Court of Appeal File No.:
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO
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 of Appeal File No.:
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Plaintiffs

- and –

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

Defendants

RESPONDING FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

May 17, 2013

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TO: THE ATTACHED SERVICE LIST AT SCHEDULE "C "

PART I – OVERVIEW[1]

1. The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Committee")[2] opposes the motion by the Kim Orr Objectors[3], who held only 1.6% of Sino's outstanding shares at June 2, 2011, for leave to appeal the orders of Justice Morawetz denying the Kim Orr Objectors representative status, and approving a $117 Million settlement achieved in the CCAA proceedings and implemented through the CCAA plan. The motions judge found that the EY Settlement provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. This settlement is the largest auditor settlement in Canadian history, is twice as large as the second largest auditor settlement, and is more than ten times the fees earned by the auditor during the relevant period.

2. In the Class Actions, the Class Action Plaintiffs allege that Sino and others misstated Sino's financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors. They further allege that, as a result of the misrepresentations, Sino's securities traded at artificially inflated prices for many years and that, when the truth was revealed, Sino's security holders were injured by the

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[1] Any terms not defined here have the same meaning as those terms defined in the Committee's factum in response to the motion for leave to appeal the Sanction Order. "Sino" and "Sino-Forest" and "SFC" throughout means the Sino-Forest Corporation.

[2] The Committee consists of the Plaintiffs in the above-captioned class proceeding (the "Ontario Action") against Sino-Forest Corporation and various other defendants. These Plaintiffs include: 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 (the "Ontario Plaintiffs"). The Committee also includes the Plaintiffs in the parallel action commenced in Quebec Superior Court (the "Quebec Action", together with the Ontario Action, the "Class Actions"). The Committee also includes other similarly situated investors, including Davis Selected Advisors and Paulson and Co.

[3] Invesco Canada Ltd. ("Invesco"), Northwest & Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc., Gestion Férique, and Montrusco Bolton Investment Inc. (the "Kim Orr Objectors"). The Kim Orr Objectors held approximately 1.6% of Sino's shares as at June 2, 2011.

collapse in market value of their Sino holdings, giving rise to various statutory and common law causes of action.

3. At the time that the EY Settlement was before Justice Morawetz, the Kim Orr Objectors did not make any objection with respect to the overall amount of the settlement. Their only material objection at that time was regarding so-called 'opt-out rights', which in the context of CCAA proceedings they do not possess.

4. Having already sought leave to appeal the sanction of the CCAA plan, the Kim Orr Objectors now seek leave to appeal Justice Morawetz's order approving the EY Settlement and his dismissal of the representation order on the basis of their original objection and on a number of new grounds, which are also without merit. The proposed appeal is frivolous.

5. What's more, the proposed appeal does not raise any issues that are of significance to the practice.

a) The issue of the availability of third party releases in a CCAA plan was thoroughly considered and settled by this court in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*[4]

b) There is nothing novel about the compromise of claims that are or may become the subject of a class proceeding. The CCAA is paramount federal legislation that provides a procedure for dealing with *all* claims, which was necessary under the circumstances.

[4] 2008 ONCA 587 ("*ATB Financial*"), Brief of Authorities, Tab 1.

c) It is not surprising that a creditor who did not file a claim in a CCAA proceeding, took no interest in the negotiation of the restructuring plan, and did not even appear in the proceeding until after the creditors meeting lost its opportunity to influence the terms of the plan and to vote on the restructuring plan.

6. The main object of advancing claims against Sino-Forest and its auditors in the Class Actions and under the CCAA was to recover compensation for current and former security holders. The vast majority of security holders, including the highly sophisticated investment funds Davis Selected Advisors and Paulson and Co., who together controlled more than 25% of Sino's shares at June 2, 2011, support the EY Settlement. The Kim Orr Objectors, who held only 1.6% of Sino's outstanding shares, did not object to the overall amount of the EY Settlement when they appeared before Justice Morawetz.

7. What the proposed appeal will do is increase costs and delay any monetary recovery by class members, increasing the damages that they have already sustained.

PART II - THE FACTS

8. The Committee repeats and relies on the facts set out in its factum responding to the Kim Orr Objectors' motion for leave to appeal the Sanction Order in this proceeding. The following additional facts are also relevant to this appeal.

A. The Carriage Motion

9. Multiple class actions were commenced in Canada and the United States against Sino-Forest, its senior executives and directors, its auditors and underwriters. These included the

Ontario Action as well as two other class proceedings commenced in Ontario relating to Sino, one of which was commenced by Kim Orr LLP ("Kim Orr").[5]

10. In December 2011, a motion was heard to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Justice Perell granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario Action, and stayed the other two actions.[6]

11. Justice Perell ranked Kim Orr last of the 3 groups competing for carriage.

B. The CCAA Proceeding

12. It was apparent from the outset that the CCAA proceeding presented a material risk to the Canadian Plaintiffs, the U.S. Plaintiffs and the current and former security holders on whose behalf they are prosecuting the Canadian and U.S. Actions (collectively, the "Class Members"). In particular, the CCAA proceeding could have resulted in an order approving a plan of arrangement which provided releases to some or all of the defendants while imposing a meagre settlement on the Class Members.[7]

13. The Class Action Plaintiffs were alert to the risk presented by the CCAA proceeding and were active participants from the outset. In the course of the CCAA proceeding, Class

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[5] Endorsement of Justice Morawetz dated February 4, 2013 ("*Settlement Approval Decision*") at para. 10; Affidavit of Charles Wright, dated January 10, 2013 ("Wright Affidavit"), Plaintiffs' Motion Record in support of the Settlement Approval Motion before Justice Morawetz ("*Settlement Motion Record*"), vol. 1, Tab 2, para 33, p 39.
[6] *Settlement Approval Decision* at para. 11.
[7] Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, para 47, p 43.

Counsel[8] appeared numerous times to protect the interests of the Class Members. These attendances included motions (1) to lift the CCAA stay partially or fully; (2) regarding the claims procedure; (3) to permit a motion to approve a litigation funding arrangement for the Class Actions; (4) to implement a previously negotiated settlement with one of the defendants to the Ontario Action; (5) to secure access to non-public documents that were relevant to the claims advanced in Canadian Actions; and (6) to schedule the mediation.[9]

C. EY Settlement

14. The EY Settlement was reached on November 29, 2012, following a bilateral mediation held on November 28 and 29, 2012 between EY and the Class Action Plaintiffs. Clifford Lax, Q.C., presided over that mediation. The negotiations were "protracted and challenging" and nearly non-stop, at one point breaking at 4:00AM (for four hours).[10]

15. Prior to entering into the EY Settlement, Class Counsel had the benefit of its own investigation conducted with the assistance of the Dacheng law firm, one of China's largest law firms,[11] together with the various reports issued by the special committee of Sino's Board (the "SC"), which was established to investigate the Muddy Waters allegations at a cost of approximately $50 million. The SC's reports and the accompanying schedules revealed

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[8] Koskie Minsky LLP, Siskinds LLP and Paliare Roland Rosenberg Rothstein LLP.
[9] Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, paras 47-49, pp 43-44; *Re Sino-Forest Corporation*, 2012 ONSC 4377 [Commercial List], Brief of Authorities, Tab 2; *Re Sino-Forest Corporation*, 2012 ONCA 816, Brief of Authorities, Tab 3.
[10] Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, paras 55-60, 64, pp 48-49 and 50.
[11] Class Counsel's investigation into the Muddy Waters allegations continued since that time, and has been aided not only by Dacheng, but also by: (1) Hong Kong-based investigators specializing in financial fraud; (2) two separate Toronto-based firms that specialize in forensic accounting, generally accepted accounting principles and generally accepted auditing standards; (3) a lawyer qualified to practice in the Republic of Suriname, where Sino purported to own, through an affiliate, certain timber assets; and (4) a financial economist who specializes in the measurement of damages in securities class actions. Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, para 31, pp 38-39.

extensive, non-public information regarding Sino's business practices and the basis upon which Sino's financial results were compiled.[12] Class Counsel also had the benefit of confidential disclosure obtained in the course of the CCAA proceedings.

16. The key terms of the EY Settlement for present purposes are as follows:

a) EY will pay $117 million;

b) all claims or possible claims against EY relating to Sino will be released (the "Release"); and

c) the EY Settlement terms will be incorporated into the Plan, and is conditional upon the granting of the Sanction Order sanctioning the Plan, including the terms of the EY Settlement and Release.[13]

D. Approval of the EY Settlement

17. On December 21, 2012, Justice Morawetz ordered that notice of the EY Settlement be disseminated, and directed that objections to the EY Settlement be delivered by January 18, 2013.[14]

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[12] Transcripts of the Cross-Examination of Judson Martin on his affidavits sworn September 24, 2012 and October 3, 2012, Answers on Written Examination on Affidavits of Charles M. Wright, Compendium of the Ad Hoc Committee of Purchasers of the Applicant's Securities, Including the Class Action Plaintiffs submitted to the court for use in the Settlement Approval Motion on February 4, 2013 ("*Settlement Motion Compendium*"), at paras 94-96, pp 34-35.
[13] EY Settlement Minutes of Settlement, Wright Affidavit, *Settlement Motion Record*, vol. 2, Tab 2A.
[14] Order of Justice Morawetz dated December 21, 2012, Affidavit of Serge Kalloghlian sworn January 10, 2013, *Settlement Motion Record*, vol. 6, Tab 6A.

18. As indicated in the chart below, only 80 objections were received to the EY Settlement. The Kim Orr Objectors are the only institutional investors who filed objections and did not subsequently withdraw them.

	Entities	**Individuals**	**Total**
Objections Received by Deadline	11	75	86*
Objections Received by Deadline and Subsequently Withdrawn	5	28	33
Total timely and valid objections	**6**	**47**	**53**
Objections Received after Deadline	0	37	37*
Objections Received after Deadline and Subsequently Withdrawn	0	10	10
Total Objections Received after Deadline	**0**	**27**	**27**
TOTAL OBJECTIONS RECEIVED	11	112	123
TOTAL OBJECTIONS WITHDRAWN	5	38	43
TOTAL OBJECTIONS	**6**	**74**	**80**

*From the Monitor's most recent summary, sent January 28, 2013.

19. It is noteworthy that, contrary to correspondence from Kim Orr suggesting that it had "been contacted by a number of other private and public funds and expect to have further retainers from approximately a dozen funds shortly,"[15] the Kim Orr Objectors consist of only six funds. As of June 2, 2011, the day on which the initial Muddy Waters report on Sino was released, those funds collectively held only approximately 1.6% of the approximately 246 million shares which Sino had outstanding. By way of contrast, Davis Selected Advisors and

[15] Written Questions on Affidavit of Tanya Jemec, p 11, *Settlement Motion Compendium*, Tab 6.

Paulson and Co., two of many institutional investors who expressly supported the EY Settlement, controlled more than 25% of Sino's shares at this time.[16]

20. Justice Morawetz heard the motion to approve the EY Settlement on February 4, 2013, together with a motion by the Kim Orr Objectors to appoint them as representatives for all objectors to the EY Settlement. His Honour subsequently released reasons approving the EY Settlement on March 20, 2013 (the "Settlement Approval Decision"), and dismissing the Kim Orr Objectors' motion for representative status.

21. In the Settlement Approval Decision, Justice Morawetz held that:

a) the EY Settlement is part of a CCAA plan process, and that claims are regularly compromised and settled within CCAA proceedings;[17]

b) there are no "opt-outs" in the CCAA and it is not possible to ignore the CCAA proceedings;[18]

c) third party releases are not an uncommon feature of complex restructurings under the CCAA;[19]

d) in *ATB Financial* the Court of Appeal held that a CCAA plan may include a third party release where there is a "reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan";[20]

[16] *Settlement Approval Decision* at para. 33.
[17] *Settlement Approval Decision* at para. 36, 72.
[18] *Settlement Approval Decision* at para. 36 and 40, 77.
[19] *Settlement Approval Decision* at para. 46.
[20] *Settlement Approval Decision* at para. 47.

e) the Court of Appeal confirmed in *ATB Financial* that parties are entitled to settle allegations of fraud and to include releases of such claims as part of a settlement;[21]

f) the claims to be released against EY are rationally related to the purpose of the Plan and necessary for it;[22]

g) although the Plan can on its face succeed, without the approval of the EY Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds;[23]

h) EY is contributing in a tangible way to the Plan by its significant contribution of $117 million;[24]

i) the Plan benefits the claimants in the form of a tangible distribution;[25]

j) the EY Release is fair and reasonable and not overly broad or offensive to public policy;[26]

k) the EY Settlement provides a substantial benefit to relevant stakeholders, is consistent with the purpose of the CCAA; [27]

l) CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Kim Orr Objectors have the same legal interests as the Ontario Plaintiffs and other current and former security holders;[28] and

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[21] *Settlement Approval Decision* at para. 48.
[22] *Settlement Approval Decision* at para. 61.
[23] *Settlement Approval Decision* at para. 62.
[24] *Settlement Approval Decision* at para. 63.
[25] *Settlement Approval Decision* at para. 64.
[26] *Settlement Approval Decision* at para. 66.
[27] *Settlement Approval Decision* at para. 61.
[28] *Settlement Approval Decision* at para. 74.

m) even if the Kim Orr Objectors had filed a claim and voted, their minimal 1.6% stake in Sino's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.[29]

22. On March 26, 2013, the parties attended before Justice Morawetz to address the proper form of order to implement the EY Settlement (the "EY Settlement Approval Order"). No one, other than the Kim Orr Objectors, opposed the proposed order. The proposed order was substantially the same as the order before Justice Morawetz on February 4, 2013. After receiving additional written submissions from both the Committee and the Kim Orr Objectors in respect of a further issue raised by the Kim Orr Objectors, Justice Morawetz signed the EY Settlement Approval Order as proposed by the Committee.[30]

PART III - ISSUES AND THE LAW

23. Leave to appeal from a CCAA order is to be granted "sparingly" and "only where there are serious and arguable grounds that are of real and significant interest to the parties." This Court undertakes a four-part inquiry to determine leave:

a) whether the point on the proposed appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the proposed appeal is prima facie meritorious or frivolous; and

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[29] *Settlement Approval Decision* at para. 79.
[30] Letter from Kim Orr to the Court dated March 26, 2013; Letter from Paliare Roland to the Court dated March 27, 2013; Endorsement of Justice Morawetz dated March 28, 2013 (together, the "*March 28, 2013 Endorsement and Accompanying Counsel Submissions*").

d) whether the appeal will unduly hinder the progress of the action.[31]

24. These four factors militate against granting leave to appeal in this case.

A. No Significance to the Practice or this Proceeding

25. The issues raised in the proposed appeal are not significant to the practice or to this proceeding.

26. Third party releases are a frequent feature in Canadian restructurings [32] and have been the subject of detailed appellate direction.[33]

27. The fact that some of the claims being released were the subject of a proposed class action merely reflects the fact that there are a lot of creditors with similar claims—that also is not unusual. The claims themselves remain subject to compromise through the CCAA, as has been done in the past.[34]

28. Nor are the issues raised in the proposed appeal of significance to this proceeding:

a) The main object of the civil litigation is to recover compensation, and the Kim Orr Objectors themselves did not object to the quantum of the EY Settlement.

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[31] *Re Timminco Limited*, 2012 ONCA 552 at para. 2, Brief of Authorities, Tab 4.
[32] *Settlement Approval Decision* at para. 46. See e.g. *ATB Financial*, Brief of Authorities, Tab 1; *Re Nortel Networks Corp*., 2010 ONSC 1708, Brief of Authorities, Tab 5; *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 ("*Robertson*"), Brief of Authorities, Tab 6; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.) ("*Muscletech*"), Brief of Authorities, Tab 7; *Re Grace Canada Inc.* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.), Brief of Authorities, Tab 8, *Re Allen-Vanguard Corporation*, 2011 ONSC 5017, Brief of Authorities, Tab 9.
[33] *ATB Financial*, Brief of Authorities, Tab 1.
[34] See e.g. *Muscletech,* Brief of Authorities, Tab 7.

b) The proposed appeal has no support. In the context of the restructuring of a $9 billion company, one would expect that if the issues raised in the appeal were really of significance to the stakeholders in the case, the Kim Orr Objectors' position would have found some support among more than a handful of shareholders who held less than 2% of the shares of the company. It didn't.

29. The vast majority of stakeholders, including large institutional investors like Davis Selected Advisors and Paulson and Co., recognize that the EY Settlement represents a reasonable outcome for a proceeding against an auditor arising from a complex set of circumstances.

30. The Washington, DC-based law firm of Cohen Milstein Sellers & Toll PLLC, which has a class action against Sino and other defendants pending in the United States District Court for the Southern District of New York (the "U.S. Action"),[35] also supports the EY Settlement.[36]

B. The Proposed Appeal is Prima Facie Frivolous

31. The Kim Orr Objectors' laundry list of complaints regarding Justice Morawetz's decision, recited in their proposed grounds for appeal, are without merit.

32. At the outset, it is noteworthy that (a) all of the Kim Orr Objectors' complaints, other than their first complaint, relate to the exercise of discretion by Justice Morawetz. Justice Morawetz's exercise of his discretion is entitled to deference from this court and is only subject

[35] The U.S. Action was filed on behalf of a resident of the United States who purchased Sino shares over the counter in the United States, and on behalf of an entity having offices in the British Virgin Islands that purchased Sino notes in an offering conducted in October 2010 (together, the "U.S. Plaintiffs"). The U.S. Action is putatively brought on behalf of the following class: (i) all persons or entities who, from March 19, 2007 through August 26, 2011 (the "Class Period") purchased the common stock of Sino-Forest on the Over-the-Counter ("OTC") market and who were damaged thereby; and ii) all persons or entities who, during the Class Period, purchased debt securities issued by Sino-Forest other than in Canada and who were damaged thereby. See Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, para 37 and 39, p 40 and 41.

[36] Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, para 40, p 41.

to being set aside if His Honour applied the wrong principle or acted unreasonably, which His Honour did not do.[37]

Complaint No. 1: The CCAA does not provide jurisdiction to a supervising court to release claims asserted against a person other than the applicant, its subsidiaries, or its directors and officers, by equity-level claimants against the applicant who are not entitled to vote on the plan

33. The premise of this complaint is wrong for at least two reasons.

34. First, in the *ATB Financial* case this court determined that the CCAA *does* provide jurisdiction to a supervising court to release claims asserted against a non-debtor.[38]

35. Second, the Kim Orr Objectors had every opportunity to participate in the CCAA process and to seek a vote on the Plan. They did not vote because they failed to (or intentionally chose not to) appear in the CCAA proceedings. In fact, they did absolutely nothing in the CCAA proceedings to protect or advance their interests (or even make those interests known), until after the creditors meeting had been held. In particular:

a) unlike the Class Action Plaintiffs, they did not file a claim in the CCAA proceedings;

b) unlike the Class Action Plaintiffs, they took no steps to reserve their right to vote on the Plan in the event that it was amended, in accordance with its express terms, prior to or at the meeting of creditors, to include a provision that they found objectionable.

[37] *Re Crystallex International Corp.*, 2012 ONCA 404 at para. 70, Brief of Authorities, Tab 10.
[38] *ATB Financial*, Brief of Authorities, Tab 1.

36. Moreover, the Class Action Plaintiffs (who did file a claim, and who had reserved their right to vote on the Plan), were supportive of the Plan, and so every indication is that the Plan would have received the requisite support notwithstanding the Kim Orr Objectors' opposition, as observed by Justice Morawetz:

> By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their right to vote in the CCAA proceeding.
>
> Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in [Sino]'s outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.[39]

37. In essence, the Kim Orr Objectors are purporting to use their inaction and lack of diligence to oust the jurisdiction of the court. That would be an absurd result.

Complaint No. 2: As a matter of fact and law, the EY Settlement and the EY Release were not and are not reasonably connected and necessary to the restructuring of the applicant, and do not meet the requirements for third-party non-debtor releases set out in ATB Financial

38. The "test" for the inclusion of third party releases is set forth at paragraph 70 of this court's decision in the *ATB Financial* case:

> The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

[39] *Settlement Approval Decision* at para. 79.

39. This court then went on at paragraph 71 to articulate the factors that had been considered by the application judge in that case in support of his conclusion that the test had been met:

> In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:
>
> > a) The parties to be released are necessary and essential to the restructuring of the debtor;
> >
> > b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
> >
> > c) The Plan cannot succeed without the releases;
> >
> > d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
> >
> > e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

40. Subsequently, at paragraph 114 of its decision, this court emphasized that these findings "do not constitute a new and hitherto untried 'test' for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness."[40]

41. In this case, Justice Morawetz expressly applied the test articulated above. He stated:

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[40] *ATB Financial*, Brief of Authorities, Tab 1.

> 50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [ATB Financial, supra, para. 70]
>
> (a) Are the claims to be released rationally related to the purpose of the plan?
>
> (b) Are the claims to be released necessary for the plan of arrangement?
>
> (c) Are the parties who have claims released against them contributing in a tangible and realistic way? and
>
> (d) Will the plan benefit the debtor and the creditors generally?

42. Justice Morawetz also took into account the test articulated by Justice Pepall (as she then was) in *Robertson,* in respect of a settlement within the CCAA context.[41]

43. Justice Morawetz then went on to answer the questions articulated in the jurisprudence, offering careful, detailed reasons at paragraph 58 through 71 of his decision. Among other things, His Honour held that:

a) "the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it";[42]

b) the claims of the Kim Orr Objectors against EY are "intertwined and related to the claims against SFC and to the purpose of the Plan", and further that "there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and

[41] *Robertson*, Brief of Authorities, Tab 6; *Settlement Approval Decision* at para. 50. These factors include (a) whether the settlement is fair and reasonable, (b) whether it provides substantial benefits to other stakeholders; and (c) whether it is consistent with the purpose and spirit of the CCAA.
[42] *Settlement Approval Decision* at para. 61.

Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young";[43]

c) EY's contribution to the Plan, including the $117 million in settlement funds, was a tangible and significant contribution;[44]

d) the Plan benefits the claimants in the form of a tangible distribution;[45]

e) in order to effect any distribution, the Release has to be approved as part of the Settlement;[46] and,

f) the EY Settlement "provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA."[47]

44. The statements at paragraphs 68 through 70 are particularly illustrative of his reasoning:

> 68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.
>
> 69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

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[43] *Settlement Approval Decision* at para. 67.
[44] *Settlement Approval Decision* at para. 63.
[45] *Settlement Approval Decision* at para. 64.
[46] *Settlement Approval Decision* at para. 60.
[47] *Settlement Approval Decision* at para. 66.

> 70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp*., *Re*, supra, paras. 73 and 81; and *Muscletech, supra*, paras. 19-21.[48]

45. In essence, Justice Morawetz recognized that absent a settlement, EY, through its claims against SFC's subsidiaries (which were themselves third party claims and not equity claims), was in a position to tie-up and possibly veto a restructuring effort that otherwise had the support of 98% of affected stakeholders holding billions of dollars of claims.

Complaint No. 3: The Class Action Plaintiffs did not appropriately and adequately represent the members of the class whose claims against EY are proposed to be settled and released

46. This is a new complaint that was not raised before Justice Morawetz. There is no factual foundation for this complaint.

47. A comparison of just some of the steps taken by the Class Action Plaintiffs in these proceedings with those taken by the Kim Orr Objectors is instructive:

CLASS ACTION PLAINTIFFS	**KIM ORR OBJECTORS**
Attended at the initial hearing, and made submissions that were accepted by the court regarding the sale process order	**Not Present**
Attended at the comeback date and returned a motion setting forth issues with respect to these proceedings, and reserving rights	**Not Present**
Negotiated tolling agreements to prevent the erosion of Class' rights	**Not Present**

[48] *Settlement Approval Decision*.

Implemented a settlement with Pöyry to obtain material fact disclosure to assist the Class in the ongoing negotiations	**Not Present**
Obtained representative standing for the purpose of the Claims Procedure, and filed a proof of claim on behalf of the Class	**Not Present**
Attended at motion for mediation order and negotiation of the terms by which the court-ordered mediation was conducted, the exchange of briefs and negotiation of relevant confidentiality agreements	**Not Present**
Compelled production of non-public documents by Sino-Forest	**Not Present**
Conducted cross-examinations to test the evidence of Sino-Forest's representative in these proceedings;	**Not Present**
Engaged in multiple formal and informal, mediation and negotiation sessions with other stakeholders regarding the Class' claims;	**Not Present**
Negotiated the terms of the Plan with Sino-Forest and with other stakeholders, brought a motion challenging various features of the Plan, and expressly reserved the Class Action Plaintiffs' rights in connection with that motion.	**Not Present**

48. Ultimately, the achievement of a $117 million settlement supported by 98% of the class speaks volumes. It is an excellent result in the circumstances, given that Sino-Forest was insolvent.

Complaint No. 4: The CPA provides an adequate and appropriate alternative framework for the proposed settlement of the class action claims asserted against EY

49. The Kim Orr Objectors suggest that the CPA provides an adequate alternative framework for approaching the EY Settlement and Release. However, the fact is that Sino was insolvent and operating under the paramount federal insolvency legislation, and *not* under the CPA.

50. As noted by Justice Morawetz: "the reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime."[49] In that context:

> claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings.
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> […] It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647.[50]

51. The bottom line is that it is "not possible to ignore the CCAA proceedings,"[51] despite the Kim Orr Objectors' long-running attempt to do so. In this case, claims that *might have been* subject to the procedural framework set forth in the CPA *were* subject to the CCAA process.

Complaint No. 5: The terms of the EY Settlement, if implemented as a distribution to creditors under the Plan, violate section 6(8) of the CCAA and do not provide any assurance that settlement consideration would flow to the parties whose claims are proposed to be settled and released

52. There is absolutely no basis, in fact or in law, for the Kim Orr Objectors' concern that consideration will not flow to the parties whose claims have been released by the EY Settlement.

53. This *in terrorem* argument was first raised by the Kim Orr Objectors as part of the process to settle the terms of the order approving the EY Settlement, after Justice Morawetz had delivered his reasons. In a written endorsement, Justice Morawetz agreed with the Committee's

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[49] *Settlement Approval Decision* at para. 72.
[50] *Settlement Approval Decision* at para. 36-37.
[51] *Settlement Approval Decision* at para. 40-51.

submission that the Kim Orr Objectors' concern was inconsistent with the express provisions of the Plan and arose from a misinterpretation of the statute.[52]

54. Indeed, Justice Morawetz expressly holds at paragraph 67 of the Settlement Approval Decision that "The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young".[53] (emphasis added)

Complaint No.6: The terms of the EY Settlement were construed by the court not to provide opt out rights to the members of the class whose claims against EY are proposed to be settled and released

55. "Opt-outs" are not a feature of CCAA restructuring plans. As noted by this court in *ATB Financial*, "[e]ffective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors."[54]

56. Justice Morawetz concluded that if opt-outs were possible,

> no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.[55]

57. It cannot seriously be said that Justice Morawetz's conclusion was contrary to principle or unreasonable, particularly when the Kim Orr Objectors did not expressly object to the amount

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[52] *March 28, 2013 Endorsement and Accompanying Counsel Submissions*.
[53] *Settlement Approval Decision*.
[54] *ATB Financial* at para. 68, Brief of Authorities, Tab 1.
[55] *Settlement Approval Decision* at para. 77; *Re Sammi Atlas Inc.,* (1998) 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), Brief of Authorities, Tab 11.

of the $117 Million EY Settlement in their objections[56] or in oral argument at the Settlement Approval motion, and chose not to participate in the CCAA process.[57]

Complaint No. 7: The court did not address whether the amount of consideration in the proposed EY Settlement was fair, reasonable and adequate

58. The Kim Orr Objectors' assertion that Justice Morawetz failed to consider the adequacy of the consideration in the EY Settlement is unfair to the court below, and wrong.

59. The Notices of Objection filed by the Kim Orr Objectors did not criticize the amount of the settlement, but merely alleged that they could not evaluate the settlement amount without more information. In response, the Committee and EY offered the Kim Orr Objectors the opportunity to meet and discuss the rationale for the EY Settlement. The Kim Orr Objectors did not accept this offer.

60. Further, in the oral argument made on February 4, 2013, none of the parties, including the Kim Orr Objectors, challenged the settlement amount. Indeed, no evidence was led by any party questioning the adequacy of the $117 million settlement. Conversely, there was ample evidence to support the reasonableness of the EY Settlement amount.[58] This included a detailed factual and legal analysis of the challenges of claims against auditors under Canadian law. For example, there is a substantial risk that the Supreme Court of Canada's decision in *Hercules*

[56] Objections by the Kim Orr Group, Fourteenth Report of the Monitor, Tabs B16, B31, B40, B52, B57, B60.
[57] *Settlement Approval Decision* at para. 78.
[58] Wright Affidavit, *Settlement Motion Record*, vol. 1, Tab 2, para 77-112.

Managements Inc. v. Ernst & Young[59] would bar common law claims against EY and that recovery for claims under the *Securities Act*[60] would be marginal.

61. Justice Morawetz addresses his satisfaction with the quantum at paragraph 63 of the Settlement Approval Decision, noting that "Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million."[61] His Honour later refers to the amount as providing a "substantial benefit to relevant stakeholders."[62] (emphasis added)

62. After reviewing all of the evidence, Justice Morawetz concluded that the settlement was fair and reasonable in all respects.

Complaint No. 8: Justice Morawetz erred in entering the Representation Dismissal Order, particularly in that the Appellants would have appropriately and adequately represented the interests of the members of the class who objected to the proposed EY Settlement, without any conflict of interest, and the interests of justice would have been served thereby

63. No oral argument was made on this issue before Justice Morawetz, perhaps because there is no one for the Kim Orr Objectors to represent:

a) each of the individual objectors spoke for themselves by filing a Notice of Objection in the proceedings, as was their right to do. None of these other objectors have sought leave to appeal from the Settlement Approval Order.

b) Justice Morawetz has approved the Plan and the EY Settlement and Release. Accordingly, subject to appeal, any outstanding claims against Sino-Forest and various third parties have already been addressed. There's nobody to represent.

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[59] [1997] 2 S.C.R. 165.
[60] R.S.O. 1990, CHAPTER S.5.
[61] *Settlement Approval Decision* at para. 63.
[62] *Settlement Approval Decision* at para. 66.

64. This complaint is without merit.

Complaint No. 9: Justice Morawetz erred in principle or unreasonably exercised his discretion in approving the EY Settlement and Release, notwithstanding it may release claims of fraud

65. It is well-established that parties should be encouraged to settle civil disputes, where appropriate. As Justice Pepall (as she then was) describes in *Robertson*, "settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding."[63] Any negotiated resolution that results in compensation for class members, and withstands the scrutiny of the court on an approval motion, is to be encouraged.

66. In *ATB Financial*, this court explicitly held that "there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement".[64]

67. In arriving at his decision, Justice Morawetz stated:

> [48] Furthermore, in *ATB Financial*, supra, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time that it is given.
>
> …
>
> [64] Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, supra, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the plan did

[63] *Robertson* at para. 28, Brief of Authorities, Tab 6.
[64] *ATB Financial* at para. 108 and 111, Brief of Authorities, Tab 1.

> so with the knowledge of the nature and effect of the releases. That situation is also present in this case.[65]

68. It is clear from the foregoing passages, as well as from the balance of His Honour's analysis regarding the fairness and reasonableness of the EY Settlement that Justice Morawetz applied the correct test and properly exercised his discretion.

C. The Proposed Appeal Will Unduly Hinder the Progress of the Action

69. The proposed appeal is problematic in at least two ways:

a) First, it is an impediment to the satisfaction of the pre-conditions to the implementation of the EY Settlement. Until all of those pre-conditions have been satisfied, EY continues to hold the $117 Million settlement amount, and the class members lose the opportunity to earn a return on the amount withheld. By the time that this motion is heard, 2 years will have passed since the collapse of Sino-Forest. For class-members, the EY Settlement is the first opportunity to recover compensation in respect of their damages. The distribution of EY Settlement proceeds should not be delayed without clear reason.

b) Second, the uncertainty surrounding the appeal clouds the Class Action Plaintiff ability to proceed with the Class Actions against the remaining defendants. The Class Action against the remaining defendants needs to proceed.

PART IV - ORDER REQUESTED

70. For the reasons set out above, the Committee requests that this court dismiss the Kim Orr Objectors' motion for leave to appeal, with costs.

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[65] *Settlement Approval Decision* at para. 48 and 64.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 17, 2013

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Of counsel to the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

SCHEDULE "A" - AUTHORITIES

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

2. *Re Sino-Forest Corporation*, 2012 ONSC 4377 [Commercial List]

3. *Re Sino-Forest Corporation*, 2012 ONCA 816 [Commercial List]

4. *Re Timminco Limited*, 2012 ONCA 552

5. *Re Nortel Networks Corp*., 2010 ONSC 1708 [Commercial List]

6. *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [Commercial List]

7. *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5^{th}) 59 (Ont. S.C.J.) [Commercial List]

8. *Re Grace Canada Inc.* (2008), 50 C.B.R. (5^{th}) 25 (Ont. S.C.J.) [Commercial List]

9. *Re Allen-Vanguard Corporation*, 2011 ONSC 501 [Commercial List]

10. *Re Crystallex International Corp*, 2012 ONCA 404

11. *Re Sammi Atlas Inc.,* (1998) 3 C.B.R. (4^{th}) 171 (Ont. Gen. Div.) [Commercial List]

SCHEDULE “B” - LEGISLATION

None.

SCHEDULE "C" – SERVICE LIST

Court of Appeal File No.:
S.C.J. 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

Court of Appeal File No.:
S.C.J. Court File No.: CV-11-431153-00CP

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

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