

Court of Appeal File Number: M42404
Superior Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

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

Court of Appeal File Number: M42404
Superior Court File No. CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN
CANADA and THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO

Plaintiffs

-and-

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, ALLEN T.Y. CHAN, W.
JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES
P. BOWLAND, JAMES M.E. HYDE, EDMUN MAK, SIMON MURRAY, PETER WANG,
GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT
SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES
CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC
WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL
LTD. and MAISON PLACEMENTS CANADA INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**RESPONDING FACTUM OF
SINO-FOREST CORPORATION**

(Motion for Directions)

Dated: April 25, 2013

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TO: THE APPEALS SERVICE LIST

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I. OVERVIEW

1. On January 6, 2012, Kim Orr Barristers P.C. ("Kim Orr") lost a contest for carriage of the Ontario class actions against Sino-Forest Corporation ("SFC") and others, finishing third behind the successful Siskinds LLP/ Koskie Minsky LLP group and Rochon Genova LLP. Rather than accept the outcome of that determination and move on to another target, Kim Orr waited on the sidelines of SFC's *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceeding until a resolution of SFC's CCAA plan and ancillary civil claims was imminent, and then sprung to life.

2. On December 6, 2012, the day before SFC's Sanction Order hearing, Kim Orr appeared in SFC's CCAA proceeding on behalf of Invesco Canada Ltd., Northwest & Ethical Investment L.P., and Comité Syndical National de Retraite Batirente Inc. (collectively, the "Kim Orr Group"). The Kim Orr Group represents a tiny fraction of SFC's security holders, none of which filed a proof of claim in SFC's CCAA proceeding.

3. In an apparent effort to obstruct, with a view to forcing a fee split, the Kim Orr Group unsuccessfully opposed the sanction of SFC's CCAA plan and later opposed the court's approval of a settlement between the Ontario class action plaintiffs and Ernst & Young LLP ("Ernst &

Young"), under which Ernst & Young agreed to pay \$117 million to resolve civil claims (the "Ernst & Young Settlement). The Ernst & Young Settlement represents a significant recovery for SFC's stakeholders.

4. After unsuccessfully opposing the sanctioning of SFC's CCAA plan, the Kim Orr Group has adopted a passive/aggressive approach to SFC's CCAA proceeding, taking steps to oppose and obstruct, in an apparent attempt to keep issues alive, but without demonstrating any sense of urgency.

5. For example, SFC's CCAA plan was sanctioned by the court on December 10, 2012 (the "Plan") The Kim Orr Group filed a notice of motion for leave to appeal on December 31, 2012, the last day allowed under the CCAA. The Kim Orr Group served its motion record and factum on January 29, 2013, *almost a month later*. SFC's CCAA Plan was *implemented* on January 20, 2013, thereby rendering the purported appeal moot.¹ The Kim Orr Group filed its reply factum on March 3, 2013, after which the leave application was submitted to a panel of the court for determination.

6. Similarly, on March 20, 2013, the court approved the Ernst & Young Settlement. The Kim Orr Group's motion for leave to appeal was served on April 9, 2013, one day short of the outside limit under the CCAA. The motion for directions, seeking to combine the two appeals, was served on April 17, 2013, almost a month after the Ernst & Young Settlement was approved.

¹ See *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 238 at paras. 30,32, Brief of Authorities of Sino-Forest Corporation, Tab 1.

These are the actions of parties seeking to obstruct and delay, not those of parties seeking to promptly address claimed grievances in the context of real time litigation.

7. A review of the timeline of the Kim Orr Group's various motions for appeal (attached at Schedule "C") makes it clear that the Kim Orr Group has sought the maximum possible delay in advancing half-hearted efforts to appeal.

8. This motion will only serve to delay this Court's determination of the Kim Orr Group's motion for leave to appeal the Sanction Order, further prejudicing SFC and its stakeholders. SFC's plan has been implemented and SFC's operating assets are now under the control of its creditors. So long as the appeal from the Sanction Order remains live, the risk remains that a court could set aside the Sanction Order, the consequences of which to SFC and its stakeholders and operating assets are impossible to predict.

9. This motion should be dismissed with costs.

II. FACTS

10. As set out below, SFC disagrees with the characterization of the facts in the Kim Orr Group's factum.

A. Background

11. On March 30, 2012, Justice Morawetz of the Ontario Superior Court made the Initial Order granting a stay of proceedings against SFC and certain of its subsidiaries, and appointing

FTI Consulting Canada Inc. as the Monitor in the CCAA proceedings.² The stay of proceedings was subsequently extended through February 1, 2013.³

B. Claims Process

12. On May 14, 2012, Justice Morawetz granted an order (the "Claims Procedure Order") which approved a claims process that was developed by SFC in consultation with the Monitor.⁴

13. In order to identify the nature and extent of claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their Proof of Claim.⁵

C. Claims Relevant to this Motion

14. As detailed below, the claims process established by the Claims Procedure Order gave rise to a number of claims that are relevant for purposes of this motion.

1. The Noteholders

15. At the date of filing, SFC had approximately \$1.8 billion of principal amount of debt owing under notes, plus accrued and unpaid interest.⁶

² Initial Order dated March 30, 2012, Responding Motion Record of Sino-Forest Corporation, Tab 1(A), p. 4.

³ Affidavit of W. Judson Martin, sworn November 29, 2012, para. 28 (the "Martin November 29 Affidavit") Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 42.

⁴ Martin November 29 Affidavit, para. 39, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 46.

⁵ Martin November 29 Affidavit, para. 41, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), pp. 46-47.

⁶ Martin November 29 Affidavit, para. 43, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), pp. 47-48.

2. The Shareholder / Former Noteholder Group

16. SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and the Underwriters (defined below) involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan, and New York.⁷

17. The *Labourers v. Sino-Forest Corporation* class action (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP.⁸ The Quebec class action was brought by Siskinds' office in Quebec, and is similar in nature to the Ontario Class Action. The New York complaint is brought on behalf of persons who purchased SFC shares on the over-the-counter market and on behalf of non-Canadian purchasers of SFC debt securities, but no quantum of damages is specified in the complaint.⁹

18. The Ontario, Quebec and New York class action plaintiffs all filed Proofs of Claim in the CCAA proceeding. The plaintiffs in the Saskatchewan claim did not file a Proof of Claim.¹⁰ A few shareholders filed Proofs of Claim separately, but no Proof of Claim was filed by the Kim Orr Group.

⁷ Martin November 29 Affidavit, paras. 45-50, Responding Motion Record of Sino-Forest Corporation, Tab 1(b), pp. 48-49.

⁸ Who succeeded in a carriage fight. See *Smith v. Sino-Forest Corporation*, 2012 ONSC 24, para. 233 ["I award carriage to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest*. In the race for carriage of an action against Sino-Forest, I would have ranked Rochon Genova second and Kim Orr third."], Brief of Authorities of Sino-Forest Corporation, Tab 2.

⁹ Martin November 29 Affidavit, para. 50, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 50.

¹⁰ Martin November 29 Affidavit, para. 49, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 50.

19. Throughout SFC's CCAA proceeding, an Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee") appeared to represent the interests of shareholders and noteholders who have asserted class action claims against SFC and others. The Ad Hoc Securities Purchasers' Committee is represented by Siskinds LLP, Koskie Minsky LLP, and Paliare Roland Rosenberg Rothstein LLP.¹¹

3. Auditors

20. Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006.¹²

21. The auditors asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the shareholder class actions, with each of the auditors having asserted claims in excess of \$6.5 billion. In addition, the auditors asserted claims for payment of professional fees associated with SFC after the release of the Muddy Waters report, and generalized claims for damage to reputation.¹³ The auditors also asserted indemnification claims against SFC in respect of the class action claims against them by the former noteholders.¹⁴

¹¹ Martin November 29 Affidavit, para. 51, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), pp. 50-51.

¹² Martin November 29 Affidavit, para. 61, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 52.

¹³ Martin November 29 Affidavit, para. 62, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 53.

¹⁴ Martin November 29 Affidavit, para. 66, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 54.

22. The auditors asserted claims against SFC's subsidiaries for, among other things, indemnification in connection with the shareholder class actions. Those claims tended to treat SFC and its subsidiaries interchangeably or as one collective entity.¹⁵

D. Efforts and Achievements in Arriving at a Negotiated Resolution

23. From shortly after SFC's CCAA proceeding was commenced, efforts were made to develop a path forward for SFC that could achieve the requisite creditor support.

24. There could be no effective restructuring of SFC's business and separation from the Canadian parent (which was the objective since the commencement of the CCAA proceedings) if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.¹⁶ It was critical to the success of the CCAA restructuring, to the maximization of value and the preservation of assets that the claims against SFC and its subsidiaries be determined or resolved as quickly as possible.¹⁷ Therefore, the Plan had to provide for the release of claims against SFC's subsidiaries.

25. In addition, timing and delay were critical factors in this restructuring. Undue delays and the passage of time would have negatively impacted the value of SFC's assets and the recovery by stakeholders.¹⁸

26. SFC welcomed the initiative by Justice Morawetz to urge and encourage the principal stakeholders to engage in a constructive dialogue with a view to attempting to resolve disputes

¹⁵ Martin November 29 Affidavit, para. 67, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 54.

¹⁶ Martin November 29 Affidavit, para. 124, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 70.

¹⁷ Affidavit of W. Judson Martin, sworn January 11, 2013 ("Martin January 11 Affidavit"), Responding Motion Record of Sino-Forest Corporation, Tab 1(C), p. 85.

¹⁸ Martin January 11 Affidavit, para. 11, Responding Motion Record of Sino-Forest Corporation, Tab 1(C), p. 88.

on a consensual basis, including the claims against SFC and SFC's subsidiaries.¹⁹ On July 25, 2012, Justice Morawetz issued a mediation order (the "Mediation Order") on the consent of all parties.²⁰

27. Paragraph 5 of the Mediation Order directed the parties to attend the mediation with full authority to settle the class action claims. The mediation occurred in a context where the Court had the jurisdiction to settle the class actions, and yet the Kim Orr Group never attempted to participate in the mediation nor did they ever raise any objection to the mediation.

28. The mediation took place on September 4 and 5, 2012 with Justice Newbould as the mediator. While the mediation did not result in a global resolution, further discussions continued among certain of the parties after the conclusion of the mediation, and those discussions continued up to the meeting of SFC's creditors.²¹

29. As a result of these efforts, SFC obtained the support of and non-opposition to the Plan by significant participants in the CCAA proceedings prior to the creditors' meeting. In the end, the only parties who opposed the Plan was the Kim Orr Group, who must have been fully aware of the CCAA process, given the very public nature of the process and the active participation of the Ontario Class Action plaintiffs. Despite this, the Kim Orr Group waited until December 6, 2012, the day before the Sanction Hearing, to file a notice of appearance in the CCAA process.

¹⁹ Martin January 11 Affidavit, para. 13, Responding Motion Record of Sino-Forest Corporation, Tab 1(C), p. 88.

²⁰ Martin November 29 Affidavit, para. 84, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), pp. 59-60.

²¹ Martin November 29 Affidavit, para. 86, Responding Motion Record of Sino-Forest Corporation, Tab 1(B), p. 59.

E. The Ernst & Young Settlement

30. Following the mediation, Ernst & Young continued discussions with the Ontario Class Action Plaintiffs, ultimately resulting in the Minutes of Settlement which defined the terms of the Ernst & Young Settlement.²²

F. The Plan and the Treatment of Ernst & Young's, the Underwriters and Named Third Party Defendants' Claims

31. The terms of the Ernst & Young Settlement include the provision of a release in favour of Ernst & Young (the "Ernst & Young Release") in respect of all claims related to SFC. The Plan also includes third party releases in respect of other non-Applicant entities and individuals who have made material contributions to the success of the restructuring, including present and former directors and officers, and SFC's subsidiaries.²³

32. Section 11.1 of the Plan provides a framework pursuant to which Ernst & Young could receive a broad release under the Plan if several conditions are met. The Plan (and section 40 of the Sanction Order) explicitly state that the Ernst & Young Release will only be granted if all conditions are met, including further court approval of the Ernst & Young Settlement.²⁴

33. Section 11.2 of the Plan provides a framework pursuant to which a Named Third Party Defendant (which now includes the Underwriters, BDO, SFC's former CEO and Chairman of the Board Allen Chan, SFC's former CFO David Horsley and SFC's former president Kai Kit Poon)

²² Martin January 11 Affidavit, para. 16, Responding Motion Record of Sino-Forest Corporation, Tab 1(C), p. 89.

²³ Martin January 11 Affidavit, para. 22, Responding Motion Record of Sino-Forest Corporation, Tab 1(C), pp. 91-92.

²⁴ Subsection 8.2(z) of the Plan and section 11.1 of the Plan, Motion Record of Invesco Canada, Tab 2(A), p. 106.

can obtain a release under the Plan in substantially the same form as contemplated for Ernst & Young.²⁵

34. In return for sections 11.1 and 11.2, among other things, Ernst & Young agreed to drop its opposition to the Plan, which provides that none of Ernst & Young, the Underwriters or any other Named Third Party Defendant shall be entitled to any distributions under the Plan, and in fact none of them received distributions when the Plan was implemented on January 30, 2013.²⁶

35. In summary, the Plan provides for the mechanics and framework for the Ernst & Young Settlement and other potential third party settlements, should those occur in the future. The inclusion of these provisions in the Plan facilitated the support of the Plan by Ernst & Young, the Underwriters and the withdrawal of objections to the Plan by BDO.

G. Notice of Motion to Appeal Sanction Order

36. Justice Morawetz granted the Sanction Order sanctioning the CCAA Plan on December 10, 2012.²⁷

37. On December 31, 2012, the Kim Orr Group filed a notice of motion for leave to appeal the Sanction Order.²⁸

38. On January 29, 2013, the Kim Orr Group served and filed their motion record and factum for a motion for leave to appeal the Sanction Order.

²⁵ Subsections 11.2(b) and (c) of the Plan, Motion Record of Invesco Canada, Tab 2(A), pp. 115-116.

²⁶ Subsections 7.1(m) (n) and (o) of the Plan, Motion Record of Invesco Canada, Tab 2(A), p. 100.

²⁷ Plan Sanction Order of Justice Morawetz dated December 10, 2012 (the "Sanction Order"), Motion Record of Invesco Canada, Tab 2(A), p. 16.

²⁸ Amended Notice of Motion for Leave to Appeal, dated December 27, 2012, Motion Record of Invesco Canada, Tab 2(K), p. 254.

39. On March 3, 2013, pursuant to Rule 61.03.1(14), the motion for leave to appeal the Sanction Order was submitted to the Court of Appeal in writing for consideration.

H. Motion to Approve the Ernst & Young Settlement

40. On February 4, 2013, Justice Morawetz heard a motion seeking approval of the Ernst & Young Settlement. The Kim Orr Group opposed the motion, arguing that the Ernst & Young Settlement was not fair and reasonable.

41. On March 20, 2013, Justice Morawetz approved the Ernst & Young Settlement (the "Settlement Approval Order") and dismissed the Kim Orr Group's motion for a representative order (the "Representative Dismissal Order").²⁹

42. On April 9, 2013, the Kim Orr Group served and filed a notice of motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order and sought an order to consolidate that motion, should leave be granted, with the motion for leave to appeal the Sanction Order.³⁰

43. On April 17, 2013, the Kim Orr Group served and filed an amended notice of motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order. The

²⁹ Settlement Approval Order of Justice Morawetz dated March 20, 2013, Motion Record of Invesco Canada, Tab 2(B), p. 133; Representative Dismissal Order of Justice Morawetz dated March 20, 2013, Motion Record of Invesco Canada, Tab 2(C), p. 148.

³⁰ Notice of Motion for Leave to Appeal dated April 9, 2013, Responding Motion Record of Sino-Forest Corporation, Tab 1(D), p. 95.

amended notice of motion removed the portion of the notice seeking an order to consolidate the motion, should leave be granted, with the motion for leave to appeal the Sanction Order.³¹

44. On April 17, 2013, the Kim Orr Group served and filed this motion for directions.³²

45. On April 19, 2013, the Kim Orr Group served and filed a notice of appeal to the Settlement Approval Order and the Representative Dismissal Order now claiming that this was a final order despite having served and file a notice of motion for leave to appeal that same order on April 9, 2013.³³

III. LAW AND ARGUMENT

46. On this motion for directions, the Kim Orr Group are seeking:

- (a) an Order waiving or abridging the notice, service and filing obligations pursuant to the *Rules of Civil Procedure* with respect to this motion for directions;
- (b) if necessary, an Order waiving or abridging the service, notice and filing obligations pursuant to the *Rules of Civil Procedure* and validating any late service and/or filing of the notice of motion for leave to appeal from the orders dated March 20, 2013 of Justice Morawetz, being the Settlement Approval Order and the Representative Dismissal Order;

³¹ Amended Notice of Motion for Leave to Appeal dated April 9, 2013, Motion Record of Invesco Canada, Tab T, p. 349.

³² Notice of Motion (Motion for Directions), dated April 17, 2013, Motion Record of Invesco Canada, Tab 1, p. 1.

³³ Notice of Appeal dated April 19, 2013, Motion Record of Invesco Canada, Tab U, p. 356.

- (c) an Order directing that all materials related to this motion, the motions for leave to appeal, and should leave be granted, all related appeals, may be served by electronic mail, and that proof of receipt of that email is not necessary to validate service for the purpose of filing the materials with the Court;
 - (d) an Order consolidating the motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order with the pending motion for leave to appeal from the Sanction Order, and, should leave be granted, all related appeals;
 - (e) an Order directing that the hearing of the motions for leave to appeal and the appeals of the Sanction Order, Settlement Approval Order, and Representative Dismissal Order be consolidated and heard together before a panel of three judges, orally;
 - (f) an Order expediting the hearing of all such motions for leave to appeal and such appeals of the Sanction Order, Settlement Approval Order, and Representative Dismissal Order;
 - (g) an Order transferring the materials filed on the hearings before Justice Morawetz to the Court of Appeal and allowing the parties to rely on these materials for the motions for leave to appeal the Sanction Order, Settlement Approval Order, and Representative Dismissal Order, and, should leave be granted, all related appeals;
- and

- (h) an Order granting leave to the Kim Orr Group to act as the representative party for the purposes of the proposed appeal, if necessary.

47. SFC's position on each aspect of the relief sought by the Kim Orr Group is discussed below.

A. Abridging Service and Filing Obligations with Respect to this Motion

48. SFC opposes the Kim Orr Group's request for an Order waiving or abridging the notice, service and filing obligations pursuant to the Rules with respect to this motion for directions and submits that the Rules should be complied with in respect of motions and appeals before the Court of Appeal. Given the delay (as discussed above and articulated in Schedule "C") with which the Kim Orr Group have proceeded in pursuing their respective motions for leave to appeal, there is no reason to grant them such an indulgence.

49. This motion was scheduled for May 1, 2013 without consulting any of the parties who indicated (at their request) that they would participate in the leave motions of any appeals. Those responding parties still managed to comply with the Rules. The Kim Orr Group, who scheduled this motion, should be held to the same standard.

B. Abridging Service and Filing Obligations with Respect to the Motion for Leave to Appeal the Settlement Approval Order and the Representative Dismissal Order

50. SFC opposes the Kim Orr Group's request, if necessary, for an Order waiving or abridging the service, notice and filing obligations pursuant to the Rules and validating any late service and/or filing of the notice of motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order. SFC submits that the Rules should be complied with in respect of motions and appeals before the Court of Appeal.

51. The inconsistency of the Kim Orr Group's submissions can be seen in the fact that in the same motion they seek (i) an expedited hearing of the leave motion for any appeal and (ii) an order waiving late service. The Kim Orr Group claim to be expediting matters in an effort to circumvent significant procedural hurdles (the requirement to first obtain leave to appeal), but continue to delay matters in a manner that is holding up the CCAA restructuring process and foreign recognition of that process, and that may impact the existing schedule set in the class action proceedings.

52. The Kim Orr Group must face the consequences of their continued efforts to delay SFC's CCAA proceedings and this Court should not relieve them of their obligations to act within the required timeframes under the Rules.

C. Electronic Service of Materials

53. If the court grants any other relief sought on this motion, SFC consents to an Order directing that all materials related to this motion, the motions for leave to appeal, and should leave be granted, all related appeals, may be served by electronic mail, and that proof of receipt of that email is not necessary to validate service for the purpose of filing the materials with the Court.

D. Consolidation of Motions for Leave to Appeal

54. SFC opposes the Kim Orr Group's request for an Order consolidating the present motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order with the pending motion for leave to appeal from the Sanction Order, and, should leave be granted, all related appeals.

55. As described above, the Kim Orr Group's motion for leave to appeal the Sanction Order was commenced in December 2012 and proceeded in the ordinary course in writing. Pursuant to Rule 61.03.1, that motion was submitted for this Court's consideration on March 3, 2013 (nearly two full months before this motion for directions will even be heard). It is not appropriate to consolidate that leave to appeal motion with the motion for leave to appeal the Settlement Approval Order and Representative Dismissal Order given that doing so will only effect one result: to further delay the decision in the motion for leave to appeal the Sanction Order to the prejudice of SFC and its stakeholders.

56. The consolidation of proceedings is governed by Rule 6.01 of the Rules. Ontario's courts have held that the underlying policy of Rule 6.01 is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes, and to avoid inconsistent judicial findings.³⁴

57. In determining whether an order should be made under Rule 6.01, the first step is to determine whether any of the criteria under Rule 6.01(1) have been met:

- (a) do the proceedings have a question of law or fact in common;
- (b) does the relief claimed in them arise out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) is there another reason an order ought to be made under this Rule 6.01.³⁵

³⁴ *Coulls v. Pinto*, [2007] O.J. No. 4241 (Sup. Ct. J.) ["*Coulls*"] at para. 18, Brief of Authorities of Sino-Forest Corporation, Tab 3.

³⁵ Rule 6.01, *Rules of Civil Procedure*; *Coulls* at paras. 19-20, Brief of Authorities of Sino-Forest Corporation, Tab 3.

58. If none of these criteria are met, then the order must be refused. If one of the above criteria is satisfied, then the court must still consider whether the balance of convenience favours the order, such that the discretion to consolidate should be exercised.³⁶ The criteria considered with respect to a balance of convenience are also commonly considered when determining whether there is another reason an order ought to be made pursuant to Rule 6.01(c) and therefore have been considered together in this factum.

59. In this case, none of the criteria in Rule 6.01 are met to order consolidation and, even if any of the criteria were satisfied, the balance of convenience strongly weighs against making such an order.

(a) The proceedings do not have a question of law or fact in common

60. An overlap in a question of law or fact is insufficient to order consolidation where the evidence will not sufficiently overlap.³⁷

61. Even if there is a common issue of fact or law between the proceedings, "the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceedings which would render it desirable that the matters be consolidated."³⁸

62. The issues on the motions that the Kim Orr Group wish to consolidate are fundamentally different. The motion for leave to appeal the Sanction Order addresses the matter of whether it is

³⁶ *Drabinsky v. KPMG*, [1999] O.J. No. 3630 (Sup. Ct. J.) at para. 8, Brief of Authorities of Sino-Forest Corporation, Tab 4; *Coulls* at para. 20, Brief of Authorities of Sino-Forest Corporation, Tab 3.

³⁷ *Chebib v. Medcomsoft Inc.*, [2003] O.J. No. 522 (Sup. Ct. J.) at para. 7, Brief of Authorities of Sino-Forest Corporation, Tab 5.

³⁸ *Coulls* at paras. 33-34, Brief of Authorities of Sino-Forest Corporation, Tab 3.

appropriate to use a CCAA plan and CCAA proceedings to create a framework for the settlement of disputes between SFC's security holders and the third party service providers who are co-defendants with SFC in litigation commenced by SFC's security holders. The motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order deal with whether the Ernst & Young Settlement is fair and reasonable and whether the Kim Orr Group can challenge Justice Morawetz's decision that it is on a representative basis. These motions deal with different questions that affect all of SFC's stakeholders differently.

63. The fact that both motions arise out of SFC's CCAA proceeding is an insufficient overlap in facts to order consolidation. Rule 6.01 requires a common question of law or fact that is of sufficient importance; in this case, the questions that must be decided on the motions are not common.

64. If this Court finds that there are common questions of fact or law, SFC submits that the balance of convenience weighs in favour of not making the order, as further set out below.

(b) The relief does not arise out of the same transaction or occurrence

65. It is immaterial that there is simply a common transaction or occurrence between the two proceedings. Rather, the Rule requires that "the relief claimed" arises out of "the same transaction or occurrence".³⁹ That is simply not the case on the present facts. In the motion for leave to appeal the Sanction Order, the Kim Orr Group is challenging a CCAA court's ability to approve a plan that provides a framework for settlement of litigation proceedings by SFC's security holders. In their motion for leave to appeal the Settlement Approval Order, the Kim Orr

³⁹ *Coulls* at para. 27, Brief of Authorities of Sino-Forest Corporation, Tab 3.

Group is seeking to appeal Justice Morawetz's finding that the Ernst & Young Settlement is fair and reasonable. The provision of a framework for settlement agreements contained within SFC's CCAA Plan and the fairness and reasonableness of one specific settlement agreement are not "the same transaction or occurrence". SFC's CCAA Plan and the Ernst & Young Settlement were negotiated by different parties resolving different disputes at different times and Justice Morawetz's respective orders approving the two agreements applied a different test pursuant to different statutes. The Kim Orr Group's contention that these two documents can somehow constitute "one transaction" is simply untenable.

66. Even if this Court finds that the relief does arise out of the same transaction or occurrence, SFC submits that the balance of convenience weighs in favour of not making the order, as further set out below.

(c) There is no other reason an order ought to be made under Rule 6.01, and the balance of convenience weighs against making such an order

67. In determining whether there is another reason to make an order under Rule 6.01, or whether the balance of convenience weighs in favour of not making an order under Rule 6.01 notwithstanding that there are common issues of fact and law or that the relief claimed arises out of the same transaction or occurrence, some of the factors that courts have considered include:

- (a) the relative stages of the two proceedings;
- (b) whether there will be a real reduction in the number of court days taken up by the proceedings being heard at the same time;
- (c) whether there is a risk of inconsistent findings;
- (d) whether the motion is brought on consent or over the objection of another party;
- (e) whether the party seeking discretionary relief has deliberately delayed the action;

- (f) whether further delay will result from an order for consolidation;
- (g) any advantage or prejudice the parties are likely to experience if the proceedings are kept separate or consolidated;
- (h) whether any prejudice a party may suffer as a result of the consolidation or any delay outweighs the potential benefits that consolidation may otherwise have; and
- (i) whether consolidation would do more harm than good (a comparison between the ills that may occur if the proceedings are kept separate and the ills that may occur if consolidation is ordered).⁴⁰

68. Prejudice and delay to the parties involved are significant considerations when determining whether an order under Rule 6.01 should be made. While delay in bringing a motion for an order under Rule 6.01 is not fatal, it cannot be ignored.⁴¹

69. In addition, courts have considered the effects on, and potential prejudice to, parties removed from the proceedings. In an insolvency situation, consolidation has been dismissed where there was possible prejudice or expense to creditors.⁴²

70. The consolidation of the motions for leave to appeal could only serve to unreasonably delay the resolution of the motion to appeal the Sanction Order given that (i) it was submitted to the Court of Appeal for consideration on March 3, 2013; (ii) the Kim Orr Group have yet to serve or file their motion record or factum for their motion for leave to appeal the Settlement

⁴⁰ *Chebib v. Medcomsoft Inc.*, [2003] O.J. No. 522 (Sup. Ct. J.) at para. 7, Brief of Authorities of Sino-Forest Corporation, Tab 5; *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 ONSC 3306 at para. 18, Brief of Authorities of Sino-Forest Corporation, Tab 6; *Coulls* at paras. 20, 28-36, Brief of Authorities of Sino-Forest Corporation, Tab 3; *Don Bodkin Leasing Ltd. v. Bank of Montreal*, [1990] O.J. No. 732, Brief of Authorities of Sino-Forest Corporation, Tab 7.

⁴¹ *Chebib v. Medcomsoft Inc.*, [2003] O.J. No. 522 (Sup. Ct. J.) at para. 8, Brief of Authorities of Sino-Forest Corporation, Tab 5; *Don Bodkin Leasing Ltd. v. Bank of Montreal*, [1990] O.J. No. 732, Brief of Authorities of Sino-Forest Corporation, Tab 7.

⁴² *West York Construction (1984) Ltd. v. Walton Place (Scarborough) Inc.*, [1993] O.J. No. 3068 (Ct. J. (Gen. Div.)) at paras. 18, 21 and 23, Brief of Authorities of Sino-Forest Corporation, Tab 8; *J.P. Capital Corp. (Re)*, [1995] O.J. No. 538 (Ct. J. (Gen. Div.)) at para. 19, Brief of Authorities of Sino-Forest Corporation, Tab 9.

Approval Order or the Representative Dismissal Order; and (iii) they have now requested an oral hearing before a panel of three judges to hear the motions for leave.

71. The Kim Orr Group seeks an oral hearing for their motion for leave to appeal the Sanction Order even though that motion was submitted in writing to the Court of Appeal nearly two months ago. That will not reduce the court time taken up by these matters, it will increase it.

72. The delay caused by consolidating the Kim Orr Group's motions would prejudice SFC by further holding up SFC's CCAA restructuring process and the foreign recognition of that process as well as possibly impacting the schedule in the various class action proceedings.

73. Contrary to the Kim Orr Group's repeated assertions in their factum, there is no danger of inconsistent findings if the motions are heard separately. The questions involved in the two motions for leave to appeal are separate and distinct and relate to the Justice Morawetz's approval of different documents negotiated by different parties resolving different issues and approved by Justice Morawetz pursuant to different statutes applying different tests. How could that ever lead to inconsistent findings?

74. Based on the above considerations, there is no other reason to make an order under Rule 6.01 and the balance of convenience weighs in favour of not making such an order.

E. Oral Hearing of the Motions For Leave to Appeal

75. The Kim Orr Group seeks an Order directing that the hearing of the motions for leave to appeal and the appeals of the Sanction Order, Settlement Approval Order, and Representative Dismissal Order be consolidated and heard together before a panel of three judges, orally.

76. The Court has expressed a clear preference to address motions seeking leave to appeal in writing.⁴³

77. Notwithstanding the foregoing, SFC is content to attend and provided submissions as requested if this Court is inclined to hear, or believes it would be helpful to hear, only the motions for leave to appeal the Settlement Approval Order and the Representative Dismissal Order orally.

78. As described above, SFC opposes the consolidation of the motions for leave to appeal. The motion for leave to appeal the Sanction Order in writing has been submitted to the Court of Appeal in writing and there is no reason to now have that matter be re-litigated in an oral hearing. SFC submits that this is simply another delay tactic being employed by the Kim Orr Group in an effort to hijack the process and create leverage to their benefit.

79. SFC also opposes the consolidation of the motion for leave to appeal and the appeals. Given the Kim Orr Group's delay in pursuing these motion for leave to appeal (discussed above and demonstrated by the timeline at Exhibit "C"), SFC submits that the Kim Orr Group ought not to now be allowed to skip the important procedural step of being granted leave to appeal by rolling leave to appeal into the appeal of the Settlement Approval Order and Representative Dismissal Order. SFC recognizes that there are circumstances where appellants are legitimately trying to expedite matters in CCAA proceedings in which it makes sense to have the Court hear

⁴³ Correspondence from J. Kromkamp to D. Byers dated April 3, 2012, Brief of Authorities of Sino-Forest Corporation, Tab 10.

the motion for leave to appeal at the same time as the appeal, should leave be granted, of the matter. This is not such a circumstance.

F. Expedited Hearings

80. The Kim Orr Group's motions are holding up the CCAA process and foreign recognition of that process and may have an impact on the schedule set in the class action proceedings. SFC submits that the motions for leave, and any appeals if granted should be dealt with as expeditiously as possible. SFC submits that the most important way to expedite this matter is to keep the Kim Orr Group's motions for leave to appeal separate and not to further delay the release of this Court's decision regarding the Kim Orr Group's motion for leave to appeal the Sanction Order.

G. Transfer of Materials

81. The Kim Orr Group are seeking an Order transferring the materials filed on the hearings before Justice Morawetz to the Court of Appeal and allowing the parties to rely on these materials for the motions for leave to appeal the Sanction Order, Settlement Approval Order, and Representative Dismissal Order, and, should leave be granted, all related appeals.

82. SFC consents to the transfer of the full record before Justice Morawetz for the motion heard February 4, 2013 (the motion resulting in the Settlement Approval Order and the Representative Dismissal Order), but submits that the material before His honour on the Sanction Hearing is not necessary for the current leave motion given that it related to a separate matter.

H. Representative Order

83. The Kim Orr Group seeks an Order granting leave to the Kim Orr Group to act as the representative party for the purposes of their proposed appeal, if necessary. SFC opposes this relief and submits that it is unnecessary.

84. The *Class Proceedings Act*⁴⁴ makes a clear distinction between the representative plaintiff and a class member. The rights of appeal to the Court of Appeal are set out in subsection 30(3) of the *Class Proceedings Act*, which clearly state that an appeal from a judgment on common issues (or an order under section 24 that determines individual claims) can be commenced by a "party". A class member who is not the representative plaintiff is not a party.

85. Subsection 30(5) of the *Class Proceedings Act* provides that if a representative party does not appeal, as permitted by subsection 30(3) or if a representative party abandons the appeal, any class member can bring a motion seeking leave to act as a representative party for the purposes of that appeal.

86. The Kim Orr Group erroneously tries to rely on these provisions to argue that this Court should appoint them as a representative party for their motion to appeal the Settlement Approval Order and the Representative Dismissal Order.

87. In *Dabbs v. Sun Life Assurance Co. of Canada*,⁴⁵ a class member argued that he had a right of appeal under section 6(1)(b) of the *Courts of Justice Act*⁴⁶. That argument was not

⁴⁴ S.O. 1992, c. 6.

⁴⁵ *Dabbs v. Sun Life Assurance Co. of Canada*, 41 O.R. (3d) 97 at para. 17 (C.A.) ["Dabbs"], Brief of Authorities of Sino-Forest Corporation, Tab 11.

successful. The Court of Appeal held that, among other things, the *Class Proceedings Act* granted specific rights of appeal in class proceedings and took precedence over statutes of general application such as the *Courts of Justice Act*. Accordingly, the *Courts of Justice Act* did not apply.⁴⁷

88. In considering the motion for leave under subsection 30(5) of the *Class Proceedings Act* to allow the class member to act as a representative party for purposes of the appeal in *Dabbs*, this Court denied leave, stating that the test is guided by the best interests of the class and the factors to be considered are "whether the class member applying would fairly and adequately represent the interest of the class".⁴⁸ The present facts are identical to the facts before this Court in *Dabbs*: there is nothing in the record which indicates that the Kim Orr Group would adequately represent the interests of this class by bringing an appeal which seeks to set aside a settlement agreement.

89. In fact, the issue of whether the Kim Orr Group ought to be the representatives of SFC's security holders has already been considered by Ontario's courts and they have been found wanting. The Kim Orr Group sought to be the representative plaintiff during the carriage motion in the Ontario class action and as is described above, in awarding carriage to the Ontario Class Action plaintiff, the Court took the remarkable step of stating that the Kim Orr Group's counsel came third (out of three) in receiving carriage of the Ontario Class Action.⁴⁹

⁴⁶ R.S.O. 1990 c. C. 43.

⁴⁷ *Dabbs* at para. 17 (C.A.) ["*Dabbs*"], Brief of Authorities of Sino-Forest Corporation, Tab 11.

⁴⁸ *Dabbs* at para. 19

⁴⁹ *Smith v. Sino-Forest Corporation*, 2012 ONSC 24, para. 233 ["I award carriage to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest*. In the race for carriage of an action against Sino-Forest, I would have ranked Rochon Genova second and Kim Orr third."], Brief of Authorities of Sino-Forest Corporation, Tab 1.

90. The Kim Orr Group has advanced the argument that its case differs from *Dabbs* in that the class member in *Dabbs* who was refused representative status still had the right to pursue a remedy by invoking opt out rights under the *Class Proceedings Act*. Although the Court in *Dabbs* noted the existence of an available remedy, it did not import the availability of an alternative remedy into the test, which requires the Court only to determine "whether the class member applying would fairly and adequately represent the interest of the class".⁵⁰ Moreover, the Kim Orr Group, like the class member in *Dabbs*, is also entitled to pursue alternative relief, albeit in the form of a motion seeking leave to appeal, a process which has already been commenced.

91. SFC submits that there is no reason to grant the Kim Orr Group's representative status.

IV. RELIEF SOUGHT

92. SFC respectfully requests that the Kim Orr Group's motion for directions be dismissed with costs.

⁵⁰ *Dabbs*, Brief of Authorities of Sino-Forest Corporation, Tab 11.

93. SFC consents to an Order directing that all materials related to this motion, the motions for leave to appeal, and should leave be granted, all related appeals, may be served by electronic mail, and that proof of receipt of that email is not necessary to validate service for the purpose of filing the materials with the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

April 25, 2013

A handwritten signature in cursive script that reads "Bennett Jones LLP". The signature is written in black ink and is positioned above a horizontal line.

BENNETT JONES LLP
Lawyers for Sino-Forest Corporation

SCHEDULE "A" – AUTHORITIES CITED

Jurisprudence

1. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 238
2. *Smith v. Sino-Forest Corporation*, 2012 ONSC 24
3. *Coulls v. Pinto*, [2007] O.J. No. 4241 (Sup. Ct. J.)
4. *Drabinsky v. KPMG*, [1999] O.J. No. 3630 (Sup. Ct. J.)
5. *Chebib v. Medcomsoft Inc.*, [2003] O.J. No. 522 (Sup. Ct. J.)
6. *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 ONSC 3306
7. *Don Bodkin Leasing Ltd. v. Bank of Montreal*, [1990] O.J. No. 732
8. *West York Construction (1984) Ltd. v. Walton Place (Scarborough) Inc.*, [1993] O.J. No. 3068 (Ct. J. (Gen. Div.))
9. *J.P. Capital Corp. (Re)*, [1995] O.J. No. 538 (Ct. J. (Gen. Div.))
10. Correspondence from J. Kromkamp to D. Byers dated April 3, 2012
11. *Dabbs v. Sun Life Assurance Co. of Canada*, 41 O.R. (3d) 97 (C.A.)

SCHEDULE "B" – STATUTORY REFERENCES

Rules of Civil Procedure, RRO 1990, Reg 194

Notice of Motion for Leave

61.03 (1) Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

- (a) state that the motion will be heard on a date to be fixed by the Registrar;
- (b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and
- (c) be filed with proof of service in the office of the Registrar, within five days after service.

WHERE ORDER MAY BE MADE

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

- (a) they have a question of law or fact in common;
- (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) for any other reason an order ought to be made under this rule,

the court may order that,

- (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
- (e) any of the proceedings be,
 - (i) stayed until after the determination of any other of them, or
 - (ii) asserted by way of counterclaim in any other of them.

Class Proceeding Act, 1992, SO 1992, c 6

Appeals: judgments on common issues and aggregate awards

30(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

Idem

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

Courts of Justice Act, RSO 1990, c C. 43

Court of Appeal jurisdiction

6.(1)An appeal lies to the Court of Appeal from,

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

SCHEDULE "C" – TIMELINE

Date	Event	Delay
December 7, 2012	Sanction Hearing	
December 10, 2012	Sanction Order	
December 31, 2012	Kim Orr Group filed notice of motion for leave to appeal Sanction Order	21 days – served and filed on the last day allowed under subsection 14(2) of the CCAA
January 29, 2013	Kim Orr Group served and filed motion record and factum for motion for leave to appeal Sanction Order	30 days – served and filed on the last day allowed under Rule 61.03.1(6)
February 4, 2013	Hearing to approve Ernst & Young Settlement	
February 22, 2013	The respondents served and filed their facta responding to motion for leave to appeal Sanction Order	
March 3, 2013	Kim Orr Group served and filed reply factum for motion for leave to appeal Sanction Order	
March 3, 2013	Under Rule 61.03.1(14) the motion for leave to appeal the Sanction Order was submitted to the Court of Appeal for consideration	
March 20, 2013	Justice Morawetz issued the Settlement Approval Order and the Representative Dismissal Order	
April 9, 2013	Kim Orr Group served and filed notice of motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order and sought an order to consolidate the motion, should leave be granted, with the motion for leave to appeal the Sanction Order	20 days – the second last day allowed under subsection 14(2) of the CCAA and after the 15 day time limit provided by Rule 61.03.1(3)
April 17, 2013	Kim Orr Group served and filed amended notice of motion for leave to appeal the Settlement Approval Order and the Representative Dismissal Order – removed portion of notice seeking an order to consolidate motion, should leave be granted, with the motion for leave to appeal the Sanction Order	8 days – well after the deadline to seek leave to appeal under either the CCAA or the <i>Rules of Civil Procedure</i>
April 17, 2013	Kim Orr Group served and filed this motion for directions	

April 19, 2013	Kim Orr Group served and filed a Notice of Appeal of Justice Morawetz's approval of the Settlement Approval Order and the Representative Dismissal Order now claiming that these were final orders despite having served and filed a notice of motion for leave to appeal on April 9, 2013	30 days – served and filed on the last day allowed under Rule 61.04(1) even if the Court's accepts that these were final orders.
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IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File Number: M42404
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

**RESPONDING FACTUM OF SINO-
FOREST CORPORATION**
(Motion for Directions)

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