

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING
ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT
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,
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WEST, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC.,
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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*

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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**

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PART I - INTRODUCTION

1. The plaintiffs in the Ontario class action bring this motion for approval of the fees and disbursements of Siskinds LLP and Koskie Minsky LLP (“Canadian Class Counsel”) and insolvency counsel Paliare Roland Rosenberg Rothstein LLP in the amount of \$5,517,207 (exclusive of tax) for fees and \$289,614.50 for disbursements. The requested fee represents 17.5% of the class action settlement with the Dealers¹ (the “Dealers Settlement”) that is notionally attributable to Canadian claims.

2. This fee request is fair and reasonable, given the success achieved on the Dealers Settlement and the risks that class counsel assumed in acting on a contingency fee basis:

- (a) The fee request is lower than what the retainer agreements between Canadian Class Counsel and the plaintiffs in the Ontario class action would allow.
- (b) The requested fees here are below the range of fee percentages that Ontario courts have repeatedly endorsed as being fair and reasonable. As noted by Justice Strathy in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, fees in the range of 20% to 30% are very common in class proceedings and are usually approved as fair and reasonable.
- (c) The Dealers Settlement represents a very good recovery for the class and represents a very substantial recovery for purchasers of Sino-Forest’s shares on the primary market.
- (d) The allegations, claims, and the very basis for the case against the Dealers was fundamentally distinct in fact and law from the case against Sino-Forest, its officers and directors, and its auditors. It relied on a distinct theory of the case, advanced unique claims and required separate evidence.
- (e) Canadian Class Counsel believe that the Dealers Settlement is the largest settlement with a syndicate of dealers/underwriters in Canadian history.
- (f) Canadian Class Counsel took on significant risk for claims against the Dealers because of the multiple legal and practical impediments to establishing liability and recovering damages under Canadian and U.S. law.

¹ 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).

- (g) Canadian Class Counsel took on the risk of no success and minimal recovery in this action, while at the same time having to devote a massive commitment of time, money and other resources to the prosecution of this action. Canadian Class Counsel and insolvency counsel have needed to commit millions of dollars in resources to this action, including over 30,343 lawyer hours (with a time value of \$13.9 million) and out-of-pocket disbursements exceeding \$2.8 million.

3. In summary, the requested fees and disbursements are extremely fair and reasonable under the circumstances and ought to be approved.

PART II - THE FACTS

A. Background of These Proceedings and Settlement with the Dealers

4. These proceedings relate to the precipitous decline of Sino-Forest Corporation following allegations on June 2, 2011 that there was fraud at the company and that its public disclosure contained misrepresentations regarding its business and affairs.² On July 20, 2011, this action was commenced against Sino-Forest, the Dealers and other defendants in Ontario under the *Class Proceedings Act, 1992*. The Dealers can be divided into two (2) groups:

- (a) Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc, Canaccord Financial Ltd., and Maison Placements Canada Inc. served as underwriters in one or more of Sino-Forest's public offerings of shares during the class period (collectively, the "**Share Underwriters**"); and
- (b) TD Securities Inc., Credit Suisse Securities (USA) LLC, and Merrill Lynch Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC) served as initial purchasers in one or more of Sino-Forest's public offerings of notes during the Class Period (collectively, the "**Initial Note Purchasers**").³

5. Siskinds LLP and Koskie Minsky LLP are counsel to the plaintiffs in the Ontario class action. There were also class actions commenced in Québec (the "Québec Action") and New

² Affidavit of Charles Wright (Settlement Approval), para. 12 Exhibit "A" to the affidavit of Charles Wright sworn April 13, 2015 [Wright Affidavit (Settlement Approval)], Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 42.

³ Wright Affidavit (Settlement Approval), para. 9, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 40.

York (the “U.S. Action”) relating to Sino-Forest. Siskinds Desmeules is counsel to the plaintiffs in the Québec action styled as *Guining Liu v. Sino-Forest Corporation*. The Dealers were let out of the Québec Action. Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) is counsel to the plaintiffs in the New York action styled as *Leopard v. Sino-Forest Corporation*. The U.S. Action did not name as Defendants any of the Share Underwriters or TD Securities Inc., an Initial Note Purchaser.⁴

6. In November 2014, a settlement was negotiated between the plaintiffs and the Dealers. The Dealers Settlement provides for payment of \$32.5 million to securities claimants in full settlement of all claims against the Dealers that relate to Sino-Forest. The settlement negotiations with Dealers were protracted and conducted on an adversarial, arm's-length basis.⁵ Justice Goudge, who conducted the last of three mediations which resulted in the Dealers Settlement, has confirmed in an affidavit that the negotiations were hard-fought and the resulting settlement is fair and reasonable.⁶

B. Allocation of the Settlement Amount

7. The proposed settlement with Dealers provides for a total payment of \$32.5 million to resolve the class actions, with \$22.5 million allocated to primary market share claims and \$10 million allocated to primary market note claims.

8. The plaintiffs and class counsel in the Ontario, Québec and New York actions have agreed to a notional allocation of that settlement amount between the Canadian and U.S. claims

⁴ Wright Affidavit (Settlement Approval), para. 20, Plaintiffs’ Motion Record (Fee Approval), Tab 2(A), p. 44.

⁵ Wright Affidavit (Settlement Approval), paras. 39-40, Plaintiffs’ Motion Record (Fee Approval), Tab 2(A), pp. 50-51.

⁶ Affidavit of Stephen Goudge sworn April 1, 2015, Plaintiffs’ Motion Record (Settlement Approval), Tab 3, pp. 260-261.

for the purposes of determining class counsel fees. Since the U.S. action did not include primary market share claims, there is no notional allocation of settlement proceeds to the U.S. action in respect of primary market share claims. In addition, since the U.S. action did not make a claim against TD, one of the Initial Note Purchasers who purchased approximately 2.7% of one of the Note offerings, there is no notional allocation of settlement proceeds to the U.S. action respect of such claims.

9. Consequently, Canadian and U.S. counsel have agreed to a notional allocation of \$31,526,900 to Canada and \$973,100 to the U.S., which reflects a 90/10 split in respect of settlement funds allocated to the claims asserted in the two actions (taking into account the above adjustments for the different claims asserted in the Canadian and U.S. actions). This notional allocation is based on the relative class sizes of the Canadian and U.S. class actions, the claims asserted in each action, and the worked performed by the law firms. This is consistent with prior settlements and is appropriate under all the circumstances.⁷ Accordingly, Canadian Class Counsel requests fees based on a recovery of \$31,526,900. U.S. Class Counsel will request fees based on a recovery of \$973,100. This notional allocation does not determine the actual distribution of settlement proceeds to securities claimants, which will be based on claims which are ultimately made by class members.⁸

C. Fees Pursuant to the Retainer Agreements

10. Siskinds LLP and Koskie Minsky LLP, along with insolvency counsel Paliare Roland Rosenberg Rothstein LLP, have acted in these proceedings on a contingency fee basis. Insolvency counsel will be paid out of the fees and disbursements of Canadian Class Counsel.

⁷ Affidavit of Charles Wright sworn April 13, 2015 (Fee Approval), paras. 33-34 [Wright Affidavit (Fee Approval)], Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 30.

⁸ Wright Affidavit (Fee Approval), para. 34, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 30.

11. The retainer agreements between the plaintiffs and Canadian Class Counsel were approved by order of this court dated December 27, 2013. The order provided that “[...] the contingency fee retainer agreement entered into between the plaintiffs and Canadian Class Counsel is approved [...]”.⁹

12. The retainer agreements provide for repayment without premium of all disbursements and for a sliding scale of fees depending on the monetary level of success and the stage of the litigation, as follows:¹⁰

	For the first \$20 million of any Recovery	For the portion of the Recovery between \$20 million and \$40 million	For the portion of the Recovery between \$40 million and \$60 million	For the portion of the Recovery in excess of \$60 million
If the Action is settled or there is judgment before the Court renders a decision on a certification motion	twenty-five percent (25%)	twenty percent (20%)	fifteen percent (15%)	ten percent (10%)
If the Action is settled or there is judgment after the Court renders a decision on a certification motion and before the commencement of the Common Issues trial;	twenty-seven and a half percent (27.5%)	twenty-two and a half percent (22.5%)	seventeen and a half percent (17.5%)	twelve and a half percent (12.5%)
If the Action is settled after the commencement of the Common Issues trial or is determined by judgment after the trial.	thirty percent (30.0%)	twenty-five percent (25.0%)	twenty percent (20.0%)	fifteen percent (15.0%)

13. This grid is meant to ensure that Canadian Class Counsel is paid in a manner that is tied directly to the degree of success achieved in the action, while at the same time ensuring the overall fees are not excessive. Accordingly, the grid ensured that the larger the recovery as

⁹ Order of Justice Morawetz dated December 27, 2013, Plaintiffs’ Book of Authorities (Fee Approval) [Plaintiffs’ Book of Authorities], Tab 24.

¹⁰ Wright Affidavit (Fee Approval), para. 36, Plaintiffs’ Motion Record (Fee Approval), Tab 2, p. 31.

against any one defendant, the less Canadian Class Counsel will be paid as a percentage of that additional recovery. In addition, the fee grid provides that Canadian Class Counsel is paid less if the claims against defendants settle early in the proceeding. There are three different time periods contemplated: (a) settlement before a certification decision; (b) settlement after a certification decision and before the commencement of the common issues trial; and (c) settlement after the commencement of trial or a judgment after trial.¹¹

14. These different time periods are meant to reflect the resources that class counsel would have to expend in pursuing the claims and securing recovery. For instance, had the defendants all settled the action within 30 days of its commencement in July 2011, class counsel would have committed relatively few resources to the action. In contrast, had the action proceeded to a common issues trial and success achieved only through judgment, class counsel would have committed an enormous amount of resources to this litigation. The grid is meant to take into account this increasing level of resources, but uses objective measures of stages in the proceeding in order to determine when the next level of compensation would be awarded.¹²

15. On the face of the retainer agreement, the second row of the grid applies as there was a certification decision in the Ontario class action in September 2012 relating to the settlement with Pöyry (Beijing) Company Limited. Additionally, on the face of the retainer agreement the first and second columns of the grid apply, as the recovery from the Dealers is above \$20 million and below \$40 million. If the second row and first and second column of the grid were applied, class counsel would be entitled to fees of \$8,093,552.50, representing 25.6% of the settlement

¹¹ Wright Affidavit (Fee Approval), para. 37, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 31.

¹² Wright Affidavit (Fee Approval), para. 39, Plaintiffs' Motion Record (Fee Approval), Tab 2, pp. 31-32

amount notionally allocated to Canadian purchasers, plus HST and repayment of disbursements.¹³

16. Although the retainer agreement does not specifically refer to successive settlements, interpreting it in the manner described above is consistent with the purpose of this grid, which is to acknowledge the resources that class counsel has expended in respect of each class of defendants and the very different cases on both the facts and the law which apply to each class of defendants. Recovery pursuant to the Ernst & Young and Horsley settlements is not tied to the recovery in the Dealers Settlement, given that the claims advanced against the Dealers are distinct in fact and law from those advanced against Ernst & Young or Horsley.¹⁴

17. Canadian Class Counsel is seeking a lower fee of 17.5% of the Canadian allocation, or \$5,517,207.50, plus HST and repayment of disbursements. This is a more than \$2.5 million reduction from the amounts owing. This fee will be shared among all of Canadian class counsel, including Koskie Minsky LLP, Siskinds LLP, Siskinds, Desmeules (Quebec City), Paliare Roland Rosenberg Rothstein LLP (insolvency counsel), and Canadian Class Counsel's U.S. agent, Kessler Topaz Meltzer & Check, LLP.¹⁵

18. There are a small number of objections filed in respect of Canadian Class Counsel's fees. These are dealt with below.

¹³ Wright Affidavit (Fee Approval), para. 40, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 32.

¹⁴ Wright Affidavit (Fee Approval), para. 41, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 31.

¹⁵ Wright Affidavit (Fee Approval), para. 42, Plaintiffs' Motion Record (Fee Approval), Tab 2, pp. 32-33.

D. Counsel's Efforts to Advance the Ontario and Québec Class Actions Against the Dealers

19. There has been significant progress and considerable efforts by Canadian Class Counsel to advance the Ontario and Québec actions. Canadian Class Counsel, along with insolvency counsel and counsel for the plaintiffs in the Québec action, have taken the following steps to advance claims against the defendants:

- (a) undertook a preliminary investigation of the allegations against the defendants;
- (b) prepared for and argued a motion for carriage of the Ontario action against one of the competing actions that did not advance claims against the Initial Note Purchasers;
- (c) prepared for and argued a motion for directions in the Ontario action, including a request for an order for substituted service, compelling insurance information, and requiring delivery of statements of defence;
- (d) undertook further investigations and prepared voluminous materials for the motion for certification of the Ontario action as a class proceeding under the *Class Proceedings Act, 1992* and the motion for leave to proceed with statutory misrepresentation claims under the *Securities Act*;
- (e) negotiated the litigation funding agreement between the plaintiffs in this action and CFI and brought a motion for approval of the agreement;
- (f) designed and implemented a notice program and opt out process for the Ontario and Québec actions;
- (g) prepared for, argued or attended approximately 26 motions and other appearances in the Sino-Forest *CCAA* proceeding;
- (h) prepared proofs of claim in the *CCAA* proceeding for the Ontario and Québec actions, including detailed claims submissions;
- (i) reviewed tens of thousands of Chinese and English documents in the Sino-Forest data-room for mediation;
- (j) prepared for and attended the two-day all-party mediation in August 2012;
- (k) undertook extensive negotiations over the course of more than six months in respect of the Sino-Forest plan of compromise and restructuring (the "Plan") to ensure the claims in the Ontario and Québec class actions were minimally affected, particularly as it related to non-debtor defendants;

- (l) prepared for and negotiated settlements with Ernst & Young, David Horsley, and Pöyry (Beijing) Company Limited ("Pöyry (Beijing)"), designed and implemented appropriate notice programs for these settlements, and prepared for and argued motions for settlement approval, responded to the efforts of certain objectors to appeal the Ernst & Young settlement approval order including a motion for leave to appeal to the Court of Appeal, a motion to quash a purported direct appeal to the Court of Appeal and an application for leave to the Supreme Court of Canada;
- (m) obtained and reviewed evidence from Pöyry (Beijing);
- (n) prepared for and made submissions in support of the motion to sanction the Plan, along with responding to a motion for leave to appeal from the sanction order by certain objectors;
- (o) prepared a plan of allocation to distribute the Ernst & Young settlement and other materials for approval of the plan of allocation and the related motion;
- (p) moved for and obtained recognition of the Ernst & Young settlement in Québec and the United States;
- (q) reviewed more than 1 million Chinese and English documents;
- (r) proposed amendments to the statement of claim to assert additional claims under U.S. law against the Dealers and others;
- (s) amended the Québec pleading;
- (t) delivered eight (8) expert reports from two (2) experts on U.S. Federal and New York State law responding to expert reports filed by the Dealers;
- (u) prepared for and cross-examined twelve (12) defendant experts and fact witnesses in Toronto, New York, and Hong Kong, including two (2) experts and two (2) fact witnesses that swore affidavits in support of the Dealers' opposition to the plaintiffs' motion for certification and to amend the claim;
- (v) prepared for and defended five (5) experts and six (6) proposed representative plaintiff on cross-examinations;
- (w) posed and responded to written interrogatories in respect of the claims against the Dealers;
- (x) delivered notices of motion to strike an expert report and a clerk affidavit delivered by the Dealers;
- (y) made extensive documentary requests to the Dealers, including transaction information relating to the sale and purchase of Sino-Forest securities;
- (z) prepared for and litigated class certification against multiple defendants and multiple counsel;

- (aa) drafted facta for the plaintiffs' motions for leave, certification, to amend the statement of claim, and to strike the Dealers affidavits;
- (bb) prepared for and argued a refusals motion and a motion to strike affidavits;
- (cc) undertook extensive, protracted and hard-fought negotiations with the defendants to settle the form of the leave and certification orders on a consent or unopposed basis;
- (dd) argued an outstanding issue before Justice Perell against Sino-Forest, Judson Martin, Simon Murray and Edmund Mak in respect to their opposition to leave and certification of claims made on behalf of former noteholders;
- (ee) responded to numerous class member inquiries;
- (ff) attended two (2) separate mediations in the fall and winter of 2014 with the Dealers before the Honourable Stephen Goudge (a retired judge of the Court of Appeal for Ontario);
- (gg) undertook extensive, protracted and hard-fought negotiations with the Dealers to reach the Dealers settlement; and
- (hh) designed and implemented a notice program for the approval hearings of the settlement with the Dealers.¹⁶

20. A summary of the major steps is provided below.

i. Preliminary investigation leading to the commencement of this action

21. The allegations against Sino-Forest were made by Muddy Waters, a research firm that also engages in short selling. Given this context, the plaintiffs conducted a preliminary investigation of the allegations before commencing and pursuing this action.¹⁷ For this preliminary investigation, Canadian Class Counsel retained and received advice from: (a) a law firm in China (Dacheng Law Firm) in relation to the various allegations in the Muddy Waters report; (b) Hong Kong based investigators specializing in financial fraud who conducted extensive field work in China; (c) accounting and damages experts; and (d) a legal expert who provided advice regarding Sino-Forest's operations in Suriname. As a result of these

¹⁶ Wright Affidavit (Fee Approval), para. 16, Plaintiffs' Motion Record (Fee Approval), Tab 2, pp. 22-25.

¹⁷ Wright Affidavit (Settlement Approval), para. 19, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 43.

investigations, the initial statement of claim contained significant detail, running to 92 pages, of which a significant portion relates to the Dealers.¹⁸

22. There has been further detail and amendments since that time as information regarding Sino-Forest's affairs has become available. In particular, in February 2015, the Class Plaintiffs filed the Second Fresh as Amended Statement of Claim. The Second Fresh as Amended Statement of Claim was served on the Dealers in May 2013, and the Ontario Plaintiffs subsequently brought a motion for leave to file the amended pleading. The Second Fresh as Amended Statement of Claim included amendments containing additional claims and allegations against the Initial Note Purchasers, including breaches of U.S. Federal law and New York State common law, and allegations that the purported private note offerings were public offerings. In addition, Davis New York Venture Fund, Inc. and Davis Selected Advisers L.P. were added as proposed representative plaintiffs in order to bolster the claim against the Initial Note Purchasers because they purchased Sino-Forest notes in the primary market.¹⁹

ii. Motion for carriage of this action

23. A number of class proceedings were commenced against Sino-Forest and Horsley in response to the allegations against Sino-Forest on June 2, 2011, including this action and two other class proceedings in Ontario: *Northwest & Ethical Investments L.P. v. Sino-Forest Corporation* and *Smith v. Sino Forest Corporation*. On January 6, 2012, the Honourable Justice Perell granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the *Northwest* and *Smith* actions.²⁰ One of these

¹⁸ Wright Affidavit (Settlement Approval), para. 19, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 43-44.

¹⁹ Wright Affidavit (Settlement Approval), para. 23, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 45.

²⁰ Wright Affidavit (Settlement Approval), paras. 21-22, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), pp. 44-45.

actions, *Smith et al. v. Sino-Forest Corporation et al.* did not make any claims against Credit Suisse Securities (USA) LLC or Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC), the two primary Initial Note Purchasers.

iii. Motions for directions (service, defences, insurance and scheduling) and funding

24. On February 1, 2012, the plaintiffs moved for various relief, including: (a) an order validating service of the statement of claim on certain defendants in China; (b) requiring delivery of statements of defence; (c) requiring production of responsive insurance policies; and (d) setting a timetable for the hearing of the motions to approve funding, for certification under the *Class Proceedings Act, 1992* and for leave to proceed with statutory claims under section 138.3 of the *Securities Act*. The plaintiffs succeeded on the motion. On March 26, 2012, Justice Perell ordered that a statement of defence be delivered by any defendant that delivered an affidavit pursuant to s. 138.8(2) of the *Securities Act*, and set a timetable for the funding approval motion and the leave and certification motion.²¹

25. Canadian Class Counsel also sought out a funder that would provide indemnity for adverse costs and brought a motion to approve the CFI funding agreement. The motion was heard on May 17, 2012, and an order issued the same day approving the agreement.²²

iv. Motion for certification and motion for leave under the *Securities Act*

26. In March and April 2012, the Ontario plaintiffs brought: (a) a motion for certification of the Ontario action as a class action under the *Class Proceedings Act, 1992*; and (b) a motion for

²¹ *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 1924, Plaintiffs' Book of Authorities, Tab 1.

²² *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937, Plaintiffs' Book of Authorities, Tab 2.

leave to proceed with statutory claims under Part XXIII.1 of the *Securities Act*. The plaintiffs filed motion records in support of their motions, including:

- (a) an affidavit of Steven Chandler, a senior law enforcement official from Hong Kong who was involved in investigating Sino in China;
- (b) six affidavits of Alan Mak, an expert in forensic accounting;
- (c) an affidavit of Dennis Deng, a lawyer qualified to practice in the People's Republic of China, and a partner in the Dacheng law firm;
- (d) an affidavit of Carol-Ann Tjon-Pian-Gi, a lawyer qualified to practice in the Republic of Suriname;
- (e) four affidavits of Adam Pritchard, an expert in US securities law; and
- (f) three affidavits of Patrick Borchers, an expert in New York State law.²³

27. These expert materials, or portions thereof, related to the Dealers liability and damages.

28. In response to the U.S. law claims asserted in the Ontario class action, the Dealers filed five (5) affidavits from Michael Chepiga, a retired senior partner of the New York law firm Simpson Thatcher & Bartlett, LLP. The Dealers also filed an affidavit from Edward Greene, Senior Counsel from Cleary Gottlieb Steen and Hamilton and the former Director of the Division of Corporation Finance of the U.S. Securities and Exchange Commission. Messrs. Chepiga and Greene gave the opinion that the Second Fresh as Amended Statement of Claim did not establish the elements of the U.S. law claims and that under U.S. law the allegations would be struck. In response, the Ontario plaintiffs relied on affidavits from Professor Adam C. Pritchard and Professor Patrick Borchers to support their claims pursuant to U.S. law.²⁴

²³ Wright Affidavit (Settlement Approval), para. 24, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), pp. 45-46.

²⁴ Wright Affidavit (Settlement Approval), paras. 69-70, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), pp. 62-63.

29. The plaintiffs also brought motions to strike the expert reports and a clerk affidavit filed by the Dealers. The motions for certification and leave were rescheduled to January 2015, to be heard with the motion to strike and the motion for leave to amend the claim. The non-Dealer defendants resisted the Ontario plaintiffs' motions for certification and leave until shortly before they were scheduled to be heard on January 15, 2015. The motion for certification was adjourned as against the Dealers and the motion for certification and leave was granted on consent or opposed against the non-Dealer defendants.²⁵

v. Settlement with Pöyry (Beijing)

30. In March 2012, the plaintiffs in the Ontario and Québec actions reached a settlement with Pöyry (Beijing). On September 21, 2012, the Ontario court heard the motion for approval of the Pöyry (Beijing) settlement and the motion for certification of this action for the purposes of the settlement. The action was certified and the settlement was approved in Ontario on September 25, 2012. The settlement was approved in Québec on November 9, 2012. Soon after the approval in Québec, there was a notice of the settlement approval and certification.²⁶

vi. Sino-Forest's insolvency and CCAA proceeding

31. On March 30, 2012, Sino-Forest obtained an initial order under the CCAA, including a stay of proceedings in respect of Sino-Forest and certain of its subsidiaries. On May 8, 2012, following negotiations between Canadian Class Counsel and other stakeholders in the CCAA proceeding, the stay of proceedings was extended to the other defendants in this action.²⁷

²⁵ Wright Affidavit (Settlement Approval), para. 25, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 46.

²⁶ Wright Affidavit (Settlement Approval), para. 31, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 48.

²⁷ Wright Affidavit (Settlement Approval), para. 26, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 46.

32. Canadian Class Counsel and insolvency counsel were heavily involved in the CCAA proceeding and took a number of steps to protect the claims of purchasers of Sino-Forest securities. Among other things, they:

- (a) negotiated amendments to the Claims Procedure Order to permit the filing of a single claim on behalf of class members persons in the Ontario, Québec and New York actions, among other amendments;
- (b) prepared and filed proofs of claim for the Ontario and Québec actions, including detailed claims submissions;
- (c) negotiated amendments to the Sino-Forest Plan to ensure claims of Securities Claimants against non-debtors, such as the Dealers, and Sino-Forest's liability insurers were preserved as far as possible and to facilitate discovery from Sino-Forest; and
- (d) negotiated access to Sino-Forest's data-room for the purposes of mediation of the Ontario and Québec actions with the defendants, including the Dealers.²⁸

33. Canadian Class Counsel and insolvency counsel brought or attended 25 motions in the CCAA proceeding, plus an appeal and two motions for leave to appeal.²⁹

vii. All-party mediation in September 2012

34. By order dated July 25, 2012, this Court ordered a mediation of the claims in the Ontario and Québec actions. There was substantial preparation for the all-party mediation. The all-party mediation took place on September 4 and 5, 2012 and the Dealers were in attendance. While it did not result in a settlement, it was the starting point for further negotiations with the Dealers.³⁰

viii. Sanction of the CCAA Plan and Ernst & Young settlement approval and distribution

35. On December 7, 2012 this court heard submissions on the sanctioning of the Sino-Forest Plan. Three former shareholders sought to challenge the sanctioning of the Plan (the "Kim Orr

²⁸ Wright Affidavit (Settlement Approval), para. 29, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 47.

²⁹ Wright Affidavit (Settlement Approval), para. 29, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 47.

³⁰ Wright Affidavit (Settlement Approval), para. 32, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 48.

Objectors”). Their arguments were rejected and the court sanctioned the Plan without changes on December 10, 2012. The Kim Orr Objectors then sought leave to appeal the sanction order to the Court of Appeal. Canadian Class Counsel, among others, responded to the leave to appeal motion. The leave to appeal motion was dismissed on June 26, 2013.³¹

36. On February 4, 2013, this court heard the plaintiffs’ motion for approval of the settlement with Ernst & Young. The Kim Orr Objectors (along with 3 other former shareholders) opposed settlement approval. The settlement was approved over their objection on March 20, 2013.³² The Kim Orr Objectors sought both leave to appeal to the Court of Appeal and a direct appeal to the Court of Appeal. Canadian Class Counsel responded to both appeal routes. The leave to appeal motion was dismissed on June 26, 2013 and the Court of Appeal quashed the direct appeal on June 28, 2013.³³

37. The Kim Orr Objectors then sought leave to appeal to the Supreme Court of Canada. Again, Canadian Class Counsel responded, and leave to appeal to the Supreme Court of Canada was denied on March 12, 2014.³⁴

38. On December 13, 2013, this court heard the plaintiffs’ motion for approval of a claims distribution protocol for the Ernst & Young settlement. The plaintiffs’ claims distribution protocol was approved by this court on December 27, 2013, and the plaintiffs, in conjunction

³¹ *Sino-Forest Corporation (Re)*, 2012 ONSC 7041, Plaintiffs’ Book of Authorities, Tab 3; *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of)*, 2013 ONCA 456, Plaintiffs’ Book of Authorities, Tab 4.

³² *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2013 ONSC 1078, Plaintiffs’ Book of Authorities, Tab 5.

³³ *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of)*, 2013 ONCA 456, Plaintiffs’ Book of Authorities, Tab 4.

³⁴ *Invesco Canada Ltd. v. Sino-Forest Corp.*, [2013] S.C.C.A. No. 395 (S.C.C.), Plaintiffs’ Book of Authorities, Tab 6.

with NPT RicePoint, the Ernst & Young settlement administrator, have been implementing the protocol since that time.³⁵

E. Context of Contingency Fee Retainers in Class Proceedings

39. A class proceedings practice creates unique challenges for counsel.

40. First, class proceedings involve a significant commitment of time and financial resources. These actions are typically taken on a contingency fee basis. It is common to dedicate thousands of lawyer hours and hundreds of thousands of dollars in disbursements to a particular case. Investigation and expert expenses are typical.³⁶ As stated by the Law Reform Commission:

While not receiving any remuneration for his or her work, the usual expenses of running an office are being incurred. Moreover, substantial advances must be made by counsel to pay for the enormous expenses incurred in the action, which would augment significantly the financial risk assumed by the class lawyer.³⁷

41. Second, class proceedings are highly adversarial and are often protracted. The concept that class proceedings often settle soon after the motion for certification is not correct. Cases, such as this one, continue beyond certification, through productions, examination for discovery and trial. The defendants are well-resourced. The defendants bring motions for almost any dispute and appeal almost all decisions. A scorched-earth approach is common and even motion scheduling is hotly-contested. As a result, costs are high and litigation proceeds slowly.³⁸

³⁵ *Labourer's Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2014 ONSC 62, Plaintiffs' Book of Authorities, Tab 7.

³⁶ Wright Affidavit (Fee Approval), para. 11, Plaintiffs' Motion Record (Fee Approval), Tab 2, pp. 20-21.

³⁷ Ontario Law Reform Commission, *Report on Class Actions*, vol. 3, p. 676, Plaintiffs' Authorities, Tab 25.

³⁸ Wright Affidavit (Fee Approval), para. 12, Plaintiffs' Motion Record (Fee Approval), Tab 2, pp. 21; see also *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924 at paras. 1 and 80-83, Plaintiffs' Authorities, Tab 1 where 17 counsel appeared to argue over the scheduling of leave and certification. The court discusses how class action decisions are inevitably appealed.

42. In *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, Justice Strathy noted the inevitable resource disparity between class counsel and defendants in class proceedings. Defendants are well-resourced and represented by large firms. They tend to have “virtually unlimited resources and no incentive to roll over and play dead”. Defendants are able to “frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing.”³⁹

43. Third, there are unique risks arising from the class proceedings procedure, including

- (a) the risk that the action will not be certified as a class proceeding;
- (b) the risk that a large number of class members opt out;
- (c) the risk that the defendant successfully moves to decertify a class proceeding;
- (d) the risk that an award of aggregate damages on a class-wide basis is denied and individual issues trials are ordered;
- (e) the risk that individual issues trials are ordered but are not economically feasible;
- (f) the risk that the court does not approve a settlement agreement after lengthy, time-consuming and expensive negotiations; and
- (g) the risk that the court does not approve class counsel fees, or approves them only at a reduced rate.⁴⁰

44. Fourth, class counsel’s obligation to the class do not end at settlement approval, even where all defendants settle and the litigation is at an end. Class counsel typically perform the following work as part of settlement administration, including

- (a) identifying class members;
- (b) advising and instructing class members with questions concerning the settlement agreement and claims process;

³⁹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 65 and 66, Plaintiffs’ Authorities, Tab 8.

⁴⁰ Wright Affidavit (Fee Approval), para. 13, Plaintiffs’ Motion Record (Fee Approval), Tab 2, p. 21.

- (c) providing information to class members, including relevant documents;
- (d) assisting class members with claim forms, if necessary;
- (e) providing documentation to the accountants and financial advisors of class members to assist with determinations of tax implications of settlement proceeds;
- (f) facilitating the claims process;
- (g) monitoring settlement implementation to ensure the processed are be followed;
- (h) liaising with the claims administrator; and
- (i) overall coordination of the settlement distribution.⁴¹

PART III - ISSUES AND THE LAW

45. The fees and disbursements requested are lower than what the retainer agreements with the Ontario class action plaintiffs which have been approved by this court provide for, and are fair and reasonable in light of the significant risks that Canadian Class Counsel and insolvency counsel undertook in these proceedings and the success achieved.

A. Approach to Fee Approval in Class Proceedings

i. Test for fee approval

46. The retainer agreement is the starting point for the approval of contingency fees. In *Cannon v. Funds for Canada Foundation*, Justice Belobaba stated “contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved.”⁴² In addition the court may determine whether the fees and disbursements as provided for in the retainer agreement are

⁴¹ Wright Affidavit (Fee Approval), para. 14, Plaintiffs’ Motion Record (Fee Approval), Tab 2, pp. 21-22.

⁴² *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at para. 8, Plaintiffs’ Book of Authorities, Tab 9.

fair and reasonable, failing which the court has discretion to determine the amount owing to class counsel for fees and disbursements.⁴³

47. Courts assessing the fairness and reasonableness of fees focus on two main factors: the risk that class counsel undertook in conducting the litigation and the degree of success or result achieved.⁴⁴ Risk in this context is measured from the commencement of the action. These risks include all of the risks facing class counsel such as the liability risk, recovery risk and the risk that the action will not be certified as a class proceeding. As set out in paragraphs 39-44, above, there are unique risks arising from the class proceedings procedure.⁴⁵

ii. The importance of strong incentives for class counsel

48. Ontario courts have recognized that class proceedings depend on entrepreneurial lawyers willing to take on these cases and that class counsel compensation must reflect this. Compensation must be sufficiently rewarding to “provide a real economic incentive to lawyers to take on a class proceeding and do it well”.⁴⁶

49. The incentive must be large enough to justify the significant risks that class counsel undertake in class proceedings, which are often complex and protracted. The incentive must also be large enough to justify the delayed payment for legal work. Even where there is recovery, it often comes after years of unpaid legal work and incurred disbursements. At the same time,

⁴³ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.32(2), Plaintiffs Fee Approval Factum, Schedule B, and (4); *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs Authorities, Tab 8. *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) at paras. 59 and 63, Plaintiffs’ Authorities, Tab 10.

⁴⁴ *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13, Plaintiffs’ Authorities, Tab 11; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 12.

⁴⁵ *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 (C.A.) at para. 16, Plaintiffs’ Authorities, Tab 13; *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at para. 28, Plaintiffs’ Authorities, Tab 14.

⁴⁶ *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 12; *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs’ Authorities, Tab 15; *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 at para. 53, Plaintiffs’ Authorities, Tab 16.

counsel incurs the ongoing expenses of maintaining an office, paying salaries and paying for disbursements while receiving no revenue in the interim and accumulating no interest on what would otherwise be billed time. Compensation in class proceedings must therefore be sufficiently appealing to justify counsel's lost opportunity to take on paying clients and the years-long carrying costs of a case.

50. The incentive must also be large enough when assessed in the context of counsel's class action practice as a whole. Class counsel's assessment of incentive does not hinge on each case, but the sum of successes and losses. As Justice Strathy stated:

They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.⁴⁷

B. Canadian Class Counsel's Fees and Disbursements are Fair and Reasonable

51. The requested fees and disbursements are consistent with the retainer agreement entered into with the plaintiffs. They are below the range of percentages typically approved by Ontario courts. They reflect a fair multiplier on Canadian Class Counsel's time.

i. Fees as a percentage of recovery are within the appropriate range

52. The requested fees are below the range of percentages that Ontario courts have approved in the past.⁴⁸ In *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, Justice Strathy stated that fees in the range of 20% to 30% are "very common" in class proceedings. There have been a number of instances in recent years in which this court has approved fees that fall within that range:⁴⁹

⁴⁷ *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs' Authorities, Tab 15.

⁴⁸ *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2014 ONSC 62 at paras. 38, 49, Plaintiffs Authorities, Tab 7.

⁴⁹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 8.

<i>Abdulrahim v. Air France</i> ⁵⁰	30%
<i>Ainslie v. Afexa Life Sciences Inc.</i> ⁵¹	19.4%
<i>Robertson v. ProQuest LLC</i> ⁵²	24%
<i>Osmun v. Cadbury Adams Canada Inc.</i> ⁵³	25%
<i>Pichette v. Toronto Hydro</i> ⁵⁴	28.5%
<i>Robertson v. Thomson Canada Ltd.</i> ⁵⁵	36%
<i>Cassano v. Toronto- Dominion Bank</i> ⁵⁶	20%
<i>Martin v. Barrett</i> ⁵⁷	29%

53. Justice Strathy explained that compensating counsel through a percentage of recovery is “generally considered to reflect a fair allocation of risk and reward as between lawyer and client.” It induces the lawyer to maximum the recovery for the client and is fair to the client because there is no pay without success.⁵⁸

54. In *Cassano v. Toronto Dominion Bank*, Justice Cullity endorsed a percentage approach in approving a retainer agreement that provided fees of 20%, which in that case resulted in fees of \$11 million out of a \$55 million settlement. His Honour adopted the reasoning of Justice Cumming in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* in emphasizing the value of a percentage approach to fees: “[u]sing a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the

⁵⁰ *Abdulrahim v. Air France*, 2011 ONSC 512, Plaintiffs Authorities, Tab 17.

⁵¹ *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294, Plaintiffs Authorities, Tab 18.

⁵² *Robertson v. ProQuest LLC*, 2011 ONSC 2629, Plaintiffs Authorities, Tab 19.

⁵³ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, Plaintiffs Authorities, Tab 20.

⁵⁴ *Pichette v. Toronto Hydro*, 2010 ONSC 4060, Plaintiffs Authorities, Tab 21.

⁵⁵ *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.), Plaintiffs Authorities, Tab 22.

⁵⁶ *Cassano v. Toronto- Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.), Plaintiffs Authorities, Tab 10.

⁵⁷ *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.), Plaintiffs Authorities, Tab 23.

⁵⁸ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 8.

class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours".⁵⁹

55. In this case, the requested fees are 17.5% of the settlement that is notionally attributable to Canadian claims. This is below the range of fees that Ontario courts typically approve and, as set out below, there were considerable risks in this litigation and great success as against the Dealers.

ii. Multiplier as a “check” on the reasonableness of fees claimed

56. It is appropriate for the court to consider metrics such as the effective multiplier on counsel’s docketed time as a check of the reasonableness of the fees claimed. However, Ontario class action judges have warned against an excessive focus on the multiplier: “courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate.” The result achieved, not the time expended by counsel, should generally be the most important test of the value of counsel’s services.⁶⁰

57. The effective multiplier in this case is 2.14 since the commencement of this action (when taking into account the fees sought in this motion, and all time incurred, and fees recovered in prior settlements). It is below the range that Ontario courts have found as reasonable where the

⁵⁹ *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) at paras. 50-63, Plaintiffs’ Authorities, Tab 10.

⁶⁰ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 22, Plaintiffs Authorities, Tab 20. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs Authorities, Tab 8; *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) at para. 60, Plaintiffs’ Authorities, Tab 10; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 25, Plaintiffs’ Authorities, Tab 15.

retainer requires a multiplier approach. That range is “slightly greater than one (at the low end) to four or higher in the most deserving cases”.⁶¹

iii. Recovery risk was very high from the outset of the litigation

58. Canadian Class Counsel took on significant risk for claims against the Dealers because of the legal and practical impediments to recovery:

- (a) **Risks Associated with Canadian common law claims against the Initial Note Purchasers:** The Ontario *Securities Act* does not contain any statutory claims against underwriters on behalf of primary market note purchasers. Only Canadian common law claims can be asserted on behalf of noteholders against the Initial Note Purchasers. Such claims may pose significant challenges, including: (i) the court may have concluded that based on concerns over indeterminate liability or for other reasons, the Initial Note Purchasers did not owe a duty of care to note purchasers; (ii) the note offering memoranda explicitly state that the Dealers made no representations concerning the quality of Sino-Forest’s securities; and (iii) in order for the Canadian common law claims against the Initial Note Purchasers, each class member may be required to individually prove reliance or causation.⁶²
- (b) **Risks associated with primary market unjust enrichment claims:** The plaintiffs in the Ontario class action claimed for unjust enrichment in respect of the fees earned by the Dealers pursuant to the primary market offerings. However, the Dealers have asserted that such fees were paid by Sino-Forest, and not by primary market purchasers, and that any such fees were paid pursuant to a valid contract constituting a juristic reason for the Dealers’ enrichment. As a result, there was a risk that the unjust enrichment claims on behalf of primary market purchasers may not have been successful on the merits.⁶³
- (c) **Risks associated with secondary market unjust enrichment claims:** The Ontario action also claims for unjust enrichment in respect of the fees earned by the Dealers when such Dealers sold Sino-Forest securities to their clients on the secondary market. The Dealers have asserted that such fees were paid pursuant to a valid contract, which may be found to be a juridical reason for the alleged enrichment. In addition, the entities that sold securities to class members on the secondary market typically are separate corporate entities from those that participated in the primary market offerings, and such entities may not be named

⁶¹ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 31, Plaintiffs Authorities, Tab 20.

⁶² Wright Affidavit (Settlement Approval), para. 59, Plaintiffs’ Motion Record (Fee Approval), Tab 2(A), p. 59.

⁶³ Wright Affidavit (Settlement Approval), paras. 63-64, Plaintiffs’ Motion Record (Fee Approval), Tab 2(A), pp. 60-61.

defendants in the Ontario and U.S. actions. As a result, there is no viable basis for such claims.⁶⁴

- (d) **Liability limits under the *Securities Act*:** The Ontario class action advances claims against the Dealers under section 130 of the Ontario *Securities Act*. According to the plaintiffs' damages expert, the damages for these claims as against all defendants are limited in the aggregate to approximately \$78.5 million. Actual damages may be lower for a number of reasons: (i) defendants have advised that they have obtained expert opinions that make different assumptions and which support lower damages figures; (ii) the damages alleged are for all losses suffered, including those attributable to Sino-Forest, individual defendants, and auditors; and (iii) the actual damages to be paid may only be for claims filed, and for a variety of reasons, less than 100% of class members generally file claims.⁶⁵
- (e) **Risks associated with U.S. law claims:** The Ontario class action asserts claims against the Initial Note Purchasers pursuant to the common law of New York State and U.S. Federal law. Both of these claims faced very significant challenges by the Initial Note Purchasers. In response to the U.S. law claims asserted in the Ontario action, the Dealers filed expert opinions from accomplished and recognized experts in the area stating that the Second Fresh as Amended Statement of Claim did not satisfy the pleading requirements for the U.S. law claims and under U.S. law would be struck. Although the Ontario Plaintiffs relied on responding expert opinions to support their claims pursuant to U.S. law, there was a very significant risk that such claims would not be certified or ultimately successful at trial.
- (f) **Challenges in establishing Dealers' liability:** Canadian Class Counsel had significant insight into the underwriting process and due diligence as a result of documents and cooperation flowing from the Horsley settlement. The Dealers asserted that they met the standard of care for the share and note offerings. The Share Underwriters took the position that they had experience dealing with forestry issuers and Chinese issuers, and that they completed comprehensive due diligence for each prospectus offering. The Dealers asserted that they hired and relied upon legal counsel for each offering, and relied upon forestry expertise and valuation reports prepared on behalf of Sino-Forest as well as the financial statements audited by Ernst & Young and BDO Limited. In addition, the Initial Note Purchasers argued that they had no or limited due diligence obligations, given that they made explicit statements in the offering memoranda that they made no representations concerning the quality of Sino-Forest's securities. These due diligence defences added additional risk, particularly with respect to the Note claims.
- (g) **Risk that certain primary market claims were not covered in the class actions:** The Dealers argued that the class definition in the Ontario class action should excluded all individuals and entities residing outside of Canada that

⁶⁴ Wright Affidavit (Settlement Approval), paras. 63-64, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), pp. 60-61.

⁶⁵ Wright Affidavit (Settlement Approval), paras. 73-77, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), pp. 64-65

purchased Sino-Forest's securities on the primary market outside of Canada. The Dealers have provided information that a significant portion of primary market purchasers reside outside of Canada. There was a risk therefore that the claims of these class members were not covered by any of the class actions which would have significantly reduced the class size and the damages that could be sought.

iv. The high risk of prosecuting a difficult and expensive case

59. Canadian Class Counsel took on the major risk that there would be little or no recovery from the Dealers, while at the same time having to commit a very significant amount of time, money and resources to the prosecution of this action. Canadian Class Counsel and insolvency counsel have already incurred more than \$11.1 million in docketed time (without HST) and spent more than \$2.8 million in disbursements.⁶⁶ There are at least four reasons the claims against the Dealers have been and will continue to be difficult and costly to pursue:

- (a) **This is a highly complex action and Sino-Forest is in organizational disarray:** This case relates to a multi-billion dollar alleged fraud over the course of more than four years. The difficulty in mining Sino-Forest's records and prosecuting this action is best demonstrated by the challenges faced by Sino-Forest's "independent committee" of its directors (the "IC"). After the allegations of fraud in June 2011, Sino-Forest's directors formed the IC to investigate the allegations. They produced three reports and expended in excess of \$50 million attempting to determine the validity of the allegations. They were unable to complete their mandate given the poor records and lack of cooperation faced in China. Canadian Class Counsel has faced and will continue to face similar challenges to advancing this case against the Dealers.⁶⁷
- (b) **Even with proper discovery, proving the facts in this case will be unusually difficult:** Many of the key Sino-Forest witnesses are likely in China. Their voluntary cooperation is doubtful and the enforcement of letters rogatory by the courts of the People's Republic of China seems unlikely. Further, the documentary production in this action has already exceeded one million documents, and continues to grow. Many of these documents are in Chinese. Canadian Class Counsel has retained Chinese-speaking lawyers and translators to assist in reviewing the documents. Canadian Class Counsel expects to receive a substantial number of additional documents as this action continues.⁶⁸
- (c) **This action raises novel and complex legal issues:** This action advances various statutory claims and common law claims that are largely untested in Canadian

⁶⁶ Wright Affidavit (Fee Approval), para. 22, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 26-27.

⁶⁷ Wright Affidavit (Fee Approval), paras. 49-51, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 34-35.

⁶⁸ Wright Affidavit (Fee Approval), para. 16, Plaintiffs' Motion Record (Fee Approval), Tab 2, p. 22-25.

courts. There has never been a trial of claims under Part XXIII.1 of the *Securities Act*. Its detailed provisions that create defences and place limits on damages are uncertain and will be contentious. There have also been few securities trials of negligent misrepresentation claims. Further, the claims on behalf of note purchases are made more complex by the terms of the offering memoranda. This will include legal disputes regarding the applicable law and restrictions on the ability to advance claims.

- (d) **This case will require extensive and expensive expert evidence:** In advancing this action, Canadian Class Counsel has already retained experts on financial accounting and audit standards, market efficiency and damages, Chinese law, Suriname law, U.S. federal and New York State law, and the standards for underwriting due diligence. This has been tremendously costly.⁶⁹

60. Canadian Class Counsel undertook these challenges at the commencement of this action, knowing this action would be very expensive and resource intensive, all with the real possibility of little or no recovery after trial against the defendants who could satisfy a large judgment.

v. Canadian Class Counsel achieved significant success against the Dealers

61. Canadian Class Counsel achieved significant success against the Dealers by extracting a considerable sum. The \$32.5 million settlement represents a significant component of the total estimated damages associated with primary market share claimants (being \$77.3 million), which reflects the availability of statutory claims under the *Securities Act*, and thus, fewer challenges in respect of establishing these claims. Although claims on behalf of primary market noteholders are significantly discounted, as described above these claims suffer from significantly greater risk. Finally, the quantum of the settlement also represents approximately 40% of the commissions received by the Dealers in respect of the offerings of Sino-Forest securities as estimated by the plaintiffs, a very significant percentage.⁷⁰ Class Counsel believes the Dealers Settlement represents an excellent recovery for purchasers of Sino-Forest's securities on the primary market.

⁶⁹ Wright Affidavit (Settlement Approval), para. 24, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), pp. 45-46.

⁷⁰ Wright Affidavit (Settlement Approval), para. 77, Plaintiffs' Motion Record (Fee Approval), Tab 2(A), p. 65.

C. OBJECTIONS

62. Canadian Class Counsel has engaged in a broad notice program to provide notice of the proposed fee and disbursement request, including direct notice to securities claimants and sought any objections relating to fees. Notice of the fee request was delivered to over 49,000 class members. Canadian Class Counsel has received six objections regarding the fee request stating that it is too high.⁷¹

63. These objectors do not appear to be aware of the risks and limitations associated with the primary market claims as set out in this factum which represent an impediment to the recovery as against the Dealers. In addition, the fee request is consistent with the retainer agreements and is below the percentage typically allowed by the courts. Class Counsel believes that it reflects the risks that it assumed in acting on a contingency fee basis and the success achieved on the Dealers Settlement.

64. In addition, one of the representative plaintiffs, Robert Wong, has objected to the manner in which Canadian Class Counsel has calculated the proposed fees. Canadian Class Counsel understands that Mr. Wong's objection is: (a) the certification of this class proceeding in connection with the Poyry (Beijing) settlement should be ignored, and counsel fees should therefore be calculated in accordance with the first row of the fee grid in the retainer agreement; and (ii) the amounts recovered in successive settlements should be aggregated for the purpose of the fee grid calculation. Mr. Wong calculates counsel fees of \$1.4198 million or, alternatively, \$2.925 million using this approach.⁷² Canadian Class Counsel disagrees with Mr. Wong's objection and his interpretation of the retainer agreement for the reasons explained at paragraphs

⁷¹ Exhibit "A" to the Affidavit of Heather Palmer sworn April 23, 2015, Motion Record of Objections, Tab 1(A).

⁷² Exhibit "C" to the Wright Affidavit (Fee Approval), Plaintiffs' Motion Record (Fee Approval), Tab 2(C), p. 147.

13-16 of this factum. In addition, the fee request is supported by the other representative plaintiffs.

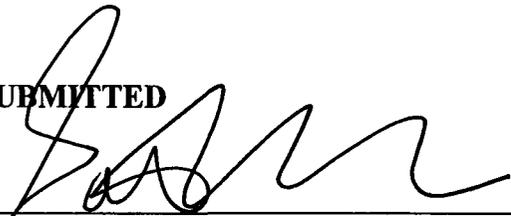
D. CONCLUSION

65. Given all of the factors outlined above, including the multiple legal and practical impediments to establishing liability and recovering damages under Canadian and U.S. law, the time and expense devoted to pursuing the claims against the Dealers, Canadian Class Counsel's risk of no success and minimal recovery, and the significant success achieved against the Dealers, the requested fees and disbursements are extremely fair and reasonable under the circumstances and ought to be approved.

PART IV - ORDER REQUESTED

66. Canadian Class Counsel and insolvency counsel request that this court make an order approving their fees of \$5,517,207.50 (exclusive of tax) and repayment of disbursements of \$289,614.50.

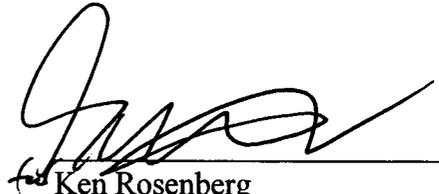
ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Ontario Class Action**

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 1924
2. *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937
3. *Sino-Forest Corporation (Re)*, 2012 ONSC 7041
4. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of)*, 2013 ONCA 456
5. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2013 ONSC 1078
6. *Invesco Canada Ltd. v. Sino-Forest Corp.*, [2013] S.C.C.A. No. 395 (S.C.C.)
7. *Labourer's Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2014 ONSC 62
8. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
9. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
10. *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.)
11. *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)
12. *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962
13. *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 (C.A.)
14. *Endean v. Canadian Red Cross Society*, 2000 BCSC 971
15. *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602
16. *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292
17. *Abdulrahim v. Air France*, 2011 ONSC 512
18. *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294
19. *Robertson v. ProQuest LLC*, 2011 ONSC 2629
20. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752
21. *Pichette v. Toronto Hydro*, 2010 ONSC 4060

22. *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.)
23. *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.)
24. Order of Justice Morawetz dated December 27, 2013
25. Ontario Law Reform Commission, *Report on Class Actions*, vol. 3

SCHEDULE "B"
RELEVANT STATUTES

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

Section 32(2)

Court to approve agreements

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

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

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

and

Sino-Forest Corporation, et al.

Plaintiffs

Defendants

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

Superior Court File No: CV-10-414302

**ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List**

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

**FACTUM OF THE PLAINTIFFS
Fee Approval
(Returnable May 11, 2015)**

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