

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

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

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**RESPONDING MOTION RECORD OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE CLASS ACTION PLAINTIFFS  
(Motion Returnable April 20, 2015)**

April 14, 2015

**KOSKIE MINSKY LLP**  
900-20 Queen Street West  
Box 52  
Toronto, ON M5H 3R3

**Kirk M. Baert (LSUC#: 30942O)**  
Tel: 416.595.2117/Fax: 416.204.2889  
**Jonathan Ptak (LSUC#: 45773F)**  
Tel: 416.595.2149/Fax: 416.204.2903

**SISKINDS LLP**  
680 Waterloo Street  
P.O. Box 2520  
London, ON N6A 3V8

**A. Dimitri Lascaris (LSUC#: 50074A)**  
Tel: 519.660.7844/Fax: 519.660.7845  
**Charles M. Wright (LSUC#: 36599Q)**  
Tel: 519.660.7753/Fax: 519.660.7754

**PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**  
155 Wellington Street, 35<sup>th</sup> Floor  
Toronto, ON M5V 3H1

**Ken Rosenberg (LSUC #21102H)**  
**Massimo Starnino (LSUC #41048G)**  
Tel: 416-646-4300/Fax: 416-646-4301

Lawyers for the Ad Hoc Committee of Purchasers of the  
Applicant's Securities, including the Class Action Plaintiffs

**TO: CLYDE & CO CANADA LLP**  
Laywers/Avocats  
Suite 2500  
401 Bay Street  
Toronto, ON M5H 2Y4

**Mary Margaret Fox**  
**Paul Emerson**  
Tel: (416) 366-4555  
Fax: (416) 366-6110

Lawyers for the Applicant, Chubb Insurance Company of Canada

**AND TO: RICKETTS, HARRIS LLP**

Barristers and Solicitors  
Suite 816  
181 University Avenue  
Toronto, ON M5H 2X7

**Gary Luftspring**

**Sam Sasso**

Tel: (416) 364-6211

Fax: (416) 364-1697

Lawyers for Travelers Insurance Company of Canada

**AND TO: McMILLAN LLP**

Lawyers  
Suite 4400, Brookfield Place  
181 Bay Street  
Toronto, ON M5J 2T3

**Markus Koehnen**

Tel: (416) 865-7218

Fax: (416) 865-7048

Lawyers for George Ho, Alfred C.T. Hung, Albert Ip, and Simon Yeung

**AND TO: LERNERS LLP**

Lawyers  
Suite 2400  
130 Adelaide Street West  
Toronto, ON M5H 3P5

**William E. Pepall**

Tel: (416) 601-2352

Fax: (416) 867-2415

Lawyers for William P. Rosenfeld

**AND TO: BABIN BESSNER SPRY LLP**

Lawyers Suite 101  
65 Front Street East  
Toronto, ON M5E 1B5

**Edward J. Babin**

Tel: (416) 637-3294

Fax: (416) 637-3243

Lawyers for Kee Y. Wong

**AND TO: THE ATTACHED SERVICE LIST**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

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

**SERVICE LIST  
(as at February 2015)**

<b>TO: BENNETT JONES LLP</b> 3400 One First Canadian Place, P.O. Box 130 Toronto, Ontario M5X 1A4	<b>AND GOWLING LAFLEUR HENDERSON LLP</b> <b>TO:</b> 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, Ontario M5X 1G5
Robert W. Staley Tel: 416.777.4857 Fax: 416.863.1716 Email: staleyr@bennettjones.com	Derrick Tay Tel: 416.369.7330 Fax: 416.862.7661 Email: derrick.tay@gowlings.com
Kevin Zych Tel: 416.777.5738 Email: zychk@bennettjones.com	Clifton Prophet Tel: 416.862.3509 Email: clifton.prophet@gowlings.com
Derek J. Bell Tel: 416.777.4638 Email: belld@bennettjones.com	Jennifer Stam Tel: 416.862.5697 Email: jennifer.stam@gowlings.com
Raj S. Sahnir Tel: 416.777.4804 Email: sahnir@bennettjones.com	Ava Kim Tel: 416.862.3560 Email: ava.kim@gowlings.com
Jonathan Bell Tel: 416.777.6511 Email: bellj@bennettjones.com	Lawyers for the Monitor
Sean Zweig Tel: 416.777.6254 Email: zweigs@bennettjones.com	
Lawyers for the Applicant, Sino-Forest Corporation	

AND **FTI CONSULTING CANADA INC.**

TO: T-D Waterhouse Tower  
79 Wellington Street West  
Toronto-Dominion Centre, Suite 2010,  
P.O. Box 104  
Toronto, Ontario M5K 1G8

Greg Watson  
Tel: 416.649.8100  
Fax: 416.649.8101  
Email: greg.watson@fticonsulting.com

Jodi Porepa  
Tel: 416.649.8070  
Email: Jodi.porepa@fticonsulting.com

Monitor

AND **BAKER MCKENZIE LLP**

TO: Brookfield Place  
2100-181 Bay Street  
Toronto, Ontario M5J 2T3

John Pirie  
Tel: 416.865.2325  
Fax: 416.863.6275  
Email: john.pirie@bakermckenzie.com

David Gadsden  
Tel: 416.865.6983  
Email: david.gadsden@bakermckenzie.com

Lawyers for Poyry (Beijing) Consulting  
Company Limited

AND **AFFLECK GREENE MCMURTY LLP**

TO: 365 Bay Street, Suite 200  
Toronto, Ontario M5H 2V1

Peter Greene  
Tel: 416.360.2800  
Fax: 416.360.8767  
Email: pgreene@agmlawyers.com

Kenneth Dekker  
Tel: 416.360.6902  
Fax: 416.360.5960  
Email: kdekker@agmlawyers.com

David Villaincourt  
Tel: 416.360.8100  
Fax: 416.360.5960  
Email: dvillaincourt@agmlawyers.com

Lawyers for BDO

AND **TORYS LLP**

TO: 79 Wellington Street West  
Suite 3000, Box 270  
Toronto-Dominion Centre  
Toronto, Ontario M5K 1N2

John Fabello  
Tel: 416.865.8228  
Fax: 416.865.7380  
Email: jfabello@torys.com

David Bish  
Tel: 416.865.7353  
Email: dbish@torys.com

Andrew Gray  
Tel: 416.865.7630  
Email: agray@torys.com

Lawyers for the Underwriters named in Class  
Actions

AND **LENCZNER SLAGHT ROYCE SMITH**  
TO: **GRIFFIN LLP**  
Suite 2600, 130 Adelaide Street West  
Toronto, Ontario M5H 3P5

Peter H. Griffin  
Tel: 416.865.9500  
Fax: 416.865.3558  
Email: pgriffin@litigate.com

Peter J. Osborne  
Tel: 416.865.3094  
Fax: 416.865.3974  
Email: posborne@litigate.com

Linda L. Fuerst  
Tel: 416.865.3091  
Fax: 416.865.2869  
Email: lfuerst@litigate.com

Shara Roy  
Tel: 416.865.2942  
Fax: 416.865.3973  
Email: sroy@litigate.com

Lawyers for Ernst & Young LLP

AND **MERCHANT LAW GROUP LLP**  
TO: Saskatchewan Drive Plaza  
100-2401 Saskatchewan Drive  
Regina, Saskatchewan S4P 4H8

E.F. Anthony Merchant, Q.C.  
Tel: 306.359.7777  
Fax: 306.522.3299  
tmerchant@merchantlaw.com

Lawyers for the Plaintiffs re Saskatchewan  
action

AND **GOODMANS LLP**  
TO: 333 Bay Street, Suite 3400  
Toronto, Ontario M5H 2S7

Benjamin Zarnett  
Tel: 416.597.4204  
Fax: 416.979.1234  
Email: bzarnett@goodmans.ca

Robert Chadwick  
Tel: 416.597.4285  
Email: rchadwick@goodmans.ca

Brendan O'Neill  
Tel: 416.979.2211  
Email: boneill@goodmans.ca

Caroline Descours  
Tel: 416.597.6275  
Email: cdescours@goodmans.ca

Lawyers for Ad Hoc Committee of Bondholders

AND **ONTARIO SECURITIES COMMISSION**  
TO: Suite 1900, 20 Queen Street West  
Toronto, Ontario M5H 3S8

Hugh Craig  
Senior Litigation Counsel  
Tel: 416.593.8259  
Email: hcraig@osc.gov.on.ca

AND **OSLER, HOSKIN & HARCOURT LLP**

TO: 1 First Canadian Place  
100 King Street West  
Suite 6100, P.O. Box 50  
Toronto, Ontario M5X 1B8

Larry Lowenstein  
Tel: 416.862.6454  
Fax: 416.862.6666  
Email: llowenstein@osler.com

Edward Sellers  
Tel: 416.862.5959  
Email: esellers@osler.com

Geoffrey Grove  
Tel: (416) 862-4264  
Email: ggrove@osler.com

Lawyers for the Board of Directors of Sino-Forest Corporation

AND **SISKINDS LLP**

TO: 680 Waterloo Street  
P.O. Box 2520  
London, Ontario N6A 3V8

A. Dimitri Lascaris  
Tel: 519.660.7844  
Fax: 519.672.6065  
Email: dimitri.lascaris@siskinds.com

Charles M. Wright  
Tel: 519.660.7753  
Email: Charles.wright@siskinds.com

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

AND **COHEN MILSTEIN SELLERS & TOLL PLC**

TO: 1100 New York, Ave., N.W.  
West Tower, Suite 500  
Washington, D.C. 20005

Steven J. Toll  
Tel: 202.408.4600  
Fax: 202.408.4699  
Email: stoll@cohenmilstein.com

Matthew B. Kaplan  
Tel: 202.408.4600  
Email: mkaplan@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed Class re New York action

AND **KOSKIE MINSKY LLP**

TO: 20 Queen Street West, Suite 900  
Toronto, Ontario M5H 3R3

Kirk M. Baert  
Tel: 416.595.2117  
Fax: 416.204.2899  
Email: kbaert@kmlaw.ca

Jonathan Ptak  
Tel: 416.595.2149  
Fax: 416.204.2903  
Email: jptak@kmlaw.ca

Garth Myers  
Tel: 416.595.2102  
Fax: 416.977.3316  
Email: gmyers@kmlaw.ca

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant



AND **COHEN MILSTEIN SELLERS & TOLL**  
TO: **PLC**  
88 Pine Street, 14<sup>th</sup> Floor  
New York, NY 10005

Richard S. Speirs  
Tel: 212.838.7797  
Fax: 212.838.7745  
Email: rspeirs@cohenmilstein.com

Stefanie Ramirez  
Tel: 202.408.4600  
Email: sramirez@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed  
Class re New York action

AND **THOMPSON HINE LLP**  
TO: 335 Madison Avenue – 12<sup>th</sup> Floor  
New York, New York 10017-4611

Yesenia D. Batista  
Tel: 212.908.3912  
Fax: 212.344.6101  
Email: yesenia.batista@thompsonhinc.com

Irving Apar  
Tel: 212.908.3964  
Email: irving.apar@thompsonhinc.com

Curtis L. Tuggle  
3900 Key Center, 127 Public Square  
Cleveland, Ohio 44114  
Tel: 216.566.5904  
Fax: 216.566.5800  
Email: Curtis.tuggle@thompsonhinc.com

Lawyers for Senior Note Indenture Trustee

AND **LAW DEBENTURE TRUST COMPANY OF**  
TO: **NEW YORK**  
400 Madison Avenue – 4<sup>th</sup> Floor  
New York, New York 10017

James D. Heaney  
Tel: 646-747-1252  
Fax: 212-750-1361  
Email: james.heaney@lawdeb.com

Senior Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: Global Corporate Trust  
101 Barclay Street – 4<sup>th</sup> Floor East  
New York, New York 10286

David M. Kerr, Vice President  
Tel: 212.815.5650  
Fax: 732.667.9322  
Email: david.m.kerr@bnymellon.com

Convertible Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: 320 Bay Street, 11<sup>th</sup> Floor  
Toronto, Ontario M5H 4A6

George Bragg  
Tel: 416.933.8505  
Fax: 416.360.1711 / 416.360.1737  
Email: George.bragg@bnymellon.com

Convertible Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: 12/F Three Pacific Place  
1 Queen's Road East, Hong Kong

Marelize Coetzee, Vice President  
Relationship Manager, Default Administration  
Group – APAC  
Tel: 852.2840.6626  
Mobile: 852.9538.5010  
Email: marelize.coetzee@bnymellon.com

Grace Lau  
Email: grace.lau@bnymellon.com

Convertible Note Indenture Trustee

AND **WARDLE DALEY BERNSTEIN LLP**  
TO: 2104 - 401 Bay Street, P.O. Box 21  
Toronto Ontario M5H 2Y4

Peter Wardle  
Tel: 416.351.2771  
Fax: 416.351.9196  
Email: pwardle@wdblaw.ca

Simon Bieber  
Tel: 416.351.2781  
Email: sbieber@wdblaw.ca

Erin Pleet  
Tel: 416.351.2774  
Email: eplet@wdblaw.ca

Lawyers for David Horsley

AND **LINKLATERS LLP**  
TO: 10<sup>th</sup> Floor, Alexandra House  
18 Chater Road  
Hong Kong China

Melvin Sng  
Tel: 852 2901 5234  
Fax: 852 2810 8133  
Email: Melvin.Sng@linklaters.com

Lawyers for Sino-Forest Corporation (Hong  
Kong)

AND **LINKLATERS LLP**  
TO: 10<sup>th</sup> Floor, Alexandra House  
18 Chater Road  
Hong Kong China

Hyung Ahn  
Tel: 852 2842 4199  
Fax: 852 2810 8133  
Email: hyung.ahn@linklaters.com

Samantha Kim  
Tel: 852.2842 4197  
Email: Samantha.Kim@Linklaters.com

Jon Gray  
Tel: 852.2842.4188  
Email: Jon.Gray@linklaters.com

Lawyers for Sino-Forest Corporation (U.S.)

AND **APPLEBY GLOBAL**  
TO: Jayla Place, Wickham's Cay 1  
P.O. Box 3190, Road Town  
Tortola VG1110 BVI

Eliot Simpson  
Tel: 284.852.5321  
Fax: 284.494.7279  
Email: esimpson@applebyglobal.com

Andrew Willins  
Tel: 284 852 5323  
Email: awillins@applebyglobal.com

Andrew Jowett  
Tel: 284 852 5316  
Email: ajowett@applebyglobal.com

Lawyers for Sino-Forest Corporation (BVI)

AND **KING AND WOOD MALLESONS**  
TO: 9th Floor, Hutchison House  
Central, Hong Kong Island  
Hong Kong (SAR)

Helena Huang  
Tel: 852.2848.4848  
Email: Helena.huang@kingandwood.com

Tata Sun  
Tel: 852.2848.4848  
Email: tata.sun@kingandwood.com

Lawyers for Sino-Forest Corporation (PRC)

AND **THORNTON GROUT FINNIGAN LLP**  
TO: Suite 3200, 100 Wellington Street West  
P. O. Box 329, Toronto-Dominion Centre  
Toronto, Ontario M5K 1K7

James H. Grout  
Tel: 416.304.0557  
Fax: 416.304.1313  
Email: jgrout@tgf.ca

Lawyers for the Ontario Securities Commission

AND **McCARTHY TETRAULT LLP**  
TO: Suite 2500, 1000 De La Gauchetiere St.  
West  
Montreal, Québec, H3B 0A2

Alain N. Tardif  
Tel: 514.397.4274  
Fax : 514.875.6246  
Email: atardif@mccarthy.ca

Mason Poplaw  
Tel: 514.397.4155  
Email: mpoplaw@mccarthy.ca

Céline Legendre  
Tel: 514.397.7848  
Email: clegendre@mccarthy.ca

Lawyers for Ernst & Young LLP

AND **CHAITONS LLP**  
TO: 5000 Yonge Street, 10<sup>th</sup> Floor  
Toronto, Ontario M2N 7E9

Harvey G. Chaiton  
Tel: 416.218.1129  
Fax: 416.218.1849  
Email: Harvey@chaitons.com

Lawyers for the Law Debenture Trust  
Company of New York

AND **RUETER SCARGALL BENNETT LLP**  
TO: 250 Yonge Street  
Suite 2200  
Toronto, Ontario M5B 2L7

Robert Rueter  
Tel: 416.869-3363  
Email: robert.rueter@rslawyers.com

Sara J. Erskine  
Tel: 416.597-5408  
Email: sara.erskiner@rslawyers.com

Jason Beitchman  
Tel: 416.597.5416  
Email: Jason.beitchman@rslawyers.com

Lawyers for Allan Chan

AND **PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**  
TO: 155 Wellington Street, 35<sup>th</sup> Floor  
Toronto, Ontario M5V 3H1

Ken Rosenberg  
Tel: 416.646.4304  
Fax: 416.646.4301  
Email: ken.rosenberg@paliareroland.com

Massimo (Max) Starnino  
Tel: 416.646.7431  
Email: max.starnino@paliareroland.com

Lawyers for an Ad Hoc Committee of Purchasers  
of the Applicant's Securities, including the  
Representative Plaintiffs in the Ontario Class  
Action against the Applicant

AND **ERNST & YOUNG LLP**  
TO: 222 Bay Street, P.O. Box 251  
Toronto, Ontario M5K 1J7

Mike P. Dean  
Tel: 416-943-2134  
Fax: 416-943-3300  
Email: Mike.P.Dean@ca.ey.com

AND **FASKEN MARTINEAU LLP**  
TO: 333 Bay Street, Suite 2400,  
Bay-Adelaide Centre, Box 20  
Toronto, Ontario M5H 2T6

Stuart Brotman  
Tel: 416.865.5419  
Fax: 416.364.7813  
Email: sbrotman@fasken.com

Conor O'Neill  
Tel: 416 865 4517  
Email: coneill@fasken.com

Canadian Lawyers for the Convertible Note  
Indenture Trustee (The Bank of New York  
Mellon)

AND **LAPOINTE ROSENSTEIN**  
TO: **MARCHAND MELANÇON,**  
**S.E.N.C.R.L.**  
1250, boul. René-Lévesque Ouest, bureau  
1400  
Montréal (Québec) Canada H3B 5E9

Bernard Gravel  
Tel: 514.925.6382  
Fax: 514.925.5082  
Email: bernard.gravel@lrmm.com

Bruno Floriani  
Tel: 514.925.6310  
Email: bruno.floriani@lrmm.com

Québec counsel for Pöyry (Beijing)  
Consulting Company Ltd.

AND **DAVIS LLP**  
TO: 1 First Canadian Place, Suite 6000  
PO Box 367  
100 King Street West  
Toronto, Ontario M5X 1E2

Susan E. Friedman  
Tel: 416.365.3503  
Fax: 416.777.7415  
Email: sfriedman@davis.ca

Bruce Darlington  
Tel: 416.365.3529  
Fax: 416.369.5210  
Email: bdarlington@davis.ca

Brandon Barnes  
Tel: 416.365.3429  
Fax: 416.369.5241  
Email: bbarnes@davis.ca

Lawyers for Kai Kat Poon

AND **CLYDE & COMPANY**  
TO: 390 Bay Street, Suite 800  
Toronto, Ontario M5H 2Y2

Mary Margaret Fox  
Tel: 416.366.4555  
Fax: 416.366.6110  
Email: marymargaret.fox@clydeco.ca

Paul Emerson  
Tel: 416.366.4555  
Email: paul.emerson@clydeco.ca

Lawyers for ACE INA Insurance and Chubb  
Insurance Company of Canada

AND **RICKETTS, HARRIS LLP**  
TO: Suite 816, 181 University Ave  
Toronto ON M5H 2X7

Gary H. Luftsprung  
Tel: 647.288.3362  
Fax: 647.260.2220  
Email: GLuftsprung@rickettsharris.com

Lawyers for Travelers Insurance Company of  
Canada

AND **DAVIES WARD PHILLIPS &  
TO: VINEBERG LLP**  
155 Wellington Street West  
Toronto, ON M5V 3J7

Jay Swartz  
Tel: 416.863.5520  
Fax: 416.863.0871  
Email: [jswartz@dwpv.com](mailto:jswartz@dwpv.com)

James Doris  
Tel: 416.367.6919  
Fax: 416.863.0871  
Email: [jdoris@dwpv.com](mailto:jdoris@dwpv.com)

Canadian Counsel for the Plaintiff and the  
Proposed Class re New York action

**CLYDE & COMPANY**  
390 Bay Street, Suite 800  
Toronto, Ontario M5H 2Y2

Mary Margaret Fox  
Tel: 416.366.4555  
Fax: 416.366.6110  
Email: [marymargaret.fox@clydeco.ca](mailto:marymargaret.fox@clydeco.ca)

Paul Emerson  
Tel: 416.366.4555  
Email: [paul.emerson@clydeco.ca](mailto:paul.emerson@clydeco.ca)

Lawyers for ACE INA Insurance and Chubb  
Insurance Company of Canada

# INDEX

**INDEX**

	<b><u>TAB</u></b>	<b><u>PAGE</u></b>
Affidavit of Serge Kalloghlian, sworn April 14, 2015 .....	1.	1
Exhibit “A” – Correspondence from Clyde & Co Canada LLP to Koskie Minsky LLP and Siskinds LLP, dated July 3, 2014 .....	A.	7
Exhibit “B” – <i>Labourers’ Pension Fund of Central and Eastern Canada     (Trustees of) v Sino-Forest Corp</i> , 2015 ONSC 439 ONSC .....	B.	11
Exhibit “C” – Email correspondence from Siskinds LLP to Clyde & Co Canada LLP, dated April 10, 2015 .....	C.	32



**TAB 1**

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

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

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AFFIDAVIT OF SERGE KALLOGLIAN  
(sworn April 14, 2015)**

I, **SERGE KALLOGHLIAN**, of the City of Toronto, in the Province of Ontario  
AFFIRM:

1. I am a lawyer at Siskinds LLP, who, along with Koskie Minsky LLP (together, “Class Counsel”), are counsel to the plaintiffs (the “Class Plaintiffs”) in the above-captioned class proceeding.

2. For the purposes of the above-captioned proceeding under the CCAA (the “CCAA Proceedings”), Paliare Roland Rosenberg Rothstein LLP (“Paliare Roland”) acts together with Class Counsel to represent the Ad Hoc Committee of Purchasers of the Applicant’s Securities, including the Class Plaintiffs (together, the “Ontario Plaintiffs”).

3. I have knowledge of the matters deposed to below. Where I make statements in this affidavit that are not within my personal knowledge, I have indicated the source of my information and believe such information to be true.

4. I affirm this affidavit in connection with the motion by Chubb Insurance Company of Canada (“Chubb”) scheduled for April 20, 2015.

5. Unless otherwise defined or the context suggests otherwise, capitalized terms in this affidavit have the meanings ascribed to them in the Affidavit of Paula Kargas, sworn April 6, 2015 (the “Kargas Affidavit”).

**Amounts Paid Out as Defence Costs**

6. As explained in the Kargas Affidavit, the four directors’ and officers’ liability policies covering the Sino-Forest Insureds afford coverage totalling CDN \$62 million.

7. The events giving rise to these proceedings occurred in June 2011. The Kargas Affidavit indicates that, to date, approximately \$46 million has been paid out under the policies comprising the Insurance Tower. Of that amount, the only Indemnity Payment referenced in the Kargas Affidavit is the \$5 million paid in respect of the Horsley Settlement. To the best of my knowledge, this is the only Indemnity Payment made to date by the Insurance Tower in connection with these or related proceedings.

8. The Kargas Affidavit indicates that the first \$15 million of insurance was paid out by ACE in respect of Defence Accounts by January 2014. In connection with the Horsley settlement in July 2014, Chubb's counsel disclosed that on July 3, 2014, approximately \$7 million remained payable under the Chubb policy, and that all amounts paid until that date related solely to Defence Costs. It is my understanding that Defence Costs includes the costs of defending these proceedings as well as the proceedings commenced by the Ontario Securities Commission against certain insured persons. Attached and marked as **Exhibit "A"** is a July 3, 2014 letter from Mary Margaret Fox, counsel to Chubb and ACE, addressed to Garth Myers and I containing this and other information.

9. To date, the only major motions in the Ontario class action have been the motions for certification and for leave to assert the right of action contained in Part XXIII.1 of the Ontario *Securities Act* ("leave motion"). Those motions were originally set to be heard in 2012, but were rescheduled a number of times.

10. Based on my review of the cross examination transcripts and other materials filed in connection with the certification and leave motions, it appears to me that certain defendants' counsel attended one or more of the approximately 19 cross examinations (including as far away as Hong Kong) without asking any substantive questions, and continued to oppose the relief

sought on those motions despite the fact that they did not have a basis to contest such relief. Indeed, the motions ultimately proceeded almost entirely unopposed or on consent in January of 2015. Some of the proposed common issues were modified slightly following discussion with the defendants in advance of the motions.

11. In addition, I am advised by Dimitri Lascaris, a partner of Siskinds LLP, that one or more lawyers for the defendants attended the certification and leave hearings, and certain of the interlocutory motions, CCAA motions, and case conferences in the class proceeding and in the CCAA proceeding without making any submissions, and often had little or no stake in the matters being addressed.

12. Finally, I am advised by Garth Myers, an associate at Koskie Minsky LLP, that counsel to Allen T.Y. Chan (Miller Thomson LLP) and Kai Kit Poon (Davis LLP) vigorously opposed the Class Plaintiffs' motion to strike certain affidavits filed by David Horsley in response to the Class Plaintiffs' motion for leave under the *Securities Act*. Ultimately, the Class Plaintiffs and Messrs Chan and Poon settled the motion and the affidavits remained on the record. However, notwithstanding their vigorous opposition to the Class Plaintiffs' motion to strike, neither Mr. Chan nor Mr. Poon relied on any of these expert reports in their facta in response to the Class Plaintiffs' motion for leave.

13. Paragraph 2 of Justice Perell's reasons for decision on the certification and leave motions, which are marked and attached as **Exhibit "B,"** state that "[s]ave for one contested issue that affects two motions, the parties have agreed to settle, to adjourn, or not to oppose, the five multifaceted-motions that were to comprise the 10-day hearing."

14. The opposition to the contested issue was advanced only by Sino-Forest. The argument on that issue took less than half a day of court time and was restricted to legal issues. The issue was characterized by Justice Perell at paragraphs 100 and 110 of the reasons for decision as follows :

The discussion can now turn to the one disputed issue that affects both the certification motion and also the leave motion. This is the dispute between Sino-Forest and the Plaintiffs about the claims of Former Noteholders. For reasons that will soon become apparent, I shall be circumspect in resolving this dispute, which I shall resolve as a matter of civil procedure rather than as a matter of substantive law.

[...]

From this legal and factual background, Sino-Forest argues that save for their claims under s. 12(a)(2) of the *United States Securities Act of 1933*, the Class Members that are Former Noteholders have assigned their claims, and the transferees (Former Noteholders) should not be included in the class and further, leave should not be granted under the Ontario *Securities Act*, because there is a no possibility, let alone a reasonable possibility, that the action will be resolved at trial in favour of the Former Noteholders who have legally assigned their claims and causes of action.

15. It is my understanding that the Defence Costs of the following defendants to the Ontario class action have been paid by the Insurance Tower:

- a. Sino-Forest Corporation (“Sino”), represented by Bennett Jones LLP;
- b. W. Judson Martin, Peter Wang, Edmund Mak, and Simon Murray, represented by Bennett Jones LLP;
- c. Allen T.Y. Chan; previously represented by Miller Thomson LLP, and now represented by Rueter Scargall Bennett LLP;
- d. Kai Kit Poon, represented by Davis LLP;
- e. David Horsley, represented by Wardle Daley Bernstein Bieber LLP;
- f. William E. Ardell, James P. Bowland, James M.E. Hyde, and Garry J. West represented by Osler, Hoskin, & Harcourt LLP.

16. Bennett Jones LLP has been involved in three different roles in these and related proceedings: i) it advised the independent committee of the board of directors in its investigation following the Muddy Waters allegations against Sino; ii) it is defending Sino and certain directors in the class actions; and iii) it is counsel to the SFC Litigation Trust.

17. On April 10, 2015, I sent an email to Paul Emerson, counsel to Chubb, requesting a full accounting of the monies paid out by the Insurance Tower. That email is marked and attached as **Exhibit "C."** I have not received a response to that request as of the date of this affidavit.

**SWORN OR AFFIRMED** before )  
me at the City of Toronto, in the )  
Province of Ontario, this 14<sup>th</sup> day of )  
April, 2015 )



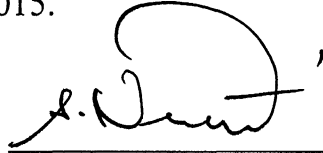
A Commissioner, etc. )

Seyed Sajjad Nematollahi

LSUC #: 623 11 B

  
Serge Kaloghlian

This is Exhibit "A" mentioned and referred to in the Affidavit of Serge Kalloghlian, sworn before me at the City of Toronto, in the Province of Ontario, this 14<sup>th</sup> day of April, 2015.

A handwritten signature in black ink, appearing to be 'J. Dent', written over a horizontal line.

A Commissioner, etc.



# CLYDE & CO

Clyde & Co Canada LLP

390 Bay Street  
Suite 800  
Toronto, Ontario  
M5H 2Y2

Tel.: (416) 366-4555  
Fax: (416) 366-6110

www.clydeco.ca

Direct Line: 647-789-4808

E-mail: MaryMargaret.Fox@clydeco.ca

July 3, 2014

## BY E-MAIL

Mr. Garth Myers  
Koskie & Minsky LLP  
900 - 20 Queen Street West  
Toronto, ON M5H 3R3

Mr. Serge Kalloghlian  
Siskinds LLP  
302 - 100 Lombard Street  
Toronto, ON M5C 1M3

Dear Messrs. Myers and Kalloghlian:

<b>Re:</b>	<b>Insured:</b>	<b>Sino-Forest Corporation</b>
	<b>ACE Policy / Claim No.:</b>	<b>DO024464 / C6010297023</b>
	<b>Chubb Policy / Claim No:</b>	<b>8209-4449 / 259358</b>
	<b>Matter:</b>	<b>Various</b>
	<b>Our File Name:</b>	<b>Sino-Forest Corp. et al ats Smith et al</b>
	<b>Our File No.:</b>	<b>1123674</b>

You have asked for a letter from this firm on behalf of our clients, ACE-INA Insurance Company ("ACE") and Chubb Insurance Company of Canada ("Chubb") (collectively "Our Clients"), addressing the provisions of the Draft Settlement Order ("Draft Order"), Schedule C to the Minutes of Settlement entered into between the Class Action Plaintiffs<sup>1</sup>, the Litigation Trust and Mr. Horsley (the "Settlement"), being sought in the Class Action Plaintiffs' motion for approval of the Settlement (the "Settlement Approval Motion"). In particular, you, and counsel for Mr. Horsley, have asked that we address paragraphs 18-30 of the Draft Order insofar as these paragraphs address the requirements of the Insurers<sup>2</sup>.

Paragraph 18 of the Draft Order includes a declaration that any amounts paid by Chubb toward the Settlement are fair and reasonable in all circumstances and for all purposes. Chubb's decision to contribute the amounts indicated toward the settlement of the Class Actions and the

<sup>1</sup> In this letter, unless separately defined herein, words in capital letters represent terms defined in the Settlement, in the ACE policy, or headings in the Declarations thereto and are used with that meaning.

<sup>2</sup> Lloyd's Underwriters' and Travelers' policies covering Sino-Forest are excess to Our Clients' policies, and may be engaged by the Effective Date. Lloyd's Underwriters and Travelers have reviewed and approved this letter. All references to the Insurers (not otherwise specific to ACE or Chubb) include Lloyd's Underwriters and Travelers.

Litigation Trust Action (the "Chubb Settlement Contribution<sup>3</sup>"), supported by all of the Insurers, was based upon recommendations of counsel for Mr. Horsley which, Our Clients were advised, resulted from extensive arms-length negotiations with Koskie Minsky, Siskinds, and Bennett Jones, counsel for the Litigation Trustee. Chubb accepted the recommendations made by Mr. Horsley's counsel in this regard.

Paragraph 19 of the Draft Order includes a declaration that payment by Chubb of the Chubb Settlement Contribution does not violate the interests of any party to the Class Actions, of any other party who might have a claim against any person or entity potentially covered under the Insurance Policies or the interests of any party potentially covered under the Insurance Policies.<sup>4</sup> The purpose of this language is to protect the Insurers from claims in the future by third parties with unsatisfied claims against Insured Persons or claims by Insured Persons who are or may be subject to third party claims for which no Limits of Liability under the Chubb policy remain, by reason of the Chubb Settlement Contribution.

Paragraph 20 of the Draft Order includes a declaration that that portion of the Chubb Settlement Contribution referable to settlement of the Litigation Trust Action shall constitute covered Loss, without prejudice to the Insurers' coverage position in relation to the Litigation Trust Action or any other action instituted by the Litigation Trust.

Loss<sup>5</sup> is defined to mean damages, judgments, any award of pre-judgment and post-judgment interest, settlements and Defense Costs which an Insured becomes legally obligated to pay on account of any Claim first made against any Insured for Wrongful Acts to which the Insurance Policies apply.

Mr. Horsley requested coverage for the allegations made against him by the Litigation Trustee in the Litigation Trust Action. The Insurers were concerned that the ACE policy exclusion IV E (the "Insured v. Insured exclusion") would exclude coverage for the Litigation Trust Action. In light of the risks and costs associated with potential coverage litigation, however, and the fact that the Insurers were advised that it would not be possible for Mr. Horsley to enter into a satisfactory settlement with the Class Action Plaintiffs absent a satisfactory settlement with the Litigation Trust, the Insurers agreed, on a wholly without prejudice basis, to make a contribution towards settlement of the Litigation Trust Action against Mr. Horsley. Because of the possibility, however, that other Insured Persons might later argue that Chubb's contribution to settlement of the Litigation Trust Action did not constitute covered Loss and therefore its Limits of Liability had not been exhausted, Chubb and the other Insurers require that, for purposes of the Settlement, Chubb's contribution to settlement of the Litigation Trust Action be declared to constitute covered Loss for all purposes. The Insurers agree that Chubb's contribution towards settlement of the Litigation Trust Action is reasonable in the circumstances.

Paragraphs 21 and 28 of the Draft Order include a declaration that Chubb's contribution towards the Settlement, together with amounts previously paid by Chubb and ACE as Defense Costs constitute Loss and thus reduce the Limits of Liability under the ACE Policy and the Chubb Policy

<sup>3</sup> In the event of exhaustion of the Chubb Policy prior to the Effective Date, we suggest that the Draft Order be amended where appropriate to reflect the possibility that Lloyd's Underwriters (or Travelers in the event of exhaustion of the Lloyd's Policy) may also be making a payment towards the Settlement.

<sup>4</sup> The Draft Order erroneously refers to Schedule "D" to the Minutes of Settlement

<sup>5</sup> As amended by Endorsement No. 13 to the Policy.

for all purposes, regardless of whether any subsequent finding is made that Mr. Horsley engaged in conduct that would trigger any exclusion disentitling him to coverage. At paragraph 21 of the Minutes of Settlement, Mr. Horsley acknowledges the possibility that criminal charges may yet be laid against him as a result of an investigation being conducted by the Royal Canadian Mounted Police in relation to Sino-Forest. For as long as there are any unresolved investigations, Claims or allegations against Mr. Horsley there is a possibility, however remote, that findings of dishonesty, criminal conduct or the receipt of illegal profit or financial advantage may be made against Mr. Horsley. If any such finding were made, section X. E. of the Policy provides that any advancement of Defense Costs to him, or on his behalf, shall be repaid. Section X. E refers only to Defense Costs but, because Mr. Horsley is also asking Chubb to pay settlement amounts, Chubb has required as a condition of its agreement, that Mr. Horsley sign an Interim Funding Agreement committing to repay not only Defense Costs but also the Chubb Settlement Contribution, in the event that he were ultimately found not entitled to coverage.

If such an obligation were triggered and Mr. Horsley were to fail to repay the sums advanced on his behalf, the declaration sought in paragraph 21 of the Draft Order operates to protect the Insurers from claims by other Insureds or third parties with interests in the Insurers' Limits of Liability from asserting that the amounts paid to Mr. Horsley did not constitute Loss and that the Limits of Liability under the Insurance Policies have not been exhausted. The Insurers receiving any such repayment would unquestionably be required make those funds available to other Insureds for covered Claims.

These issues also underscore the importance of paragraphs 22 and 27 of the Draft Order, so as to protect the Insurers (and the remaining Insureds' interests) from those who may attempt to assert that by payment of the Chubb Settlement Contribution, the Insurers have waived the coverage defences which they have asserted to date against all Insureds (paragraph 22) and/or that they were not provided with notice of the Settlement Approval Motion (paragraph 27).

Paragraphs 23 and 24 of the Draft Order reflect the fact that all Insurers support the Settlement.

Paragraph 25 of the Draft Order contains a declaration that ACE be released from any and all claims against it in relation to the ACE Policy<sup>6</sup>. The ACE Policy had a \$15M Limit of Liability. On or about January 7, 2014, the ACE Limit of Liability was confirmed exhausted in its entirety, solely by payment of Defense Costs incurred in defence of the Class Actions and the OSC Proceeding. All defence counsel (and experts') accounts submitted for coverage were reviewed by our firm and payment obligations determined based upon the ACE Policy wording, our firm's previous coverage advice, compliance with ACE's litigation management guidelines, and by applying the hourly rates agreed by ACE. No payments were made by ACE without our firm's recommendation for reimbursement on the basis that the expenses incurred were reasonable and necessary in the circumstances.

Paragraph 26 of the Draft Order contains a similar declaration pertaining to Chubb, i.e, that Chubb be released from any and all claims for amounts paid to date in relation to the Chubb Policy<sup>7</sup>.

<sup>6</sup> Save and except for its obligations under Endorsement No. 16 to the ACE Policy, which affords a further \$1,000,000 Limit of Liability to Independent Directors on terms specified in that Endorsement.

<sup>7</sup> Save and except for remaining Limits of Liability and its obligations under Endorsement No. 2 to the Chubb Policy. Endorsement No. 2 affords a similar further \$1,000,000 Limit of Liability to Independent Directors on terms specified in that Endorsement.



The difference between paragraphs 25 and paragraph 26 are that (i) Chubb's Policy has not yet been exhausted and (ii) that Chubb is paying settlement amounts in addition to Defense Costs. The Chubb policy has a \$15M Limit of Liability. As of the date of this letter, \$7,002,379.82 remains payable. (The Chubb Settlement Contribution will reduce that amount by \$5,000,000.00.) The amounts paid to date relate solely to payment of Defense Costs incurred in defence of the Class Actions and the OSC Proceeding. All defence counsel accounts submitted to Chubb for coverage have been reviewed by Chubb's Litigation Cost Management Group, and payment obligations determined based upon the ACE policy wording, our firm's previous coverage advice, compliance with Chubb's litigation management guidelines, and by applying the hourly rates agreed initially by ACE and/or subsequently by Chubb. No payments have been made by Chubb without confirmation of coverage for same by Chubb's professionals.

The Insurers were consulted with respect to certain provisions in the Plan addressing the Insurance Policies. Paragraphs 29 and 30 of the Draft Order confirm that, subject to those Plan provisions, the Settlement does not affect the plaintiffs' remaining claims against other Insureds or the Insurers' defences with respect thereto.

We will be in attendance on the hearing of the Settlement Approval Motion in the event that Justice Morawetz has any questions of the Insurers that have not been satisfied by this letter.

Yours very truly,

CLYDE & CO



per: Mary Margaret Fox

MMF/es

cc: Maria Di Pietro, CIP  
Director, Claims  
ACE INA Insurance

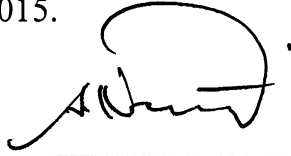
Paula Kargas  
Senior Technical Specialist, Specialty Claims  
Chubb Insurance Company of Canada

David Cherepacha  
Davies Howe Partners LLP

Gary Luftspring / Sam Sasso  
Ricketts, Harris LLP

Peter Wardle / Simon Bieber  
Wardle Daley Bernstein Bieber LLP

This is Exhibit "B" mentioned and referred to in the Affidavit of Serge Kalloghlian, sworn before me at the City of Toronto, in the Province of Ontario, this 14<sup>th</sup> day of April, 2015.

A handwritten signature in black ink, appearing to be 'A. [unclear]', written over a horizontal line.

A Commissioner, etc.

2015 ONSC 439  
Ontario Superior Court of Justice

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.

2015 CarswellOnt 621, 2015 ONSC 439, 248 A.C.W.S. (3d) 766

**The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (Formerly Known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC), Defendants**

Perell J.

Heard: January 12, 2015  
Judgment: January 20, 2015  
Docket: CV-11-431153CP

Counsel: Jonathan Ptak, Garth Myers, A. Dimitri Lascaris, Kirk M. Baert, for Plaintiffs

Jonathan G. Bell, Amanda McLachlan, for Defendants, Sino- Forest Corporation, Simon Murray, Edmund Mak, W. Judson Martin, and Peter Wang

Emily Cole, John Chapman, for Defendant, Allen T.Y. Chan

Brandon Barnes, for Defendant, Kai Kit Poon

Larry Lowenstein, Geoffrey Grove, for Defendants, William E. Ardell, James P. Bowland, James M.E. Hyde and Garry J. West  
John Fabello, Rebecca Wise, for Defendants, 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. and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC)

Kenneth A. Dekker, David Vaillancourt, for BDO Limited

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Restitution; Securities; Torts

#### Table of Authorities

##### Cases considered by *Perell J.*:

*Anderson v. Wilson* (1999), 36 C.P.C. (4th) 17, 78 O.T.C. 320, 44 O.R. (3d) 673, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 122 O.A.C. 69 (Ont. C.A.) — referred to

*Anderson v. Wilson* (2000), 138 O.A.C. 200 (note), 2000 CarswellOnt 1837, 2000 CarswellOnt 1838, 258 N.R. 194 (note), 185 D.L.R. (4th) vii (note) (S.C.C.) — referred to

*Bluebird Partners v. First Fid. Bank* (2002), 767 N.E.2d 672, 97 N.Y.2d 456, 741 N.Y.S.2d 181 (U.S. N.Y. Ct. App.) — considered

*Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — referred to

*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 1983 CarswellBC 734, 1983 CarswellBC 812 (S.C.C.) — referred to

*Dobbie v. Arctic Glacier Income Fund* (2011), 3 C.P.C. (7th) 261, 2011 CarswellOnt 1301, 2011 ONSC 25 (Ont. S.C.J.) — referred to

*Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.* (2011), 837 F.Supp.2d 162 (U.S. Dist. Ct. S.D. N.Y.) — referred to

*Fehring v. Sun Media Corp.* (2003), 2003 CarswellOnt 3841, 39 C.P.C. (5th) 151 (Ont. Div. Ct.) — referred to

*Garland v. Consumers' Gas Co.* (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 72 O.R. (3d) 80, 2004 CSC 25, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — referred to

*Green v. Canadian Imperial Bank of Commerce* (2014), 2014 CarswellOnt 1143, 2014 ONCA 90, 50 C.P.C. (7th) 113, (sub nom. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*) 118 O.R. (3d) 641, 314 O.A.C. 315, 370 D.L.R. (4th) 402 (Ont. C.A.) — referred to

*Green v. Canadian Imperial Bank of Commerce* (2014), 2014 CarswellOnt 10791, 2014 CarswellOnt 10792 (S.C.C.) — referred to

*Hollick v. Metropolitan Toronto (Municipality)* (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, 2001 CSC 68 (S.C.C.) — referred to

*Hunt v. T & N plc* (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — followed

*LNC Investments, Inc. v. First Fidelity Bank* (1999), 173 F.3d 454 (U.S. C.A. 2nd Cir.) — referred to

*Mustapha v. Culligan of Canada Ltd.* (2008), 55 C.C.L.T. (3d) 36, 375 N.R. 81, 293 D.L.R. (4th) 29, [2008] 2 S.C.R. 114, 2008 CarswellOnt 2824, 2008 CarswellOnt 2825, 2008 SCC 27, 238 O.A.C. 130, 92 O.R. (3d) 799 (note) (S.C.C.) — referred to

*Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2013), [2014] 1 W.W.R. 421, 50 B.C.L.R. (5th) 219, 45 C.P.C. (7th) 1, 19 B.L.R. (5th) 177, 12 C.C.L.T. (4th) 171, 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258, 364 D.L.R. (4th) 573, 40 N.R. 201, 345 B.C.A.C. 1, 589 W.A.C. 1, [2013] 3 S.C.R. 477 (S.C.C.) — considered

*Queen v. Cognos Inc.* (1993), 1993 CarswellOnt 801, 1993 CarswellOnt 972, D.T.E. 93T-198, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — referred to

*Sauer v. Canada (Minister of Agriculture)* (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — referred to

*Sauer v. Canada (Minister of Agriculture)* (2009), 246 O.A.C. 256, 2009 CarswellOnt 680 (Ont. Div. Ct.) — referred to

*Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222, 2009 CarswellOnt 7874 (Ont. S.C.J.) — referred to

*Zaniewicz v. Zungui Haixi Corp.* (2012), 2012 ONSC 6061, 2012 CarswellOnt 13175 (Ont. S.C.J.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, 2002 CarswellOnt 4272 (Ont. S.C.J.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2003), 2003 CarswellOnt 998, 169 O.A.C. 343, 64 O.R. (3d) 42 (Ont. Div. Ct.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

#### **Statutes considered:**

*Business Corporations Act*, R.S.O. 1990, c. B.16

Generally — referred to

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

*Code de procédure civile*, L.R.Q., c. C-25

art. 999 — considered

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

Generally — referred to

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



Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 130 — considered

s. 130.1 [en. 1999, c. 9, s. 218] — considered

s. 138.3 [en. 2002, c. 22, s. 185] — considered

s. 138.5 [en. 2002, c. 22, s. 185] — considered

s. 138.7(2) [en. 2002, c. 22, s. 185] — considered

*Securities Act, 1933*, 15 U.S.C. 2A

Generally — referred to

s. 12(a)(2) — considered

MOTION by plaintiffs to certify action as class proceeding.

***Perell J.:***

### **1. Introduction**

1 This proposed securities class action was originally scheduled for a 10-day hearing.

2 Save for one contested issue that affects two motions, the parties have agreed to settle, to adjourn, or not to oppose, the five multifaceted-motions that were to comprise the 10-day hearing; namely: (1) a motion for leave to deliver a Second Fresh as Amended Statement of Claim to plead an additional cause of action based on United States law; (2) a motion for an Order certifying this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6; (3) a motion for leave under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (and, if necessary, the equivalent provisions of the securities legislation of the other provinces and territories of Canada) to assert a secondary market misrepresentation action; (4) a motion for an Order striking the affidavits of Michael Chepiga, Edward Greene, and Rose Lombardi filed by the Defendant underwriters to resist the certification motion; and (5) a motion brought by the Defendant Allen T.Y. Chan to strike the affidavit of Stephen Chandler delivered for the Plaintiffs.

3 The motion to amend the Statement of Claim is not opposed and is granted - subject to the rights of the Defendants, 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) (the "Underwriters") to oppose the amendments.

4 Subject to the one contested issue, which I foreshadow to say I shall decide in the Plaintiffs' favour, the motion for leave under Part XXIII.1 of the Ontario *Securities Act* is unopposed or on consent. For the reasons set out below, the motion is granted. (Once again, the Underwriters are not to be affected by this Order.)

5 Subject to the one contested issue, which, as already mentioned, I shall decide in the Plaintiffs' favour, the motion for certification is unopposed or on consent. For the reasons set out below, the motion is granted. (Once again, the Underwriters are not affected by this Order.)

6 The motion to strike the Chepiga, Greene, and Lombardi affidavits is adjourned.

7 The motion to strike Mr. Chandler's affidavit is withdrawn.

## 2. The Parties and the Claims

8 This proposed securities class action arises out of the cataclysmic collapse and subsequent bankruptcy of Sino-Forest Corporation ("Sino-Forest"). Investors lost billions of dollars. The action is brought on behalf of purchasers of Sino-Forest's securities (notes and shares) from March 19, 2007 to June 2, 2011 ("the proposed Class Period").

9 During the proposed Class Period, Sino-Forest raised \$2.7 billion pursuant to seven public offerings of securities; visualize:

- *Note Offerings*

(1) the July 2008 Note Offering pursuant to an Offering Memorandum dated July 17, 2008

(2) the June 2009 Note Offering to exchange Sino-Forest's Guaranteed Senior Notes for new notes pursuant to an Exchange Offer Memorandum dated June 24, 2009

(3) the December 2009 Note Offering pursuant to a Final Offering Memorandum dated December 10, 2009

(4) the October 2010 Note Offering pursuant to a Final Offering Memorandum dated October 14, 2010

- *Share Offerings*

(5) the June 2007 Share Offering pursuant to a Short Form Prospectus, dated June 5, 2007

(6) the June 2009 Share Offering pursuant to a Final Short Form Prospectus, dated June 1, 2009

(7) the December 2009 Share Offering pursuant to a Final Short Form Prospectus, dated December 10, 2009.

10 The Plaintiffs allege that Sino-Forest made misrepresentations in its public disclosure in the following documents:

- 2006 - 2010 Annual Consolidated Financial Statements
- 2006 - 2010 Annual Information Forms ("AIFs")
- 2006 - 2010 Annual Management's Discussion and Analysis ("MD&A")
- Management Information Circulars: Management Information Circular dated April 27, 2007, April 28, 2008, April 28, 2009, May 4, 2010, and May 2, 2011
- Quarterly Financial Statements: Q1 2006, Q1, Q2, Q3 2007, Q1, Q2, Q3 2008, Q1, Q2, Q3, 2009, Q1, Q2, Q3 2010 Quarterly Financial Statements (collectively, the "Quarterly Financial Statements");
- Quarterly MD&A: Q1, Q2, Q3 2007, Q1, Q2, Q3 2008, Q1, Q2, Q3, 2009, Q1, Q2, Q3 2010 MD&A
- Prospectuses dated June 2007, June 2009, and December 2009
- Offering Memoranda dated July 2008, June 2009, December 2009, and October 2010.

11 The Plaintiffs are the Trustees of the Labourers' Pension Fund of Central and Eastern Canada (the "Labourers Fund"), the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario (the "OE Fund"), Sjunde Ap-Fonden ("AP7"), David Grant, and Robert Wong.

12 The Labourers Fund is a multi-employer pension plan. It currently has approximately \$2 billion in assets, over 39,000 members and over 13,000 pensioners and beneficiaries and approximately 2,000 participating employers. The Labourers Fund

purchased Sino-Forest's common shares over the Toronto Stock Exchange ("TSX") during the Class Period and continued to hold 128,700 shares at the end of the Class Period.

13 The OE Fund is a multi-employer pension plan. It has approximately \$1.5 billion in assets, over 9,000 members and pensioners and beneficiaries. The OE Fund purchased Sino-Forest's common shares over the TSX during the Class Period and continued to hold 324,100 shares at the end of the Class Period.

14 AP7 is the Swedish National Pension Fund. As of June 30, 2011, it had approximately \$15.3 billion in assets under management. Funds managed by AP7 purchased Sino-Forest's common shares over the TSX during the Class Period and continued to hold 139,398 common shares at the end of the Class Period.

15 Mr. Grant resides in Calgary, Alberta. He purchased 100 of Sino-Forest's 6.25% Guaranteed Senior Notes that were offered by the October 2010 Offering Memorandum and in the distribution to which that Offering Memorandum related. Mr. Grant continued to hold 100 Notes at the end of the Class Period.

16 Mr. Wong resides in Kincardine, Ontario. During the Class Period, he purchased Sino-Forest's common shares over the TSX and continued to hold some or all of such shares at the end of the Class Period. In addition, Mr. Wong purchased 30,000 Sino-Forest common shares offered by the December 2009 Prospectus and in the distribution to which that Prospectus related, and he continued to own 518,700 shares at the end of the Class Period, including the shares he purchased on the primary market.

17 The Plaintiffs seek leave to add Davis Selected Advisers, L.P. ("DSALP") and Davis New York Venture Fund, Inc. ("DNYVF") as representative plaintiffs. DSALP is an asset management firm, and DNYVF is a fund managed by DSALP. DSALP purchased Sino-Forest's common shares over the TSX during the Class Period and allocated these shares to funds managed by DSALP, including DNYVF, who continued to hold those common shares at the end of the Class Period.

18 DSALP purchased Sino-Forest's Notes pursuant to the July 2008 Offering Memorandum and in the distribution to which that Offering Memorandum related, and allocated these Notes to funds, including DNYVF, who continued to hold those Notes at the end of the Class Period. DSALP purchased Sino-Forest's common shares pursuant to the December 2009 Prospectus and in the distribution to which that Prospectus related, and allocated these common shares to funds managed by DSALP, including DNYVF, who continued to hold those common shares at the end of the Class Period.

19 Sino-Forest operated forest plantations in the People's Republic of China ("PRC" or "China"). Sino-Forest was incorporated in 1994 under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, and continued under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 in 2002. It was a "reporting issuer" in all provinces of Canada. Sino-Forest had shares outstanding that were listed for trading on various exchanges including the TSX. Sino-Forest also had various debt instruments, derivatives and other securities that are traded in the secondary market in Canada and elsewhere.

20 Since the commencement of this action, the Plaintiffs have settled their claims against P• yry (Beijing) Consulting Company Limited, a forestry consulting firm, Ernst & Young LLP, Sino-Forest's auditors after 2007, and David Horsley, Sino-Forest's CFO.

21 Pending court approval, there is also a settlement recently reached with the Underwriters. Pending the approval of the settlement, the parties have consented to an adjournment of the certification and leave motions and also the Plaintiffs' motion to strike out affidavits about foreign law filed by the Underwriters.

22 The remaining Defendants are: BDO Limited, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, and Garry J. West.

23 Mr. Chan and Mr. Poon were co-founders of Sino-Forest. Mr. Chan was Sino-Forest's Chairman, CEO, and a Director until his resignation in August 2011. Mr. Poon was Sino-Forest's President and a Director.

24 As Sino-Forest's CEO, Mr. Chan signed and certified Sino-Forest's disclosure documents during the Class Period. He signed and certified Sino-Forest's annual and quarterly MD&As and Financial Statements as well as the AIFs. He signed and

certified the June 2007, June 2009, and December 2009 Prospectuses as constituting full, true, and plain disclosure of all material facts relating to the securities offered.

25 Messrs. Wang, Martin, Mak, Murray, Hyde, Ardell, Bowland, and West were Sino-Forest's Directors during the Class Period. Mr. Poon was a Director until May 2009. Mr. Ardell became a Director in January 2010. Mr. Bowland and Mr. West became Directors in February 2011. Mr. Hyde was the chairman of Sino-Forest's Audit Committee, and Messrs. Bowland, West, and Martin were members of the Audit Committee. Messrs. Martin and Hyde signed and certified the June 2007, June 2009, and December 2009 Prospectuses. Mr. Hyde, along with Mr. Chan, signed each of the 2007 - 2010 Annual Consolidated Financial Statements on behalf of all of the members of Sino-Forest's Board of Directors.

26 BDO Limited ("BDO"), formally known as BDO McCabe Lo Limited, was Sino-Forest's auditor from March 21, 2005 to August 12, 2007. It audited Sino-Forest's annual consolidated financial statements for 2005 and 2006.

27 On August 12, 2007, Ernst & Young LLP ("E&Y") replaced BDO as auditor.

### **3. The Catastrophic Collapse of Sino-Forest and the Claims against the Parties**

28 After its establishment in 1994, Sino-Forest appeared to experience extraordinary growth. It reported profits from the first quarter of 2000 through to the fourth quarter of 2010. As at year-end 2010, Sino-Forest reported approximately \$5.7 billion in assets and annual revenue of approximately \$2 billion. Immediately before its collapse in 2011, Sino-Forest enjoyed a market capitalization of approximately \$4.5 billion.

29 However, on June 2, 2011, Muddy Waters LLC, a short seller, issued a research report alleging that Sino-Forest had: (a) falsely claimed to have acquired trees; (b) reported sales that had not been made or had been made in a manner that did not permit Sino-Forest to include those sales as revenue under Canadian Generally Accepted Accounting Principles ("GAAP"); and (c) failed to disclose numerous related-party transactions.

30 The Plaintiffs allege that Sino-Forest's purportedly strong financial performance and its ever growing assets and revenues were based on fraudulent transactions indicating plantation assets that did not exist or to which Sino-Forest did not have valid proof of ownership for public disclosure or financial reporting purposes. The Plaintiffs allege that Sino-Forest's financial statements violated GAAP.

31 The Plaintiffs also allege that in its public disclosure documents Sino-Forest: (a) misrepresented the extent of its assets, which were exceptionally overstated; (b) failed to disclose numerous and extensive related party transactions with and among its Authorized Intermediaries ("AIs") and suppliers; (c) failed to disclose that it had title to only 8% of its purported standing timber holdings; (d) massively overstated its cash flow from operating activities; and (e) failed to disclose the risks that its subsidiaries were engaging in unlicensed business activities in China (i.e., Sino-Forest never received any proceeds for its sale of timber through AIs) and Sino-Forest engaged in unlawful and potentially criminal payments to staff at Chinese forestry bureaus.

32 The Plaintiffs allege that the senior officers and directors of Sino-Forest breached their duties to ensure that the public statements of Sino-Forest were not false or misleading.

33 The Plaintiffs allege that BDO made two misrepresentations in the 2005 and 2006 Audit Reports: (1) that BDO audited Sino-Forest's financial statements in accordance with Generally Accepted Auditing Standards ("GAAS"), and (2) that Sino-Forest's financial statements presented fairly, in all material respects, Sino-Forest's financial position and the results of its operations and its cash flows.

34 BDO consented in writing to the inclusion of its 2005 and 2006 Audit Reports in: (a) the June 2007 Prospectus; (b) the December 2009 Prospectuses; (c) the July 2008 Offering Memorandum; (d) the June 2009 Offering Memorandum; and (e) the December 2009 Offering Memorandum. On each occasion, in consideration of new fees, BDO entered into a new engagement agreement with Sino-Forest that required BDO, among other things, to review Sino-Forest's interim financial statements, to

review subsequent events up to the date of the filing of the Offering Memorandum, to communicate with Sino-Forest's legal counsel and management, and to participate in due diligence meetings with the Underwriters.

35 The Plaintiffs allege that BDO breached a duty of care to Class Members to perform proper audits of Sino-Forest.

36 The Plaintiffs allege that Class Members relied on the Defendants to their detriment in purchasing Sino-Forest's securities. In particular, the Plaintiffs allege that Class Members relied that: (a) Sino-Forest's financial statements were GAAP-compliant; and (b) BDO had conducted audits in compliance with GAAS. The Plaintiffs submit that the market, including the Class Members, would not have relied on Sino-Forest's financial reporting had BDO disclosed that Sino-Forest's financial statements were in fact unreliable.

#### **4. The Aftermath of the Muddy Waters Research Report**

37 The market immediately and brutally responded to the news of the Muddy Waters Research Report. Sino-Forest's shares dropped from \$18.21 on June 1 to \$5.23 on June 2, a decline of 71.3%.

38 BDO submits that the Muddy Waters Report was manipulative (self-interested), libelous, and contained false and unproven allegations about the mismanagement of the finances of Sino-Forest and about its financial position. BDO denies that its audit was deficient in any way. Other Defendants deny the truth of the allegations made by the Muddy Waters Report.

39 In any event, the Muddy Waters Report was taken seriously by Sino-Forest and by the marketplace. The Report had serious consequences. The Board of Sino-Forest struck an Independent Committee to investigate the allegations made by Muddy Waters. The initial members of the Committee were Messrs. Hyde, Ardell, and Bowland. On August 26, 2011, the Ontario Securities Commission (the "OSC") issued a cease-trade order in respect of Sino-Forest securities. The shares stopped trading.

40 On November 13, 2011, the Independent Committee released an interim report, revealing that: (a) there was a risk that certain of Sino-Forest's operations were in violation of Chinese law; (b) Sino-Forest lacked proof of title to the majority of its holdings of standing timber; (c) there was no verification that income tax and value added tax ("VAT") have been paid; (d) Sino-Forest's "transaction volumes with a number of AIs and Suppliers did not match the revenue reported by such Suppliers in their SAIC filing"; and (e) none of the British Virgin Island timber purchase contracts had as attachments either: (i) plantation rights certificates or (ii) villager resolutions, both of which are standard attachments to a timber purchase contract.

41 On January 31, 2012, the Independent Committee released its final report which indicated that the Committee had been unable to find evidence to refute Muddy Waters' allegations.

42 On March 30, 2012, Sino-Forest filed for insolvency protection pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA").

43 In May 2012, Sino-Forest's common shares were delisted from the TSX and the OSC issued a Statement of Allegations against Sino-Forest and certain of its officers, alleging that they had engaged in deceitful and dishonest courses of conduct that resulted in the overstatement of Sino-Forest's assets and revenues.

44 On January 21, 2013, Sino-Forest's insolvency concluded with the implementation of Sino-Forest's Plan of Compromise and Reorganization. The shareholders received nothing. The noteholders experienced significant losses.

#### **5. The Class Proceedings**

45 This proposed class action was commenced on June 20, 2011.

##### ***(a) The Negligent Misrepresentation Claim***

46 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, Ardell, Martin, Bowland and West for negligent misrepresentation.

47 The elements of a claim of negligent misrepresentation are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.).

48 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest, the Individual Defendants, and BDO had a special relationship with members of the Class by virtue of their purported accounting, financial and managerial acumen and qualifications, and by virtue of having assumed the role of gatekeepers. These Defendants knew at all material times that the Impugned Documents were prepared for the purpose of attracting investment and inducing Class Members to purchase Sino-Forest securities.

(b) Sino-Forest, the Individual Defendants, and BDO owed a duty of care to Class Members who purchased securities in the Share and Note Offerings and on the secondary market to exercise care and diligence to ensure that the Impugned Documents, including Prospectuses and Offering Memoranda and the documents incorporated therein, fairly and accurately disclosed Sino-Forest's financial condition and performance in accordance with GAAP;

(c) Sino-Forest and the Individual Defendants represented that the Impugned Documents, including the Prospectuses and Offering Memoranda and the documents incorporated therein, fairly and accurately disclosed Sino-Forest's financial condition and performance in accordance with GAAP which was untrue, inaccurate or misleading;

(d) BDO made the GAAP Representation in the 2005 and 2006 Audit Reports, which were incorporated into the June 2007, December 2009 Prospectuses, the July 2008, June 2009, and December 2009 Offering Memoranda, and Sino-Forest's Annual Financial Statements for 2005 and 2006;

(e) Sino-Forest, the Individual Defendants, and BDO acted negligently in making the GAAP Representation;

(f) The Labourers Fund, the OE Fund, AP7, Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary and secondary markets during the Class Period reasonably relied, directly or indirectly, on the GAAP Representation; and

(g) The Labourers Fund, the OE Fund, AP7, Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary or secondary markets during the Class Period suffered damages as a result of relying on the GAAP Representation.

**(b) The Negligence Claim in the Primary Market**

49 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, and Martin for negligence in the primary market.

50 The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.).

51 The theory of the claim is that Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, and Martin had a duty to prevent the securities from being sold before the misrepresentations in the offering documents were corrected.

52 The claim for negligence against BDO is limited to those Class Members who purchased Sino-Forest's shares and notes in the primary market pursuant to the June 2007 and December 2009 Prospectuses and the July 2008, June 2009 and December 2009 Offering Memoranda.

53 The Second Fresh as Amended Statement of Claim pleads:



(a) Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO owed a duty of care to Class Members who purchased Sino-Forest securities in the primary market during the Class Period to ensure that the Prospectuses and Offering Memoranda made full, true, and plain disclosure of all material facts relating to the securities offered thereby. In the circumstances plead, it was reasonably foreseeable that Class Members would be damaged by the alleged misrepresentations, and there are no policy considerations that negate the prima facie duty.

(b) Sino-Forest Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO breached the standard of care by failing to prevent the Note and Share Offerings from occurring prior to the correction of the misrepresentations in the offering documents or in the documents incorporated therein, and by failing to maintain or ensure that Sino-Forest had appropriate internal controls in place to ensure that its disclosure documents adequately and fairly presented its business and affairs on a timely basis.

(c) Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO's breach directly caused damages to Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary market during the Class Period when Sino-Forest's misrepresentations were revealed and the price of Sino-Forest's securities fell.

(d) The causal link between Sino-Forest's alleged negligence and the damage to the Class Members arises from the fact that had Sino-Forest Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO complied with the standard of care, the securities regulators would not have issued a receipt for any of the Prospectuses, and the Share and Note Offerings would not have occurred, or would have occurred at prices that reflected the true value of Sino-Forest's securities

**(c) Unjust Enrichment in the Primary Market and the Secondary Market**

54 The Plaintiffs sue Sino-Forest for unjust enrichment in the primary market.

55 The Plaintiffs sue Messrs. Chan, Poon, Mak, Murray, and Martin for unjust enrichment in the secondary market.

56 The elements of a claim of unjust enrichment claim are: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and, (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at para. 30.

57 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest was enriched by the difference between the amount for which the securities offered in the primary market were actually sold, and the amount for which such securities would have been sold had the offerings not included Sino-Forest's misrepresentation.

(b) Chan, Martin, Poon, Mak and Murray sold shares during the Class Period at prices that were inflated as a result of their wrongful acts and omissions during the Class Period, and were enriched thereby.

(c) primary and secondary market purchasers of the securities sold by Sino-Forest, Chan, Martin, Poon, Mak and Murray were correspondingly deprived.

(d) no juristic reason existed for the enrichment

**(d) Negligent Misrepresentation under New York State Common Law**

58 The Plaintiffs sue Sino-Forest and BDO for negligent misrepresentation under New York State law.

59 To state a claim for negligent misrepresentation under the common law of the State of New York, a plaintiff must allege: (1) a special relationship that creates a duty to exercise reasonable care toward the plaintiff; (2) the transmittal of false information; and (3) justifiable, detrimental reliance on the false information.

60 The claim against BDO is limited to those Class Members who purchased Sino-Forest's notes in the primary market pursuant to the July 2008, June 2009, and December 2009 Offering Memoranda.

61 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest and BDO were in a special relationship with Grant, DSALP, and other Class Members who purchased notes in the primary market in the Class Period;

(b) the Offering Memoranda contained misstatements; and

(c) DSALP, Grant and Class Members who purchased notes in the primary market during the Class Period justifiably relied upon Sino-Forest's representation, and suffered losses.

**(e) Section 12(a)(2) of the United States Securities Act of 1933**

62 The Plaintiffs sue Sino-Forest and BDO for breach of s. 12(a)(2) of the United States *Securities Act of 1933*.

63 The claim against BDO is limited to those Class Members who purchased Sino-Forest's notes in the primary market pursuant to the July 2008, June 2009, and December 2009 Note Offerings.

64 To state a claim under s. 12(a)(2) of the *United States Securities Act of 1933*, a plaintiff must allege that the defendant: (1) sold or offered the sale of a security; (2) by the use of any means of communication in interstate commerce; (3) through a prospectus or oral communication that contained a material misstatement or omission; and (4) the plaintiff is entitled to rescission or damages.

65 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest sold notes pursuant to the Note Offerings;

(b) the Notes were sold pursuant to the Offering Memoranda;

(c) the Offering Memoranda contained misstatements made by Sino-Forest and BDO; and

(d) Grant, DSALP, and Class Members who purchased notes in the primary market are entitled to damages.

**(f) Section 130 of Ontario Securities Act (Primary Market Claim)**

66 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Wang, Mak, Murray, Hyde, and Martin for breach of s. 130 of Ontario's *Securities Act* and, if necessary, equivalent provincial legislation.

67 Section 130 of the Ontario *Securities Act* provides purchasers of a security offered by prospectus during the period of distribution or during distribution to the public a remedy for a misrepresentation in the prospectus. The remedy is available against the issuer of the security as well as directors of the issuer and others who have signed the prospectus or have allowed their reports or statements to be used in the prospectus.

68 The claim against BDO is limited to those Class Members who purchased shares in the primary market pursuant to the December 2009 Share Offering.

69 The Second Fresh as Amended Statement of Claim pleads:

(a) The June 2009 and December 2009 Prospectuses and the documents incorporated therein contained the GAAP Representation and other misrepresentations, and that Wong, DSALP, and other Class Members purchased shares during the period of distribution or during distribution to the public of these Offerings.



(b) There were misrepresentations in BDO's 2005 and 2006 Audit Reports, that BDO consented to the inclusion of the 2005 and 2006 Audit Reports in the December 2009 Prospectus.

(c) Chan, Wang, Mak, Murray, and Hyde were Directors of Sino-Forest when the June 2009 and December 2009 Prospectuses were filed.

**(g) Section 130.1 of Ontario Securities Act (Primary Market Claim)**

70 The Plaintiffs sue Sino-Forest for breach of s. 130.1 of Ontario *Securities Act* and, if necessary, the equivalent securities legislation in other provinces.

71 The elements of a claim for statutory liability for misrepresentation in prospectus are: (a) the issuer's offering memorandum contains a misrepresentation; and (b) the purchaser purchased a security offered by the offering memorandum during the period of distribution.

72 The Second Fresh as Amended Statement of Claim pleads that Sino-Forest's July 2008, June 2009, December 2009, and October 2010 Offering Memoranda and the documents incorporated therein by reference contained the representation and other misrepresentations, and that Mr. Grant, DSALP, and other Class Members purchased notes during the period of distribution.

**(h) Section 138.5 of the Ontario Securities Act (Secondary Market Claim)**

73 Section 138.5 of the Ontario *Securities Act* provides purchasers of a security with a right of action for misrepresentations in ongoing public disclosure. If leave to make the claim is granted, subject to statutory defences, an issuer, such as Sino-Forest, and each Director of the issuer at the time the document was released, is liable under s. 138.5 if there was a written misrepresentation. If leave to make the claim is granted, subject to statutory defences, an auditor such as BDO is liable under s. 138.5 where a misrepresentation was contained in the auditor's report, and the audit report is included, summarized or quoted in a document released by a responsible issuer, and the auditor consented to the use of its report.

74 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, Ardell, Martin, Bowland and West for breach of s. 138.5 of the Ontario *Securities Act*.

75 In the Second Fresh as Amended Statement of Claim, the Plaintiffs plead in some considerable detail that there were misrepresentations in all of the impugned disclosure documents.

76 These claims require leave under the Ontario *Securities Act*.

**(i) Conspiracy (Secondary Market Claim)**

77 The Plaintiffs sue Sino-Forest and Messrs. Chan and Poon for conspiracy in the secondary market.

78 The elements of a claim of conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants either (a) use some means (lawful or unlawful) for the predominant purpose of injuring the plaintiff; or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and (4) the plaintiff suffers damages as a result of the defendants' conduct: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.); *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

79 The Plaintiffs allege that Sino-Forest and Messrs. Chan, and Poon conspired to inflate the price of Sino-Forest's securities by making misrepresentations, and to profit from such misrepresentations by issuing themselves stock options in respect of which the strike price was impermissibly low.

80 The Second Fresh as Amended Statement of Claim pleads:

- (a) Sino-Forest, Chan, and Poon reached an agreement;
- (b) the common predominant intention of the agreement was to inflate the price of Sino-Forest shares;
- (c) Sino-Forest, Chan, and Poon committed acts that were either unlawful (under the *Securities Act* and other statutes) and likely to cause injury to the class members, or had the predominant purpose of causing injury to the class members; and
- (d) Sino-Forest, Chan, and Poon thereby cause damage to be suffered by the Class Members.

## 6. Certification

81 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

82 For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

83 On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

84 As I will discuss later in these Reasons for Decision there is a dispute about the certification of the claims of Class Members who are the former owners of Sino-Forest notes ("Former Noteholders"). For the immediate purposes of discussing the certification criteria, I will ignore this dispute about the claims of Former Noteholders who assigned their notes to others. I will return to the dispute with a more fulsome discussion below. I foreshadow to say that my conclusion is that this dispute does not alter my decision to certify the action as a class proceeding or to grant leave under the Ontario *Securities Act*.

## 7. Cause of Action Criterion

85 The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*, *supra*, is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

86 Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

87 On consent or because the cause of action criterion was unopposed, I conclude that the Plaintiffs have satisfied the cause of action criterion as follows:

- (a) the claims and rights of action asserted on behalf of the Class against Sino-Forest are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory liability for misrepresentation in offering memoranda, breach of section 12(a)(2) of the *United States Securities Act of 1933*, negligent misrepresentation under New York State law, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the Ontario *Securities Act* ("OSA"), unjust enrichment, and conspiracy;

(b) the claims and rights of action asserted on behalf of the Class against BDO are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, negligent misrepresentation under New York State law, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

(c) the claims and rights of action asserted on behalf of the Class against Allen T.Y. Chan are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, unjust enrichment, and conspiracy;

(d) the claims and rights of action asserted on behalf of the Class against Kit Kai Poon are negligence, negligent misrepresentation, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, unjust enrichment, and conspiracy;

(e) the claims and rights of action asserted on behalf of the Class against Peter Wang and James M. E. Hyde are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

(f) the claims and rights of action asserted on behalf of the Class against William E. Ardell, Gary J. West, and James P. Bowland are negligent misrepresentation, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

(g) the claims and rights of action asserted on behalf of the Class against Simon Murray and Edmund Mak are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, and unjust enrichment;

(h) the claims and rights of action asserted on behalf of the Class against W. Judson Martin are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, and unjust enrichment.

## 8. Leave under Part XXIII.1 of the Securities Act

88 Leave under Part XXIII.1 of the *Securities Act* must be granted if the Court is satisfied that: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. See: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (Ont. C.A.) at para 90; leave to appeal granted [2014] S.C.C.A. No. 137 (S.C.C.); *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 6061 (Ont. S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 (Ont. S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (Ont. S.C.J.).

89 On consent or because leave was not opposed, I conclude that leave should be granted to the Plaintiffs.

## 9. Identifiable Class Criterion

90 The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

91 Subject to a concession made as a result of an observation made during the oral argument of the leave and certification motion with respect to the Plaintiffs' claim on behalf of noteholders, the Class is defined as:

(i) all persons and entities, wherever they may reside, who acquired Sino-Forest Corporation's Securities during the Class Period on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest Corporation's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino-Forest Corporation's Securities outside of Canada, except: those persons resident or domiciled in the Province of Quebec at the time they

acquired Sino-Forest Corporation's Securities, and who are not precluded from participating in a class action by virtue of Article 999 of the *Quebec Code of Civil Procedure*, RSQ, c C-25, and except the Excluded Persons; and

(ii) all persons and entities, wherever they may reside, who acquired Sino-Forest Corporation's Securities during the Class Period by distribution in Canada in an Offering, or are resident of Canada or were resident of Canada at the time of acquisition and acquired Sino-Forest Corporation's Securities by offering outside of Canada, except the Excluded Persons.

92 During the oral argument, it was observed that a person who purchased a note during the Class Period and who sold the note during the Class Period was not affected by the alleged wrongdoings of Sino-Forest because they would not have suffered any consequent damages. The Plaintiffs conceded that subject to drafting appropriate language, the class definition should be amended accordingly.

93 Subject to this amendment with respect to noteholder claimants being made, on consent or because the identifiable class criterion was unopposed, I conclude that the Plaintiffs have satisfied the identifiable class criterion.

### 10. Common Issues Criterion

94 The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each Class Member's claim and its resolution must be necessary to the resolution of each Class Member's claim: *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at para. 18. An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each Class Member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.

95 On consent or because the common issues criterion was not opposed, I conclude that the Plaintiffs have satisfied this criterion with respect to the following common issues:

#### Were There Misrepresentations?

(1) Did the financial statements of Sino-Forest Corporation comply with Canadian GAAP?

(2) Did the Defendants make misrepresentations, including a failure to make timely disclosure, and if so, who made these representations, when, where and how?

#### Negligent Misrepresentation

(3) Did the Defendants owe a duty of care to the Class Members purchasing Sino-Forest? If so, what is the content of such duty, which Defendants owed such a duty and when?

(4) If the answer to (1) is no, did the Defendants negligently make misrepresentations that Sino-Forest's financial statements complied with GAAP (the "GAAP Misrepresentation")?

(5) If the answer to (4) is yes, did the Defendants make the GAAP Misrepresentation intending that the Class Members rely upon it and acquire Sino-Forest securities?

#### Statutory Liability -Secondary Market under the Securities Legislation

(6) If the answer to (2) is yes, do the misrepresentations give rise to liability under section 138.3 of the *Securities Act*, R.S.O. 1990, c. S.5, or the equivalent securities legislation in other provinces? If so, for which Defendants, for which misrepresentations for each Defendant and for what time period?

(7) If the answer to (6) is yes,

i. Did each of the Individual Defendants who were not Directors at the time of the misrepresentations authorize, permit or acquiesce in the release of each of the documents containing such misrepresentations?

ii. Did each of Sino-Forest, Chan, Poon, or BDO know of each of the misrepresentations at the time they were made? If not, were these Defendants wilfully blind to each of the misrepresentations at the time that they were made and does wilful blindness constitute knowledge for the purposes of subsection 138.7(2) of the *Securities Act* or the Equivalent securities legislation in other provinces?

(8) What are the damages payable by each Defendant found liable under section 138.3 of the

**Securities Act or the equivalent securities legislation in other provinces? Statutory Liability -Primary Market under the Securities Legislation**

(9) If the answer to (2) regarding Sino-Forest's June 2009 or December 2009 prospectuses is yes, do the misrepresentations give rise to liability in favour of the Class Members who purchased shares in such prospectus offerings, pursuant to section 130 of the *Securities Act* or the equivalent securities legislation in other provinces? If so, for which defendants?

(10) What are the damages payable by each Defendant found liable under section 130 of the *Securities Act* or the equivalent securities legislation in other provinces?

(11) If the answer to (2) regarding Sino-Forest's July 2008, June 2009, December 2009 and October 2010 offering memoranda is yes, is Sino-Forest liable to Class Members who purchased notes in such offerings, pursuant to section 130.1 of the *Securities Act* or the equivalent securities legislation in other provinces?

(12) If the answer to (11) is yes, what are the damages payable by Sino-Forest?

**Negligence for Primary Market Offerings**

(13) Did Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, or BDO owe a duty of care to the Class Members purchasing Sino-Forest securities in an offering? If so, which Defendants owed such a duty, for which offerings and what is the content of such duty?

(14) If the answer to (13) is yes, did the Defendants owing such a duty breach that duty of care in connection with the offerings? If so, which Defendants breached their duty and how?

**Unjust Enrichment: Chan, Poon, Martin and Murray: Secondary Market**

(15) Are there any members of the class who can be identified as having bought shares of Sino-Forest Corporation from any of Poon, Chan, Martin or Murray?

(16) In connection with amounts paid by those class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin or Murray, were these defendants enriched by the price paid for those shares?

(17) Was there a corresponding deprivation by those class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin or Murray, as at the time that they disposed of or were deprived of their shares of Sino-Forest?

(18) Did each of Chan, Poon, Martin and Murray have continuous disclosure obligations and if so during what period(s) of time?

(19) If the answer to (18) is yes, did Chan, Poon, Martin and Murray fail to meet their continuous disclosure obligations or fail to ensure that Sino-Forest met its continuous disclosure obligations under the securities legislation and regulation in Ontario and other provinces? If so, did such a failure deprive such defendants of a juristic reason for their resulting enrichment?

(20) If the answer to (19) is yes, are the class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin and Murray entitled to repayment as restitution of the amounts paid for such shares, to the extent that each was deprived of their shares or, as applicable, to the difference between such amounts paid by each of them and the lesser amounts received by each of them at the time that they disposed of their shares?

#### **Unjust Enrichment: Sino-Forest: Primary Market**

(21) In connection with amounts paid by the class members who purchased Sino-Forest securities in the Share or Note Offerings during the Class Period, was Sino-Forest enriched by the amounts it received in connection with its offerings, and was there a corresponding deprivation by the Class Members who purchased Sino-Forest securities in the Share or Note Offerings during the Class Period?

(22) Did Sino-Forest fail to meet its disclosure obligations under the securities legislation and regulation in Ontario and other provinces in connection with its offerings? If so, did such a failure deprive such defendants of a juristic reason for their resulting enrichment?

(23) If the answer to (22) is yes, are the class members who purchased Sino-Forest securities in the share and note offerings during the class period entitled to repayment as restitution of the amounts paid for such securities that Sino-Forest received or, alternatively, the difference between such amounts paid and the amount Sino-Forest would have been received had there not been a failure by Sino-Forest to meet its disclosure obligations?

#### **Conspiracy**

(24) Did Sino-Forest, Chan, and Poon, or some of them, conspire one with the other, or with persons unknown, for the purpose of inflating the price of Sino-Forest securities? If so, who conspired with whom, when, where, why and for what purpose?

#### **Breach of Section 12(a)(2) of the United States Securities Act of 1933**

(25) Did Sino-Forest sell or offer for sale a security by the use of any means of communication in interstate commerce through a prospectus?

(26) If the answer to (25) is yes, did the prospectus contain a material misstatement or omission?

#### **Negligent Misrepresentation under New York State Common Law**

(27) Was there a special relationship between the Defendants and the Class that creates a duty to exercise reasonable care towards the Class?

(28) If the answer to (27) is yes, was the duty to exercise reasonable care breached and was false information transmitted?

(29) If the answer to (28) is yes, was the false information transmitted with the intention that the Class Members rely upon it and acquire Sino-Forest securities?

#### **Inflation in Securities**

(30) Did the price of Sino-Forest's securities incorporate and reflect any of the alleged misrepresentations made during the Class Period, and if so, what effect did any such misrepresentations have on the prices of Sino-Forest's securities during the Class Period?

#### **Vicarious Liability**



(31) Is Sino-Forest vicariously liable or otherwise responsible for the acts of the individual defendants and their other officers, directors and employees?

(32) Is BOO vicariously liable or otherwise responsible for the acts of their respective officers, directors, partners and employees?

### **Punitive Damages**

(33) Should any of Sino-Forest, Chan, and Poon pay punitive damages? If so, which Defendant, in what amount and to whom?

### **Costs of Administration and Distribution**

(34) Should the defendants pay the cost of administering and distributing recovery to the Class?

## **11. Preferable Procedure Criterion**

96 On consent or because the preferable procedure criterion was not opposed, I conclude that the Plaintiffs have satisfied the preferable procedure criterion.

## **12. Representative Plaintiff Criterion**

97 The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

98 On consent or because the representative plaintiff criterion was unopposed, I conclude that the Plaintiffs have satisfied this criterion.

## **13. Miscellaneous Orders**

99 I order that the form, manner and cost of notice and the time and manner of opting out shall be determined by further order of this Court.

## **14. The Dispute about the Claims of Current and Former Noteholders**

100 The discussion can now turn to the one disputed issue that affects both the certification motion and also the leave motion. This is the dispute between Sino-Forest and the Plaintiffs about the claims of Former Noteholders. For reasons that will soon become apparent, I shall be circumspect in resolving this dispute, which I shall resolve as a matter of civil procedure rather than as a matter of substantive law.

101 To be frank, while I disagree with the Plaintiffs' argument that as a matter of jurisdiction the Court cannot resolve this dispute at this juncture, and while I agree with Sino-Forest's argument based on *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 15 that some substantive matters, such as standing and who are the parties to a claim, can be resolved at the certification motion, I think it would be prudent and preferable for the Court to decide the dispute about the Former Noteholders' claims — only after the certification motion.

102 If Sino-Forest's argument is substantively correct, about which I express no opinion, given that megamillions approaching billions of dollars of claims might be taken out of the class action, it is preferable that Sino-Forest, which has not yet delivered a statement of defence, first, be put to the pain of pleading a defence to the class action and, second, it should be required to either pose a substantive question for the common issues trial or bring a summary judgment motion for a dismissal of the Former Noteholders' Claims.

103 In my opinion, in the circumstances of the case at bar, the preferable approach to resolving the situation of the Former Noteholders is to postpone until after the certification motion a question that is, in truth, a determination of a matter of necessary, proper, or improper parties. I have four reasons for postponing a substantive decision.

104 First, it appears to me that up to and including the oral argument of the certification and leave motions, the Plaintiffs have never understood the substantive law point being advanced by Sino-Forest, and, thus, Sino-Forest's argument and the Plaintiffs' counterargument are like legal battleships unknowingly passing each other on a foggy night. The opposing parties characterize or classify the legal problem differently, and, thus, they never come to terms about each other's arguments.

105 Second, given that, as will be seen, Sino-Forest's argument is not comprehensive of all of the Former Noteholders' claims, there is little to recommend deciding the substantive legal point now.

106 Third, were the point to be decided now, there would be the inevitable appeal, which would delay the advancement of the certified Class Action, which has numerous other claims against Sino-Forest. The dispute between the parties can conveniently be decided later.

107 Fourth, even if Sino-Forest's argument about the Former Noteholders is substantively correct, then, nevertheless, in all the circumstances, Sino-Forest is not prejudiced by having to be patient and waiting its vindication after the certification motion.

108 A circumspect synthesis of the factual and legal context for the disputed issue about the Former Noteholders' claims is that the Noteholder Class Members advance seven tort or statutory causes of action against Sino-Forest; namely: (1) negligent misrepresentation; (2) negligence; (3) unjust enrichment; (4) negligent misrepresentation under New York State common law; (5) breach of s. 12(a)(2) of the *United States Securities Act of 1933*; (6) breach of s. 130.1 of the *Ontario Securities Act*; and (7) breach of 138.5 of the *Ontario Securities Act*.

109 The Sino-Forest notes are expressly governed by New York law, and under New York law, with an exception for federal enactments (such as s. 12(a)(2) of the *United States Securities Act of 1933*), unless expressly reserved in writing, a transfer of any bond vests in the transferee (viz., not a Class Member) all claims or demands of the transferor (viz., the Class Member Former Noteholder) for damages against the obligor (viz., Sino-Forest).

110 From this legal and factual background, Sino-Forest argues that save for their claims under s. 12(a)(2) of the *United States Securities Act of 1933*, the Class Members that are Former Noteholders have assigned their claims, and the transferees (Former Noteholders) should not be included in the class and further, leave should not be granted under the *Ontario Securities Act*, because there is a no possibility, let alone a reasonable possibility, that the action will be resolved at trial in favour of the Former Noteholders who have legally assigned their claims and causes of action.

111 To be somewhat more precise about the factual and legal background and using the July 2008 Note to illustrate Sino-Forest's argument, pursuant to s. 12.08(a) of the July 2008 Note, the note is governed by New York State law. Section 12.08(a) states:

Each of the Notes, the Subsidiary Guarantees and the Indentures shall be governed by and construed in accordance with, the laws of the State of New York without giving effect to applicable principles of conflicts of law to the extent that the application of the law of another jurisdiction would be required thereby.

Pursuant to sections 2.06, 2.12, 2.13, and the transfer certificate of the July 2008 Note, the transfer and sale of the notes from original holders to subsequent noteholders is also governed by New York law.

112 The provisions of the June 2009 Note, the December 2009 Note, and the October 2010 Note are similar and state that those notes are also governed by New York State law.

113 Without having delivered a Statement of Defence, Sino-Forest delivered an affidavit from Gregory P. Joseph, as an expert on New York law.



114 In his report dated October 7, 2013, Mr. Joseph explained that under New York law, all claims and causes of action, other than the claims under s. 12(a)(2) of the *Federal Securities Act of 1933*, whether asserted under New York State law or Canadian law, by former noteholders who transferred or sold their notes before the end of the class period are automatically assigned by operation of New York General Obligations Law ("GOL") § 13-107 to the subsequent purchaser of the notes. Therefore, Mr. Joseph opined that under New York law, the former noteholders are not entitled to pursue an assigned cause of action against Sino-Forest, other than the claims advanced under s. 12(a)(2) of the *Federal Securities Act of 1933*.

115 GOL § 13-107, states:

1. Unless expressly reserved in writing, a transfer of any bond shall vest in the transferee all claims or demands of the transferrer, whether or not such claims or demands are known to exist, (a) for damages or rescission against the obligor on such bond, (b) for damages against the trustee or depository under any indenture under which such bond was issued or outstanding, and (c) for damages against any guarantor of the obligation of such obligor, trustee or depository.

2. As used in this section, "bond" shall mean and include any and all shares and interests in an issue of bonds, notes, debentures or other evidences of indebtedness of individuals, partnerships, associations or corporations, whether or not secured.

3. As used in this section, "indenture" means any mortgage, deed of trust, trust or other indenture, or similar instrument or agreement (including any supplement or amendment to any of the foregoing), under which bonds as herein defined are issued or outstanding whether or not any property, real or personal, is, or is to be, pledged, mortgaged, assigned or conveyed thereunder.

116 In *Bluebird Partners v. First Fid. Bank*, 97 N.Y.2d 456 (U.S. N.Y. Ct. App. 2002), at pp. 460 -462, the New York Court stated that the wording of GOL § 13-107 makes it clear that the buyer of a bond receives exactly the same claims or demands as the seller held before the transfer. See also: *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F.Supp.2d 162 (U.S. Dist. Ct. S.D. N.Y. 2011), at pp. 181 -82; *LNC Investments, Inc. v. First Fidelity Bank*, 173 F.3d 454 (U.S. C.A. 2nd Cir. 1999), 462.

117 Sino-Forest thus seeks an Order denying certification of all claims advanced by Former Noteholders against them other than the claim advanced pursuant to the *Federal Securities Act of 1933*, on behalf of the Former Noteholders.

118 In a counterargument, which in my opinion is not responsive to Sino-Forest's argument, the Plaintiffs submit that there is no standing or proper-parties issue and that Sino-Forest is improperly and prematurely attempting to have the substantive defence of what law governs the tort claims of some of the noteholders determined on a certification motion when that issue must be determined on a full evidentiary record after pleadings or upon a motion for summary judgment or at the common issues trial.

119 As noted above, I disagree with the Plaintiffs' argument that the Court cannot decide the merits of Sino-Forest's argument at this juncture, but, in my opinion, while the Court could decide the substantive issue, it is procedurally preferable that the decision come later.

120 As a matter of substance, the Plaintiffs submit that the tort claims of Former Noteholders are not governed by a choice of law clause because under Canadian law contractual choice of law clauses do not govern the substantive law applicable to claims in tort claims are governed by the *lex loci delicti*, the substantive law of where the tort occurred.

121 As a matter of substance, although the Plaintiffs' position is that the matters discussed by Mr. Joseph ought not properly to be determined at this juncture of the proceedings, out of an abundance of caution, they retained Adam C. Prichard as their expert in New York State law. Mr. Prichard's opinion was similar to Mr. Joseph's, but Mr. Prichard explained that GOL § 13-107 does not preclude claims against others and was limited in its application to Sino-Forest.

122 However, more to the substantive point, the Plaintiffs submit that for the present purposes of the certification and leave motions, the opinions of Messrs. Joseph and Prichard beg the critical question of whether or not the Ontario Court should apply New York law to the Former Noteholders' tort claims.

123 Mr. Joseph, who was cross-examined, conceded that he was not retained as an expert on conflict of laws issues and that he was not opining on conflict of laws issues. Further, he conceded that he is not qualified to opine on conflict of laws issues under the law of Ontario; and that he cannot opine on whether under Canadian law, there has been any assignment of rights under the notes. Mr. Joseph did not provide an opinion as to whether or not this Court would apply New York or Ontario law to the tort claims of Class Members.

124 Once again, I shall express no opinion about the merits of the Plaintiffs' argument. I simply note again my opinion that the Plaintiffs' argument is not substantively responsive to Sino-Forest's actual argument, which is not about what jurisdiction's law governs tort claims but is about the law about the assignment of causes of action, be those causes of action in contract, in debt, in tort, in restitution, or in statute. Sino-Forest is, in truth, quite content to have the *lex loci delicti* govern the tort claims of the Former Noteholders; Sino-Forest's point is that with an exception for s. 12(a)(2) of the *United States Securities Act of 1933*, the tort claims are vested in persons who are not Class Members.

125 In any event, for the reasons discussed above, it is prudent and preferable and procedurally fair to decide the substantive merits of the competing arguments about all the Former Noteholders' claims after Sino-Forest has pleaded its defence.

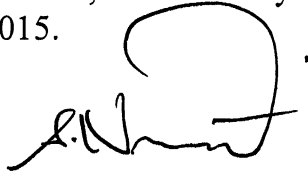
## 15. Conclusion

126 Orders accordingly.

127 I order that that the costs of these motions shall be determined by further Order of this Court.

*Motion granted.*

This is Exhibit "C" mentioned and referred to in the Affidavit of Serge Kalloghlian, sworn before me at the City of Toronto, in the Province of Ontario, this 14<sup>th</sup> day of April, 2015.

A handwritten signature in black ink, appearing to be "J. W. Smith", written over a horizontal line.

A Commissioner, etc.

**Serge Kalloghlian**

---

**From:** Serge Kalloghlian  
**Sent:** Friday, April 10, 2015 5:05 PM  
**To:** Emerson, Paul (Paul.Emerson@clydeco.ca)  
**Cc:** Charles M. Wright; A. Dimitri Lascaris; Daniel Bach (daniel.bach@siskinds.com); Jonathan Ptak (jptak@kmlaw.ca); Garth Myers (gmyers@kmlaw.ca); Kirk M. Baert (kbaert@kmlaw.ca); Ken.Rosenberg@paliaroland.com; marymargaret.fox@clydeco.ca; GLuftspring@rickettsharris.com; ssasso@rickettsharris.com; 'markus.koehnen@mcmillan.ca'; wpepall@lernal.com; 'ebabin@babinbessnerspry.com'; staleyr@bennettjones.com; llowenstein@osler.com; sfriedman@davis.ca; 'robert.reuter@rslawyers.com'; 'jason.beitchman@rslawyers.com'  
**Subject:** Sino-Forest - Chubb Insurance Motion

Paul,

In advance of your client's April 20<sup>th</sup> motion, we request that you provide a full accounting of the monies paid out by the Insurance Tower (as defined in the April 6, 2015 Affidavit of Paula Kargas). Such accounting could be provided to class counsel on a redacted basis, to an agreeable third party, or the court for review.

We look forward to your response.

Regards,

Serge

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

Court File No.: CV-12-9667-00-CL  
Court File No.: CV-11-431153-00CP

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**AFFIDAVIT OF SERGE KALLOGLHIAN**

**KOSKIE MINSKY LLP**  
900-20 Queen Street West  
Box 52

Toronto, ON M5H 3R3

**Kirk M. Baert (LSUC#: 309420)**

Tel: 416.595.2117/Fax: 416.204.2889

**Jonathan Ptak (LSUC#: 45773F)**

Tel: 416.595.2149/Fax: 416.204.2903

**SISKINDS LLP**

680 Waterloo Street

P.O. Box 2520

London, ON N6A 3V8

**A. Dimitri Lascaris (LSUC#: 50074A)**

Tel: 519.660.7844/Fax: 519.660.7845

**Charles M. Wright (LSUC#: 36599Q)**

Tel: 519.660.7753/Fax: 519.660.7754

**PALIARE ROLAND ROSENBERG**

**ROTHSTEIN LLP**

155 Wellington Street, 35<sup>th</sup> Floor

Toronto, ON M5V 3H1

**Ken Rosenberg (LSUC #21102H)**

**Massimo Starnino (LSUC #41048G)**

Tel: 416-646-4300/Fax: 416-646-4301

Lawyers for the Ad Hoc Committee of Purchasers of  
Applicant's Securities, including the Class Action Plaintiffs

00033

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

Court File No.: CV-12-9667-00-CL  
Court File No.: CV-11-431153-00CP

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**RESPONDING MOTION RECORD**

**KOSKIE MINSKY LLP**

900-20 Queen Street West  
Box 52

Toronto, ON M5H 3R3

**Kirk M. Baert (LSUC#: 309420)**

Tel: 416.595.2117/Fax: 416.204.2889

**Jonathan Ptak (LSUC#: 45773F)**

Tel: 416.595.2149/Fax: 416.204.2903

**SISKINDS LLP**

680 Waterloo Street

P.O. Box 2520

London, ON N6A 3V8

**A. Dimitri Lascaris (LSUC#: 50074A)**

Tel: 519.660.7844/Fax: 519.660.7845

**Charles M. Wright (LSUC#: 36599Q)**

Tel: 519.660.7753/Fax: 519.660.7754

**PALIARE ROLAND ROSENBERG**

**ROTHSTEIN LLP**

155 Wellington Street, 35<sup>th</sup> Floor

Toronto, ON M5V 3H1

**Ken Rosenberg (LSUC #21102H)**

**Massimo Starnino (LSUC #41048G)**

Tel: 416-646-4300/Fax: 416-646-4301

Lawyers for the Ad Hoc Committee of Purchasers of the  
Applicant's Securities, including the Class Action Plaintiffs