

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE U.S. PLAINTIFFS  
(Motion for Approval of U.S. Counsel Fees,  
returnable December 13, 2013)**

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Action

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Class Counsel for Plaintiffs in the U.S. Class  
Action

**TO: THE ATTACHED SERVICE LIST**

## PART I – OVERVIEW OF THE MOTION

1. The Plaintiffs in the U.S. Class Action bring this motion for approval of the fees and disbursements to U.S. Class Counsel, Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") in the amount of (CAD) \$ 2,340,000 for fees and (US) \$151,611.15 for disbursements. This fee and disbursement request is made in accordance with the retainer agreements between U.S. Class Counsel and the Lead Plaintiffs in the U.S. Class Action, and is consistent with counsel fees approved in other class actions by Canadian and U.S. courts.

2. On March 20, 2013, this Court approved a (CAD) \$117 million settlement (the "E&Y Settlement") with Ernst & Young LLP ("E&Y") and its affiliates, and established a settlement trust for the settlement proceeds. The settlement approval order provides that the net settlement proceeds (net of class counsel fees and other specified expenses)<sup>1</sup> shall be distributed among persons who purchased Sino-Forest securities ("Securities Claimants"), excluding the defendants and their affiliates after all conditions are satisfied. Plaintiffs and class members in the U.S. Class Action are among the Securities Claimants.

3. The approved settlement with Ernst & Young provides for a total payment of (CAD) \$117 million. The plaintiffs and class counsel in the Ontario, Québec and New York class actions have agreed to a notional allocation of that settlement amount between the Canadian and U.S. claims for the purposes of determining class counsel

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<sup>1</sup> The net settlement proceeds are equivalent to the amount remaining from the (CAD) \$117 million settlement after payment of administration and notice costs, class counsel fees and expenses as approved by the Court and payment to Claims Funding International (CFI) in accordance with the funding order of Perell J. dated March 17, 2012.

fees. They have agreed that the fees of Canadian Class Counsel will be determined on the basis that 90% of the gross settlement is allocated to the Canadian claims and 10% of the gross settlement is allocated to the U.S. claims ("U.S. Settlement Proceeds").<sup>2</sup>

4. Based on this notional allocation, 10% of the E&Y settlement is (CAD) \$11,700,000, and U.S. Class Counsel requests attorneys' fees of 20% of that amount or (CAD) \$2,340,000. Canadian Class Counsel is seeking its attorney's fees from the remaining 90% of the E&Y Settlement amount or (CAD) \$105.3 million.

5. For the reasons set out below, the fees and disbursements requested by U.S. Class Counsel are consistent with Canadian and U.S. law, and are otherwise fair and reasonable having regard to the litigation and recovery risks undertaken by U.S. Class Counsel and the success achieved. In addition, the requested fee of 20% of the settlement amount allocated to U.S. Plaintiffs represents a multiple of approximately 1.67 of the time docketed by U.S. Class Counsel,<sup>3</sup> and falls within the range of reasonableness for awards of attorneys' fees approved in previous Canadian and U.S. class action securities cases. Finally, each of the Lead Plaintiffs in the U.S. Class Action has agreed to the requested fee under their respective retainer agreements. The U.S. Plaintiffs respectfully submit that the motion for approval of attorneys' fees and reimbursement of expenses should be granted.

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<sup>2</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 20.

<sup>3</sup> The 1.67 multiplier was calculated based on U.S. class counsel's docketed time of approximately (US) \$1.3 million, which was converted to Canadian dollars and divided into the fee request of (CAD) \$2.34 million: Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, paras. 53,59.

## PART II – THE FACTS

### A. Background of These Proceedings and Settlement with Ernst & Young

6. These proceedings arise from the precipitous decline of Sino-Forest Corporation following allegations on June 2, 2011 that there was fraud at the company and that its public disclosures contained misrepresentations regarding its business and affairs.<sup>4</sup>

7. On July 20, 2011, this action was commenced against Sino-Forest, Ernst & Young LLP and other defendants in Ontario under the *Class Proceedings Act, 1992*.<sup>5</sup>

8. Class actions relating to Sino-Forest were also commenced in Québec and New York. Cohen Miistein Sellers & Toll PLLC is counsel to the plaintiffs in the New York action styled as *Leopard v. Sino-Forest Corporation*. E&Y is a defendant in both the Québec and New York actions.<sup>6</sup>

9. On March 30, 2012, Sino-Forest applied for and was granted protection from its creditors pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").<sup>7</sup>

10. In November 2012 the E&Y Settlement was negotiated with E&Y. The settlement provides for payment of (CAD) \$117 million in full settlement of all claims that relate to Sino-Forest as against Ernst & Young LLP, Ernst & Young Global

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<sup>4</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 3.

<sup>5</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 4.

<sup>6</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, paras. 5, 6.

<sup>7</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 7.

Limited and their affiliates, subject to court approval. This court approved the E&Y Settlement on March 20, 2013.<sup>8</sup>

**B. Notional Allocation of the Settlement Amount**

11. Plaintiffs and counsel have agreed upon a proposed Claims and Distribution Protocol which provides a claims-based process for Securities Claimants to seek compensation from the E&Y Settlement fund. U.S. Class Counsel participated in the preparation and development of the Claims and Distribution Protocol, and U.S. Lead Plaintiffs support the Claims and Distribution Protocol proposed by counsel.<sup>9</sup>

12. As described above, the plaintiffs and class counsel in the Ontario, Québec and New York actions have also agreed to a notional allocation of that settlement amount between the Canadian and U.S. claims for the purposes of determining class counsel fees. They have agreed that the fees of Canadian Class Counsel will be determined on the basis that 90% of the gross settlement is allocated to the Canadian claims and 10% of the gross settlement is allocated to the U.S. claims ("U.S. Settlement Proceeds"). This notional allocation is based on the relative class sizes of the Canadian and U.S. class actions and the work performed by the respective law firms.<sup>10</sup>

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<sup>8</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, paras. 9, 10.

<sup>9</sup> Affidavit of David W. Leopard, sworn November 19, 2013, U.S. Plaintiffs' Motion Record, Tab 4, para. 3, Affidavit of Imad M. Fathallah, U.S. Plaintiffs' Motion Record, Tab 3, para. 3; Affidavit of Myong Hyon Yoo, sworn November 2013, U.S. Plaintiffs' Motion Record, Tab 5, para. 3.

<sup>10</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 20.

13. Accordingly, Canadian Class Counsel's requested fees are based on a recovery of (CAD) \$105.3 million (90% of (CAD) \$117 million), and Cohen Milstein's requested fees are based on a recovery of (CAD) \$11,700,000 million (10% of (CAD) \$117 million).<sup>11</sup>

14. This notional allocation has no bearing on the actual distribution of settlement proceeds to Securities Claimants. As set out in the proposed Claims and Distribution Protocol, the distribution of the net settlement fund is based on the claims made, the losses for those claims and the relevant risk adjustment factor for each claim.<sup>12</sup>

### **C. The U.S. Retainer Agreements**

15. In the U.S. proceedings, Cohen Milstein has acted as lead counsel and provided litigation services in these proceedings pursuant to a contingency fee agreement with U.S. Lead Plaintiffs. The retainer agreement with U.S. Lead Plaintiffs does not specify a particular percentage for fees, and the retainer is based on a customary contingency fee whereby Lead Plaintiffs do not pay any fees or costs throughout the course of the litigation. Instead, the retainer agreement provides for the repayment of disbursements and fees only in the event of a recovery by settlement or judgment and only after review and approval by the Court.<sup>13</sup>

16. This requested fee is meant to reflect the resources that U.S. Class Counsel expended in pursuing the claims and securing recovery. For instance, had the defendants all settled the action within 30 days of the commencement of the U.S.

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<sup>11</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 20.

<sup>12</sup> Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 21.

<sup>13</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 3.

Class Action in March 2012, U.S. Class Counsel would have committed relatively few resources to the action. In contrast, had the action proceeded to trial and success achieved only through judgment, U.S. Class Counsel would have committed an enormous amount of resources to this litigation. The requested fee is meant to take into account the substantial risks taken on by U.S. Class Counsel and the time expended in prosecuting the claims of U.S. investors.<sup>14</sup>

**D. U.S. Class Counsel's Efforts to Advance the U.S. and Ontario Class Actions and Implement the E&Y Settlement**

17. As described below, U.S. Class Counsel has expended significant efforts to advance the U.S. Class Action while simultaneously acting to protect class members' interests in connection with ongoing proceedings in Canada, including implementation of the E&Y Settlement on behalf of all investors, including Canadian class members. As described in detail below, Lead Plaintiffs in the U.S. Class Action have taken the following steps to advance the litigation and the E&Y Settlement.

***(a) Preliminary investigation and filing of the U.S. Class Action***

18. Shortly after the publication of the fraud allegations against Sino-Forest in the Muddy Waters report, Cohen Milstein spoke with various investors in Sino-Forest securities and commenced an investigation into the allegations published in the Muddy Waters report.<sup>15</sup>

19. U.S. Class Counsel conducted an extensive investigation, which, in part, involved an analysis of the various securities involved and the implications of cross-

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<sup>14</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, at paras. 43, 47, 58, and 61.

<sup>15</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 13.



border trading of Sino-Forest securities. This area of investigation was particularly significant due to the recent U.S. Supreme Court ruling in a securities class action lawsuit, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) ("*Morrison*"), which limited U.S. investor claims to only securities traded in the United States. As part of this investigation as to the scope of the class, U.S. Plaintiffs also reviewed the claims and allegations in the Canadian Class Actions which did not assert claims on behalf of investors who purchased in the U.S. markets, except for Canadian residents.<sup>16</sup>

20. In preparing the initial complaint, U.S. Class Counsel reviewed and analyzed: (i) all Sino-Forest's public filings issued during the relevant period; (ii) all new articles, analyst reports, and other public statements regarding Sino-Forest's business and finances; (iii) all available reports and exhibits prepared by Sino-Forest's independent committee of the Board of Directors; (iv) documents relating to the investigations of the Ontario Securities Commission; and (v) relevant Canadian accounting and auditing standards.<sup>17</sup>

21. Plaintiffs in the U.S. Class Action also reviewed and analyzed the relevant trading in Sino-Forest Securities, potential damage and causation issues, and investigated the jurisdictional basis for commencing the action.<sup>18</sup>

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<sup>16</sup> The class in the Ontario action is defined to include persons who acquired Sino's securities by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, and persons who acquired Sino securities who are residents of Canada or were residents of Canada at the time of acquisition: Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, paras. 5, 14, fn.3.

<sup>17</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 15.

<sup>18</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 16.

22. As a result of these investigations, and in light of the *Morrison* decision, Plaintiffs drafted and filed a complaint in New York Supreme Court, based on various common law theories of liability including, among others, common law fraud, negligence and negligent misrepresentation. The initial complaint was removed to federal court in the Southern District of New York.<sup>19</sup>

23. After removal to federal court, plaintiffs in the U.S. Class Action researched and briefed issues related to defendants' proposed motions to dismiss the original claims pled under New York State law and negotiated a relevant tolling agreement. The U.S. Plaintiffs conducted further review and analysis of factual developments based on the ongoing investigations of defendants and information disclosed in the CCAA proceedings.<sup>20</sup>

24. Following extensive research and investigation of additional legal claims and factual developments, U.S. Plaintiffs prepared a comprehensive 101 page Amended Complaint which included expanded allegations against E&Y, as well as other defendants under U.S. securities laws.<sup>21</sup>

25. U.S. Plaintiffs prepared and issued the requisite statutory notice to class members advising them of the litigation, and in December 2012, researched and briefed lead plaintiff motion and supporting pleadings for appointment as lead plaintiff and lead counsel in the U.S. Class Action. Following briefing on the motion to appoint lead plaintiff and lead counsel, the U.S. District Court, Southern District of New York

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<sup>19</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 17

<sup>20</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 18

<sup>21</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 19.

entered an order on January 4, 2013 appointing lead plaintiff and appointing Cohen Miistein lead counsel in the U.S.<sup>22</sup>

***(b) Sino-Forest's Insolvency and CCAA Proceeding***

26. On March 30, 2012, Sino-Forest obtained an initial order under the CCAA, including a stay of proceedings with respect to Sino-Forest and certain of its subsidiaries. Immediately thereafter, U.S. Class Counsel commenced monitoring the CCAA proceedings, reviewed all motions and related papers, and reviewed the voluminous record in Sino-Forest's CCAA case as it developed, including all the Monitor's Reports and exhibits. On May 8, 2012, following negotiations between Canadian Class Counsel and other stakeholders in the CCAA proceeding, the stay of proceedings was extended to the other defendants in this action. The parties entered a tolling agreement reflecting the delay caused by the insolvency proceeding and there was an order permitting a settlement approval hearing and certification hearing relating to a settlement with the defendant Pöyry (Beijing). Given these developments, Plaintiffs in the U.S. Class Action agreed to a stay of their case against Sino-Forest.<sup>23</sup>

27. Shortly thereafter, in order to protect the interests of U.S. Class Members, U.S. Class Counsel filed proofs of claim in Sino-Forest's CCAA proceeding on behalf of Lead Plaintiffs and class members in the U.S. Class Action.<sup>24</sup>

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<sup>22</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 20.

<sup>23</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 21.

<sup>24</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 22.

28. On July 25, 2012, the Court entered an order requiring certain parties to mediate the claims in Sino-Forest's CCAA proceeding. That mediation was held on September 4 and 5, 2012. Prior to the mediation, U.S. Class Counsel contacted the Monitor and other parties in an effort to participate in the mediation. However, the Monitor did not permit the U.S. Class Plaintiffs to participate at that time.<sup>25</sup>

29. Subsequently, Canadian Class Counsel entered into separate negotiations and eventually mediation with E&Y. On November 28, 2012, they executed the Minutes of Settlement setting forth the terms of the settlement with E&Y. Several days later, U.S. Class Counsel was advised of the settlement and the terms agreed to with E&Y, which included a proposal to resolve all investor claims through the CCAA proceeding.<sup>26</sup>

30. Over the next two months, U.S. Class Counsel engaged in extensive negotiations and discussions regarding the terms of the E&Y Settlement. First, U.S. Class Counsel retained U.S. bankruptcy counsel and Canadian counsel, Davies Ward Phillips & Vineberg LLP, to advise them of the procedural, substantive, and jurisdictional implications relating to the CCAA proceeding resulting from the E&Y Settlement. Among other things, Plaintiffs in the U.S. Class Action:

- (a) consulted extensively with the Davies firm regarding the rights of U.S. class members and course of action in a CCAA proceeding in light of Sino-Forest's Plan of Reorganization and the E&Y Settlement;

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<sup>25</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 23.

<sup>26</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 24.

- (b) engaged in lengthy and ongoing negotiations and discussions with Canadian Class Counsel regarding the E&Y Settlement and the impact on the U.S. Class Action;
- (c) reviewed documents, conducted interviews and analyzed the adequacy of the E&Y Settlement with respect to the claims of plaintiffs in the U.S. Class Action;
- (d) retained and consulted with damages experts to analyze the adequacy of the E&Y Settlement as it pertained to U.S. Class Members and overall damages in the various class actions;
- (e) retained U.S. bankruptcy counsel, Lowenstein Sandler LLP, to advise plaintiffs in the U.S. Class Action regarding the consequences of CCAA proceedings in Canada, as well as the proceedings in the U.S. Bankruptcy Court for the Southern District of New York for recognition of the CCAA proceeding under U.S. Chapter 15, Title 11 of the U.S. Code; and
- (f) negotiated an agreement with Canadian Class Counsel regarding the participation of U.S. Class Members in the E&Y Settlement, resulting in the U.S. Plaintiffs supporting the E&Y Settlement and motion approval in this proceeding.<sup>27</sup>

31. Lead Plaintiffs in the U.S. Class Action subsequently agreed to and supported the E&Y Settlement. On December 10, 2012, the Plan of Reorganization was approved by this Court which included a mechanism for approving the E&Y Settlement. On March 20, 2013, this Court approved the E&Y Settlement with the support of the U.S. Plaintiffs.<sup>28</sup>

***(c) Recognition of the E&Y Settlement in U.S. Bankruptcy Court***

32. On February 4, 2013, the Canadian Monitor filed a Memorandum of Law in Support of Chapter 15 Petition for Recognition of Foreign Proceeding and Related

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<sup>27</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 29.

<sup>28</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, paras 7, 8.

Relief to petition the U.S. Bankruptcy Court for recognition of the **CCAA** proceedings and E&Y Settlement.<sup>29</sup>

33. Lead Plaintiffs consulted with U.S. bankruptcy counsel, Lowenstein Sandler, regarding the procedural and jurisdictional implications of the Chapter 15 proceedings in the U.S. Bankruptcy Court and the implementation of the E&Y Settlement. Among other things, Plaintiffs in the U.S. Class Action:

- (a) researched issues pertinent to the effect of any potential U.S. Bankruptcy Court orders on the U.S. Class Action, and engaged in litigation strategy analysis with consulting bankruptcy counsel regarding the claims of plaintiffs in the U.S. Class Action;
- (b) coordinated efforts in Chapter 15 proceeding with Canadian Class Counsel and U.S. Bankruptcy Counsel to implement E&Y settlement on behalf of investors in both the Canadian and U.S. class actions;
- (c) drafted and filed in the U.S. Bankruptcy Court a joinder to the motion of E&Y for recognition of the E&Y Settlement under Chapter 15 and participated in developing the notice program for U.S. investors; and
- (d) participated in hearings in U.S. Bankruptcy Court relating to the Chapter 15 proceeding and recognition of the E&Y settlement.<sup>30</sup>

***(d) Coordination with the Ontario Class Action***

34. Beginning in early 2013, U.S. Class Counsel began assisting Canadian Class Counsel in the prosecution of the Ontario Class Action by participating in the ongoing document review in that action. In particular, as part of an ongoing review of over 1.2 million documents produced by Sino-Forest, U.S. Class Counsel provided attorneys to assist in the review and analysis of those documents for the Canadian Class

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<sup>29</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 26.

<sup>30</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 27.

Action. U.S. Class Counsel expects that future litigation efforts among the Class Actions will continue to be coordinated in an effort to reduce duplicative litigation and costs to class members.<sup>31</sup>

### PART III – ISSUES AND THE LAW

35. The issue before this Court on this motion is whether the fees and disbursements requested by U.S. Class Counsel should be approved. For the reasons set out below, U.S. Plaintiffs submit that the fees and disbursements requested should be approved as they are consistent with the retainer agreements entered into with Lead Plaintiffs in the U.S. Class Action, and are fair and reasonable having regard to the significant risks that U.S. Class Counsel undertook in these proceedings and the success achieved.

#### A. Context of Contingency Fee Retainers in Class Proceedings

36. The U.S. Plaintiffs adopt the submissions found in the Factum of Canadian Plaintiffs with respect to the unique challenges and benefits faced by class action counsel, which emphasize the following:

- (a) the significant commitment of time and financial revenues by class action counsel;
- (b) the highly adversarial and often protracted nature of class proceedings;

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<sup>31</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 28.

- (c) the unique risks that arise from the procedures governing class proceedings; and
- (d) the fact that class counsel's obligations to the class do not end at settlement approval.<sup>32</sup>

37. All of the above factors are equally applicable to the risks and rewards faced by U.S. class action counsel. In reviewing class action settlements and an award of attorneys' fees, U.S. courts consider many similar factors. In the U.S. District Court, Southern District of New York, where the U.S. Class Action remains pending, courts determine the reasonableness of a settlement and award of attorneys' fees by reference to the factors set forth in *Goldberger v. Integrated Resources, Inc.*<sup>33</sup>

- (a) the time and labor expended by counsel;
- (b) the magnitude and complexities of the litigation;
- (c) the risk of the litigation;
- (d) the quality of representation;
- (e) the requested fee in relation to the settlement; and
- (f) public policy considerations.

As described in detail below, all of these factors are met here.

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<sup>32</sup> See paragraphs 51 to 57 of Canadian Plaintiffs' Factum; Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8, para. 16.

<sup>33</sup> *In re Citigroup Inc. Sec. Litig.*, --- F. Supp. 2d ---, 2013 WL 3942951, at \*16 (S.D.N.Y. Aug. 1, 2013); U.S. Plaintiffs' Authorities, Tab 1, citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d at 50 (2000).



**B. Approach to Fee Approval in Class Proceedings**

38. U.S. Plaintiffs adopt the submissions in the Factum of Canadian Plaintiffs with respect to the approach taken by courts in Canada for approval of fees in class proceedings, which emphasize the following:

- (a) the retainer agreement is the starting point for approval of a contingency fee;
- (b) courts assess the fairness and reasonableness of a contingency fee focusing on the risk that class counsel undertook and the success achieved;
- (c) it is important that compensation to class action counsel recognize that class proceedings depend on entrepreneurial lawyers, and there must be an incentive large enough to justify the significant risks that class counsel undertake in class proceedings; and
- (d) metrics, such as multipliers on counsel's docketed time, act as appropriate checks on the reasonableness of the fees claimed.<sup>34</sup>

39. With respect to the risks faced by plaintiff class action counsel in U.S. class actions, the highly renowned case of *Wal-Mart Stores, Inc. v. Dukes*<sup>35</sup> illustrates the

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<sup>34</sup> See paragraphs 59 to 69 of Canadian Plaintiffs' Factum.

<sup>35</sup> 131 S.Ct. 2541 (2011), U.S. Plaintiffs' Authorities, Tab 2.

risks in the same way that the *Andersen v. St. Jude*<sup>36</sup> case does in Canada. *Wal-Mart* was a contingency-fee case that was originally filed in June 2001 in the Northern District of California and is still pending. After plaintiffs in the case were granted class certification in 2004, defendants continuously appealed until the case reached the Supreme Court of the United States in 2011, which then issued a decision overturning class certification.<sup>37</sup> Since that ruling, Plaintiffs have proceeded with a narrower class definition, and last year survived a motion to dismiss.<sup>38</sup> Eleven years later, after incurring enormous costs, the litigation continues at a preliminary procedural stage, indeed at the near-beginning of a typical class action case with no class yet certified.

**C. U.S. Class Counsel's Fees and Disbursements are Fair and Reasonable**

40. The fees and disbursements requested by U.S. Class Counsel are consistent with the retainer agreement entered into with lead U.S., plaintiffs, are in accord with Canadian and U.S. class action precedents, and are otherwise fair and reasonable having regard to, as described below, the risks undertaken by U.S. Counsel and the success achieved.

**(1) Fees as a percentage of recovery are within the appropriate range accepted by both Canadian and U.S. Courts**

41. In *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, Justice Strathy (as he was then) held that compensating counsel through a percentage of recovery is

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<sup>36</sup> 2012 ONSC 3660, at paras. 8, 9; Canadian Plaintiffs' Authorities, Tab 11.

<sup>37</sup> *Wal-Mart Stores*, *supra*, note 38.

<sup>38</sup> *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2012 WL 4329009, at \*1 (N.D. Cal. Sept. 21, 2012), U.S. Plaintiffs' Authorities, Tab 3.

"generally considered to reflect a fair allocation of risk and reward as between lawyer and client." It induces the lawyer to maximum the recovery for the client and is fair to the client because there is no pay without success.<sup>39</sup>

42. In *Cassano v. Toronto Dominion Bank*, Justice Cullity also endorsed a percentage approach in approving a retainer agreement that provided fees of 20%, which in that case resulted in fees of \$11 million out of a \$55 million settlement. His Honour adopted the reasoning of Justice Cumming in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* in emphasizing the value of a percentage approach to fees: "[u]sing a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours".<sup>40</sup>

43. With respect to range of percentages approved by courts in Canada, Justice Strathy in *Baker (Estate)* noted that fees in the range of 20% to 30% are "very common" in class proceedings, and there have been a number of instances in recent years in which this court has approved fees that fall within that range:<sup>41</sup>

<i>Abdulrahim v. Air France</i> , [2011] O.J. No. 326:	30%
<i>Ainslie v. Afexa Life Sciences Inc.</i> , [2010] O.J. No. 3302:	19.4%
<i>Robertson v. ProQuest LLC</i> , [2011] O.J. No. 2013:	24%
<i>Osmun v. Cadbury Adams Canada Inc.</i> , [2010] O.J. No.	25%

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<sup>39</sup> *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Canadian Plaintiffs' Authorities, Tab 1.

<sup>40</sup> *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at paras. 50-63 (S.C.J.), Canadian Plaintiffs' Authorities, Tab 4.

<sup>41</sup> *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Canadian Plaintiffs' Authorities, Tab 1.

2093:	
<i>Pichette v. Toronto Hydro</i> , [2010] O.J. No. 3185:	28.5%
<i>Robertson v. Thompson Canada Ltd.</i> , [2009] O.J. No. 2650:	36%
<i>Cassano v. Toronto- Dominion Bank</i> (2009), 98 O.R. (3d) 542:	20%
<i>Martin v. Barrett</i> , [2009] O.J. No. 2015:	29%

44. The requested fees of U.S. Class Counsel of 20% of the U.S. settlement amount are within the range of percentages that Ontario courts have approved in the past.

45. The effective multiplier in this case for fees and disbursements requested by U.S. Class Counsel of 1.67 is also within the range that Ontario courts have found reasonable. That range is "slightly greater than one (at the low end) to four or higher in the most deserving cases".<sup>42</sup>

46. The 20% figure is also within the range approved by courts in the U.S. in numerous cases. In U.S. class action securities cases, "courts traditionally award plaintiffs' counsel fees in class actions based on either a reasonable percentage of the settlement fund" known as a percentage of the fund method, "or an assessment by the court of the market value of the work plaintiffs' attorneys performed."<sup>43</sup> Yet, "in complex securities fraud class actions, courts have long observed that the 'the trend

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<sup>42</sup> *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 31, Canadian Plaintiffs' Authorities, Tab 12.

<sup>43</sup> *In re Citigroup Inc. Sec. Litig.*, --- F. Supp. 2d ---, 2013 WL 3942951, at \*15 (S.D.N.Y. Aug. 1, 2013), U.S. Plaintiffs' Authorities, Tab 1.

in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases."<sup>44</sup>

47. Courts in the U.S. typically use the lodestar analysis simply to "cross-check" the reasonableness of the requested percentage.<sup>45</sup> This method entails totalling the hours worked by class counsel (the "lodestar" or "docketed time") and then dividing the dollar value of the percentage of the fund award by the dollar amount of total lodestar amount to obtain a multiplier.

48. The U.S. District Court, Southern District of New York, where the U.S. Class Action is pending, has frequently found reasonable and approved fees that are equivalent to more than 20% of the recovery obtained through settlement, and roughly a multiplier of 2 or greater by the lodestar cross-check. The following are a few examples of fees as a percentage of a settlement that have been approved by the U.S. District Court, Southern District of New York:

- (a) 22.5% of recovery or a 2.09 lodestar multiplier in *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124 (2008);
- (b) 25% of recovery, or a lodestar multiplier of 1.6, in *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570 (S.D.N.Y. 2008);
- (c) 24% of the total recovery, or a lodestar multiplier of 1.985 in *In re Merrill Lynch & CO., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156 (S.D.N.Y. 2007);

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

- (d) a 19%-18% sliding scale fee of the total recovery, which was a 2.16 lodestar multiplier, in *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004); and
- (e) 33% of the total recovery, or a multiplier of 4.65 in *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002).<sup>46</sup>

**(2) Recovery risk was very high from the outset of the litigation**

49. U.S. Class Counsel took on significant risk by pursuing claims against E&Y because of the multiple legal impediments to establishing liability and recovering damages against an auditor under Canadian and U.S. law even where there was wrongdoing.

50. U.S. Class Counsel were always confident that they would establish liability against Sino-Forest and the senior insiders at Sino-Forest. However, from the outset, establishing liability against defendants who could actually satisfy a large judgment was the greatest risk for this litigation and thus for U.S. Class Counsel.<sup>47</sup>

51. The defendants that are most culpable (Sino-Forest, Allen Chan, Kai Kit Poon and David Horsley) are also the defendants that became insolvent (Sino-Forest), have limited personal means (Mr. Horsley) or are individuals living in the People's Republic of China (Messrs. Chan and Poon), where enforcement of a U.S. judgment is doubtful.<sup>48</sup>

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<sup>46</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, paras. 51, 52

<sup>47</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, paras. 35, 43 and 44.

<sup>48</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 32.

52. In contrast, while E&Y may have the means to satisfy a substantial judgment, recovery was still a major challenge. The damages recoverable from E&Y after a trial might have been zero or less than the E&Y Settlement amount. This is because U.S. law provides auditors with many defenses from liability. The result is that investors in a securities class action may often fail to establish any liability against the auditor or recover only a tiny proportion of actual damages.<sup>49</sup>

53. Plaintiffs would first have had to establish that E&Y was liable in conducting its audits of Sino-Forest and issuing a false audit opinion, which may have been particularly difficult because E&Y asserts that Sino-Forest deliberately misled its auditors.<sup>50</sup>

54. Assuming plaintiffs established liability, they would then have to overcome the numerous defenses under U.S. law available for claims against auditors. Had the action proceeded against E&Y, U.S. Plaintiffs would have confronted significant challenges to liability and damages. In particular, as described below, U.S. Plaintiffs faced liability hurdles at the initial pleading stage, and class certification as well as in ultimately proving, scienter, loss causation, fraud on the market, and damages. Significantly, even if U.S. Plaintiffs prevail on liability and damages, any damage award would be subject to a potentially significant reduction based on E&Y's relative proportionate fault. Given the evidence that E&Y would submit claiming that the

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<sup>49</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 33.

<sup>50</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 34.

Sino-Forest defendants misled it and E&Y was not the principal wrongdoer, the reduction allowed under U.S. law could be substantial.<sup>51</sup>

55. Similar or greater challenges faced U.S. Class Counsel in advancing the claims advanced against the other solvent defendants with the means to satisfy a large judgment thus reinforcing the high risk nature of this litigation.<sup>52</sup>

***(3) The high risk of prosecuting a difficult and expensive case***

56. U.S. Class Counsel took on the major risk that there would be little or no recovery from the defendants with the means to satisfy judgment, while at the same time having to commit a significant amount of time, money and resources to the prosecution of this action. U.S. Class Counsel has already expended over (US) \$1.3 million in attorneys' time and (US) \$151,611.15 in out-of-pocket expenses.<sup>53</sup>

57. This action has been and will continue to be difficult and costly to pursue for a number of reasons.

58. First, this is a highly complex action and Sino-Forest is in organizational disarray. This case relates to a multi-billion dollar alleged fraud over the course of more than four years which took place in nine countries. Compounding this complexity is the fact that Sino-Forest has filed for insolvency and its records are in disarray and incomplete.<sup>54</sup>

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<sup>51</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para.35.

<sup>52</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 36.

<sup>53</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 37.

<sup>54</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 39.



59. The difficulty in mining Sino-Forest's records and prosecuting this action is best demonstrated by the challenges faced by Sino-Forest's "independent committee" of its directors (the "IC"). After the allegations of fraud in June 2011, Sino-Forest's directors formed the IC to investigate the allegations. They produced three reports and expended in excess of \$50 million attempting to determine the validity of the allegations. They were unable to complete their mandate given the poor records and lack of cooperation faced in China. Plaintiffs face, and will continue to face, similar challenges in advancing this case.<sup>55</sup>

60. Second, even with proper discovery, proving the facts in this case will be unusually difficult. Most of the key witnesses are likely in China. Their voluntary cooperation is doubtful and the enforcement of letters rogatory by the courts of the People's Republic of China seems equally unlikely. Further, the documentary evidence in the Canadian Class Action already exceeds 1 million documents, and continues to grow. To date, Sino-Forest has produced 1.2 million documents to Canadian Class Counsel. Approximately 30% of the documents are in Chinese and counsel has hired translators to assist in going through the documents. Canadian Counsel and U.S. Class Counsel expect that substantially more documents will be produced.<sup>56</sup>

61. Third, the U.S. Class Action faces significant challenges in litigation. Under the U.S. *Securities Exchange Act*, auditors are not liable for more than their proportionate share of damages. Thus, as noted above, if E&Y could show that other

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<sup>55</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 41.

<sup>56</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 41.

actors were more culpable for the fraud, E&Y would pay a relatively small amount of damages even where plaintiffs succeeded in otherwise proving their case.<sup>57</sup>

62. Fourth, to prove their claims, plaintiffs in the U.S. Class Action would be required to prove *scienter* (fraudulent intent) – a standard for which, as the United States Supreme Court has stated, they would face "[e]xacting pleading requirements...".<sup>58</sup> As held by a leading case in the U.S. District Court, Southern District of New York where the U.S. Class Action is pending, allegations supporting *scienter* must satisfy the heightened pleading requirements of Rule 9(b) of the *Federal Rules of Civil Procedure* and the *Private Securities Litigation Reform Act* (the "PSLRA"), which requires pleading facts with sufficient particularity to prove a state of mind behind knowing or reckless conduct.<sup>59</sup> Where plaintiffs do not meet this standard in their complaint, the *PSLRA* mandates dismissal under 15 U.S.C. § 78u-4(b)(3)(A). These pleading standards create a distinctly high burden that plaintiffs must reach in order to survive a motion to dismiss – and all *without* the benefit of *any* discovery. Under U.S. securities laws, all discovery and other proceedings are stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary.<sup>60</sup>

63. Finally, this case will require extensive and expensive expert evidence. In advancing this action, U.S. Class Counsel has already retained experts on insolvency

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<sup>57</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 42.

<sup>58</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), U.S. Plaintiffs' Authorities, Tab 5.

<sup>59</sup> *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001), U.S. Plaintiffs' Authorities, Tab 6.

<sup>60</sup> This is provided for under the U.S. Code as amended by the *PSLRA*, 15 U.S.C. § 78u-4(b)(3)(B): see Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 43.

issues and damages, as noted in paragraphs 30 and 33 above. The prosecution of the case against E&Y and with respect to Sino-Forest's financial statements would further require retention of a costly forensic accounting and auditing expert, as well as experts and consultants familiar with Chinese business and accounting practices.<sup>61</sup>

64. U.S. Class Counsel undertook these challenges at the commencement of this action, knowing this action would be very expensive and resource intensive, all with the real possibility of little or no recovery after trial, and many defendants who might be out of reach or unable to satisfy a large judgment. This risk increased significantly with Sino-Forest's insolvency filing which eliminated a potential source of recovery. Moreover, U.S. Class Counsel has pursued the U.S. Class Action on a contingent fee basis, which requires upfront payment of all costs, including significant fees to consulting experts for damages and two sets of consulting counsel. U.S. Class Counsel has also supported the Class Counsel in the Ontario Class Action by shouldering significant efforts in conducting document review and shepherding the E&Y Settlement through the U.S. Bankruptcy Court.<sup>62</sup>

***(4) Class Counsel achieved significant success against Ernst & Young***

65. Canadian Class Counsel negotiated a significant settlement with E&Y that is (i) possibly more than the potential outcome against E&Y at trial; (ii) is the largest securities settlement involving a Canadian issuer, the shares of which were not listed on a U.S. stock exchange; (iii) the largest settlement paid by a Canadian audit firm in

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<sup>61</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 40.

<sup>62</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 45.

a securities class action; and (iv) the fifth largest paid by any audit firm in a class action worldwide. This is significant success. This is a significant result for U.S. investors as well. U.S. class members have the opportunity to participate in a large recovery, at a very early stage of the litigation, without risking potential dismissal at the pleadings stage. Importantly, U.S. Lead Plaintiffs had the opportunity to assess the terms and scope of the E&Y settlement, negotiate their participation in the resolution of their claims, and assist substantially in the preparation of the Claims and Distribution Protocol that would allocate the settlement proceeds among Securities Claimants, including U.S. investors.<sup>63</sup>

66. The settlement with E&Y is *more than double* the second largest settlement with a Canadian audit firm in a securities class action. Previously, the largest recovery to shareholders by a Canadian auditing firm was a (US) \$50.5 million settlement paid by the Canadian branch of Deloitte & Touche in *In Re Philip Services Corp Securities Litigation*.<sup>64</sup>

67. Finally, the scale of auditor settlements, and the (CAD) \$117 million settlement achieved in this case, must be considered in the context of the realistic recovery from E&Y at trial. For good or bad, there are legal impediments in U.S. law to establishing liability and recovering from auditors. Success at trial against E&Y may have resulted in a damage award that was less than the settlement amount. Assessing the value of the settlement achieved should account for this reality.

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<sup>63</sup> Affidavit of Steven J. Toll, U.S. Plaintiffs' Motion Record, Tab 2, para. 46.

<sup>64</sup> January 2013 Affidavit of Charles Wright at para. 121, Exhibit "D" to Affidavit of Charles Wright, Canadian Plaintiffs' Motion Record, Tab 8.

68. A settlement of (CAD) \$117 million with E&Y was a significant success. The achievement of this success is particularly significant in light of the substantial risks assumed by U.S. Class Counsel in pursuit of the U.S. Class Action, as well as Canadian Counsel. For these reasons, and as set out above, the requested fees reflect four key factors: (a) the contingent nature of the fee retainer agreement for this action; (b) the significant risks undertaken by counsel that existed from the outset of this action; (c) the significant undertaking of time, money and resources required to prosecute this action, with a risk of little or no compensation for counsel; and (d) the considerable success achieved for claims against E&Y.

**D. Objections Received**

69. None of the objections received to date challenge the fees requested specifically by U.S. Class Counsel. To the extent certain objectors have objected to the fees requested by counsel, in general, those objections provide no substantive basis for finding that the requested fees are not reasonable. For these reasons, and the reasons cited by Canadian Class Counsel which U.S. Plaintiffs adopt, all objections to the request for fees and disbursements should be rejected.

**PART IV – ORDER REQUESTED**

70. Plaintiffs in the U.S. Class Action request that this court make an order approving their request for attorneys' fees of (CAD) \$2,340,000 and reimbursement of disbursements of (US) \$151,611.15.

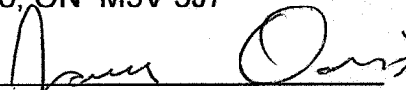
**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

December 6, 2013



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for



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Action

## SCHEDULE "A" - LIST OF AUTHORITIES

1. *Citigroup Inc. Sec. Litig.*, --- F. Supp. 2d, 2013 WL 3942951 (S.D.N.Y. Aug. 1, 2013)
2. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)
3. *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660
4. *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2012 WL 4329009
5. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
6. *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 (S.C.J.)
7. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752
8. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)
9. *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001)

## SCHEDULE "B" - RELEVANT STATUTES

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

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

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(4) If an agreement is not approved by the court, the court may,

- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
- (b) direct a reference under the rules of court to determine the amount owing; or
- (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

(2) For the purpose of subsection (1), success in a class proceeding includes,



- (a) a judgment on common issues in favour of some or all class members; and
- (b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

(5) A motion under subsection (4) shall be heard by a judge who has,

- (a) given judgment on common issues in favour of some or all class members; or
- (b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

- (a) shall determine the amount of the solicitor's base fee;
- (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

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

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

The Trustees of the Labourer's Pension Fund of Central and Eastern Canada, et al.

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

Plaintiffs

Defendants

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
Proceeding commenced at Toronto

**FACTUM OF THE U.S. CLASS ACTION**  
**PLAINTIFFS**  
**(Approval of U.S. Counsel Fees,**  
**returnable December 13, 2013)**

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