BDO and the Underwriters if Class Counsel reaches a settlement with those parties since they are Eligible Third Party Defendants as defined by the Plan.
[6] Plan of Compromise and Reorganization dated December 3, 2012 at pp. 17-18.

19. Under Articles 11.2(b) & (c), once such a settlement is concluded among the specified parties, the settling defendant will obtain releases and bar orders in the *CCAA* proceeding, preventing the continued litigation of any Sino-Forest-related claims against them. If a settlement is reached in the future, the *CCAA* release and bar orders would remain available notwithstanding that the *CCAA* process may have concluded.

20. Accordingly, it appears that these provisions purport to vest authority in the parties as described to enter into settlements that may have the effect of barring any claimants (such as the Funds) from prosecuting Sino-Forest-related claims against the underwriters, BDO, and/or E&Y, subject to the approval of this Court. The bar would be imposed without complying with the established prerequisites of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") -- including class certification, a fairness hearing, approval by the court supervising the class action, and provision of opt out rights -- necessary to impose releases or other restrictions on class members who are not named parties before that court.[7]

21. Stated more succinctly, the Plan appears designed to unnecessarily fetter the powers of a future Court, namely the Class Action case management Court, by assigning to this *CCAA* Court the power to approve and effectuate class-wide settlements without regard to established statutory and rule-based procedural safeguards found in the *CPA*. Under the regime imposed by the Plan, the Funds and other absent putative class members would forever lose their statutorily enshrined rights to opt out of a class settlement and maintain their claims against affected defendants,. The Funds object to the proposed usurpation of class action jurisdiction, rights, and safeguards, for the reasons described in the next section.

[7] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 at ss. 5, 8, 9, 29 ("*CPA*").

Part III -- ISSUES AND THE LAW

A. Request for Adjournment

22. The Funds object to the moving parties' submission of material amendments to the Plan four days before commencement of the scheduled hearing for approval of the Sanction Order and the Plan. This is particularly unseemly because objections to the Plan were required to be submitted at least five days prior to the hearing. The fact that the late-included provisions concern matters of vital importance to the Funds, and presumably to other absent putative class members who may not even have received notice of the late filings, underscores the prejudice that may arise if these matters are heard on such short notice.

23. In addition, the moving parties have not submitted any explanatory materials or factums in support of their requests. As demonstrated in Part II above, it is therefore difficult even to understand what they are asking and why.

24. The Funds accordingly request adjournment of the hearing for one month.

B. Investors May Not Properly Be Deprived of Their Opt Out Rights and Other Procedural Protections

25. As described in Part II above, it appears to be the intent of the moving parties that the auditor and underwriter defendants in the Sino-Forest Class Action be permitted to obtain complete releases of the claims against them as may be asserted by any and all absent putative class members, without satisfying any of the established statutory requirements for class action settlements, including notice to the class, class certification, approval of the class action settlement, consideration of objections to the settlement, and provision of opt out rights to class members who do not wish to be bound.

26. Use of the *CCAA* proceedings for the purpose of circumventing valid statutory protections found in the *CPA* is improper, and the effect would be unlawful.

27. The Ontario Class Action has not yet been certified under the *CPA*.[8] There is no class action at this time, only a proposed class action for which the Ontario class action has been granted carriage. When there is a carriage motion, the action that is not granted carriage is not brought to an end, but rather stayed. The unsuccessful plaintiffs retain the right to prosecute their action as an ordinary lawsuit and can opt out of the class and continue with their own action.[9]

28. Prior to certification as a class proceeding, there is no solicitor and client relationship between counsel for representative plaintiffs and putative class members.[10]

29. The named plaintiffs in the proposed class proceedings have simply commenced actions and purport to act on behalf of others. It is yet to be determined whether the status of a class proceeding will be granted through class certification.[11]

30. The importance of class action procedural protections was recognized by Class Counsel in April 2012, when they specifically sought an order to represent absent class members in these *CCAA* proceedings. Moreover, the Representation Order they proposed contained an Opt-Out Letter, which would have allowed absent class members to opt-out from having Class Counsel represent them in these *CCAA* proceedings.[12] A class member's invocation of that opt out right presumably would have prevented Class Counsel from binding the class member to any settlement entered into as part of the

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[8] *CPA*, s. 5(1).
[9] *Locking v. Armtec Infrastructure Inc.*, 2012 ONCA 774 at para. 13 (C.A.).
[10] *Pearson v. Inco* (2001), 57 O.R. (3d) 278, [2001] O.J. No. 4877 at para. 18 (S.C.J.).
[11] *Pearson v. Inco* (2001), 57 O.R. (3d) 278, [2001] O.J. No. 4877 at para. 15 (S.C.J.).
[12] Notice of Motion, Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant, dated April 10, 2012.

CCAA proceedings, such as the E&Y settlement. However, the Representation Order and Opt-Out Letter were never approved by the *CCAA* court.

31. In Ontario's class proceedings regime, the right of a party to opt-out is fundamental to the Court's jurisdiction over un-named class members. It is also fundamental to preserve the legal entitlement of those who wish to exercise their legal rights outside of a particular class action.[13] The opt-out period allows individuals to pursue their self-interest and to preserve their rights to pursue individual actions.[14]

32. The Ontario Court of Appeal has recognized that the right to opt out is fundamental and should not negated by the Courts:

> While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. It is not an illusory right that should be negated by speculation, judicial or otherwise.[15]
>
> [Emphasis added]

33. In the absence of a class certification order in the Class Action, Class Counsel do not represent absent putative class members, and only represent their direct clients who are named plaintiffs. Not all absent class members wish to be represented by Class Counsel.[16]

34. Since Class Counsel are not counsel to absent class members, they cannot bind them.

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[13] *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 at para. 28 (C.A.).
[14] *Mangan* v. *Inco Ltd.*, [1998] O.J. No. 551 at para. 36 (Gen. Div.).
[15] *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 at para. 69 (C.A.).
[16] Affidavit of Eric J. Adelson sworn December 6, 2012 at paras. 6 and 18.

C. Circumvention of Class Action Procedural Safeguards Is Not Permitted in These Circumstances, Even Under the Flexible Standard of the *CCAA*

35. The purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent company and its creditors so that the company is able to continue in business.[17]

36. In considering whether to sanction a reorganization plan, the court should consider fundamental principles of fairness and reasonableness[18] The *CCAA* does not provide an appropriate forum to release absent putative class members' claims against the third party defendants.

37. Release of investors' claims against an insolvent *CCAA* applicant may readily be seen as necessary in order to restructure the applicant. In contrast, there is no cogent reason that an investor needs to release a third party defendant in order to effectuate a restructuring. In the case of Sino-Forest, releasing the underwriters or auditors from misrepresentation claims asserted by investors would not assist Sino-Forest.

38. Sanctioning third party releases in a plan should be the exception, and such releases should not be requested or granted as a matter of course in a *CCAA* sanction hearing.[19]

39. There are seven factors that the courts have considered when determining whether third party releases are justified in a *CCAA* plan of reorganization. These factors are:

i.) the parties released are necessary and essential to the restructuring of the debtor;

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[17] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 3164 at para. 50 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337.
[18] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 2265 at para. 61(S.C.J.), aff'd, [2008] O.J. No. 3164 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337
[19] *Canwest Global Communications (Re)*, 2010 ONSC 4209 at para. 29 (S.C.J.).

ii.) the claims to be released are rationally related to the purpose of the plan and necessary for it;

iii.) the plan cannot succeed without the releases;

iv.) the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;

v.) the plan will benefit not only the debtor companies but creditors generally;

vi.) the creditors approved the plan with knowledge of the nature and effect of the releases; and

vii.) the court is satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy.[20]

40. None of those factors is present here.

41. With respect to the first three factors, it is obvious that the releases of Named Third Party Defendants are not essential to the Plan because several viable iterations of the Plan were proposed without any mention of such releases. In fact, the settlements and third party releases are eleventh-hour add-ons that have nothing to do with Sino-Forest's reorganization; they are only sought to be imported into the *CCAA* process for the convenience of non-parties. Third party releases should only be sanctioned when the releases are integral or necessary to the restructuring.[21]

42. The central provision of the Plan is the creation and transfer of notes and shares of Newco and Newco II to affected creditors with proven claims.[22] Settlements and releases involving Third Party Defendants do not affect or impact the restructuring or improve its chances for success.

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[20] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 2265 at para. 143 (S.C.J.), aff'd, [2008] O.J. No. 3164 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337.
[21] *Allen-Vanguard Corp. (Re)*, 2011 ONSC 5017, [2011] O.J. No. 3946 at para. 61 (S.C.J.).
[22] Plan of Compromise and Reorganization dated December 3, 2012, Article 6.

43. The settlement with E&Y provides for the creation of a Settlement Trust to receive settlement consideration.[23] The purpose and operation of the Settlement Trust are not defined in the Plan. The Trust has not been designed to serve any purpose of Sino-Forest.

44. Even the vote of creditors is suspect with regard to the Third Party Defendant settlements and releases. Creditors who voted on the Plan by proxy had to submit their proxies by November 26, 2012, or at the latest (due to the adjournment of the creditors' meeting) on November 30, 2012.[24] Creditors who voted by proxy could not have had knowledge of the settlements and releases when they voted, because the settlements were reached later.

45. Presumably, proponents of the Plan will seek to use the *Allen-Vanguard (Re)*[25] and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. ("ATB Financial")*[26] cases to try to justify the release provision of the Plan and settlements, but those cases are clearly distinguishable.

46. In *Allen-Vanguard (Re)*, Justice Campbell approved releases of the underwriters (who were non-party defendants) in that *CCAA* proceeding because class counsel, who were the ones seeking to preserve their claims against the underwriters, had failed to object to the release provisions in the Sanction Order, which had been previously entered.[27] The present motion involves a Sanction Order and the Funds are objecting. Accordingly the setting is the opposite of that in *Allen-Vanguard (Re)*.

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[23] Plan of Compromise and Reorganization dated December 3, 2012, Article 11.1(a).
[24] Ordinary Affected Creditors' Proxy, October 24, 2012; Noteholders' Proxy, October 24, 2012.
[25] *Allen-Vanguard Corp. (Re)*, 2011 ONSC 5017, [2011] O.J. No. 3946 (S.C.J.).
[26] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 2265 (S.C.J.), aff'd, [2008] O.J. No. 3164 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337.
[27] *Allen-Vanguard Corp. (Re)*, 2011 ONSC 5017, [2011] O.J. No. 3946 at paras. 108-109 (S.C.J.).

47. *ATB Financial* involved releases granted to third party banks through a *CCAA* plan in a "unique" circumstance[28] following a liquidity crisis, which threatened the entire Canadian market in Asset Backed Commercial Paper ("ABCP"), and which was exacerbated by the pendency of the lawsuits in which claims were sought to be released in the *CCAA* plan. Justice Campbell justified allowance of the releases by focusing on the salutary effect of releases on the market -- similar to the more conventional consideration of whether a *CCAA* remedy will assist the applicant in reentering its market. On appeal, the Ontario Court of Appeal affirmed that reasoning.[29] Here, the moving parties cannot articulate any salutary effect on Sino-Forest or any segment of a relevant market that would follow from granting the proposed Third Party Defendant releases. On the contrary, it is suggested that allowing the releases would produce an adverse effect on the perceived integrity of our securities markets, given the importance of motivating auditors and underwriters to fulfill their gatekeeper roles in performing their audit and due diligence responsibilities.[30]

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[28] *Canwest Global Communications (Re)*, 2010 ONSC 4209 at para. 28 (S.C.J.).
[29] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 3164 at para. 56 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337.
[30] Affidavit of Erlo J. Adelson sworn December 6, 2012 at para. 17.

Part IV – ORDER SOUGHT

48. The Funds request that the Court adjourn the Sanction Hearing to January 7, 2012.

49. In the alternative, the Funds request that the Court dismiss the motion to sanction the Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 6TH DAY OF DECEMBER, 2012

p/c Won J. Kim P.C.

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p/c Michael C. Spencer

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Schedule A – Authorities

Allen-Vanguard Corp. (Re), 2011 ONSC 5017, [2011] O.J. No. 3946 (S.C.J.)

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., [2008] O.J. No. 2265 (S.C.J.), aff'd, [2008] O.J. No. 3164 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337

Canwest Global Communications (Re), 2010 ONSC 4209 (S.C.J.)

Currie v. McDonald's Restaurants of Canada Ltd. (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (C.A.)

Fischer v. IG Investment Management Ltd., 2012 ONCA 47 (C.A.), leave to appeal to S.C.C. granted, [2012] S.C.C.A. No. 135

Locking v. Armtec Infrastructure Inc., 2012 ONCA 774 (C.A.)

Mangan v. *Inco Ltd.*, [1998] O.J. No. 551 (Gen. Div.)

Pearson v. Inco (2001), 57 O.R. (3d) 278, [2001] O.J. No. 4877 (S.C.J.)

Smith v. Sino-Forest Corp., 2012 ONSC 24, [2012] O.J. No. 88 (S.C.J.)

Schedule B – Legislation

Class Proceedings Act, 1992, S.O. 1992, c. 6

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
(a) the pleadings or the notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,
(i) would fairly and adequately represent the interests of the class,
(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

8. (1) An order certifying a proceeding as a class proceeding shall,
(a) describe the class;
(b) state the names of the representative parties;
(c) state the nature of the claims or defences asserted on behalf of the class;
(d) state the relief sought by or from the class;
(e) set out the common issues for the class; and
(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. 1992, c. 6, s. 8 (1).

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).
(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).
(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).
(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
(a) an account of the conduct of the proceeding;
(b) a statement of the result of the proceeding; and
(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

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

1. (1) In this Act,

...

"self-regulatory organization" means a person or company that is organized for the purpose of regulating the operations and the standards of practice and business conduct, in capital markets, of its members and their representatives with a view to promoting the protection of investors and the public interest; ("organisme d'autoréglementation")

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets. 1994, c. 33, s. 2.

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

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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COMMERCIAL LIST

Proceeding commenced at Toronto

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(Motion for Sanction Order returnable December 7 & 10 2012)

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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 COMPROMISE 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 OBJECTORS

(Motion for Settlement Approval returnable February 4, 2013)

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TO: THE SERVICE LIST

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Part I – OVERVIEW

1. Invesco Canada Ltd. ("Invesco"), Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. (the "Objectors") are leading Canadian investment funds that held shares in Sino-Forest Corporation ("Sino-Forest") on June 2, 2011, and were injured when the market in those shares plunged upon publication of the Muddy Waters securities analyst report alleging that Sino-Forest was a "near total fraud".[1]

2. The Objectors oppose the settlement of claims against E&Y (the "E&Y Settlement") proposed by the named plaintiffs ("Ontario Plaintiffs") in the putative Superior Court class action titled above (the "Class Action") and supported by some or all of the other parties in the Sino-Forest *CCAA*[2] proceeding titled above. The Objectors particularly oppose the no-opt-out and full *CCAA* third party release features of the Settlement. The Objectors also oppose the motion for a Representation Order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the E&Y Settlement.

3. Evidence has just come to the attention of the Objectors showing that E&Y had actual knowledge as early as April 2010 that Sino-Forest was refusing to provide sufficient information to verify the composition of its timber holdings.[3] At a meeting among high level E&Y partners, Sino-Forest officers Allen T.Y. Chan ("Chan") and David Horsley, and key employees of Pöyry (Beijing) Consulting Company Limited

[1] Muddy Waters Report dated June 2, 2011 ("Muddy Waters Report"), Exhibit "G" to Affidavit of Charles Wright, sworn January 10, 2013, ("Wright Aff"), Plaintiffs' Motion Record, Volume 1, Tab 2G, pp. 239-279.

[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("*CCAA*").

[3] Responses to Questions on Written Cross Examination on Affidavit of Christina Doria, dated January 29, 2013 ("Doria Written Cross Examination") at para.1.

("Pöyry"), E&Y appears to have defended Sino-Forest's lack of informational forthrightness by pointing out that "Sino-Forest's business model is truly unique" because the "purchasers of Sino-Forest stock are financial players that purchase and hold, betting on timber prices to increase".[4] Whatever E&Y's explanation was, the evidence from Pöyry suggests that E&Y was aware at least as early as April 2010 that Sino-Forest would not corroborate its asset valuations -- yet E&Y continued to provide clean audit reports.

4. The present objections in a sense pick up where this Court left off in its Reasons, dated December 12, 2012,[5] released in support of the Endorsement of the Sanction Order of Sino-Forest's *CCAA* plan of compromise and reorganization (the "Plan").[6] At the time, the Court dismissed the Objectors' concerns about the no-opt out E&Y Settlement in conjunction with the "third party" releases in the Plan on the basis that the concerns were premature.[7] The Objectors renew their strenuous objection and opposition to the approval of this settlement.[8]

5. In the Plan Sanction Reasons, this Court found (among many other things) that the release of the Subsidiaries of Sino-Forest was justified according to the standards set forth for allowing such *CCAA* "third party" releases in *Metcalfe & Mansfield Alternative*

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[4] Minutes of Meeting dated April 9, 2010, Schedule A to the Doria Written Cross Examination ("Minutes of Pöyry meeting"), *ibid.*

[5] Plan Sanction Reasons, dated December 12, 2012 ("Sanction Reasons-Dec. 12"), Exhibit "E2" to the Affidavit of Charles Wright, sworn January 10, 2013, ("Wright Aff"), **Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 220-233.**

[6] Plan of Compromise and Reorganization ("Plan"), **Plaintiffs' Motion Record, Volume 6 Tab 7, pp. 1411-1505,**

[7] Plan Sanction Endorsement dated December 10, 2012 "(Plan Sanction Endorsement-Dec. 10)", at paras. 20, 22-25,Exhibit "E1" to Wright Aff, **Plaintiffs Motion Record, Volume 1, Tab E1, pp. 215-216.**

[8] Affidavit of Eric J. Adelson, sworn January 18, 2012 ("Adelson Aff") at para. 15., **Responding Motion Record of the Objectors, Tab 2C, p. 13.**

Investments II Corp., (Re)[9] (*"Metcalfe"*). This Court noted and accepted the submissions of Sino-Forest's counsel that there "can be no effective restructuring of SFC's business" without the releases of the Subsidiaries; that such releases were "necessary and essential" to the restructuring; and that it was "difficult to see how any viable plan could be made" without the releases.[10] This Court found that the Plan "cannot succeed without the releases of the Subsidiaries" and that the releases thus were "fair and reasonable and ... rationally connected to the overall purpose of the Plan".[11] Those criteria are, the Objectors respectfully submit, the ones this Court should apply in analyzing the propriety of any proposed third party releases in a *CCAA* plan.

6. The proposed E&Y Settlement includes a requirement that E&Y receive a full *CCAA* release of all Sino-Forest-related claims that could be asserted against it – in other words, a full third party release.[12] But the criteria for proper third party releases are not satisfied here.

7. *No party has even asserted – let alone provided evidence -- that the Plan cannot succeed without the releases or the settlement.* The version of the Plan submitted to, and obviously on the verge of approval by, the creditors in late November 2012 did not make any mention of the E&Y Settlement or of the "framework" for third party releases now relied upon. That demonstrates, more clearly than any legal argument could, that the E&Y Settlement is not integral to the success of the Plan, and that the third party release called for by the Settlement does not qualify for approval under the *Metcalfe* factors.

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[9] *Metcalfe & Mansfield Alternative Investments II Corp.(Re)*, 2008 ONCA 587, 45 C.B.R. (5th) 163, leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337 (*"Metcalfe"*).

[10] Sanction Reasons-Dec. 12, *supra* note 5 at para. 72. Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 219

[11] *Ibid.*, at para. 74, Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 231.

[12] Fifteenth Report of the Monitor, dated January 28, 2013 at paras. 13 and 31.

8. The Objectors thus submit that the proposed E&Y Settlement represents a simple case of overreaching. E&Y and Class Counsel seek to effectuate their settlement in this *CCAA* proceeding, using a full third party release, when in fact they instead should proceed by using the Class Action, as was done for the Pöyry settlement.

9. The salient difference between a *CCAA* settlement and a Class Action settlement here is that the former would extinguish or render illusory the right of investors to opt out of the settlement, whereas the latter would preserve and give effect to that important right.

10. The case precedents are unanimous in recognizing that opt out rights are fundamental to the entire structure of class actions, as described fully below.[13] The Objectors have opted out through the certification and settlement opt out process in connection with the prior settlement with another third party defendant, Pöyry; and according to the notice distributed in connection with that settlement the opt outs were effective as opt outs from the entire Class Action. The Objectors now wish, and should have the right, to pursue their claims against E&Y (and the other defendants) individually, and to have the results of that litigation not rendered illusory by third party *CCAA* releases in E&Y's favor obtained, we submit, without coming close to satisfying the *Metcalfe* criteria.

11. The Objectors understand that the parties and their counsel in the *CCAA* proceeding worked hard and devoted long hours to devising the Plan, which came to include the E&Y Settlement at the last moment. The Objectors also are aware of Class Counsel's position that the amount to be paid by E&Y -- $117 million – is very large for

[13] *See* p. 23 of factum; *see also Fischer v. IG Investment Management Ltd*, 2012 ONCA 47 at para. 69 (C.A.) ("*Fischer*"); *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399 at paras. 2 and 19 (S.C.J.) ("*Sauer*").

a Canadian settlement of claims against an auditor. With respect, however, we submit that those considerations do not address the fundamental issue raised by the present objections: whether such a settlement, when it is only incidental to a *CCAA* plan, can be "crammed down" as against class members in derogation of their opt out rights.

12. Many serious securities fraud cases have in the past involved, and will in the future involve, insolvency proceedings for the company at the center of the alleged misconduct. These situations also commonly include the presence of additional third parties asserting multiple and overlapping cross claims and claims over against the applicant, subsidiaries, and each other.

13. The Objectors submit that it would be a highly troubling precedent, from the viewpoint of investors deciding whether to trust in the integrity of Canadian securities markets, for such a "cram down" of a third party settlement and release to be countenanced by this Court. [14]

14. The alternative – use of normal class action procedures to effectuate such a settlement – is obviously appropriate, and would not, in the present situation at least, impose any unwarranted or problematic burdens. The Objectors should be free, as provided in class action procedures, to test their contention that the E&Y Settlement amount is really not so ample, in light of the gravity of defendants' apparent misconduct and the magnitude of losses suffered by investors, by opting out.

15. Accordingly, the Objectors oppose the proposed release of E&Y, as described in Article 11.1 of the Plan and sections 8, 9 and 12 of the proposed Settlement Approval

[14] Adelson Aff, supra note 8 at para. 24, Responding Motion Record of the Objectors, Tab 2, p. 16.

Order[15], which would extinguish the right of all Security Claimants to pursue individual opt-out litigation against E&Y in connection with Sino-Forest.

16. For similar reasons, the Objectors oppose the Ontario Plaintiffs' motion for a representation order.[16] Clearly, the interests of the Ontario Plaintiffs and of persons who filed objections to the E&Y Settlement are divergent. The Objectors will more appropriately represent the other objectors' interests.

Part II – FACTS

17. The background facts concerning Sino-Forest, the class actions, and the *CCAA* proceedings have been recited by multiple parties. The Objectors here set forth some other facts that may deserve attention or emphasis.

18. The Objectors are Securities Claimants. Collectively they held 3,995,932 shares[17] of Sino-Forest on June 2, 2011 when Muddy Waters LLC publicized a report that accused Sino-Forest of being a "near total fraud". In comparison, the Ontario Plaintiffs who are seeking to represent all purchasers of Sino-Forest securities, have reported holdings of 1,110,898 shares as of the end of day on June 1, 2011.[18]

19. Sino-Forest's year-end market capitalization for 2010 was approximately $5.7 billion and its market capitalization in early 2011 was approximately $6.2 billion. The market decline in Sino-Forest stock, over the two days following the release of the

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[15] Settlement Approval Order, Exhibit A to Notice of Motion dated January 11, 2013, Plaintiffs' Motion Record, Volume 1, Tab 1A, pp. 21-22.

[16] *Ibid.*, in the event this Court nevertheless grants representation to the Ontario Plaintiffs, the Objectors request that they be relieved of the binding effect of the Representation Order and Settlement Approval Order, relieved of any release, and allowed to opt out of the E&Y Settlement.

[17] The Supplemental Affidavit of Charles Wright calculates the holdings of the Objectors at 3,921,618. The 74,314 difference in the calculation is the holding of Invesco. Supplemental Affidavit of Charles M. Wright, sworn January 23, 2013, Plaintiffs' Reply Motion Record, Volume 1, Tab1, pp. 3-4.

[18] Class Counsel declined to respond to the Objectors' interrogatory requesting evidence that any investors other than the Ontario Plaintiffs support the settlement.

Muddy Waters report alleging the company was a "near total fraud," was from $18.21 to $5.23 per share.[19]

E&Y's Knowledge of the Sino-Forest Fraud

20. E&Y acted as the auditor of Sino-Forest for the majority of time that it was a public company,[20] including the years 2007-2012.[21] E&Y issued unqualified ("clean") audit reports on Sino-Forest from 2007 to 2010 and specifically authorized Sino-Forest to use the audit reports in public filings and offering documents. E&Y represented that it had performed its audits in accordance with relevant industry standards, namely, Generally Accepted Auditing Standards ("GAAS").[22]

21. From late 2007, Pöyry progressively raised concerns with Sino-Forest in relation to the quality and sufficiency of the information and data from Sino-Forest concerning the physical composition of the forest holdings to be valued.[23]

22. On April 9, 2010, shortly after E&Y issued an unqualified audit report on the 2008 and 2009 consolidated financial statements of the company, a high level meeting took place between Pöyry, E&Y and Sino-Forest.[24] The purpose of the meeting was to discuss Sino-Forest's unwillingness to provide sufficient information to confirm its timber holdings, to provide an overview of Sino-Forest's valuation requirements, and to develop an action plan that would allow Pöyry to verify Sino-Forest timber holdings with

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[19] Muddy Waters Report, supra note 1, Plaintiffs' Motion Record, Volume 1, Tab 2G, pp. 239-279; Statement of Claim issued in *Northwest & Ethical Investments L.P. et al. v. Sino-Forest Corporation et. al.*, at para. 9, Exhibit "T" to Wright Aff, Plaintiffs' Motion Record, Volume 2, Tab 2T, p. 362.

[20] Muddy Waters Report, *Ibid.*, Plaintiffs' Motion Record, Volume 1, Tab 2G, p. 239-279.

[21] Affidavit of Mike P. Dean, sworn January 11, 2013 ("Dean Aff"), at paras. 8-9, Motion Record of Ernst & Young LLP, Tab 1, pp. 3-4 ; Statement of Allegations of Ontario Securities Commission, dated December 3, 2012 ("OSC Allegations-Dec. 3, 2012"), at para. 1, Exhibit "FF" to Wright Aff, Plaintiffs' Motion Record, Volume 3, Tab 2FF, p. 826.

[22] *Ibid.*, OSC Allegations-Dec. 3, 2012 at para. 1, Exhibit "FF" to Wright Aff, Plaintiffs' Motion Record, Volume 3, Tab 2FF, p. 826.

[23] Doria Written Cross-Examination, *supra* note 3 at para. 1.

[24] Minutes of Pöyry meeting, *supra* note 4.

confidence.[25] The Minutes of Meeting taken by Pöyry clearly show that E&Y knew that there was a gap between the market capitalization value and forest resource valuation estimate, which Pöyry could not effectively verify at any rate.

23. Notwithstanding the concerns of Pöyry, it appears that E&Y took no steps to exercise reasonable skepticism as required by GAAS before providing Sino-Forest with unqualified audits. In fact, evidence of Pöyry suggests that E&Y intended to avoid probing Sino-Forest for sufficient evidence to corroborate its alleged timber valuations.

OSC Investigation

24. In August 2011, shortly after the collapse in price of Sino-Forest shares, the Ontario Securities Commission ("OSC") commenced regulatory proceedings and an investigation against Sino-Forest and some of its officers and directors.

25. On May 22, 2012, the Ontario Securities Commission formally alleged that Sino-Forest, and its former senior executives, engaged in a "complex fraudulent scheme" to inflate the assets and revenue of Sino-Forest, and made materially misleading statements in Sino-Forest's public disclosure record related to its primary business.[26] Allegations were made against Mr. Chan, former Chairman and Chief Executive Officer of Sino-Forest, for committing fraud and making "materially misleading statements".[27] Horsley was alleged to have failed to comply with Ontario securities laws and to have authorized, permitted or acquiesced in the commission of fraud.[28]

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[25] *Ibid.*, See also email from Horsely to Chan dated March 26, 2010, Schedule A to the Doria Written Cross Examination, *Ibid.*

[26] Statement of Allegations of the Ontario Securities Commission, dated May 22, 2012 ("OSC Allegations-May 22")., at para 11, Exhibit "EE" to Wright Aff, Plaintiffs' Motion Record, Volume 3, Tab 2EE, p. 789.

[27] *Ibid.*, at paras. 12, 27-31, 142, 150-156, Plaintiffs' Motion Record, Volume 3, Tab 2EE, pp. 789, 792, 814, 816-817.

[28] *Ibid.*, at paras. 14, 40, 119, 141, Plaintiff's Motion Record, Volume 3, Tab 2EE, pp. 789, 793, 809, 814.

26. The OSC allegations remain outstanding.

Sino-Forest's CCAA Proceedings

27. The Ontario Plaintiffs participated in the *CCAA* proceedings as the "Ad Hoc Committee of Purchasers of the Applicant's Securities".

28. In its Reasons in support of the Sanction Order, this Court stated that the Committee, represented by Class Counsel, "has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others."[29] Class Counsel moved in the *CCAA* proceeding on April 10, 2012 for a Representation Order pursuant to Rule 10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*").[30] The proposed Representation Order contained an Opt-Out Letter by which putative class members could have opted out from having Class Counsel represent them in these proceedings.[31] However, the Ontario Plaintiffs did not obtain the requested Representation Order and the motion was adjourned *sine die*.[32] Certain Objectors have previously stated in affidavits that they do not view Class Counsel as having represented their interests in these proceedings.[33]

29. During the *CCAA* proceedings, the Ontario Plaintiffs moved to lift the *CCAA* stay against Pöyry and its affiliated companies in order to move for settlement approval and

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[29] Sanction Reasons-Dec. 12, *supra* note 5 at para. 26., Plaintiffs' Motion Record, Volume 1, Tab 2E2, p. 224.

[30] Draft Representation Order of the Ad Hoc Committee of Purchasers of the Applicant's Securities dated April 13, 2012 ("Draft Representation Order"), Exhibit "D" to Affidavit of Daniel Simard sworn January 18, 2013 ("Simard Aff"), Responding Motion Record of the Objectors, Tab 3D, pp. 155-160.

[31] *Ibid.*,

[32] Order of Honourable Mr. Justice Morawetz, dated August 31, 2012 & October 9, 2012, Exhibit "E" to Simard Aff, Responding Motion Record of the Objectors, Tab 3E, pp. 161-162.

[33] Adelson Aff, *supra* note 8, Responding Motion Record of the Objectors, Tab 2, p. 8-18.; Affidavit of Daniel Simard, sworn on January 10, 2013 ("Simard Aff"), Responding Motion Record of the Objectors, Tab 3, p. 131-140.

certification for settlement purposes with Pöyry before the Class Action Court.[34] The settlement called for cooperation by Pöyry with Class Counsel but did not provide for any payment by Pöyry, other than sharing part of the notice costs. Notice of the proposed settlement and of a settlement approval hearing was disseminated to the class.[35] On September 25, 2011, Justice Perell, the Class Action case management judge, certified the claims against Pöyry for settlement purposes and approved the settlement.[36] A further notice was disseminated, which included opt out rights.[37] The notice stated that class members opting out of the settlement would also be opting out of the entire class proceeding:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.[38]

30. The Objectors opted out of the Pöyry certification for settlement by the January 15, 2013 deadline.[39]

31. The first version of Sino-Forest's Plan was filed in August 2012. Revised versions of the Plan were filed on October 19, 2012 and November 28, 2012.[40] These

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[34] Order of the Honourable Mr. Justice Morawetz entered May 11, 2012, Exhibit "C" to the Simard Aff, Responding Motion Record of the Objectors, Tab 3C, pp. 151-154.

[35] Notice of Settlement, Exhibit "X" to Wright Aff, Plaintiff's Motion Record, Volume 3, Tab 2X, pp. 694-696.

[36] Reasons of the Honourable Mr. Justice Morawetz, dated September 25, 2012, Exhibit "F" to Simard Aff, Responding Motion Record of the Objectors, Tab 3F, pp. 164-175.

[37] Pöyry Notice, Schedule B to the Order of the Honourable Mr. Justice Perell, dated September 25, 2012, Exhibit "G" to Simard Aff, Responding Motion Record of the Objectors, Tab 3G, pp. 228-231.

[38] *Ibid.*, Responding Motion Record of the Objectors, Tab 3G, pp. 230.

[39] Opt out form of Invesco Canada Ltd., Exhibit "D" to Adelson Aff, January 18, 2013, Responding Motion Record of the Objectors, Tab 2D, pp. 111; Opt out form of Comité Syndical National de Retraite Bâtirente Inc., Exhibit "H" to Simard Aff, Responding Motion Record of the Objectors, Tab 3H, pp. 236-237; Opt out form of Northwest &Ethical Investments L.P., Matrix Asset Management Inc., Gestion FÉRIQUE, and Montrusco Bolton Investments Inc., Exhibits "E" to "H" to the Jemec Aff, Responding Motion Record of the Objectors, Tabs 4E-4H, pp. 255-261.

[40] Fifteenth Report of the Monitor, dated January 28, 2013 at para. 24.

versions contained standard language providing that all claims against Sino-Forest and certain claims against officers and directors would be barred (excepting claims described in section 5.1(2) of the *CCAA*, claims of fraud, claims of conspiracy and insured claims). Claims against Subsidiaries were released as necessary and essential to the restructuring, as described above. Any Equity Claims – which this Court had determined included defendants' claims for indemnification with respect to share purchaser claims in the Class Action[41] -- would be released as of the Plan Implementation Date or Equity Cancellation Date.

32. The Creditors' Meeting and vote on the Plan was scheduled to occur on November 29, 2012. When the Plan was amended on November 28, 2012 the Creditors' Meeting was adjourned to November 30, 2012. Up to this point, none of the versions of the Plan, including the version mailed to creditors along with their proxy forms, included or mentioned the E&Y Settlement; indeed, Article 7.5 of the Plan provided that claims against third party defendants were not being addressed:

> Notwithstanding anything to the contrary in this Plan, **any Class Action Claim against the Third Party Defendants that relates to the purchase, sale or ownership of Existing Shares or Equity Interests**: (a) is unaffected by this Plan; **(b) is not discharged, released, cancelled or barred pursuant to this Plan**; (c) shall be permitted to continue as against the Third Party Defendants; (d) shall not be limited or restricted by this Plan in any manner as to quantum or otherwise (including any collection or recovery for any such Class Action Claim that relates to any liability of the Third Party Defendants for any alleged liability of SFC); and (e) does not constitute an Equity Claim or an Affected Claim under this Plan.[42]
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> [Emphasis added]

[41] *Sino-Forest Corp. (Re)*, 2012 ONSC 4377, aff'd 2012 ONCA 816.
[42] Plan of Compromise and Reorganization, dated December 3, 2012 ("Plan-Dec. 3"), Exhibit "C" to Wright Aff, Plaintiffs' Motion Record, Volume 1, Tab 2C, pp. 99-188.

Thus, in these earlier versions of the Plan there were no provisions barring claims against, or providing releases in favour of, "Third Party Defendants" named in the Class Action - i.e., E&Y, BDO Limited or the Underwriters.

The Proposed E&Y Settlement

33. On November 29, 2012, counsel for E&Y and Class Counsel concluded the proposed E&Y Settlement. The Creditors' Meeting was again adjourned, to December 3, 2012. On December 3, 2012, a new Plan revision was released in the morning[43] and the fact of the settlement was publicly announced.[44]

34. The Minutes of Settlement were not disclosed to the Objectors until December 5, 2012. The Minutes of Settlement provided, among other terms:

> ¶10 It is the intention of the Parties that this settlement shall be approved and implemented in the Sino-Forest Corporation CCAA Proceedings. **The settlement shall be conditional upon full and final releases and claims bar orders in favour of EY and which satisfy and extinguish all claims against EY, and without opt-outs,** and as contemplated by the additional terms attached hereto as Schedule B hereto and incorporated as part of these Minutes of Settlement.[45]
>
> [Emphasis added]

35. The Plan now contained a new Article 11, reflecting the "framework" for the proposed E&Y Settlement and for third party releases for Named Third Party Defendants as identified at that time as the Underwriters or in the future. Section 7.5 was later amended to reflect Article 11's provisions.[46]

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[43] Plan-Dec. 3, *Ibid.*,, Plaintiffs' Motion Record, Tab 2C, pp. 99-188.
[44] Adelson Aff, *supra* note 8 at para. 9, Responding Motion Record of the Objectors, Tab 2, pp. 11.
[45] Minutes of Settlement at para. 10, Exhibit "A" to Wright Aff, Plaintiff's Motion Record, Volume 1, Tab 2A, p. 70. The attached Schedule "B" contains a cryptic reference (p.2) to a Final Order to be issued in the Ontario Class Action, to include an "opt-out threshold agreeable to E&Y." The Objectors have sought an explanation of that reference, but none has been furnished.
[46] Plan, Article 7.5, *supra* note 6 Plaintiffs' Motion Record, Volume 6, Tab 7, pp. 1474-1475.

36. On December 3, 2012, a large majority of creditors approved the Plan. The number of votes cast by proxy as opposed to in person has not been disclosed. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting. It is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan.

37. No equity claimants, such as the Objectors were entitled to vote on the Plan.[47]

38. Also on December 3, 2012, the OSC released a Statement of Allegations, asserting that E&Y had failed to perform its audit work on Sino-Forest's financial statements in accordance with GAAS, in violation of ss. 78(2), 78(3) and 122(1)(b) of the Ontario *Securities Act,* R.S.O. 1990, c. S-5, as amended.[48] The document did not set forth extensive evidence, but did include some samples, including:

> ¶58 Some of these limitations were acknowledged by Ernst & Young staff in the course of performing their audits of the Material Financial Statements but were never adequately addressed. For example, in an e-mail exchange between the members of Ernst & Young's audit team, one auditor posed the question "[h]ow **do we know that the trees that Poyry is inspecting (where we attend) are actually trees owned by the company? E.g. could they show us trees anywhere and we would not know the difference?**" Another auditor answered "**I believe they could show us trees anywhere and we would not know the difference...**"[49]

39. On December 6, 2012, the Plan was further amended, adding E&Y and BDO Limited to Schedule A, thereby defining them as Named Third Party Defendants.

40. On December 7, 2012, the Sanction Hearing to approve the Plan was held.

41. Three of the Objectors -- Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc., at the time referred to as

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[47] Fifteenth Report of the Monitor, dated January 28, 2013, at para. 27.
[48] OSC Allegations-Dec. 3, *supra* note 21 , Exhibit "FF" to Wright Aff, Plaintiffs' Motion Record, Volume 3, Tab 2FF , pp.825-840.
[49] *Ibid.*, at para. 58, Plaintiffs' Motion Record, Volume 3, Tab 2FF, pp. 838-839. [emphasis added].

the "Funds" -- opposed the sanctioning of the Plan insofar as it included Article 11, the framework for the release of E&Y and other third party defendants. The Plan was nevertheless sanctioned on December 10, 2012 with Article 11.[50] The opposition of the Funds was dismissed as premature and on the basis that nothing in the Sanction Order affected their rights.[51]

42. At the Plan Sanction Hearing, counsel for Sino-Forest made it clear that the Plan itself did not embody the E&Y Settlement[52], and that the parties' request that the Plan be sanctioned did not also cover approval of the settlement. Moreover, according to the Plan and the Minutes of Settlement, the settlement would not be consummated (i.e. money paid and releases effective) unless and until several conditions had been satisfied in the future.

43. In sanctioning the Plan, the Court reasoned that the implementation of the Plan was not conditional on the E&Y matter being successfully settled, and that any concerns with respect to the effect of the releases on the rights of the Funds could be addressed when settlements were presented for approval.[53]

44. Following the sanctioning of the Plan, three directors and officers were added as Named Third Party Defendants, making them eligible for broad no-opt-out releases under Article 11.2 of the Plan. On January 11, 2013, Chan and Poon were added.[54] On January

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[50] Plan Sanction Order, dated December 10, 2012 ("Plan Sanction Order"), Exhibit "D" to Wright Aff, Plaintiffs' Motion Record, Volume 2, Tab 2D, pp. 189-209.

[51] Plan Sanction Endorsement-Dec. 10, *supra* note 7 at para. 25, Plaintiffs' Motion Record, Volume 1, Tab E1, p. 216

[52] *Ibid.*, at paras. 19-20, Plaintiffs' Motion Record, Volume 1, Tab E1, p. 215.

[53] Plan Sanction Endorsement-Dec. 10, *supra* note 7, at para. 25, Plaintiffs' Motion Record, Volume 1, Tab E1, p. 216

[54] Correspondence between Mr. James Orr and Ms. Jennifer Stam, Exhibits " F" to "H" to Adelson Aff, Responding Motion Record of the Objectors, Tabs 2F-2H, pp.117-125; OSC Allegations-May 22, *supra* note 26, Plaintiffs' Motion Record, Volume 3, Tab 2EE, pp. 786-824.

22, 2013, Horsley was added.[55] The OSC has accused both Chan and Horsley of unlawful conduct in connection with the Sino-Forest fraud.

45. Since obtaining the Sanction Order, Sino-Forest has taken and is taking further steps to implement the Plan.[56] It is now estimated that Plan Implementation will occur on January 29, 2013, and in any event prior to the end of January 2013.[57] Clearly, implementation is intended to occur prior to this Court's determination of the present objections, and prior to consummation of the E&Y Settlement.

46. On December 13, 2012, the Court directed that its hearing on the E&Y Settlement take place on January 4, 2013, under both the *CCAA* and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), as assigned to the Court by the Regional Senior Justice.[58]

47. The Ontario Plaintiffs proposed a notice program for the settlement approval hearing that in effect provided only a one-day period between the deadline for notice dissemination and the deadline for submitting objections. The proposed Notice made no reference to the no-opt-out feature of the proposed E&Y Settlement. In response to the Funds' protests, E&Y and the Ontario Plaintiffs revised the contents of the notice to reflect the no-opt-out provision, and obtained a one-month adjournment of the hearing, to February 4, 2013.

48. On December 31, 2012, Class Counsel publicized in a memorandum to institutional investors that they believed that a "substantial premium" was negotiated with E&Y in exchange for extinguishing class members' statutory opt out rights.[59]

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[55] Appendix P to the Fifteenth Report of the Monitor, dated January 28, 2013.
[56] On January 21, 2013 Sino-Forest obtained a further order from the Court intended to facilitate the transfer of shares between a Sino-Forest subsidiary and Newco II. Order of the Honourable Mr. Justice Morawetz re Plan Implementation, entered January 21, 2013.
[57] Fifteenth Report of the Monitor, dated January 28, 2013 at para. 31.
[58] Fifteenth Report of the Monitor, dated January 28, 2013 at para. 39.

49. The Objectors submitted timely objections to the E&Y Settlement to the Monitor.[60] The objections were that: it is improper to trade away opt out rights, or render opt out rights illusory through a full and final release for a substantial premium; it is improper to approve a release to E&Y; it is improper to approve the E&Y Settlement to bind putative class members who have opted out and without certification, notice and opt out rights; it is improper to provide the Ontario Plaintiffs with a representation order; and, it is improper to approve the E&Y Settlement in installments in the absence of any plan for distribution or allocation.[61]

50. The Monitor received 93 objections (including the Objectors'). Eighty-four objections were counted as valid and timely.[62] Outside of the objections filed by the Objectors, 25 objections cited the proposed settlement amount as inadequate and six objections state that consideration of the settlement is premature in light of the ongoing investigation by the OSC and the lack of publicly available information. Nine investors objected on the ground that they purchased outside of the class period, never considered themselves represented by Class Counsel or the Ontario Plaintiffs, and yet would be bound by the proposed release.[63]

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[59] Memorandum by Siskinds LLP dated December 31, 2012 ("Siskinds Memo"), Exhibit "E" to Adelson Aff, Responding Motion Record of the Objectors, Tab 2E, pp. 112-116.

[60] Notice of Objection of Invesco Canada Ltd., Exhibit "A" to Adelson Aff-Jan 18, 2012, Responding Motion Record of the Objectors, Tab 2A, pp. 19-21; Notice of Objection of Comité Syndical National de Retraite Bâtirente Inc., Exhibit "A" to Simard Aff, Responding Motion Record of the Objectors, Tab 3A, pp. 141-143; Notice of Objections of Northwest & Ethical Investments L.P., Matrix Asset Management Inc., Gestion FÉRIQUE, and Montrusco Bolton Investments Inc., Exhibits "A" to "D" to Affidavit of Tanya T. Jemec ("Jemec Aff"), Responding Motion Record of the Objectors, Tab 4A-4D, pp. 242-253.

[61] Adelson Aff, *supra* note 8 at para. 5, Responding Motion Record of the Objectors, Tab 2C, pp. 8-10.

[62] Fourteenth Report of the Monitor, dated January 22, 2013, p. 2.

[63] Fourteenth Report of the Monitor, dated January 22, 2013; While 93 notices of objections were received, the Monitor counted a total of 91 objections.

Part III – ISSUES AND THE LAW

A. The Proposed Full Release of E&Y Is Not Integral or Necessary to the Success of Sino-Forest's Restructuring Plan, and Therefore the Standards for Granting Third Party Releases in *CCAA* Proceedings Are Not Satisfied

51. E&Y is obviously not the applicant in this *CCAA* proceeding; nor is it a subsidiary of the applicant; nor is it seeking a director or officer release of the type treated specifically in Article 4.9. E&Y is a "third party" and the present motion includes at its core a request that this Court approve a third party release of all claims by anyone against E&Y relating to Sino-Forest.

52. As this Court has recognized, the authority of a court to sanction a *CCAA* plan incorporating a third party release is governed by the Court of Appeal's decision in *Metcalfe*.[64] More recently, the Superior Court has reiterated that such third party *CCAA* releases are permissible when they are necessary and integral to the restructuring of the applicant company, in furtherance of the purpose of the *CCAA*.[65] The British Columbia Supreme Court has observed that the purpose of the *CCAA* is to facilitate compromises and arrangements between a company and its creditors, "not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute."[66]

53. Accordingly, as noted above, this Court was careful to point out the ways in which the proposed third party releases of Sino-Forest's Subsidiaries were essential to the

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[64] *Metcalfe*, *supra* note 9.
[65] *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017 at para. 61 (S.C.J.). The third party release was approved in this case only because class counsel had not objected to it on a timely basis.
[66] *Pacific Coastal Airline Ltd. v. Air Canada*, 2001 BCSC 1721 at para. 24 (S.C.).

restructuring, rendering that aspect of the proposed Plan "fair and reasonable".[67] That was the correct analytical framework for assessing a third party release.

54. When the objecting Funds raised this issue at the sanction hearing, the parties objected that it was premature to do so, and that the objection should await the settlement approval hearing; and the Court agreed.[68] Thus it is clear the issue has not yet been decided by this Court.

55. Whatever terms are used to describe the standard – whether the third party release is "necessary," "integral," or "essential" to the success of the restructuring plan, such that the plan "cannot succeed without" the release – the proposed E&Y release, and thus the settlement, does not measure up.[69]

56. The most obvious evidence is the fact that all parties to the restructuring were fully ready to proceed with the Plan without the E&Y Settlement. The Affidavit of W. Judson Martin, Sino-Forest's CEO and vice chairman, sworn November 29, 2012, does not say anything about the E&Y Settlement or about any possible exceptions to Section 7.5 of the Plan, as it then was, confirming that claims against third party defendants, including in the Class Action, were not affected.[70]

57. No one has asserted that the parties needed the E&Y Settlement or release to allow the Plan to go forward. In fact, there remains the possibility that the E&Y Settlement might not be approved by this Court, or other conditions precedent might fail – yet still the Plan would proceed (in fact, it will probably be implemented by the time of

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[67] Sanction Reasons-Dec. 12, *supra* note 5 at paras. 70-74. Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 231-232.

[68] Plan Sanction Endorsement-Dec. 10, *supra* note 7 at paras. 20 and 25, Plaintiffs Motion Record, Volume 1, Tab E1, pp. 215-216.

[69] See Schedule C for a number of definitions of the word "integral".

[70] Affidavit of W. Judson Martin, sworn Nov. 29, 2012, Exhibit "C" to the Affidavit of W. Judson Martin sworn January 11, 2013, Responding Motion Record of Sino-Forest Corporation, Tab 1C, pp. 93-143.

the February 4 hearing), confirming again that the Settlement and release are not integral to the success of the Plan.

58. The Court made this disconnect clear in its December 10 and December 12, 2012 Endorsements, when it held that E&Y's Settlement and release is not a condition of Plan Implementation:

> ¶48 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order ...[71]
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> ...
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> ¶20 Essentially, if certain conditions are met and further court approval and order are obtained, it is conceivable that E&Y will get a release. However, such a release is not being requested at this time. Further, it is not a condition of Plan Implementation that the E&Y matter be settled.[72]
>
> [Emphasis added]

59. E&Y's affiant, Mike Dean, attempts to fill this void by describing a number of benefits E&Y provided to the *CCAA* proceeding, including supporting the Plan, releasing its indemnification claims, waiving leave to appeal the Equity Claims Order, and agreeing not to receive any distributions under the Plan.[73] However, he does not describe any of those benefits as being essential to the restructuring, and in fact they are all being provided regardless of whether the E&Y Settlement is approved and regardless of whether the requested *CCAA* release of E&Y is obtained.

60. The fact is that none of the benefits described by Mr. Dean were sufficiently important to convince any party to condition the implementation of the Plan on the approval of the E&Y Settlement and issuance of a third party release to E&Y.

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[71] Sanction Reasons-Dec. 12 at para. 48, *supra* note 5 Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 220-233.

[72] Plan Sanction Endorsement-Dec. 10 at para. 20, *supra* note 7, Plaintiffs Motion Record, Volume 1, Tab 2E1, p. 215.

[73] Dean Aff, *supra* note 21 , Motion Record of Ernst & Young LLP, Tab 1, pp. 1-23.

61. Nor is the $117 million settlement payment described as essential, or even related, to the restructuring. In fact, the $117 million is to be paid into a Settlement Trust for the purpose of paying Securities Claimants who have not yet been identified, but who certainly include primarily share purchaser class members in the Class Action, whose equity claims against Sino-Forest are being barred in the Plan.

62. Lastly, it is questionable that varying the E&Y Settlement and release to accommodate opt outs would spell the end of the settlement. Notwithstanding the intention of the parties to effect a no-opt-out settlement, E&Y retained discretion to accept opt outs up to a certain threshold number.[74] E&Y has since confirmed that this provision, while it may be discretionary, is not just theoretical:

> The conditions precedent to the Ernst & Young Settlement and the Ernst & Young Release as defined in the Plan are set out in the Sanction Order. The opt-out threshold referred to at Schedule B of the Minutes of Settlement, if it ever became operative, is at the discretion of Ernst & Young and would be set by it at such time.[75]

63. In summary, the E&Y settlement and release do not come close to resembling the extraordinary situations when these types of third party releases have been approved over objections.

64. Third party releases have been approved to avoid chaos in the Canadian airline industry or the collapse of the Canadian ABCP market.[76] In particular, the Court of Appeal in *Metcalfe* carefully noted that the releases at issue were vital to the restructuring of the participants in the ABCP market and indeed the market itself; [77] that the parties

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[74] Schedule B to Minutes of Settlement, Exhibit "A" to Wright Aff, Plaintiffs' Motion Record, Volume 1, Tab 2A , pp. 75-76.
[75] Answers of Written Examination of Mike Dean,
[76] *Metcalfe, supra* note 9 ; see also *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, leave to appeal ref'd, 2000 ABCA 238.
[77] *Metcalfe, Ibid.*, at para. 118 .

required to "give" releases were also creditors of the applicant market participants and thus were benefited by the plan; that the parties "receiving" releases were contributing in a tangible and realistic way to the plan; and that the creditors giving the releases were in the class of creditors that voted to approve the plan.[78] None of those characteristics could fairly be said to apply to the proposed release of E&Y in the present situation, directly or even by analogy.

65. Accordingly, the proposed third party Release of E&Y is not justified and the settlement is not fair and reasonable if it is implemented as proposed.

B. The E&Y Settlement Should Not Be Approved Because It Would Negate the Objectors' Opt Out Rights

66. As described above in the Overview, if a Class Action settlement with E&Y is being proposed, it should be approved solely under the *Class Proceedings Act,* as the Pöyry settlement was, and not through misuse of a third party release procedure under the *CCAA.* However, since the Minutes of Settlement make it clear that E&Y retains discretion not to accept or recognize normal opt outs even if the *Class Proceedings Act* procedures are invoked, the E&Y Settlement should not be approved in this respect either.

67. The E&Y Settlement, as conceived by its proponents, would negate opt out rights of class members. The Minutes of Settlement state that the settlement is to be "approved and implemented in the Sino-Forest Corporation *CCAA* proceedings" "and without opt outs" (paragraph 10); as noted, however, the attached Schedule "B" (described in paragraph 10 as "additional terms ... incorporated as part of these Minutes of Settlement") refers to approvals in all forums and to an "opt-out threshold agreeable to

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[78] *Ibid.*, at para. 113

E&Y" in the Ontario Class Action.[79] In any event, the proposed Release, as described in Article 11.1(b) of the sanctioned Plan, provides that "[n]otwithstanding anything to the contrary herein, upon receipt by the Settlement Trust of the settlement amount in accordance with the Ernst & Young Settlement: (i) **all Ernst & Young Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied an extinguished as against Ernst & Young ...**"[80] There is no exception in the release and discharge for objectors or opt outs.

68. The parties' intention to eliminate or negate any opt out right is exemplified in the case of the Objectors -- who have opted out from the Pöyry settlement, clearly would opt out from the E&Y Settlement (if a separate opt out were necessary or available), and yet clearly are not intended to retain any ability to assert their claims against E&Y in the wake of the proposed approval of the E&Y Settlement.[81]

69. The right to opt out is explicitly set forth in section 9 of the *CPA*: "Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order."[82]

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[79] Recent responses to interrogatories by E&Y state that "the conditions precedent to the Ernst & Young Settlement and the Ernst & Young Release as defined in the Plan are set out in the Sanction Order. The opt-out threshold referred to at Schedule B of the Minutes Settlement, if it ever became operative, is at the discretion of Ernst & Young and would be set by it at such time." See Answers to Written Examination of Mike Dean.

[80] Plan, *supra* note 6 Article 11.1(b). Alternatively, if that direct method fails, the Plan also provides a framework for E&Y to obtain a full release as a Named Third Party Defendant through Article 11.2(c). Plan, Article 11.1(c). The conditions precedent under Article 11.2 only require the granting of the Sanction Order, the granting of the Named Third Party Defendant Settlement Order and the satisfaction or waiver of all conditions precedent in the settlement. Plan, *supra* note 6, Article 11.2(b).

[81] As noted in the Overview, the Objectors' opt out forms included a condition that it was intended to be effective only to the extent that any defendant did not obtain a final release of any claim, such as the release sought by E&Y. The Affidavit of Eric Adelson of Invesco explained the reason: "It appeared to us that the Pöyry opt out procedure might involve a 'Catch 22' provision – if we opted out to pursue our remedies individually, we might be giving up our ability to share in any settlement proceeds, but the proposed full Release of E&Y might prevent us from seeking remedies on our own, thus making the opt out right illusory. Accordingly, in an effort to avoid such a trap," the opt out form included the stated condition. Adelson Aff, *supra* note 8 at para 18, Responding Motion Record of the Objectors, Tab 2C, p. 13.

[82] *Class Proceedings Act*, S.O.1996, C. 6, s. 9

70. The right to opt out of a class action is a fundamental element of procedural fairness in the Ontario class action regime.[83] It is not a mere technicality or an illusory right; rather, it is the foundation for the court's jurisdiction over class members and it is the mechanism by which the class members are bound by the court's decision. It has been described as absolute.[84] Contracting out of the opt-out right is objectionable in principle and impermissible in light of the *CPA*.[85] The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions.[86]

71. In *Western Canadian Shopping Centres v. Dutton*[87], the Supreme Court of Canada held that the right to opt out is the foundation for a court's jurisdiction over class members in a class action – class members are bound only after proper notice has been given to the class and the right to opt out has been granted:

> ...A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. ...[88]

72. The principle was further explained by the Supreme Court in *Canada Post Corp. v. Lepine*[89]:

> ... In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — **in particular the possibility of opting out**

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[83] *Fischer, supra* note 13 at para. 69.
[84] *Durling v. Sunrise Propane Energy Group Inc.* 2011 CarswellOnt 77 at para. 19 (S.C. J.); *Cheung v. Kings Land Developments Inc.*, 2001 CarswellOnt 3227 at para. 12 (S.C.J.).
[85] *Davies v. Clarington (Municipality)*, 2010 ONSC 418 at para. 32. (S.C.J.)
[86] *Mangan* v. *Inco Ltd.*, [1998] O.J. No. 551 at para. 36 (Ct .J.(Gen. Div.)).
[87] *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46.
[88] *Ibid.*, at para. 49; see also *Sauer, supra* note 13 at paras. 2, 19
[89] *Canada Post Corp.v. Lepine*, 2009 SCC 16 [emphasis added]

> of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case.[90]
>
> [Emphasis added]

73. The Ontario Court of Appeal has recognized that the right to opt out is fundamental and should not be negated by the courts:

> While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. **It is not an illusory right that should be negated by speculation, judicial or otherwise.**[91]
>
> [Emphasis added]

74. That Court has also described the opt out right as an important procedural protection afforded to unnamed class action plaintiffs:

> The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding.[92]

75. There are no exceptions to these principles for situations in which class counsel and a settling defendant have devoted long hours to negotiating a class settlement and feel strongly that the settlement is a signal achievement for the class.

C. Other Aspects of the Proposed E&Y Settlement Are Not "Fair and Reasonable"

76. The E&Y Settlement is not fair or reasonable for reasons in addition to those stated above. The "fair and reasonable" standard for approving proposed settlements applies in both *CCAA* proceedings[93] and under the *CPA*.[94]

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[90] *Ibid.*, at para 42.
[91] *Fischer, supra* note 16 at para. 69 [emphasis added].
[92] *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] 74 OR (3d) 321 at para. 28 (C.A.).
[93] *Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647 at para. 22 (S.C.J.).

1. The proposed release of E&Y does not include any carve-out for fraud and is therefore not fair and reasonable under the *CCAA*

77. The Court of Appeal in *Metcalfe* was careful to note that the releases at issue there included limited "carve-outs" so that certain fraud claims were not released.[95] The Release to be provided to E&Y is exceptionally broad in overriding the exclusions preventing release of fraud claims found elsewhere in the Plan.[96] The only exception to the proposed Release of E&Y is for claims by the Ontario Securities Commission; otherwise, the Release covers all claims, with no fraud exception whatsoever.[97]

78. The failure of the proposed Release to exclude at least the type of fraud claims identified in the *Metcalfe* carve-out means the Plan, if implemented in that way, is not fair and reasonable.

2. Class Counsel's acknowledgement that E&Y paid a "substantial premium" in order to be released from all claims without opt out rights demonstrates that the proposed settlement is not fair to opt outs

79. As noted above, the memorandum circulated by Siskinds LLP on December 31, 2012, stated that "[t]he absence of opt-out rights has long been a standard feature of Canadian insolvency proceedings. Moreover, Siskinds-Koskie believe that E&Y paid a substantial premium in order to be released from all claims through the Insolvency Proceeding."[98]

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[94] *Ibid.*, at para. 24 (S.C.J.).
[95] *Metcalfe, supra* note 9 at paras. 109-112.
[96] Plan, supra note 6, Article 7.2, Plaintiffs' Motion Record, Volume 6, Tab 7, pp. 1473-1474.
[97] Plan, *supra* note 6.
[98] Siskinds Memo, *supra* note 59. Responding Motion Record of the Objectors, Tab 2E, pp. 112-116; *See also* Affidavit of Charles Wright, sworn January 10, 2013 ("Wright Aff") at para 66, Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 50-51 (E&Y "would not have offered the large settlement amount" but for the *CCAA* proceedings, which is conditional upon full and final release of E&Y by order of the *CCAA* court); paragraph 70 (Plan Article 11.2 provides for the ability to complete further settlements,

80. This passage indicates, or at least strongly implies, that the Ontario Plaintiffs traded away the opt out rights of Class Members (or allowed them to be rendered illusory) in return for more consideration ("a substantial premium") to be paid by E&Y into the proposed Settlement Trust fund. Put more bluntly, E&Y paid more to rid themselves of having to deal with opt outs, and Class Counsel countenanced that bargain.

81. In view of the fundamental nature of opt out rights described in the previous section, it is clear that settlement payments to negate opt out rights are improper, and cannot be considered fair and reasonable under any circumstances.[99]

82. The fact that the Pöyry settlement was effectuated on a normal class action basis, with effective opt out rights, during the pendency of the *CCAA* proceedings, provides a clear counterpoint example of how the E&Y settlement should have been handled.

3. The partial information available from Class Counsel at a minimum calls the fairness and reasonableness öö of the E&Y Settlement into question

83. Other information that has become available, or whose availability has been withheld, calls the proposed settlement into further question.

84. In recommending the E&Y Settlement, Class Counsel had access to E&Y's responsive insurance policies and took coverage into account in assessing what could be reasonably recoverable from E&Y.[100] However, Class Counsel and E&Y decline to

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which could have the "benefit" of a full release for the Underwriters or BDO Limited "and would likely result in those parties paying a premium for settlement to resolve all claims against them").

[99] Siskinds' statement that "the absence of opt-out rights has long been a standard feature of Canadian insolvency proceedings" is itself misleading. Obviously, *CCAA* releases normally do not reflect opt out rights – but in the present situation, we are dealing with opt outs by putative class members, who have appeared to object to the deprivation of opt out rights, with respect to claims asserted against third parties to a *CCAA* proceeding – ingredients that have not often arisen together previously. As the Court of Appeal's *Metcalfe* decision makes clear, a third party release cannot plausibly be called a "standard feature" when such situations do appear.

[100] Wright Aff, *supra* note 98 at paras. 87(d) and 118, Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 56 and 65.

disclose the amount of available coverage.[101] One would expect, in a case involving audit failure as severe as alleged by the OSC, and involving losses as large as here, at least the insurance coverage would be exhausted. If that is not the case, the reasonableness of the amount of the proposed settlement would be highly dubious.

85. As described above, the OSC released its allegations against E&Y on the same day the proposed settlement was announced. Any fair reading of the allegations leads to the conclusion that they are a scathing indictment of E&Y's likely audit failures.

86. Class Counsel, however, concluded that the OSC's statement of allegations "does not include any allegations that amount to knowledge or recklessness with regards to a representation."[102] This conclusion casts doubt on Class Counsel's assessment of their own case, for two reasons: (a) Class Counsel apparently view the OSC allegations as a *negative* for their recovery prospects against E&Y, which seems implausible in light of the content of the allegations, as stated above; and, (b) Class Counsel has apparently concluded, after negotiations with E&Y, that "recklessness" will suffice as a type of "knowledge" for avoiding the secondary market (Part XXIII.1) liability cap applicable to experts (which is avoided if the defendant made a misrepresentation "knowing" it was false):

> (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.[103]

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[101] Answers on Written Examinations of Mike Dean & Answers on Written Examinations of Charles Wright.
[102] Wright Aff, *supra* note 98 at para 112, Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 63.
[103] *Securities Act*, R.S.O. 1990, c. S-138.7(2).

[Emphasis added]

87. Contrary to Class Counsel's assertions, the OSC's description of E&Y's alleged audit failures could readily lead to the conclusion that the failures were "reckless".

88. E&Y provided Class Counsel with "the opinion of an auditing expert, who opines that Ernst & Young complied" with GAAS and was "not negligent in the preparation of its 2010 audit report"[104] – but the opinion has not been furnished and the expert has not been identified.[105]

89. The Objectors and their legal counsel in these proceedings have not, as of this date at least, been privy to any of the documents generated while E&Y was doing its audit work, whether from E&Y or from other parties who were on the scene. However, based on logic and, to some extent, the account of the parties' negotiations, it appears that E&Y must have been persuaded by some powerful evidence that it could not rely on the liability cap applicable to the secondary market claim against it (it asserted the applicable cap was far below the amount it has agreed to pay[106]) – i.e., that it had a real risk that its misconduct could be proved to have been "knowing".

90. Finally, the lack of any plan of distribution of the proposed Settlement Trust fund makes it unrealistic to expect claimants to assess whether the outcome would be fair and reasonable as to them (including the Objectors, if they were eligible to receive distributions). This is a result of the parties' decision to handle this settlement "by installments" -- the framework for the Release was approved in the Plan, the E&Y Settlement itself is now being considered for approval, E&Y will contribute the

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[104] Wright Aff, *supra* note 98 at para 106, Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 61-62.
[105] Answers on Written Examinations of Mike Dean.
[106] Wright Aff, *supra* note 98 at para 110, Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 61-63.

consideration to the Settlement Fund if and when conditions are satisfied in the future, and a plan for allocating or distributing the settlement monies has not yet been devised. The Securities Claimants who are potential recipients include purchasers of notes and shares, purchasers on the primary and secondary market, purchasers across Canada and abroad, those who purchased within the class period as well as those who purchased outside of the class period. Such an installment-based approach has been criticized.[107]

D. The Ontario Plaintiffs' Request for a Representation Order Should Be Dismissed

91. The Ontario Plaintiffs are seeking a Representation Order to try to distract from the fact that there is substantial dissent from the E&Y Settlement.

92. As described earlier, they previously sought such an order but let the application lapse. Now, even though the negotiation of the proposed settlement is a *fait accompli,* the Ontario Plaintiffs want retroactive cover.[108] The motion should be dismissed, and if anyone is appointed, it should be the Objectors, at least for all persons who have objected to the settlement.

93. The general authority of a *CCAA* court to grant a Representation Order derives from Rule 10.01 of the *Rules of the Civil Procedure*, which allows a court to appoint one or more persons to represent any person or a class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or

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[107] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 90.

[108] E&Y and the Ontario Plaintiffs assert that the Mediation Order and the Data Room Order gave Class Counsel the authority to enter into settlement discussions: Dean Aff, *supra* note 21 at para. 51, Motion Record of Ernst & Young LLP, Tab 1, pp. 17-19. Those orders did not purport to go so far as to authorize Class Counsel to bind putative class members to any settlements; if they had, presumably the Ontario Plaintiffs would not have sought a Representation Order previously or now.

served.[109] The factors to be considered in deciding on a representation order in *CCAA* proceedings include: vulnerability and resources of the group; benefit to the debtor; social benefit to be derived from representation; facilitation of administration; avoidance of multiplicity of legal retainers; balance of convenience; whether it is fair and just to the parties; whether the representative counsel has already been appointed for those have similar interests; and the position of other stakeholders and the Monitor.[110] A representation order is not appropriate when the class of persons is overly broad, already represented by counsel, there is no issue with respect to ascertaining the members of the class, or conflicts of interests are present between class members.[111] The interest of judicial economy does not override persons' rights to have their representative or counsel of choice and to pursue their own litigation or settlement strategy against a common defendant.[112]

94. The Ontario Plaintiffs do not qualify under these standards. The six Objectors represent about three and half times as many shares as the Ontario Plaintiffs. There is a clear divergence among class members, with the Objectors and other objectors and opt outs taking positions at odds with the Ontario Plaintiffs and Class Counsel. The Objectors are represented by counsel (Kim Orr Barristers P.C.) who have appeared in

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[109] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 10.01; *Nortel Networks Corp., Re.*, 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196 at para. 10 (S.C.J.) ("*Nortel*")
[110] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 ("*Canwest-2009*"); *Nortel, Ibid.*; *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152.
[111] *Bruce (Township) v. Thornburn*, 1986 CarswellOnt 2124, 57 O.R. (2d) 77 at para. 24 (Div. Ct.); *Ravelston Corp. (Re)*, 2007 CarswellOnt 7288, O.J. No. 4350 at para. 9 (S.C.J.); *McGee v. London Life Insurance Co.*, 2008 CarswellOnt 2534, 63 C.P.C. (6th) 107 at para. 38 (S.C.J.)
[112] *Attard v. Maple Leaf Foods Inc.*, 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 at para. 4 (Ont. Gen. Div.)

these proceedings. The Objectors have strongly indicated that they do not view Class Counsel as representing them or their interests.[113]

95. Plaintiffs' counsel in a putative class action do not have a solicitor-client relationship with any putative class member with whom they do not have a retainer agreement until a court has certified the case as a class action. However, the law does recognize that class counsel owes certain duties to class members pre-certification. In *Canada Post Corp. v. Lepine,* the Supreme Court held that the representative plaintiff's duty extends to informing potential class members of the right to opt out.[114] It follows that there is a duty to protect the right to opt out as well. The Ontario Plaintiffs and Class Counsel evidently recognized exactly that when they moved for a Representation Order in April 2012 and included an "opt out letter" for claimants to execute if they did not desire the proposed representation.

96. Recent events – specifically, Class Counsel's agreement to relinquish class members' opt out rights in return for a premium payment by E&Y – create a further reason for denying the Ontario Plaintiffs' requested Representation Order: Class Counsel have a conflict of interest. As stated by Eric Adelson of Objector Invesco:

> We became definitively dissatisfied on December 3, 2012, when it was revealed that Class Counsel, without authority, had purported to bargain away absent Class members' opt out rights. This was a clear conflict as Class Counsel will be seeking as fees a percentage of the amount received for bargaining away those rights. ...[115]

And as stated by Daniel Simard of Objector Bâtirente:

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[113] Adelson Aff, *supra* note 8 at paras 25-29, Responding Motion Record of the Objectors, Tab 2, pp. 16-17; Affidavit of Eric. J. Adelson, sworn December 6, 2012 at para. 6, Exhibit "C" to Adelson Aff, Responding Motion Record of the Objectors, Tab 2C, pp. 104

[114] *Canada Post Corp.v. Lepine,* 2009 SCC 16 at para. 42.

[115] Answers to Written Examination of Eric J. Adelson at para. 29.

> ¶12 In my view, the Ontario Plaintiffs and Class Counsel have violated their duties to class members by acceding to a settlement with E&Y in which class members' opt out rights will be negated and/or rendered illusory.[116]

97. Under these circumstances, it would be highly improper to impose representation by Class Counsel on class members who object, wish to opt out, and believe Class Counsel do not represent their interests and are indeed in conflict with them.

98. For the same reasons and at the very least, if the Court does appoint the Ontario Plaintiffs as representatives of Security Claimants, the Objectors and all other objectors and opt outs should be relieved of the binding effect of the Representation Order and Settlement Approval Order. This is specifically contemplated by Rule 10.03, which states:

> 10.03 Where a person or an estate is bound by reason of a representation order . . . a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,
>
> (a) the order or approval was obtained by fraud or non-disclosure of material facts;
>
> (b) the interests of the person or estate were different from those represented at the hearing; or
>
> (c) for some other sufficient reason the order or approval should be set aside.[117]

99. The three criteria are met here. (a) As described above, many material facts concerning the E&Y Settlement have been withheld from disclosure to the Objectors, including insurance coverage, the content of E&Y's working papers and other documents

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[116] Simard Aff at para. 15, Responding Motion Record of the Objectors, Tab 3, pp. 135.
[117] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 10.03.

concerning its knowledge.[118] (b) There is a stark divergence of interest, and indeed a conflict of interest, between the interests of the Ontario Plaintiffs and the Objectors, as described above. (c) In general, it would be unacceptable to allow the Ontario Plaintiffs to obtain a representation order for the purpose of negating the Objectors' opt out rights and cramming down a controversial settlement.

100. The purpose of a Rule 10 Representation Order in the *CCAA* is to protect vulnerable and unsophisticated stakeholders who may not be able to protect their rights.[119] It should not be used to prejudice the rights of unwilling parties who are already represented. Relieving the Objectors from the binding effect of the Proposed Settlement Approval Order, offered by the Ontario Plaintiffs who do not represent the Objectors' interests, would be consistent with the overall purpose of the *CPA* and Rule 10.

101. For similar reasons, the Objectors move for appointment as representatives on behalf of all Security Claimants who filed an objection to the E&Y Settlement, pursuant to Rules 10.01(1)(c) and 10.01(1)(f). Many of those objectors evidently lack separate legal representation, and by virtue of their objections it is apparent that their interests align with those of the Objectors. It would be appropriate to appoint the Objectors and their counsel Kim Orr as representatives for all such objectors.

E. The Objectors Have Standing to Assert Their Objections

102. E&Y apparently intends to argue, as set out at paragraph 51 of the Dean Affidavit, that the Objectors have waived their positions here or lack standing to assert them, basically because they did not detect at an earlier point in the *CCAA* proceedings that a

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[118] Adelson Aff, *supra* note 8 at paragraph 23, Responding Motion Record of the Objectors, Tab 2, p. 15.

[119] *Canwest-2009*, *supra* note 110 at para. 14; *Nortel*, *supra* note 109 at para. 13.

move was afoot to consummate a settlement between the Ontario Plaintiffs and E&Y on a third party release basis and without opt outs. E&Y's argument is not credible.

103. We doubt there is any authority or case precedent for the proposition that absent class members cannot raise objections at a settlement fairness hearing – unless they have opted out of the class action, which of course is the major problem here: the Objectors are being denied their effective opt out rights. In general, of course, class members who are affected by a class action settlement have standing to object at a fairness hearing.[120]

104. Mr. Dean contends (as "advised by counsel to E&Y") that the Objectors' failure to "participate" in the Third Party Stay Order, the Claims Procedure Order, the Mediation Order, and the Data Room Order – all entered in the period May through July 2012 – "may affect the ability of the Funds [Objectors] to maintain standing to oppose the Ernst & Young settlement at this time."[121] This is tantamount to asserting that the Objectors, as absent class members, should have been second-chairing the Ontario Plaintiffs and Class Counsel as they participated in the *CCAA* proceedings, and if they did not, they would be disabled from objecting to any settlement or arrangement put forward by the Ontario Plaintiffs later in the proceeding. Even the Ontario Plaintiffs do not make such a suggestion – presumably because they are well aware, as experienced class counsel, that the continued participation of thousands of absent class members and their counsel in litigation activities after carriage is awarded would be unwise and unworkable. As discussed above, class counsel are supposed to represent the interests of the class, even pre-certification, and class members are entitled to rely on class counsel's fulfillment of that duty.

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[120] *Kidd v. Canada Life Insurance*, 2011 ONSC 6324 at para. 66 (S.C.J.)

[121] Dean Aff, *supra* note 21 at para. 51, Motion Record of Ernst & Young LLP, Tab 1, pp. 17-19.

105. In any event, as a general matter, failure to challenge previous court orders in commercial matters does not create an estoppel.[122] Similarly, waiver (in this case of standing) can only be found where the party against whom waiver is asserted had (1) a full knowledge of rights and (2) an unequivocal and conscious intention to abandon them.[123] E&Y would not be able to come close to satisfying that standard. Certainly, none of the four cited orders explicitly said anything about standing. The Ontario Plaintiffs lacked authority to bind anyone other then themselves to the E&Y Settlement, as acknowledged by the parties themselves (including E&Y) at paragraph 14 of the Minutes of Settlement:

> ¶14. The Parties shall use all reasonable efforts to obtain all court approvals and/or orders necessary for the implementation of the Minutes of Settlement, including an order in the CCAA proceedings granting the plaintiffs appropriate representative status to affect the terms herein;[124]
>
> [Emphasis added]

106. Moreover, as a matter of common sense, there was nothing in the events occurring in the CCAA proceeding in 2012 until December 3, 2012 -- when the terms of the E&Y Settlement were publicly described as including a "full" third party release designed to exclude opt out rights – that would have alerted class members that their opt out rights might be infringed in this way.

107. Entry by the Ontario Plaintiffs into tolling agreements with defendants; the Ontario Plaintiffs' submission of a class *CCAA* proof of claim against the applicant; the

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[122] *Livent Inc.*, 2010 ONSC 2267 at paras. 108 and 109. (S.C.J.)
[123] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at paras. 19, 20 and 24
[124] Minutes of Settlement, *supra* note at para. 45, Plaintiff's Motion Record, Volume 1, Tab 2A, p. 71.

Ad Hoc Purchasers' participation in the mediation[125]; and their access to Data Room documents – none of those orders and events gave any indication that a third party release of E&Y without opt out rights was contemplated.

108. If third party releases of the type sought by E&Y here were granted in *CCAA* proceedings as a matter of routine, perhaps class members could be expected to be on guard against usurpation of opt out rights. Since the *Metcalfe* case makes it clear that such releases are to be granted only in the most exceptional cases, and certainly not as a matter of routine, the parties' suggestion that the Objectors should have foreseen the objected-to aspects of the E&Y Settlement long before, and actively moved to block them, is simply not credible.

[125] The July 25, 2012 Mediation Order included the Ad Hoc Purchaser group formed by Siskinds and Koskie Minsky as a party, and referred to that group as "Plaintiffs". The mediation occurred soon after the Pöyry settlement was announced, and particularly referred to negotiations with other third party defendants in that context. Since the Pöyry settlement was proceeding according to normal class action procedures, including opt out rights, and without third party *CCAA* releases, nothing in the mediation process could reasonably have alerted onlookers that opt out rights could be defeated. Mr. Dean cannot plausibly maintain that the order's grant of "full authority to settle" to the parties, including the Ad Hoc Purchasers, gave notice that class members' opt out rights could be defeated, and required other class members to insert themselves into the mediation process if they wanted to preserve opt out rights. Order of the Honourable Mr. Justice Morawetz, dated July 25, 2012, Plaintiffs' Motion Record, Vol. 3, Tab 2AA, pp. 763-770.

Part IV – ORDER SOUGHT

109. The Objectors request that the Court dismiss the motion to approve the E&Y Settlement and the request for a Representation Order.

110. In the event that this Court grants a Representation Order to the Ontario Plaintiffs, the Objectors request an Order that the Objectors are not bound by any such Representation Order.

111. The Objectors request an Order declaring that the Objectors are representatives of all Securities Claimants who objected to the E&Y Settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 30TH DAY OF JANUARY, 2013

per James C. Orr

Won J. Kim P.C.

Megan B. McPhee

Michael C. Spencer

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Schedule A- Authorities

Tab	Authority
1.	*Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017 (S.C.J.)
2.	*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 45 C.B.R. (5th) 163, leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337.
3.	*Attard* v. *Maple Leaf Foods Inc.*, 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 (Gen. Div.)
4.	*Bruce (Township) v. Thornburn*, 1986 CarswellOnt 2124, 57 O.R. (2d) 77 (Div. Ct.).
5.	*Canada Post Corp. v. Lepine*, 2009 SCC 16
6.	*Canadian Airlines Corp. (Re)*, 2000 ABQB 442, leave to appeal ref'd, 2000 ABCA 238
7.	*Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (S.C.J.)
8.	*Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (S.C.J.)
9.	*Cheung v. Kings Land Developments Inc.*, 2001 CarswellOnt 3227 (S.C.J.)
10.	*Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] 74 OR (3d) 321 (C.A.)
11.	*Davies v. Clarington (Municipality)*, 2010 ONSC 418 (S.C.J.)
12.	*Durling v. Sunrise Propane Energy Group Inc.* 2011 CarswellOnt 77 (S.C.J.)
13.	*Fischer v. IG Investment Management Ltd*, 2012 ONCA 47
14.	*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629
15.	*Kidd v. Canada Life Insurance*, 2011 ONSC 6324 (S.C.J.)
16.	*Livent Inc. (Special Receiver and Manage of) v. Deloitte & Touche*, 2010 ONSC 2267 (S.C.J.)
17.	*Mangan* v. *Inco Ltd.*, [1998] O.J. No. 551 (Ct. J.(Gen. Div.))
18.	*McGee v. London Life Insurance Co.*, 2008 CarswellOnt 2534, 63 C.P.C. (6th) 107 (S.C. J.)

Tab	Authority
19.	*Nortel Networks Corp., Re.*, 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196 (S.C.J.)
20.	*Pacific Coastal Airline Ltd. v. Air Canada*, 2001 BCSC 1721 (S.C.)
21.	*Ravelston Corp. (Re)*, 2007 CarswellOnt 7288, O.J. No. 4350 (S.C.J.)
22.	*Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647 (S.C.J.)
23.	*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490
24.	*Sauer v. Canada (Attorney General)*, 2010 ONSC 4399 (S.C.J.)
25.	*Sino-Forest Corporation (Re)*, 2012 ONSC 4377, aff'd 2012 ONCA 816
26.	*Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46

Schedule B-Legislation

Companies Creditors' Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2)

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors

Securities Act, R.S.O. 1990, c. S-5, s. 78(2), 78(3), 122(1), 138.7(2)

78. (1) Every reporting issuer that is not a mutual fund and every mutual fund in Ontario shall file annually within 140 days from the end of its last financial year comparative financial statements relating separately to,

(a) the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer or mutual fund has completed a financial year, the last financial year, as the case may be; and

(b) the period covered by the financial year next preceding the last financial year, if any,

made up and certified as required by the regulations and in accordance with generally accepted accounting principles.

(2) Every financial statement referred to in subsection (1) shall be accompanied by a report of the auditor of the reporting issuer or mutual fund prepared in accordance with the regulations .

(3) The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make the report required by subsection (2).

122(1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is

made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(c) contravenes Ontario securities law,

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 16.

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. 2002, c. 22, s. 185.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 10

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or

administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;

(b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03.

Class Proceedings Act, S.O.1996, C. 6, s. 9.

(9) Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

Schedule "C" – Definitions of the word "Integral"

1. In the 6th edition of *Black's Law Dictionary,* the word integral is defined as

> "Term in ordinary usage means part or constituent component necessary or essential to complete the whole. "

2. In Words & Phrases Judicially Defined in Canadian Courts and Tribunals, the definition of integral is drawn from the *Oxford Dictionary* (see below) and *Webster's New Collegiate Dictionary.* Webster's Collegiate Dictionary defines integral as including:

> "essential to completeness; constituent; formed as a unit with another part; lacking nothing essential. "

3. The second edition of the *Oxford English Dictionary* defines integral as

1. Of or pertaining to a whole. Said of a part or parts: Belonging to or making up an integral whole; constituent, component; *spec.* necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage.
2. Made up of component parts which together constitute a unity; in Logic, said of a whole consisting of or divisible into parts external to each other, and therefore actually (not merely mentally) separable.
3. Having no part or element separated, taken away, or lacking; unbroken, whole, entire, complete.

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Superior Court File No.: CV-10-414302CP

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE OBJECTORS

(Motion for Settlement Approval returnable February 4, 2013)

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