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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(MOTION RETURNABLE OCTOBER 9 AND 10, 2012)

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TO: SERVICE LIST ATTACHED AS SCHEDULE “C”

NATURE OF THE MOTIONS

1. The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Class Action Plaintiffs") moves for three heads of relief.

2. First, the Class Action Plaintiffs seek to put the class actions against Sino-Forest Corporation ("Sino-Forest") pending in Ontario and Quebec (the "Class Actions") back on track to a resolution. More particularly, they seek:

(a) a direction or order that the stay of proceedings imposed by the initial order in these proceedings dated March 30, 2012 (the "Initial Order") not apply for the purposes of:

(i) a motion certifying the action styled *Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation et al.* (Toronto) Court File No. CV-11-431153-00CP (the "Ontario Class Action") as a class proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*") (the "Ontario Certification Motion");

(ii) a petition for authorization to commence a class action (the "Quebec Class Action") under the Quebec *Code of Civil Procedure,* RSQ c C-25 (the "Quebec Petition" and, together with the Ontario Certification Motion, the "Certification Motions");

(iii) a motion for leave to proceed with statutory secondary market claims in the Ontario Class Action pursuant to s. 138.3 of the *Securities Act,* R.S.O. 1990, c. S.5 ("*OSA*") (the "Ontario Leave Motion");

(iv) a motion for leave to proceed with the statutory secondary market claims in the Quebec Class Action pursuant to article 225.4 of the *Securities Act*, RSQ c V-1-1 ("*QSA*"), to be filed (the "Quebec Leave Motion" and, together with the Ontario Leave Motion, the "Leave Motions"); and

(v) a motion for leave to add CONDEX Wattco Inc. as a plaintiff in the Proposed Quebec Class Action with Ilan Toledano as its representative, and a motion to amend the pleading in the Quebec Class Action to plead the *Securities Act*, RSQ c V-1-1 and add BDO Limited as a party (the "Corollary Quebec Motion" and, together with the Leave and Certification Motions, the "Class Action Motions");

(b) alternatively, an order exempting the Class Action Motions from the Stay of Proceedings as against only Ernst & Young LLP ("E&Y"), BDO Limited ("BDO" and, together with E&Y, the "Auditors"), the underwriter defendants (the "Underwriters"), Allen T.Y. Chan, ("Chan"), David J. Horsley ("Horsley") and Kai Kit Poon ("Poon", and together with the Auditors, the Underwriters, Chan,

Horsley, and Sino-Forest's other current and former directors and officer named in the Class Actions, the "Third Party Defendants"); or

(c) in the further alternative, an order:

(i) requiring the Auditors, Underwriters, Poon, Chan and Horsley to serve and file their responding materials, if any, in the Class Action Motions (including any statements of defense, to the extent required);

(ii) permitting the Class Action Plaintiffs to serve and file their reply materials, if any, in the Class Action Motions; and,

(iii) permitting the parties to the Class Actions to conduct cross-examinations on affidavits filed in relation to the Class Action Motions, and to litigate any refusals motions arising therefrom, all within the time limits to be imposed by the Courts presiding over the Class Actions.

3. Second, the Class Action Plaintiffs move for an order directing that they be permitted to vote on the Applicant's Plan of Compromise and Reorganization dated August 14, 2012 (the "Plan"), and appointing the Class Action Plaintiffs as representatives of the members of the classes proposed in the Class Actions (the "Class Members"), for the purposes of these proceedings and any related or ensuing

receivership, bankruptcy or other insolvency proceeding that has or may be brought before this Court.

4. Finally, the Class Action Plaintiffs move for an order directing the production of the documents described in the Confidential Appendix "A" of the Notice of Motion and Return of Motion on a non-confidential basis (the "Documents"), such that the Documents may be filed in these proceedings and in the Class Action Motions.

PART I - OVERVIEW

5. Sino-Forest is a disaster. A leading national newspaper has recently accorded it the dubious distinction of being "the most high-profile scandal involving companies from China that have gained listings on North American stock markets using 'reverse takeovers' to avoid the regulatory scrutiny of an initial public offering".[1] Literally billions of dollars of shareholder wealth and creditors' money has been lost. These shareholders and creditors and, indeed, the investing public at large, have a very real interest in determining the circumstances in which this loss occurred and whether anyone can be held financially accountable. The case speaks directly to the level of confidence that investors in Canada and internationally can place in Canada's capital markets.

6. Six months ago, these *CCAA* proceedings were started to determine what could be salvaged from the Sino-Forest debacle. In that time:

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[1] Andy Hoffman, "Former CFO leaves Sino-Forest", *The Globe and Mail* (27 September 2012) online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/former-cfo-leaves-sino-forest/article4573022/>, Moving Party's Supplementary Motion Record, Tab 1.

(a) we have been told that the sales process approved by this court has determined that the market is unwilling to pay anything approaching Sino-Forest's outstanding bond-debt for Sino-Forest's assets;

(b) the Company, with the support of its current bondholders, has filed a Plan that would: transfer Sino-Forest's assets to a new company owned by Sino-Forest's creditors; establish a litigation trust to pursue various claims of Sino-Forest and/or its creditors against third parties; release some claims against some third parties; and, leave other claims against other third parties (notably, shareholder claims against Sino-Forest's auditors and underwriters) unaffected;

(c) the staff of the OSC have commenced enforcement proceedings against Chan, Horsley and other former officers of Sino-Forest, and have accused various of them of fraud, and of misleading OSC staff;

(d) E&Y has resigned as Sino-Forest's auditors and no new auditors have been appointed;

(e) Sino-Forest has discovered that over $550 million of receivables are owed to it by PRC-based entities that have been deregistered and therefore no longer exist; and,

(f) efforts to reach a comprehensive settlement of all claims between all interested persons have proven unsuccessful.

7. In these circumstances, the Class Action Plaintiffs say three things:

(a) First, it's appropriate at this time to get the Class Actions back on track. Permitting the Class Action Motions to proceed at this time is consistent with and properly balances the objectives of each of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*"), the *OSA* and the *CPA*, as well as the interests of the stakeholders. Any suggestion that this relief places undue burden on Sino-Forest rings hollow given the extensive factual investigations that have already been undertaken by Sino-Forest and others, the company's acknowledgment that its business ground to a halt months ago, the procedural nature of the Class Action Motions, the short timeline contemplated in these proceedings (the Plan is to be sanctioned by November 30), and the long timelines proposed in the Class Actions (if the plaintiffs were to proceed now the Leave and Certification Motions would not be heard until May 2013);

(b) Second, to the extent that the Plan, as drafted, would affect the economic interests of the Class Members, including any shareholders of Sino-Forest (e.g., by affecting their recourse to insurance that might otherwise pay their claims, or by releasing claims against directors, officers or other third parties):

(i) the Class Members should be entitled to vote on the Plan; and,

(ii) given the history and complexity of this case and the limited time available to properly inform the Class Members, the Class Action Plaintiffs should be appointed to represent them in these proceedings and any ensuing insolvency proceedings, including in connection with any vote on the Plan;

(c) Third, correspondence, financial statements and other documents relevant to the probity of the claims asserted in the Class Actions and in these proceedings should be produced on a non-confidential basis. Those documents are directly relevant to the merits of the arguments made in these proceedings and in the Class Actions, and the Class Members and the investing public at large have an interest in knowing their contents.

PART II - THE FACTS

A. THE CLASS ACTIONS

8. In 2011, class actions against Sino-Forest, its directors and officers and a series of service providers to Sino-Forest were commenced in Ontario, Quebec, Saskatchewan and the United States. The circumstances giving rise to that litigation and events leading up to the Initial Order in these proceedings were summarized in

the Moving Party's Motion Record for the motion returnable May 8, 2012 and in particular the First Affidavit of Daniel Bach dated April 11, 2012.[2]

9. In addition to Sino-Forest, the Ontario Class Action names 25 defendants, including certain of Sino-Forest's current and former officers and directors. The Third Party Defendants include a number of very large and solvent financial institutions, with hundreds of millions to billions of dollars in annual revenues.[3]

10. In reasons dated January 6, 2012, Justice Perell granted carriage of the Ontario Class Action to the Ontario Plaintiffs. The Ontario Plaintiffs' Fresh as Amended Statement of Claim (the "Amended Claim") alleges that Sino-Forest, certain of its officers and directors, its auditors and its underwriters made material misrepresentations regarding the operations and assets of Sino-Forest. The Amended Claim seeks $9.18 billion in damages and is brought on behalf of the following class:

> [A]ll persons and entities, wherever they may reside who acquired Sino-Forest's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons (the "Class" or "Class Members").[4]

11. The Ontario Plaintiffs brought a motion returnable March 22, 2012 to require the defendants to deliver a statement of defence and to set a timetable for the hearing of the Leave and Certification Motions. All of the defendants made submissions

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[2] Affidavit of Daniel E.H. Bach, sworn April 11, 2012 ("First Bach Affidavit"), filed in support of the motion returnable April 13, 2012.
[3] First Bach Affidavit at paras. 4, 96 (a)-(i).
[4] First Bach Affidavit at paras. 7, 16; Fresh as Amended Statement of Claim, April 18, 2012.

opposing the scheduling of the Leave and Certification Motions. These submissions were rejected. In rejecting these arguments, His Honour recognized their tactical nature:

> The truth of the matter is that the Defendants and their lawyers are not concerned about wasted time and effort but rather they do not wish to plead because they believe it is tactically better to avoid the disclosure of their case that the *Rules of Civil Procedure* would normally mandate.
>
> I see no unfairness of denying defendants a tactical manoeuvre that may be inconsistent with the general principle of rule 1.04 that the rules "shall be liberally construed to secure, the just, most expeditious and least expensive determination of every civil proceeding on its merits."[5]

12. The Leave and Certification Motions in the Ontario Class Action have been served on the defendants. These motions were originally scheduled to be heard from November 21 to 30, 2012.

B. REPORT OF THE "INDEPENDENT COMMITTEE"

13. In response to allegations made by Muddy Waters LLP ("Muddy Waters") in June, 2011, Sino-Forest struck an Independent Committee (the "IC") to investigate and refute the allegations. The IC took nine months and spent at least $50 million. Although the reports are artfully worded, a close examination of the body of those reports and of their schedules (a number of which have been redacted to withhold what appears to be key information), reveals that the IC's investigation failed to refute

[5] First Bach Affidavit at para. 9, 69; Exhibit "G" to First Bach Affidavit at para. 52.

many of Muddy Waters' key allegations, and uncovered what can at best be described as an appalling absence of internal control.[6]

C. OTHER INVESTIGATIONS

14. Other investigations have also cast serious doubt on Sino-Forest's ability to refute the core allegations of the Ontario Plaintiffs. The OSC completed its own investigation and on that basis filed a Statement of Allegations against Sino-Forest and certain of its senior management, including Chan and Horsley. OSC staff allege a widespread pattern of fraud and intent to deceive the staff of the OSC. It states in part that Sino-Forest "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" and "falsified the evidence of ownership for the vast majority of its timber holdings by engaging in a deceitful documentation process. This dishonest process included the fraudulent creating of deceitful Purchase Contracts and Sales Contracts, including key attachments and other supplemental documentation."[7]

15. In addition, Alan Mak is an expert in forensic accounting from the Toronto-based firm of Rosen & Associates, retained by the Ontario Plaintiffs. Mr. Mak opines, among other things, that:

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[6] Exhibit "I" and "J" to the First Bach Affidavit.

[7] Affidavit of Daniel E.H. Bach, sworn September 24, 2012, ("Third Bach Affidavit"), Moving Party's Motion Record, Tab 2 at para. 8; Exhibit "B", OSC Statement of Allegations, Moving Party's Motion Record at Tab 2B.

(a) From an accounting and financial reporting perspective, and based on publicly available information (including the Independent Committee reports), sufficient appropriate evidence does not exist to justify Sino-Forest's reporting of timber assets and revenues for the vast majority of Sino-Forest's standing timber activities in 2006 to 2010;

(b) The annual audited financial statements of Sino-Forest for much or all of the period 2005-2010 should not have been issued to the public;

(c) The legal ownership and occurrence of *bona fide* economic transactions have not been established by Sino-Forest or by the investigation of the Independent Committee;

(d) Given the 'closed circuit' nature of Sino-Forest's standing timber business model, it is a serious possibility (if not high probability) that Sino-Forest's entire standing timber business is an accounting fiction;

(e) Sino-Forest's timber assets, revenues and profits from at least 2006 to 2010 were grossly overstated;

(f) In direct contravention of Canadian Generally Accepted Accounting Principles, Sino-Forest's grossly overstated its "cash flows from operating activities," a figure that is extensively relied upon by financial analysts to compute valuations of the company; and

(g) E&Y and BDO failed to conduct their audits in accordance with Generally Accepted Auditing Standards, and failed to detect material misstatements in Sino-Forest's financial statements.[8]

16. The Ontario Plaintiffs have also obtained opinions from investigators based in Hong Kong (Steven Chandler) and qualified counsel from Suriname (Carol-Ann Tjon-Pian-Gi) and the PRC (Denis Deng), all of which cast serious doubt on various claims

[8] First Bach Affidavit at para. 26; Affidavit of Alan T. Mak, Exhibit "A" to First Bach Affidavit.

made in public filings by Sino-Forest from the time of its establishment in the mid-1990s to the time of the issuance of the Muddy Waters' report.[9]

D. EVENTS SUBSEQUENT TO THE INITIAL ORDER

17. Sino-Forest obtained protection from its creditors pursuant to the Initial Order on March 30, 2012. The stay of proceedings has been extended three times, on April 21, on May 31, 2012, and again on September 28, 2012, for a brief period, to facilitate the hearing of this motion.

18. As of March 20, 2012, the Class Action Plaintiffs entered into a settlement agreement with one defendant, Pöyry (Beijing) Consulting Company Limited ("Pöyry" and the "Pöyry Settlement", respectively) on behalf of all class members. The Pöyry Settlement provides that Pöyry will provide information and cooperation (the "Proffer") to the Ontario Plaintiffs for the purposes of prosecuting this action against the remaining defendants. By order in these proceedings dated May 8, 2012, the Ontario Plaintiffs were given leave to pursue the Pöyry Settlement notwithstanding the *CCAA* stay of proceedings against Sino-Forest; on May 17, 2012, Justice Perell approved a notice procedure in respect of the Pöyry Settlement and directed a hearing of the

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[9] First Bach Affidavit at para. 23-25; Affidavits of Steven Gowan Chandler, Carol-Ann Tjon-Pian-Gi and Dennis Deng sworn in support of the Leave Motion, Exhibit A to First Bach Affidavit.

motion seeking approval of the settlement on September 21, 2012. [10] On September 25, 2012, Justice Perell released reasons approving the settlement. [11]

19. On April 17, 2012, Chan resigned as Founding Chairman Emeritus and currently holds no position with Sino-Forest whatsoever. On the same date, Horsley resigned as Chief Financial Officer, but remained an employee for the stated purpose of assisting with Sino-Forest's restructuring efforts.[12] Recently, on September 27, 2012, Sino-Forest announced that, on that date, Horsley had ceased to be employed by Sino-Forest. The details of the termination of his employment are not disclosed.[13]

20. On May 9, 2012, shortly after the Initial Order in these proceedings, Sino-Forest shares were delisted from the Toronto Stock Exchange.[14]

21. The sale process undertaken following the Initial Order and pursuant to a restructuring support agreement between the Applicant and the current note-holders failed to attract any "Qualified Letters of Intent" as defined by that agreement. That is, no bidders were willing to pay 85% of the face or par value of the outstanding notes of Sino-Forest, with interest (an amount far less than the claimed value of Sino-Forest in its public statements). As a result, on July 10, 2012, Sino-Forest issued a press

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[10] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 11.
[11] Reasons of Justice Perell dated September 25, 2012, Moving Party's Supplementary Motion Record, Tab 5.
[12] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 12.
[13] Press Release by Sino-Forest Corporation, September 21, 2012, Moving Party's Supplementary Motion Record at Tab 2.
[14] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 7.

release announcing its intention to proceed with the restructuring transaction eventually contained in the Plan.[15]

22. Shortly after this announcement, the Monitor filed its Sixth Report, which, among other things, highlighted significant difficulties in verifying the value of Sino-Forest's timber assets and receivables. The Monitor reported that:

> (a) certain "Authorized Intermediaries" integral to Sino-Forest's operations, and owing significant accounts receivable, were de-registered in the PRC and no longer existed as corporate entities;
>
> (b) it was unable to verify more than 8% of Sino-Forest's forestry assets and would not likely be able to verify the rest;
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> (c) Sino-Forest was expecting to report a write-down of $560 million in respect of its unaudited 2011 financial statements; and
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> (d) the combined value of the write-down and the accounts receivable from de-registered Authorized Intermediaries could total over $1 billion.[16]

23. On July 25, 2012, the Class Action Plaintiffs sought production of various categories of documents by Sino-Forest. Sino-Forest initially opposed this relief, but ultimately agreed to the production of a number of categories of documents on a confidential basis. The Class Action Plaintiffs agreed to accept the documents on these terms, without prejudice to their rights at law to separately compel production or disclosure of any information as part of any legal proceeding or the use of such information so separately compelled or disclosed as permitted by the rules of civil procedure or applicable law.

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[15] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 17.
[16] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 18.

E. CURRENT STATUS OF THE RESTRUCTURING

24. Prior to the failure of the sale process, all parties with claims against Sino-Forest filed proofs of claim with the Applicant pursuant to the claims procedure order of this Court, dated May 14, 2012. As part of the claims procedure, the Class Action Plaintiffs were authorized to and did file claims on behalf of the Class Members.

25. Following the failure of the sale process, the Applicant and the Monitor, in cooperation with a group of current note-holders (the "Ad Hoc Committee of Note-holders"), engaged in developing the Plan. The Applicant consulted the Ontario Plaintiffs and other parties in the development of the Plan. Certain limited issues within the Plan remain disputed by the Ontario Plaintiffs. The Applicant states that it intends to call a meeting of creditors (and have the Plan sanctioned) before November 30, 2012.[17]

26. Subject to the determination of outstanding issues, the basic effect of the Plan would be, in summary, as follows:

> (a) Sino-Forest will be restructured such that its business operations will be transferred under a new entity ("NewCo") free and clear of all claims;
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> (b) NewCo will distribute its securities to the current note-holders;
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> (c) claims, including the class action claims, will be compromised as against Sino-Forest, and to the extent permitted by the *CCAA*, certain current or former director or officer of Sino-Forest shall be released from claims against them;

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[17] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 20.

(d) the class action claims that fall within the scope of s. 5.1(2) of the *CCAA* will be permitted to continue, but (this term is still contested) may be compromised by limiting them to available insurance proceeds; and

(e) the class action claims and the claims of current note-holders as against the Third Party Defendants will be permitted to proceed.[18]

27. On June 26, 2012 during the development of the Plan, the Applicant brought a motion to determine the status of certain claims against it, including the claims of the shareholder plaintiffs in the Ontario Class Action and the claims of the Third Party Defendants based on indemnities arising as a result of these shareholder claims. On July 27, 2012, this Court issued its decision finding that, among other things, the shareholder claims and related indemnity claims are "equity claims" as defined in section 2 of the *CCAA* (the "Equity Claims Decision"). The Third Party Defendants have filed a motion for leave to appeal the Equity Claims Decision at a date to be fixed. The Third Party Defendants have indicated in their motions for leave that they are willing to agree to an expedited process for this motion.[19]

28. On July 25, 2012, this Court ordered a mediation of the claims of all the parties, with a view to settling these claims within the restructuring process. The mediation involved all relevant parties, including their insurers.[20]

29. On September 4 and 5, 2012, the parties attended before the Honourable Mr. Justice Newbould for the purposes of the mediation. The parties were unable to reach any settlement, and did not re-attend on September 10th, 2012.[21]

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[18] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 24.
[19] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 32.
[20] Affidavit of W. Judson Martin, sworn September 24, 2012, Applicant's Motion Record, Tab 2 at para. 6.

PART III - ISSUES AND THE LAW

A. ISSUES

30. The Class Action Plaintiffs submit that the following issues be addressed on this motion:

(a) Should the stay of proceedings imposed by the Initial Order extend to the Class Action Motions? The Class Action Plaintiffs submit that it should not.

(b) If Sino-Forest remains intent on filing a restructuring plan that affects the interests of the Class Members:

(i) *Should the Class Members be entitled to vote on the Plan?* The Class Action Plaintiffs submit that they should.

(ii) *If so, should the Class Members be separately classified for the purpose of voting on the Plan?* The Class Action Plaintiffs submit that they should.

(iii) *Should the Class Action Plaintiffs be appointed to represent the Class Members?* The Class Action Plaintiffs submit that they should be so appointed.

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[21] Third Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 27.

(c) *Is the non-confidential production of the documents listed at Confidential Appendix "A" to the Notice of Motion appropriate*? The Class Action Plaintiffs say that it is.

B. THE LAW

1. The Stay Should Be Limited

31. Six months have passed since the Initial Order was made, and Sino-Forest is nearing the end of its restructuring process. During these 6 months, lawyers, accountants, and other professionals have incurred millions of dollars in fees to further the best interests of Sino-Forest and its creditors. While Sino-Forest has been shielded by the order of this court and assisted by dozens of professional advisors, the claims of potentially tens of thousands of Sino-Forest shareholders who have lost billions of dollars in equity have been held in abeyance. Now is an appropriate time to get the Class Actions back on track, specifically, by permitting the Class Action Motions to be heard with dispatch.

32. The purpose of the *CCAA* is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation, subject to the requisite approval of the creditors and court. Sino-Forest has been given this reasonable period of time, has prepared a *CCAA* Plan, and is in the process of scheduling a meeting to vote on that plan. While some work remains to be done in connection with these *CCAA* proceedings, it is appropriate at this juncture, having

regard to the important private and societal objectives served by the Class Actions, to advance the Class Action Motions.

33. Section 11.02 of the *CCAA* permits the court to extend a stay of proceedings, but requires the applicant to establish that:

(a) it has acted, and is acting, in good faith and with due diligence; and,

(b) circumstances exist that make the order appropriate.[22]

34. In considering whether circumstances exist that make the stay extension order "appropriate", a court will:

(a) balance the level of prejudice to the debtor and its creditors; and,[23]

(b) have regard to the fact that the stay of proceedings is "ancillary to the fundamental purpose of the *CCAA*" and that "freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose."[24]

35. Thus, in *Re Skeena Cellulose Inc.*, the B.C. Court of Appeal considered that refusing a further extension would have a severe impact on the community, contractors and suppliers.[25] Conversely, in *Re Dura Automotive Systems (Canada)*

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[22] *CCAA*, s. 11.02.
[23] *Humber Valley Resort Corp. (Re)*, [2008] N.J. No. 318 at para. 18 (Nfld. Lab. S.C. (Trial Div.)), Moving Party's Book of Authorities at Tab 1.
[24] *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para. 26, Moving Party's Book of Authorities at Tab 2.
[25] 2001 CarswellBC 2226 (BCSC), Moving Party's Book of Authorities at Tab 3.

Ltd., in refusing to extend a stay, this court took into account that the debtor had no active business and there would be no employment impact of a failure to extend the *CCAA* proceedings.[26]

36. Having regard to the circumstances of this case, including, particularly, the balance of convenience and prejudice to the stakeholders, and the fundamental purposes of the *CCAA*, the Class Action Plaintiffs submit that the stay of proceedings should not be extended to the Class Action Motions.

(i) Balance of Convenience and Relative Prejudice to Sino-Forest and its Current Directors

37. Six months have passed since the Initial Order was made. During this time, the company has conducted a sale process and prepared a plan of compromise and reorganization. Sino-Forest is on track to meet its November 30, 2012 sanction hearing goal, which is less than 2 months away. The broad direction of the restructuring is now established, including the status and treatment of the Class Action Plaintiffs' shareholder claims against Sino-Forest and its directors and officers. In particular, the Plan would permit those claims to proceed against Sino-Forest and its current directors and officers, at least with respect to the extent of available insurance.

38. Neither Sino-Forest nor its current directors and officers will be prejudiced by permitting the Class Action Motions to proceed at this time:

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[26] 2010 ONSC 1102 at para. 39, Moving Party's Book of Authorities at Tab 4.

(a) First, the Class Action Motions remain subject to ongoing supervision by the court. Bearing in mind the November 30, 2012 *CCAA* sanction date, to the extent that Sino-Forest or its current directors and officers reasonably require additional time to meet their litigation responsibilities, the courts will ensure that the litigation timetables account for this.

(b) Second, the Class Action Motions are procedural in nature.[27]

(c) Third, the burden of responding to the Class Action Motions has already in large degree been borne by the parties in their preparation for and participation in these proceedings and in the mediation. Any argument about

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[27] The *CPA* provides a statutory framework for the prosecution of class proceedings. The test under s. 5(1)(a) of the *CPA* asks whether "it is plain and obvious that the allegations pleaded are incapable of supporting a cause of action and that the claim cannot succeed." The test turns on the bare statement of claim, and does not require any additional facts or evidence from the defendants. *McCracken v. Canadian National Railway*, [2010] O.J. No. 3466 at para. 103 (Ont. S.C.J.), Moving Party's Book of Authorities at Tab 5. In *Ramdath v. George Brown College of Applied Arts & Technology,* Justice Strathy held that "[c]ertification is decidedly *not* a test on the merits of the action. The question for a judge on a certification motion is not 'will it succeed as a class action', but rather, 'can it work as a class action?'" *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411 at para. 40 (Ont. S.C.J.), Moving Party's Book of Authorities at Tab 6. In order to meet the other requirements s. 5 of the *CPA*, courts have held that the plaintiffs must merely plead "some basis in fact".*Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303 at para. 15 (Ont. S.C.J.), Moving Party's Book of Authorities at Tab 7. Defendants to a certification motion may file evidence and may cross-examine the plaintiff's affiants (although they need not). This places some degree of burden on the defendants. However, in the circumstances of this proceeding, and given the status of the Ontario Plaintiffs' claims against Sino-Forest and its current directors and officers, they may not need to participate or spend significant time and resources on the Certification Motion.

Similarly, s. 138.3 of the *OSA* requires a claimant to obtain the Court's leave to commence an action under that section. In the leading decision interpreting this provision, it was established that the plaintiffs need only satisfy the court that the claim is (i) made in good faith and (ii) has a reasonable possibility of success at trial. This court has described the leave requirement as "a relatively low threshold." *Securities Act*, R.S.O. 1990, c. S.5 s. 138.1, 138.3. *Silver v. Imax Corp.*, [2009] O.J. No. 5573 at para. 25 (Ont. S.C.J.), Moving Party's Book of Authorities at Tab 8.

prejudice on the grounds of time and expense is a delay tactic of the sort Justice Perell clearly rejected in March when the defendants sought to avoid and delay the delivery of their statements of defence.

(d) Fourth, to the extent that the claims made in the Class Actions matter to these proceedings at all in light of the Plan, the disposition of the Class Action Motions will benefit these *CCAA* proceedings by clarifying core legal issues, such as whether a common law cause of action exists against the Auditors and Underwriters.

(ii) Chan, Poon and Horsley

39. Chan has resigned from all positions with Sino-Forest. Horsley has also resigned, and as of September 27, 2012, has ceased to be an employee of Sino-Forest. Poon is also a former director and, on the evidence available to date, has not had a significant role in the restructuring at all. These individual defendants are not integral to the restructuring and in fact, given Chan's recalcitrance noted by both the IC and the OSC,[28] may have significantly hindered the restructuring. Permitting these three individuals the protection of the stay is not consistent with the objectives and purpose of the stay, and lifting the stay will not place a new or avoidable burden on these three defendants, or expose them to avoidable prejudice.

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[28] Independent Committee Final Report, Exhibit "I" to First Bach Affidavit, Moving Party's Supplementary Motion Record, Tab 2I at p. S-12; OSC Allegations, Exhibit "B" to Third Bach Affidavit, Moving Party's Motion Record, Tab 2B at paras. 155-165.

40. Permitting the Class Action Motions to proceed as against these individuals is a *de minimis* interference with the *CCAA* proceeding if it is any interference at all.

(iii) The Auditors and Underwriters

41. Similarly, the stay should not be extended to protect the Auditors and Underwriters, who are solvent and have no role in Sino-Forest's restructuring.

42. The Plan does not affect the claims made in the Class Actions on behalf of shareholders against the Auditors and Underwriters, and those claims will eventually proceed unaffected.

43. To the extent that the Class Action claims matter at all under this Plan, the advancement of the Class Action Motions will only serve to drive a resolution of related contingencies.

44. The Third Party Defendants have, as Justice Perell noted, made every tactical move possible to avoid having to respond openly to allegations against them. These delays have not benefited Sino-Forest, the restructuring or the other parties, and only serve to delay the clarification of claims and progress of the restructuring.

(iv) Prejudice to the Class Action Plaintiffs

45. The Class Actions, unlike the restructuring, have not progressed materially or at all since the Initial Order was made, except for a motion for funding and a motion to certify for the purpose of settling with one of the defendants, Pöyry (Beijing)

Consulting Company Limited. For 6 months, the claims of tens of thousands of Sino-Forest shareholders have been frozen in order to permit Sino-Forest to conduct its *CCAA* process.

46. If the stay of proceedings is extended to the Class Action Motions, the primary prejudice suffered by the Class Action Plaintiffs is and will be the costs associated with delay in prosecuting their claims, including the delays in the production and preservation of documentary evidence, the fading of memories, the death or disappearance of witnesses, and the ongoing rapid depletion on available insurance proceeds in legal and associated expenses.

47. This prejudice to the Class Action Plaintiffs cannot be remedied by the restructuring process.

(v) The Public Interest

48. The public interest should also be considered in this analysis, and it also militates in favour of exempting the Class Action Motions from the stay of proceedings herein.

49. As noted above, the B.C. Court of Appeal recently held that the stay of proceedings available in a *CCAA* proceeding is “ancillary to the fundamental purpose

of the *CCAA*" and that "freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose."[29]

50. What is the *CCAA*'s fundamental purpose? At its core, the *CCAA* reflects society's interest in efficient economic markets. As noted by Justice Deschamps (for a majority of the Supreme Court of Canada) in *Century Services Inc. v. Canada*, the *CCAA* is intended to serve the public interest. After reviewing the history of the *CCAA*, she held as follows:

> Reorganization serves **the public interest** by facilitating the survival of companies supplying goods or services **crucial to the health of the economy or saving large numbers of jobs** (ibid., at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with **reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation**.[30]

51. It follows from the foregoing that *CCAA* proceedings should be administered not only with regard to the narrow financial interests of the parties, but with an eye on societal interests in an economy characterized by "a complex web of interdependent economic relationships".

52. Sino-Forest has no material jobs to save or collateral economic activities to protect in Canada.

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[29] *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para. 26, Moving Party's Book of Authorities at Tab 2.
[30] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 18, Moving Party's Book of Authorities at Tab 40 (emphasis added).

53. These societal interests are reflected, in part, by the *OSA* and the *CPA*, important pieces of legislation that work hand in glove with the *CCAA* to protect the efficiency of the economy as a whole. The specific purpose of the *OSA* is to promote integrity in Ontario's capital markets through full, plain, true and continuous disclosure, enforced, in part, by private plaintiffs armed with a realistic and effective remedy. The *CPA*'s three principle objectives are judicial economy, access to justice, and behaviour modification.[31]

54. This is an unusual *CCAA* case, in that billions of dollars in value have been lost not because of collapsing markets, competitive pressures or unexpected cash flow constraints, but because Sino-Forest, a public company with audited financial statements, may well be a massive fraud. The issues raised by this turn of events go to the core of the *OSA*'s objectives, and the Class Actions are essential to answering the systemic question of whether anyone can be held accountable for this sorry mess.

55. The public interest very clearly favours allowing the Class Action Motions to proceed in furtherance of the objectives of the *OSA* and the *CPA*, particularly given that Sino-Forest has no Canadian operations, few or no Canadian employees, and few or no Canadian assets.

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[31] *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 at para. 12 (Q.B.), Moving Party's Book of Authorities at Tab 9; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 27-29 (S.C.C.), Moving Party's Book of Authorities at Tab 10; *Report of the Committee on Corporate Disclosure, Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange: 1997), at para. 5.14, Moving Party's Book of Authorities at Tab 41.

56. As noted by the Honourable Justice Farley in *Sairex GmbH v. Prudential Steel Ltd.*,

> ... I would think that public policy also dictates that a company under *CCAA* protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the *CCAA*.[32]

2. The Class Action Plaintiffs should be entitled to vote on the Plan

57. Notwithstanding the detrimental impact that the Plan would have on the Class Members and other members of the proposed class actions, it denies these individuals and entities, including scores of pension funds, the ability to vote with a view to protecting their interests and those of their beneficiaries. This should be corrected.

58. The Plan, as currently drafted, affects the economic interests of Class Members by: (a) compromising claims against Third Party Defendants; and (b) possibly eliminating the Class Members' ability to have recourse to liability insurance that would otherwise provide coverage in respect of claims against Sino-Forest and its directors and officers.

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[32] *Sairex GmbH v. Prudential Steel Ltd.*, [1991] O.J. No. 2363 at para. 24 (Ont. Ct. Jus. (Gen. Div.)), Moving Party's Book of Authorities at Tab 11.

59. If Sino-Forest insists on proceeding with a restructuring plan that materially impacts the interests of the Class Members, then the Class Members should be given a say on the plan. Accordingly, the Class Action Plaintiffs ask that this Court make an order:

(a) directing that the Class Members be entitled to vote on the Plan in a voting class that is separate and apart from Sino-Forest's bondholders; and,

(b) appointing the Class Action Plaintiffs as representatives of the Class Members, with the power to vote on their behalf in respect of any restructuring plan.

(i) The current Plan affects the Class Members' claims against Sino-Forest and Non-Debtors without giving them a vote

60. Although the Class Action Plaintiffs accept that their insured claims against Sino-Forest are equity claims, they submit that they should be permitted to vote those claims because of their interest in the insurance proceeds. Even the equity claim provisions of the *CCAA* reserve the discretion of the court to permit equity claimants to vote on a *CCAA* plan. The circumstances in which the court would exercise that discretion are not articulated in the statute and have yet to be judicially considered. However, inasmuch as the basic premise of those provisions is that shareholders should be denied a vote because they have no legitimate expectation of recovery from an insolvent corporation, one would expect that shareholders would be given the right to vote where the Plan actually does affect their economic interests.

61. It is well established in Canadian law that where a policy of insurance provides for payment on behalf of the insured, the proceeds of insurance are not an asset of the insolvent debtor to be distributed rateably among its creditors; rather, the insurance is payable to and for the benefit of the tort victim. [33] Accordingly, the Class Members should be entitled to vote on any *CCAA* plan that may impact their recourse to insurance coverage available for their claims.

62. As drafted, the Plan includes sweeping releases of claims against directors and officers at article 4.9. These claims are against Non-Debtors and therefore do not fall within the definition of equity claims.

63. In *Algoma Steel*, the Court of Appeal for Ontario held that the protection afforded by the *CCAA* is for the debtor—not to insulate insurers from providing appropriate indemnification.[34] In that case, as here, the debtor company suffered no prejudice if a claimant was permitted to seek recovery from the debtor's insurance proceeds. The court in *Algoma Steel* allowed the appeal and granted leave to

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[33] In *Re Major*, 1984 CarswellBC 588 (S.C.), at para. 22, Wood J. held that to permit the estate of a bankrupt to receive the proceeds of a professional liability insurance policy would result in an injustice to the applicants for whose benefits one would have expected that the insurance policy was intended. Moving Party's Book of Authorities at Tab 12.

More recently, in *Superline Fuels Inc. v. Buchanan*, 2007 NSCA 68, [2007] S.C.C.A. No. 410 (leave to appeal refused) at paras. 24, 64-65, the Nova Scotia Court of Appeal upheld a lower court decision that a discharge order in bankruptcy does not operate to discharge the right of a third party to insurance, and that "the denial of such an opportunity … would be unfair and unjust, … it is the injured party, not the insured, who has the proprietary interest in the insurance proceeds." Oland J.A. noted that this outcome would not affect the orderly distribution of the debtor's property among its creditors, and that policy reasons also support that outcome, as the liability insurer could garner a windfall if the claim was not allowed to continue. Moving Party's Book of Authorities at Tab 13.

The Nova Scotia Court of Appeal's reasoning was followed in *Genge v. Parrill*, 2007 NLCA 77, [2008] S.C.C.A. No. 65 (leave to appeal refused). Moving Party's Book of Authorities at Tab 14.

[34] *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 163 (C.A.), Moving Party's Book of Authorities at Tab 16.

proceed with a “technical amendment” which would lift the stay against the debtor for the limited purpose of accessing the debtor’s insurance policy.

64. The final version of the Plan, which has not yet been determined, must properly carve out insured claims and provide for either an assignment or direct right of action to ensure the enforcement of the insurance contract and payment of insurance proceeds. In the absence of these critical elements, there could be a windfall to the insurers at the expense of the Class Members.

65. In simple terms, the Class Members have legitimate, bona fide claims against Sino-Forest and its directors and officers for which they could receive compensation through Sino-Forest’s insurance and, possibly, by recourse to the assets of individual directors and officers. To deny the Class Members a voice in a plan that threatens to compromise their claims to insurance proceeds and third party assets would be contrary to public policy and manifestly unjust, and, where necessary, should trigger the use of the court’s discretion to permit the Class Members to vote.

3. The Class Members Should Vote Separately, and be Represented

66. As described above, the Class Action Plaintiffs submit that if a vote is to proceed on the Plan or any *CCAA* plan affecting the interests of the Class Members, then the Class Members should be given the right to vote. In that event, two issues arise as to how they should vote. Specifically:

(a) *Should they be separately classified?* The Class Action Plaintiffs say that they should.

(b) Should a representation order be made authorizing the Class Action Plaintiffs to represent the Class Members in these proceedings, including the right to vote on a Plan on their behalf? The Class Action Plaintiffs say that such an order should be made.

(i) Class Members Should Vote Separately

67. The Plan stipulates that the Equity Claimants (including the Class Members, in their role vis-à-vis Sino-Forest) are to be classified separately in their own group, and that the current Note-holders are to form their own distinct voting group.

68. The Class Action Plaintiffs submit that where the Class Members are called upon to vote on Sino-Forest's *CCAA* plan, the separation as between the Class Members and the Note-holders that is currently contemplated in the Plan is correct and should be maintained. That is, the Class Members should vote in their own class, separate and apart from the Note-holders.

69. As the Court of Appeal for Ontario found in *Stelco Inc., Re*, the classification of creditors for *CCAA* voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class.[35] In other words, creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest.[36]

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[35] *Stelco Inc., Re* (2005) 78 OR (3d) 241 (C.A.); at para. 21, Moving Party's Book of Authorities at Tab 17.
[36] Section 22(2) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36

70. Classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the *CCAA* process and the underlying flexibility of that process, there can be no fixed rules that must apply in all cases.[37]

71. Pursuant to section 22(2) of the *CCAA*, a court is to consider the following factors when determining whether there is a commonality of interest:

> - the nature of the debts, liabilities or obligations giving rise to their claims;
>
> - the nature and rank of any security in respect of their claims;
>
> - the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> - any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

72. The factors set out in s. 22(2) of the *CCAA* do not change in any material way the factors that have been identified in the case law.[38]

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[37] *Stelco Inc., Re*, (2005) 78 OR (3d) 241 (C.A.) at para. 22, Moving Party's Book of Authorities at Tab 17.

[38] *SemCanada Crude Company (Re)* (2009) 57 CBR (5th) 205 (AltaQB) at para. 45, Moving Party's Book of Authorities at Tab 18. Note that the factors or principles to be considered when dealing with the commonality of interest test were summarized by the court in *Re Canadian Airlines Corp.* 2000 CanLII 28185 (AB QB), (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Moving Party's Book of Authorities at Tab 19, and cited with approval by the Ontario Court of Appeal in *Re Stelco Inc.* (2005) 78 OR (3d) 241 (C.A.), Moving Party's Book of Authorities at Tab 17, as follows: 1) Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test; 2) The interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the Plan as well as on liquidation; 3) The commonality of interests are to be viewed purposively, bearing in mind the object of the *CCCA*, namely to facilitate reorganizations if possible; 4) In placing a broad and purposive interpretation on the *CCCA*, the court should be careful to resist classification approaches that would potentially jeopardize viable Plans; 5) Absent bad faith, the motivations of creditors to approve or disapprove of the Plan are irrelevant; and 6) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the Plan in a similar manner.

73. Central to the classification test is the desire to protect against injustice,[39] and minimize prejudice to creditors.[40] In this way, fairness and reasonableness – the two keynote concepts underscoring the philosophy and workings of the *CCAA* – drive the analysis. As the courts have made clear, fairness is the quintessential expression of the court's equitable jurisdiction. Although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity. Reasonableness is what lends objectivity to the process.[41]

74. In the Class Action Plaintiffs' view, the current Note-holders are in an entirely different position from the Class Members. They do not share a "commonality of interest". For example, the Class Members are not contractually bound to support the Plan; the nature of the amounts owed is different; the priority of claims against Sino-Forest's assets and property are different; the enforcement remedies are different; and, the risks are different.

75. Pursuant to the Restructuring Support Agreement (the "RSA") between Sino-Forest and 72% of the Note-holders, the Note-holders are obligated to vote in favour

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[39] *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.* (2004) 5 CBR (5th) 300 (AltaCA) at para. 10, Moving Party's Book of Authorities at Tab 20.
[40] *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457, at para. 36, Moving Party's Book of Authorities at Tab 21.
[41] *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457, at para. 38, Moving Party's Book of Authorities at Tab 21, quoting from *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), Moving Party's Book of Authorities at Tab 22.

of the Plan.[42] As such, there can be no meaningful consultation between these Note-holders and the Class Members.

76. The essential trade-off reflected in the RSA is that, if the Note-holders support Sino-Forest's restructuring, Sino-Forest will ensure that the Note-holders' interests are protected in the Plan through a transfer of Sino-Forest's assets to a NewCo owned by the Note-holders. This *quid pro quo* arrangement between Sino-Forest and the Note-holders stemming from the RSA puts the Note-holders in a completely different situation vis-à-vis Sino-Forest than the Class Members. The Class Members have no recourse to Sino-Forest's assets or to NewCo even if they wanted it; their recourse is to the insurance proceeds discussed above, and their claims against Non-Debtors. As a result, the Class Members are in a unique position in relation to Sino-Forest, and do not share a commonality of interest with the Note-holder voting group.

77. Further, the nature of the amounts owed by Sino-Forest to these two groups is entirely different. The Class Members allege that Sino-Forest is liable for numerous tort law claims, which is entirely different from the debt obligation Sino-Forest may owe to the Note-holders. For example, the debt obligation does not arise from the commission of a tortious act by Sino-Forest, but arises rather from a contractual arrangement.

78. As well, the Class Action Plaintiffs believe that, in the unique circumstances of this case, their risks and reward matrix is readily quantifiable by reference to

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[42] See s. 4(b) of the RSA, Exhibit "B" to Affidavit of W. Judson Martin, sworn March 30, 2012, Application Record Tab 2.

established legal and accounting principles, and available insurance pools. The Note-holder's ability to realize on Sino-Forest's inventory of assets (whatever they may be) represents a different risk.

79. Consequently, the Note-holders and Class Members should remain in the separate classes proposed by Sino-Forest in its Plan, and as contemplated by the *CCAA* with respect to Equity Claimants.[43]

(ii) A Representation Order Should be Made

80. As well, the Class Action Plaintiffs should be appointed as representatives of the Class Members in these proceedings, with the ability to vote on their behalf on any *CCAA* plan presented by Sino-Forest that materially affects their interests. The Class Action Plaintiffs do not seek any funding from Sino-Forest's estate for their professional fees in connection with the proposed representation.

81. A representation order in this case will ensure an orderly and fair process toward resolving outstanding claims against Sino-Forest, and would avoid:

(a) the logistical difficulties associated with Sino-Forest having to contact potentially tens of thousands of class members prior to a meeting of creditors and to facilitate their participation on a meeting;

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[43] See article 3.2 of the Plan.

(b) the consequent delay and unfairness that will occur if shareholders who have been depending upon the Class Action Plaintiffs to represent their interests in these proceedings (including by virtue of prior orders of this court) are suddenly called upon to become engaged in this process and come to grips with a set of very complex issues; and,

(c) the potential that Class Members will mistakenly ignore or misunderstand notice of the meeting based upon their established expectation that their interests are being represented by the Class Action Plaintiffs.

82. A representation order would also be consistent with the order of Justice Perell made January 6, 2012, granting carriage of the Ontario Class Action to the Ontario Plaintiffs and the *sui generis* obligations already imposed on the Ontario Plaintiffs to act in the interests of the Class Members.[44] The counsel to the Ontario Plaintiffs have had repeated contact with the potential class members, most recently with respect to the filing of claims and the Pöyry Settlement. It is logical to maintain this consistency in representation.

83. The court's jurisdiction to appoint representatives in *CCAA* proceedings can be found in s. 11 of the *CCAA* and rule 10.01 of the *Rules of Civil Procedure*.[45]

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[44] *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, at para. 29 and 38, Moving Party's Book of Authorities at Tab 23.
[45] *CCAA*, *supra*, s. 11; *Rules of Civil Procedure*, *supra*, r. 10.01; *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J.) at paras. 10, 12, Moving Party's Book of Authorities at Tab 24; *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J.) at para. 7, Moving Party's Book of Authorities at Tab 25; *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 at para. 20 ["*Canwest Publishing"*], Moving Party's Book of Authorities at Tab 26.

84. Courts will grant a representation order where it is fair and convenient to do so, particularly where it will serve the objectives of the *CCAA*, which include ensuring an orderly and fair process to resolve outstanding claims against the debtor.[46]

85. In *Canwest Publishing*, Justice Pepall (as she then was) set out a list of relevant factors considered by courts in granting representation orders in *CCAA* proceedings. These factors include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under *CCAA* protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.[47]

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[46] *Canwest Publishing*, *supra* at para. 24, Moving Party's Book of Authorities at Tab 26; *Nortel Networks (S.C.J.)*, (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J.) at para. 13, Moving Party's Book of Authorities at Tab 24; *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 9398 (S.C.J.) at paras 14-15, Moving Party's Book of Authorities at Tab 27.

[47] *Canwest Publishing*, *supra* at para. 21, Moving Party's Book of Authorities at Tab 26.

86. The Class Members are precisely the type of group for which a representation order is appropriate.

i) Vulnerability

87. The class definition in the Ontario Class Action encompasses a large number of individual investors from around the world who have, effectively, already been represented by the Ontario Plaintiffs. Many class members have limited abilities to pursue individual claims in complex *CCAA* proceedings. Moreover, given the dispatch of the *CCAA* proceeding, many investors (some of whom are located around the world) are at risk of having their rights affected by a process before they are able to mount an intervention.

ii) Benefit to Sino-Forest

88. Sino-Forest receives at least three benefits if this Court makes a representation order. First, Sino-Forest will avoid the delay inherent in having Class Members represent themselves in these proceedings. Second, Sino-Forest can have greater confidence when reaching a compromise that affected interests have been adequately represented. Representative counsel will interact with Class Members, as they already have done, and will represent their interests to Sino-Forest. Third, the Class Action Plaintiffs are not seeking funding for their involvement in the *CCAA* proceeding, unlike other stakeholders in the process, and so the cost of interaction with individual Class Members should be substantially reduced.

iii) Social Benefit

89. The representation order will provide a social benefit by assisting Class Members, by fielding their concerns, by providing them with information about the *CCAA* process and by representing their interests to other stakeholders in the process.

90. The objectives of the *CPA* include access to justice, judicial economy and behaviour modification. All three of these important societal objectives would be furthered by a representation order.

91. The objectives of the *CCAA* include promoting efficient markets and balancing the interests of various stakeholders. These are important societal objectives that would be upheld through a representation order in this proceeding. A representation order would benefit society at large by giving voice to thousands of investors who had faith in Canada's efficient market and were, with the *CCAA* filing and now with the filing of the Plan, suddenly at risk of having severely limited recourse.

iv) Facilitation of the administration of justice and efficiency in these proceedings

92. The representation order will streamline and introduce efficiency to the process by having a common voice represent the group of class members. It will avoid a multiplicity of legal retainers, which will be a benefit to Sino-Forest, its creditors and all participants in the process.

93. Further, the suitability of Siskinds LLP and Koskie Minsky LLP as representative counsel has been scrutinized in detail by Justice Perell. His Honour found the firms to be well-established and noted that the lead lawyers had considerable experience and proficiency in class actions and securities litigation. Justice Perell's decision can provide comfort to this court that these firms are also suitable representatives for this group in the *CCAA* proceedings.

v) Conclusion

94. In summary, the appointment of representatives and representative counsel for the Class Members will ensure that their interests are protected, while at the same time ensuring an efficient and orderly process.

4. The Documents should be made available on a non-confidential basis

95. The Class Action Plaintiffs require the public disclosure of Documents originally produced on a confidential basis by Sino-Forest and listed at Confidential Appendix "A" to the Notice of Motion. These Documents are relevant to this *CCAA* proceeding, and particularly to assess the fairness and reasonableness of the Plan, and ought to be made available on a non-confidential basis.

96. The default principle in Canadian courts is that of open court proceedings. There is a well-established public interest in open and accessible court proceedings.[48]

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[48] *Sierra Club of Canada v. Canada (Minister of Finance)*. [2002] 2 S.C.R. 522, Moving Party's Book of Authorities at Tab 28.

97. Transparency is of key importance in *CCAA* proceedings, too; full and plain disclosure is the first step in resolving competing claims, formulating restructuring options, and determining whether a plan is fair and reasonable. This is especially true in the circumstances of this proceeding, given the numerous compelling allegations of fraud and serious misconduct.

98. The Supreme Court of Canada has repeatedly emphasized that openness and transparency are foundational principles in our legal system.[49]

99. The *CCAA* is a court-supervised process precisely to ensure that the fundamental principles of fairness, transparency and openness are respected. In *Re Mecachrome Canada Inc.*, Justice Gascon of the Quebec Superior Court emphasized that while *CCAA* proceedings give a debtor company privileges, there are also corresponding responsibilities:

> A *CCAA* process does insulate a debtor company from the attacks of its creditors. However, at the same time, the Act places the process under the Court's supervision. This has meaning and consequences. **The benefits that the Act gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders.**[50]

100. Justice Gascon's comments echo similar sentiments expressed by Justice Romaine in *Calpine Canada Energy Ltd*. where Her Honour criticized the lack of transparency in settlement negotiations:

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[49] See e.g. *Re Vancouver Sun*, 2004 SCC 43; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41; *MacIntyre v. Nova Scotia (Attorney General)*, 1982 CarswellNS 21, Moving Party's Book of Authorities at Tabs 29, 28 and 30, respectively.

[50] *Re Mecachrome Canada Inc*., 2009 CarswellQue 9963 (S.C.) at para. 48(emphasis added), Moving Party's Book of Authorities at Tab 31.

> What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, **and be seen to be done**, when the process is supervised by the court. While a more open process may not lead to greater value […] the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness.[51]

101. In *Re Arclin*, Justice Hoy also noted that the *CCAA* process should be open and transparent to the greatest extent possible.[52]

102. The common thread in all of these cases is that a *CCAA* proceeding is a court-supervised process that requires openness, transparency and accountability. Transparency is of even greater importance in this case, given the cause of Sino-Forest's insolvency, and the serious accountability issues raised by the case.

103. As Justice Fish stated in *Toronto Star Newspapers Ltd. v. Ontario*, "the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."[53]

104. Sino-Forest must satisfy this court that maintaining confidentiality over these Documents is necessary to protect a serious interest and that the salutary effects of such an order outweigh the deleterious effects of it. Sino-Forest cannot meet this test, as there is simply no basis for maintaining the confidentiality of these Documents.

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[51] *Re Calpine Canada Energy Ltd.*, 2007 CarswellAlta 156 (Q.B.) at para. 31 (emphasis added), Moving Party's Book of Authorities at Tab 32.

[52] *Re Arclin Canada Ltd.*, [2009] O.J. No. 4260 (S.C.J.) at para. 17, Moving Party's Book of Authorities at Tab 33.

[53] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 1, Moving Party's Book of Authorities at Tab 35.

105. The Supreme Court of Canada articulated the test for when a sealing order should be granted in *Sierra Club of Canada v. Canada (Minister of Finance)*.[54] The test consists of two branches: necessity and proportionality. In particular, a sealing order may be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[55]

106. The courts have made clear that, under the necessity branch of the *Sierra Club* test, there are three considerations:

> (a) the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;

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[54] [2002] 2 S.C.R. 522, Moving Party's Book of Authorities at Tab 28.
[55] *Ibid.*at para. 53, Moving Party's Book of Authorities at Tab 28.

(b) the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, and the public interest in confidentiality must outweigh the public interest in openness of the courts; and

(c) consideration of reasonably alternative measures does not require the adoption of the absolutely least restrictive option, but does require the courts to restrict an order as much as is reasonably possible while preserving the commercial interest in question.[56]

107. The nature of the Documents is described in detail in the confidential factum supplement. In broad terms, however, the Documents pose no serious risk to an important interest, commercial or otherwise. Sino-Forest is no longer an operating business. Moreover, the public stands to benefit from these documents being disclosed. This case is developing into one of the most egregious cases of corporate misconduct in Canadian history. The public has an interest in, and indeed a right to, the information being kept confidential by Sino-Forest.

108. It is likely that the Documents will be producible prior to the Leave Motions being heard.[57] In the event that this court grants the alternative relief sought, and the Class Action Motions do not proceed against Sino-Forest, an order that Sino-Forest

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[56] *GasTOPS v. Forsyth*, 2011 ONCA 186 (Ont. C.A.), Moving Party's Book of Authorities at Tab 35; *Sierra, ibid*. at paras. 54-57, Moving Party's Book of Authorities at Tab 28.
[57] See e.g. *Silver v. Imax* (6 May 2008), 2008 CarswellOnt 2657, 167 A.C.W.S. (3d) 881 (Sup. Ct. J.); *Ainslie and Marenette v. CV Technologies Inc. et. al*., 2008 CarswellOnt 2657, 167 A.C.W.S. (3d) 881 (Sup. Ct. J.); *Ainslie and Marenette v. CV Technologies Inc. et. al*., 2009 CarswellOnt 934 (Sup. Ct. J.), Moving Party's Book of Authorities, Tabs 37, 38 and 39, respectively.

nonetheless produce the Documents will be relevant to the determination of the Leave Motions.

109. The deleterious effects of maintaining confidentiality over the Documents far outweighs any benefit to the *CCAA* participants or Canadian citizens. The Documents support the Class Action Plaintiffs' position that their claims are serious, material and grounded in evidence. There will likely be discussion or debate at a sanction hearing regarding the fairness and reasonableness of the Plan. In determining whether a plan is fair and reasonable, the court will consider a number of factors, including any unfairness to shareholders and the public interest.[58] If the Class Action Plaintiffs make submissions to the court at the sanction stage, they ought to be able to do so publicly and with reliance on documents that demonstrate the Plan is not fair or reasonable.

110. The Class Action Plaintiffs have a right to participate in a meaningful way in these proceedings, and cannot do so without relying on the Documents to support their case. Shareholders have an interest in knowing how it has come to pass that billions of dollars in equity are being wiped out.[59]

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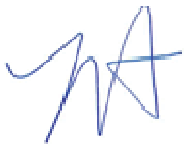
[58] *Re Canadian Airlines Corp*. (2000), 20 C.B.R. (4th) 1 (ABQB); leave to appeal refused (2000), 20 C.B.R. (4th) 46 (ABCA); leave to appeal to SCC refused (2001), CarswellAlta 888 (SCC), Moving Party's Book of Authorities at Tab 36.

[59] For instance, on September 26, 2012, the Financial Post published an article about shareholder investers retaining counsel to attempt to "wring some value" from Sino-Forest. There is no value for shareholders in Sino-Forest under the Plan. It is critically important that the Documents be produced on a non-confidential basis in order to allow shareholders and the general public to fully understand this proceeding. Peter Koven, "Sino-Forest shareholders turn to Joe Groia", *Financial Post* (26 September 2012) online: <http://business.financialpost.com/2012/09/26/sino-forest-shareholders-turn-to-joe-groia/>, Moving Party's Supplementary Motion Record, Tab 3.

PART IV - ORDER REQUESTED

111. The Class Action Plaintiffs request an Order consistent with the relief sought in its Amended Notice of Motion and Return of Motion, served on the parties on October 2, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of October, 2012.



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839653_12.DOC

SCHEDULE "A"

LIST OF AUTHORITIES

Case Law

1. *Humber Valley Resort Corp. (Re)*, [2008] N.J. No. 318 (Nfld. Lab. S.C. (Trial Div.))
2. *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327.
3. *Re Skeena Cellulose Inc*, 2001 CarswellBC 2226 (BCSC).
4. *Re Dura Automotive Systems (Canada) Ltd*, 2010 ONSC 1102.
5. *McCracken v. Canadian National Railway*, [2010] O.J. No. 3466 (Ont. S.C.J.)
6. *Ramdath v. George Brown College of Applied Arts & Technology* [2010] O.J. No. 1411 (Ont. S.C.J.)
7. *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303 (Ont. S.C.J.)
8. *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (Ont. S.C.J.)
9. *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 (Q.B.)
10. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.
11. *Sairex GmbH v. Prudential Steel Ltd.*, [1991] O.J. No. 2363 (Ont. Ct. Jus. (Gen. Div.))
12. *Re Major*, 1984 CarswellBC 588 (S.C.)
13. *Superline Fuels Inc. v. Buchanan*, 2007 NSCA 68, [2007] S.C.C.A. No. 410 (leave to appeal refused).
14. *Genge v. Parrill*, 2007 NLCA 77, [2008] S.C.C.A. No. 65 (leave to appeal refused).
15. *Perry v. General Security Insurance Co. of Canada*, (1984) 47 O.R. (2d) 472, 11 D.L.R. (4th) 516 (C.A.),
16. *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 163 (C.A.)
17. *Stelco Inc., Re* (2005) 78 O.R. (3d) 241 (C.A.)
18. *SemCanada Crude Company (Re)* (2009) 57 C.B.R. (5th) 205 (Alta. Q.B.)

19. *Re Canadian Airlines Corp.* 2000 CanLII 28185 (AB QB), (2000), 19 C.B.R. (4th) 12.

20. *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.* (2004) 5 C.B.R. (5th) 300 (Alta. C.A.)

21. *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457.

22. *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)

23. *Fantl v. Transamerica Life Canada*, 2009 ONCA 377.

24. *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J.)

25. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J.)

26. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328.

27. *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 9398 (S.C.J.)

28. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

29. *Re Vancouver Sun*, 2004 SCC 43.

30. *MacIntyre v. Nova Scotia (Attorney General)*, 1982 CarswellNS 21.

31. *Re Mecachrome Canada Inc*., 2009 CarswellQue 9963 (S.C.)

32. *Re Calpine Canada Energy Ltd.*, 2007 CarswellAlta 156 (Q.B.)

33. *Re Arclin Canada Ltd.*, [2009] O.J. No. 4260 (S.C.J.)

34. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41.

35. *GasTOPS v. Forsyth*, 2011 ONCA 186.

36. *Re Canadian Airlines Corp*. (2000), 20 C.B.R. (4th) 1 (ABQB); leave to appeal refused (2000), 20 C.B.R. (4th) 46 (ABCA); leave to appeal to SCC refused (2001), CarswellAlta 888 (SCC).

37. *Silver v. Imax*, 2008 CarswellOnt 2657, 167 A.C.W.S. (3d) 881 (Sup. Ct. J.)

38. *Ainslie and Marenette v. CV Technologies Inc. et. al*., 93 O.R. (3d) 200, 304 D.L.R. (4th) 713 (Sup Ct. J.)

39. *Ainslie and Marenette v. CV Technologies Inc. et. al.,* 93 O.R. (3d) 200, 304 D.L.R. (4th) 713 (Sup Ct. J.)

40. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379

Secondary Sources

41. *Report of the Committee on Corporate Disclosure, Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange: 1997)

SCHEDULE “B”

RELEVANT STATUTES

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

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

…

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

…

Classes of Creditors

Company may establish classes

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

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

Certification

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.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.**

REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED

Proceedings in which Order may be Made

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. 10.01 (1).

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

Liability

Liability for secondary market disclosure

Documents released by responsible issuer

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

(a) the responsible issuer;

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

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

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

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

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

(e) each expert where,

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

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

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (1, 2).

Public oral statements by responsible issuer

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

(a) the responsible issuer;

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

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

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

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

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

(e) each expert where,

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

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

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (3).

Influential persons

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

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

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

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

(d) the influential person;

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

(f) each expert where,

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

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

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in

writing to the use of the report, statement or opinion in the document or public oral statement.

Failure to make timely disclosure

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

(a) the responsible issuer;

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

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

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

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

Multiple roles

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

Multiple misrepresentations

(6) In an action under this section,

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

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

No implied or actual authority

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

SCHEDULE “C”

SERVICE LIST

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

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

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(as at September 28, 2012)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto, Ontario

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