

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING
ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT
ROBERT WONG, DAVIS NEW YORK VENTURE FUND, INC. and DAVIS SELECTED
ADVISERS L.P.**

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.
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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*

**REPLY FACTUM OF THE PLAINTIFFS
DEALERS SETTLEMENT APPROVAL
(Returnable May 11, 2015)**

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

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

**IN THE MATTER OF THE *COMPANIES' CREDITORS*
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Court File No.: CV-11-431153-00CP

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BETWEEN:

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF
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Securities LLC)**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**REPLY FACTUM OF THE PLAINTIFFS
SETTLEMENT APPROVAL
(Returnable May 11, 2015)
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PART I - OVERVIEW

1. The Ad Hoc Committee of Purchasers of the Sino-Forest Corporation's Securities (the "Ad Hoc Committee") repeats and relies upon its submissions in its factum dated April 24, 2015. The Ad Hoc Committee provides the following reply to the new arguments raised by the Litigation Trustee in its factum filed May 5, 2015:

- (a) **The Monitor has not taken a position on this motion:** The Litigation Trust erroneously states that the Monitor is opposing this motion. This is incorrect. The Monitor has advised that it is not opposing or taking any position on this motion.
- (b) **The Litigation Trustee has no litigation claims against the Dealers:** The Litigation Trust, which stands in the shoes of Sino-Forest, does not have or has released any claims against the Dealers. The Litigation Trust is not entitled to any portion of the Dealers Settlement.
- (c) **The Litigation Trustee's absolutist position is incorrect:** The Litigation Trust argues that it has an absolute right to withhold its acceptance of the Dealers Settlement under all circumstances. This is not correct. The Litigation Trust has confirmed that it has no litigation claim against the Dealers. The Litigation Trustee's absolutist position that it can in all circumstances veto a fair settlement is contrary to the purpose of the CCAA, the Litigation Trust's obligation to act in good faith and reasonably, and its discretion granted by the Court-approved Litigation Trust Agreement.
- (d) **The Litigation Trustee has not requested any changes to the order:** Notwithstanding efforts by the Ad Hoc Committee to engage the Litigation Trust in discussions, the Litigation Trust has not proposed, either formally or informally, any changes to the order that would provide it any non-monetary benefits. This stands in contrast to other non-settling defendants in this and prior settlements who have objected on the basis of a lack of discovery rights.
- (e) **Overlap between beneficiaries of the Litigation Trust and the class action claimants:** There is overlap between the beneficiaries of the Litigation Trust and the securities claimants on behalf of whom claims are advanced in the class actions. Those overlapping class members have made claims in the Ernst & Young settlement, and are entitled to make claims and receive compensation in the Dealers Settlement.
- (f) **Third party releases provided as part of *quid pro quo* for contributions in restructuring:** The Litigation Trustee acknowledges that the third party release is intended to compensate participants in the market for contributions made in the restructuring. The Ad Hoc Committee and the Dealers provided considerable contributions and gave up rights in Sino-Forest's restructuring and have now

agreed to make a considerable contribution to Sino-Forest's creditors in exchange for the availability of the release.

2. In the circumstances, the Dealers Settlement should be approved.

PART II - ISSUES AND THE LAW

A. The Monitor Has Not Taken a Position On This Motion

3. The Monitor set out its position on this motion in an email dated February 19, 2015 from Derrick Tay, counsel to the Monitor, to Messrs. Staley and Bish, counsel to the Litigation Trust and the Dealers, respectively.¹ In its factum, the Litigation Trust erroneously states that the Monitor opposes the settlement, and quotes only one passage from the Monitor's email. This is not correct. The Monitor's position is explicitly set out in the passages of Mr. Tay's email that are omitted from the Litigation Trust's factum:

If the Litigation Trust's consent is not obtained and the underwriters propose to seek relief, from the CCAA court, from the provisions of the Plan requiring such consent, it will be up to the parties to convince the court one way or the other and the Monitor will not be taking any position on such a motion other than to say that if the court were to grant such relief, it should also, in that case, direct the Monitor to issue the certificate that is required under the Plan to make the third party release effective.

To be absolutely clear on the issue, the Monitor has no view and takes no position on how the proceeds of the settlement should be shared as amongst the parties and would encourage parties to come to a mutually satisfactory arrangement.² [emphasis added]

4. Contrary to the Litigation Trustee's assertion, the Monitor has clearly and unequivocally stated that it is not taking a position on this motion and is not opposing the settlement.

¹ Email from Derrick Tay to David Bish and Rob Staley dated February 19, 2015, Exhibit "Q" to the affidavit of Cosimo Borrelli sworn April 26, 2015, Responding Motion Record of SFC Litigation Trust, Tab 1, pp. 684-685.

² Email from Derrick Tay to David Bish and Rob Staley dated February 19, 2015, Exhibit "Q" to the affidavit of Cosimo Borrelli sworn April 26, 2015, Responding Motion Record of SFC Litigation Trust, Tab 1, pp. 684-685.

B. The Litigation Trust Has No Claim Against the Dealers

5. The Litigation Trust has no claim against the Dealers. In contrast, the Litigation Trustee Cosimo Borrelli has provided a lengthy affidavit outlining the steps he has taken to advance the Litigation Trust's interest against other defendants in the class actions. For example, the Litigation Trust has taken steps to advance claims against:

- (a) Allen Chan and David Horsley, Sino-Forest's former CEO and CFO, certain former employees and members of Sino-Forest's former management, and certain former advisers;
- (b) John Zeng, Sino-Forest's former lawyer, and the Kaitong Law Firm;
- (c) Sino-Forest's former forestry consultants Poyry (Beijing) Consulting Company Limited and affiliated entities and individuals; and
- (d) BDO, Sino-Forest's former auditor.³

6. The Litigation Trust has no claim against the Dealers and has taken no steps to assert any such claim. Any payment that the Litigation Trustee is seeking in exchange for its acceptance of the Dealers Third Party Release is not connected to the release of any claim.

C. The Litigation Trustee's Absolute Position is Incorrect

7. Throughout its factum, the Litigation Trustee repeatedly states that he has an absolute right to withhold his acknowledgement of the Dealers Settlement under any circumstance. For example, the Litigation Trustee states that it has "an absolute right to grant or withhold consent" and "unfettered discretion."⁴

8. This is not correct. If the Litigation Trustee's argument were correct, by way of example the Litigation Trustee would be perfectly within his rights to insist that it must receive 99.9% of

³ Affidavit of Cosimo Borrelli sworn April 26, 2015, paras. 22-23, Responding Motion Record of SFC Litigation Trust, Tab 1, pp. 7-8

⁴ Litigation Trustee's Factum, paras. 51, 54, pp. 19, 21.

the Dealers Settlement, notwithstanding the absence of any valid claim by the Litigation Trust against the Dealers. This would render the Court-approved Plan release for which the class action plaintiffs and the Dealers gave up considerable rights completely illusory. The Litigation Trustee's absolutist position is inconsistent with:

- (a) the purpose of the CCAA and the Plan which are designed to facilitate compromise and recovery by the applicant's stakeholders;
- (b) the Litigation Trustee's good faith and reasonableness obligations under the Plan and the common law; and
- (c) the discretion afforded to the Litigation Trust under the Litigation Trust Agreement.

9. The Litigation Trustee relies on the settlement with David Horsley, Sino-Forest's former CFO, in support of his argument that his consent can be withheld under any circumstance.⁵ The circumstances of the Horsley settlement were materially different. The Litigation Trust had a valid claim against Mr. Horsley that was pursued by way of court action. The Litigation Trust therefore had a valid basis for which to negotiate a settlement since its valid claim would be compromised. In those circumstances, the Litigation Trust favoured a settlement over the alternative of litigating its claim. Here, no such claims are advanced or can be advanced against the Dealers, and there is therefore no rational basis on which to base any negotiations between the Ad Hoc Committee, the Dealers and the Litigation Trust. In these circumstances, the Litigation Trustee's discretion must be constrained.

D. The Litigation Trustee Has Not Demanded Any Non-Monetary or Procedural Benefits in the Order

10. The Ad Hoc Committee has inquired of the Litigation Trustee whether it has a demand that would satisfy him and resolve his objection to the settlement. No demand has been received,

⁵ Litigation Trustee's Factum, para. 33, p. 12.

either formally or informally. In contrast, in this settlement and in previous settlements, non-settling defendants have submitted objections outlining their demands for non-monetary compensation such as discovery rights, which were negotiated and ultimately incorporated into the settlement approval orders. For example, BDO, a defendant in the class proceeding, has objected to the Dealers Settlement on the basis of a lack of discovery rights available to them. Likewise, when approval was sought of the Ernst & Young settlement, the Dealers sought the incorporation of certain language to protect their discovery rights in the order approving the settlement. Language was negotiated to address these concerns and ultimately, the Dealers did not oppose settlement approval. To date, no such demand has been received from the Litigation Trustee, either formally or informally.⁶

E. Third Party Releases Provided as Part of *Quid Pro Quo* to Compensate Contributions Made in Restructuring

11. The Litigation Trust relies on *ATB Financial v. Metcalfe & Mansfield Alternative Trust Investments II Corp.* in support of the principle that “third party releases [...] are generally provided as part of a *quid pro quo* intended to compensate participants in the market for contributions made in the insolvency.”⁷ This is precisely the case here. The Plan compromised and released various claims and rights of both the Dealers and the Ad Hoc Committee with no distribution to these parties under the Plan. The Dealers and the Ad Hoc Committee agreed to vote on the Plan and consented or did not oppose the Sanction Order. The Dealers Settlement will also provide \$32.5 million of compensation to Sino-Forest’s creditors with valid claims. The Plan releases are the compensation provided for the Ad Hoc Committee and the Dealers in

⁶ Affidavit of Charles Wright sworn May 6, 2015, paras. 4-7, Reply Motion Record of the Plaintiffs to SFC Litigation Trust (Settlement Approval), Tab 1, pp. 2-3.

⁷ Litigation Trustee’s Factum, para. 39, p. 14.

exchange for their compromises in facilitating Sino-Forest's restructuring. In the circumstances, the Litigation Trustee's acceptance may not be withheld.

F. Overlap Between Litigation Trust Beneficiaries and Claimants in the Dealers Settlement

12. Pursuant to Article 4.11 of Sino-Forest's Plan of Compromise and Reorganization (the "Plan"), Litigation Trust Interests (as defined in the Plan) are allocated to, *inter alia*, Affected Creditors. "Affected Creditors" include the beneficial owners of notes at the time of Plan implementation.⁸ The noteholders as of Plan implementation included some noteholders who purchased their notes from the Dealers in the primary market. These noteholders will be entitled to make a claim in the Dealers Settlement in respect of their valid litigation claims, and as a result, those beneficiaries of the Litigation Trust will receive some compensation.

⁸ The Plan provides the following definitions:

"**Affected Creditor**" means a Person with an **Affected Creditor Claim**, but only with respect to and to the extent of such Affected Creditor Claim.

"**Affected Creditor Claim**" means any Ordinary Affected Creditor Claim or **Noteholder Claim**.

"**Noteholder Claim**" means any Claim by a **Noteholder** (or a Trustee or other representative on the Noteholder's behalf) in respect of or in relation to the Notes owned or held by such Noteholder, including all principal and Accrued Interest payable to such Noteholder pursuant to such Notes or the Note Indentures, but for greater certainty does not include any Noteholder Class Action Claim.

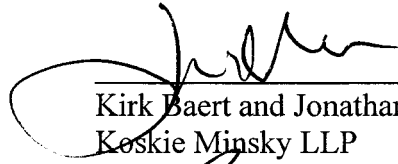
"**Noteholders**" means, collectively, the beneficial owners of Notes as of the **Distribution Record Date** and, as the context requires, the registered holders of Notes as of the Distribution Record Date, and "Noteholder" means any one of the Noteholders.

"**Distribution Record Date**" means the **Plan Implementation Date**, or such other date as SFC, the Monitor and the Initial Consenting Noteholders may agree.

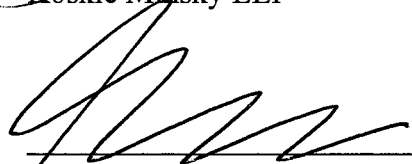
"**Plan Implementation Date**" means the Business Day on which this Plan becomes effective, which shall be the Business Day on which the Monitor has filed with the Court the certificate contemplated in section 9.2 hereof, or such other date as SFC, the Monitor and the Initial Consenting Noteholders may agree.

Plan of Compromise and Reorganization, Article 1.1, Exhibit "C" to the affidavit of Heather Palmer sworn April 9, 2015, Plaintiffs' Motion Record (Settlement Approval), Tab 5(C), pp. 338, 342, 352, 353.

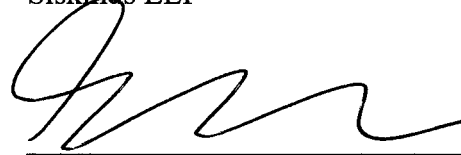
ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Action

SCHEDULE "A"
LIST OF AUTHORITIES

N/A

SCHEDULE "B"
RELEVANT STATUTES

N/A

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

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

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

and

Sino-Forest Corporation, et al.

Superior Court File No: CV-10-414302

Plaintiffs

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List**

Proceeding under the *Class Proceedings Act, 1992*
Proceeding commenced at Toronto

**REPLY FACTUM OF THE PLAINTIFFS
Dealers Settlement Approval
(Returnable May 11, 2015)**

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