

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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

KOSKIE MINSKY LLP

20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Kirk Baert (LSUC# 309420)

Jonathan Ptak (LSUC#: 45773F)

Jonathan Bida (LSUC#: 54211D)

Tel: (416) 595-2117 / Fax: (416) 204-2889

SISKINDS LLP

680 Waterloo Street
London, ON N6A 3V8

A. Dimitri Lascaris (LSUC#: 50074A)

Daniel Bach (LSUC#: 52087E)

Tel: (519) 660-7844 / Fax: (519) 660-7845

PALIARE ROLAND ROSENBERG

ROTHSTEIN LLP

250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Ken Rosenberg (LSUC#: 21101H)

Massimo Starnino (LSUC#: 41048G)

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

Lawyers for the plaintiffs and CCAA
Representative Counsel pursuant to the
settlement approval order dated March 20, 2013

TO: THE ATTACHED SERVICE LIST

TABLE OF CONTENTS

PART I – OVERVIEW OF THE MOTION	5
PART II – THE FACTS.....	7
A. Background of These Proceedings and Settlement with Ernst & Young	7
B. Notional Allocation of the Settlement Amount	8
C. Fees Pursuant to the Retainer Agreements	9
D. Counsel’s Efforts to Advance the Ontario and Québec Class Actions	11
(1) Preliminary investigation leading to the commencement of this action.....	13
(2) Motion for carriage of this action.....	14
(3) Motion for directions (service, defences, insurance and scheduling)	14
(4) The litigation funding agreement and motion for funding approval	15
(5) Motion for certification and motion for leave under the Securities Act	16
(6) Settlement with Pöyry (Beijing).....	17
(7) Sino-Forest’s insolvency and CCAA proceeding.....	17
(8) All-party mediation in September 2012	18
(9) Mediation and settlement with Ernst & Young.....	19
(10) Sanction of the CCAA Plan and settlement approval	19
E. Context of Contingency Fee Retainers in Class Proceedings	20
PART III – ISSUES AND THE LAW.....	22
APPROVAL OF COUNSEL FEES.....	22
A. Approach to Fee Approval in Class Proceedings.....	23
(1) Test for fee approval.....	23
(2) The importance of strong incentives for class counsel.....	23
(3) Multiplier as a “check” on the reasonableness of fees claimed.....	25
B. Canadian Class Counsel’s Fees and Disbursements are Fair and Reasonable	26
(1) Fees as a percentage of recovery are within the appropriate range.....	26
(2) Recovery risk was very high from the outset of the litigation	28
(3) The high risk of prosecuting a difficult and expensive case	30
(4) Canadian Class Counsel achieved significant success against Ernst & Young	32
C. Objections Received.....	33
HONOURARIUM PAYMENT FOR ROBERT WONG.....	33
PART IV – ORDER REQUESTED	35

PART I – OVERVIEW OF THE MOTION

1. The plaintiffs 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 \$17,846,250 (exclusive of tax) for fees and \$1,737,650.84 for disbursements. This fee and disbursement request is made in accordance with the executed retainer agreements between Canadian Class Counsel and the plaintiffs in this action.
2. On March 20, 2013, this court approved a \$117 million settlement with Ernst & Young LLP and its affiliates and established a settlement trust for the settlement proceeds. Section 19 of the settlement approval order provides that the fees and disbursements of Canadian Class Counsel together with insolvency counsel are to be paid from the settlement trust, subject to court approval of such fees and disbursements in accordance with the laws of Ontario governing the payment of counsel’s fees and disbursements in class proceedings.
3. The retainer agreement is the starting point for the approval of counsel fees in class proceedings. The court determines whether the fees and disbursements as provided for in the retainer agreement are fair and reasonable, failing which the court has discretion to determine the amount owing to class counsel for fees and disbursements. There are two main factors in these determinations: (a) the risks that class counsel assumed; and (b) the success achieved.
4. In this case, the requested fees and disbursements are consistent with the retainer agreement entered into with the plaintiffs and are fair and reasonable.
5. First, the requested fees are within the range of percentages that Ontario courts have approved in the past. As noted by Justice Strathy (as he then was) in *Baker (Estate) v. Sony*

BMG Music (Canada) Inc., fees in the range of 20% to 30% are very common in class proceedings and there have been a number of instances in recent years in which this court has approved fees that fall within that range. In this case, the requested fees are 16.9% of the settlement that is notionally attributable to Canadian claims.¹

6. Second, Canadian Class Counsel took on significant risk for claims against Ernst & Young because of the multiple legal impediments to establishing liability and recovering damages against an auditor under Canadian and U.S. law – even if there was wrongdoing.

7. Third, Canadian Class Counsel took on the risk of no success and minimal recovery, while at the same time having to devote a massive amount of time, money and other resources to the prosecution of this action. Canadian Class Counsel and insolvency counsel have already committed millions of dollars in resources to this action, including 23,000 lawyer hours (with a time value of \$8.6 million) and out-of-pocket disbursements exceeding \$1.7 million.

8. Fourth, the settlement obtained, \$117 million, is the largest auditor settlement in Canadian history – *by a factor of two*. Canadian Class Counsel successfully achieved a very good settlement.

¹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

PART II – THE FACTS

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

9. 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

10. On July 20, 2011, this action was commenced against Sino-Forest, Ernst & Young LLP and other defendants in Ontario under the *Class Proceedings Act, 1992*. Siskinds LLP and Koskie Minsky LLP are counsel to the plaintiffs in the Ontario class action.³

11. There were also class actions commenced in Québec and New York relating to Sino-Forest. Siskinds Demeules is counsel to the plaintiffs in the Québec action styled as *Guining Liu v. Sino-Forest Corporation*. Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) is counsel to the plaintiffs in the New York action styled as *Leopard v. Sino-Forest Corporation*. Ernst & Young LLP is a defendant in both the Québec and New York actions.⁴

12. On March 30, 2012, Sino-Forest applied for and was granted protection from its creditors pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”).⁵

13. In November 2012 a settlement was negotiated with Ernst & Young LLP. The settlement provides for payment of \$117 million in full settlement of all claims that relate to

² Affidavit of Charles Wright at para. 3, Plaintiffs’ Motion Record, Tab 8.

³ Affidavit of Charles Wright at para. 4, Plaintiffs’ Motion Record, Tab 8.

⁴ Affidavit of Charles Wright at paras. 5 and 6, Plaintiffs Motion Record, Tab 8.

⁵ Affidavit of Charles Wright at para. 7, Motion Record, Tab 8.

Sino-Forest as against Ernst & Young LLP, Ernst & Young Global Limited and their affiliates, subject to court approval. This court approved the settlement on March 20, 2013.⁶

B. Notional Allocation of the Settlement Amount

14. The approved settlement with Ernst & Young provides for a total payment of \$117 million. 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 for the purposes of determining class counsel fees. They agreed that the fees of Canadian Class Counsel will be determined on the basis that 90% of the gross settlement is allocated to the Canadian claims and 10% of the gross settlement is allocated to the U.S. claims. This notional allocation is based on the relative class sizes of the Canadian and U.S. class actions and the work performed by the law firms.⁷

15. Accordingly, Canadian Class Counsel's requested fees are based on a recovery of \$105.3 million (90% of \$117 million) and Cohen Milstein's requested fees are based on a recovery of \$11.7 million (10% of \$117 million).⁸

16. This notional allocation has no bearing on the actual distribution of settlement proceeds to Securities Claimants. As set out in the proposed Claims and Distribution Protocol, the distribution of the net settlement fund is based on the claims made, the losses for those claims and the relevant risk adjustment factor for each claim.⁹

⁶ Affidavit of Charles Wright at paras. 9 and 10, Plaintiffs' Motion Record, Tab 8.

⁷ Affidavit of Charles Wright at para. 20, Plaintiffs' Motion Record, Tab 8.

⁸ Affidavit of Charles Wright at para. 20, Plaintiffs' Motion Record, Tab 8.

⁹ Affidavit of Charles Wright at para. 21, Plaintiffs' Motion Record, Tab 8.

C. Fees Pursuant to the Retainer Agreements

17. 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. Canadian Class Counsel fees and disbursements are governed by the retainer agreements entered into with the plaintiffs.¹⁰ Insolvency counsel will be paid out of the fees and disbursements of Canadian Class Counsel.

18. 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:¹¹

	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%)

¹⁰ Affidavit of Charles Wright at paras. 17 and 18, Plaintiffs' Motion Record, Tab 8.

¹¹ Affidavit of Charles Wright at para. 22, Plaintiffs' Motion Record, Tab 8.

19. This grid is meant to ensure that Canadian Class Counsel are 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 provides that the larger the recovery, the less Canadian Class Counsel will be paid as a percentage of that recovery.¹²

20. In addition, the fee grid provides that Canadian Class Counsel is paid less if the action settles 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.¹³

21. These different time periods are meant to reflect the resources that Canadian Class Counsel expended 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, Canadian Class Counsel would have committed fewer resources to the action. In contrast, had the action proceeded to a common issues trial and success achieved only through judgment, Canadian Class Counsel would have committed an even larger amount of resources to this litigation. The grid is meant to take into account this increasing level of resources, but uses the objective measure of stages in the proceeding in order to determine when the next level of compensation would be awarded.¹⁴

22. On the face of the retainer agreement, the second row of the grid would apply as there was a certification decision in the Ontario class action in September 2012 relating to the

¹² Affidavit of Charles Wright at para. 23, Plaintiffs' Motion Record, Tab 8.

¹³ Affidavit of Charles Wright at para. 24, Plaintiffs' Motion Record, Tab 8.

¹⁴ Affidavit of Charles Wright at para. 25, Plaintiffs' Motion Record, Tab 8.

settlement with Pöyry (Beijing) Company Limited. Applying the second level of compensation is also consistent with the purpose of this grid, which is to acknowledge the resources that Canadian Class Counsel has expended, including the enormous efforts involved as stakeholders and participants in the Sino-Forest insolvency proceeding. If the second row of the grid is applied, Canadian Class Counsel would receive fees of \$19,162,500.¹⁵

23. However, Canadian Class Counsel, in consultation with the plaintiffs, have decided to request a lower amount of fees as the retainer agreement did not specifically deal with the issue of what happens when the action is certified against one, but not all, of the defendants. The lower amount sought is \$17,846,250, which is 16.9% of the notional allocation of \$105.3 million. Canadian Class Counsel and plaintiffs have agreed that a fee award that is midway between the first and second row of compensation in the retainer agreement is fair and reasonable in all of the circumstances at this time.¹⁶

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

24. There has been significant progress and considerable efforts by Canadian Class Counsel to advance the Ontario and Québec actions. The plaintiffs assert numerous common law and statutory claims against 26 defendants resident in Ontario, New York, Hong Kong and the People's Republic of China. There have been approximately 17 motions and 16 orders in the Ontario and Québec actions.¹⁷

25. Canadian Class Counsel, along with insolvency counsel and counsel for the plaintiffs in the Québec action, took the following steps to advance claims against the defendants:

¹⁵ Affidavit of Charles Wright at para. 26, Plaintiffs' Motion Record, Tab 8.

¹⁶ Affidavit of Charles Wright at para. 27, Plaintiffs' Motion Record, Tab 8.

¹⁷ Affidavit of Charles Wright at para. 27, Plaintiffs' Motion Record, Tab 8.

- (a) undertook a preliminary investigation of the allegations against Sino-Forest;
- (b) prepared for and argued a motion for carriage of the Ontario action;
- (c) prepared for and argued a motion for directions in the Ontario action, including a request for an order for substituted services, 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) negotiated and settled with the defendant Pöyry (Beijing) Company Limited (“Pöyry (Beijing)”);
- (g) prepared for and argued the motions for certification for settlement purposes and approval of the Pöyry (Beijing) settlement in Ontario and Québec;
- (h) obtained and reviewed evidence from Pöyry (Beijing);
- (i) designed and implemented a notice program and opt out process for the Ontario and Québec actions;
- (j) prepared for, argued or attended approximately 26 motions and other appearances in the Sino-Forest *CCAA* proceeding;
- (k) prepared proofs of claim in the *CCAA* proceeding for the Ontario and Québec actions, including detailed claims submissions;
- (l) reviewed tens of thousands of Chinese and English documents in the Sino-Forest data-room for mediation;
- (m) prepared for and attended the two-day all-party mediation in August 2012;
- (n) 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;
- (o) prepared for and attended at a two-day mediation with Ernst & Young in November 2012, which resulted in a settlement;
- (p) 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;
- (q) designed and implemented a notice program for the Ernst & Young settlement approval hearing;

- (r) prepared for and argued the motion for settlement approval of the Ernst & Young settlement and responded to the efforts of certain objectors to appeal the 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;
- (s) began review of more than 1 million Chinese and English documents;
- (t) have been served with responding records for the leave and certification motion and are replying;
- (u) retained U.S. bankruptcy counsel, attended in U.S. courts and designed a notice program for U.S. investors of Sino-Forest in order to obtain recognition of the Ernst & Young settlement in the United States;
- (v) moved for recognition of the Ernst & Young settlement in Québec; and
- (w) prepared plan of allocation to distribute the Ernst & Young settlement and other materials for approval of the plan of allocation and the within motion.¹⁸

(1) Preliminary investigation leading to the commencement of this action

26. The fraud allegations against Sino-Forest were made by Muddy Waters, a research firm that also engages in short selling. The plaintiffs also conducted their own preliminary investigation of the allegations before commencing and pursuing this action.¹⁹

27. For this preliminary investigation, Canadian Class Counsel retained and received advice from: (a) a law firm in China (Dachen 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.²⁰

¹⁸ Affidavit of Charles Wright para. 29, Plaintiffs' Motion Record, Tab 8.

¹⁹ Affidavit of Charles Wright at para. 30, Plaintiffs' Motion Record, Tab 8.

²⁰ Affidavit of Charles Wright at para. 31, Plaintiffs' Motion Record, Tab 8.

28. As a result of these investigations, the initial statement of claim contained significant detail, running to 92 pages. There has been further detail and amendments since that time as information regarding Sino-Forest's affairs has become available.²¹

(2) Motion for carriage of this action

29. A number of class proceedings were commenced against Sino-Forest and Ernst & Young in response to the fraud 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*. As a result, it was necessary for there to be a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed.²²

30. 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.²³

(3) Motion for directions (service, defences, insurance and scheduling)

31. On February 1, 2012, the plaintiffs moved for various relief, including an order (a) 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

²¹ Affidavit of Charles Wright at para. 32, Plaintiffs' Motion Record, Tab 8.

²² Affidavit of Charles Wright at paras. 33 and 34, Plaintiffs' Motion Record, Tab 8.

²³ Affidavit of Charles Wright at para. 35, Plaintiffs' Motion Record, Tab 8.

under the *Class Proceedings Act, 1992* and for leave to proceed with statutory claims under section 138.3 of the *Securities Act*.²⁴

32. Service issues were addressed in advance of the motion and the defendants agreed to provide responsive insurance policies. However, the defendants vigorously opposed having to deliver statements of defence or the scheduling of the motions for certification and leave.²⁵

33. The plaintiffs succeeded in the motion. On March 26, 2012, Justice Perell ordered that a statement of defence be delivered by any defendant that delivers 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.²⁶

(4) The litigation funding agreement and motion for funding approval

34. Adverse costs in Ontario class proceedings have become significant and present a concern for any plaintiff advancing class claims. In this case, the adverse costs exposure could have been enormous given the complexity of this case and the 26 defendants. Accordingly, Canadian Class Counsel sought out a funder that would provide indemnity for adverse costs.²⁷

35. Canadian Class Counsel approached Claims Funding International (CFI) to provide funding. Through negotiations, Canadian Class Counsel was able to extract terms that are more favourable to the class members than any other funding arrangement approved in

²⁴ Affidavit of Charles Wright at para. 36, Plaintiffs' Motion Record, Tab 8.

²⁵ Affidavit of Charles Wright at para. 37, Plaintiffs' Motion Record, Tab 8. As noted in Mr. Wright's affidavit, service had been a challenge on some of the defendants, particularly those resident in China. Service issues were addressed leading up to the motion as a result of notices of intent to defend being served. Service on Pöyry (Beijing) was no longer an issue as a result of the settlement with Pöyry (Beijing).

²⁶ Affidavit of Charles Wright at para. 38, Plaintiffs' Motion Record, Tab 8.

²⁷ Affidavit of Charles Wright at para. 39, Plaintiffs' Motion Record, Tab 8.

Canada. In exchange for the indemnity, CFI agreed to accept only 5% of net recovery up to a maximum of \$5 million, increased to 7% with a \$10 million maximum if the action is settled after a pre-trial. CFI also agreed to post security for costs, which by the time of trial would be \$6 million. This can be contrasted with the Class Proceedings Fund, which imposes a 10% levy on a net recovery with no maximum, and with other CFI agreements that were approved in other Ontario cases where a 7% commission is payable.²⁸

36. Canadian Class Counsel brought a motion to approve the CFI funding agreement. Justice Perell heard the motion on May 17, 2012 and he issued an order the same day approving the agreement.²⁹

(5) Motion for certification and motion for leave under the Securities Act

37. In March and April 2012, the Ontario plaintiffs brought a motion for (a) certification of the Ontario action as a class action under the *Class Proceedings Act, 1992*; and (b) leave to proceed with statutory claims under Part XXIII.1 of the *Securities Act*.³⁰

38. The plaintiffs filed motion records (5 double-sided volumes with a CD containing another 202 documents) in support of their motions. This included

- (a) an affidavit of Steven Chandler, a former senior law enforcement official in Hong Kong who was involved in investigating Sino-Forest in China;
- (b) two reports from Alan Mak, an expert in forensic accounting;
- (c) an expert affidavit of Dennis Deng, a lawyer qualified to practice law in the People's Republic of China, and a partner in the Dacheng law firm;
- (d) an expert affidavit of Carol-Ann Tjon-Pian-Gi, a lawyer qualified to practice in the Republic of Suriname; and

²⁸ Affidavit of Charles Wright at para. 40, Plaintiffs' Motion Record, Tab 8.

²⁹ Affidavit of Charles Wright at para. 41, Plaintiffs' Motion Record, Tab 8.

³⁰ Affidavit of Charles Wright at para. 42, Plaintiffs' Motion Record, Tab 8.

(e) an expert affidavit of Frank Torcchio setting out an estimate of damages and opining on the efficiency of the Toronto Stock Exchange.³¹

39. The motion was initially scheduled for November 21 to 30, 2012. However, as a result of Sino-Forest's insolvency and the *CCAA* stay of proceedings, it did not proceed as scheduled. The motion has been rescheduled to May 2014 for seven days of hearings.³²

(6) Settlement with Pöyry (Beijing)

40. In March 2012, the plaintiffs in the Ontario and Québec actions reached a settlement with Pöyry (Beijing). The settlement required Pöyry (Beijing) to provide documents, information and material assistance in the prosecution of the plaintiffs' claims against Sino-Forest, Ernst & Young and the other defendants. Canadian Class Counsel relied on this information from Pöyry (Beijing) in negotiations with Ernst & Young towards settlement.³³

41. 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.³⁴

(7) Sino-Forest's insolvency and CCAA proceeding

42. 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,

³¹ Affidavit of Charles Wright at para. 43, Plaintiffs' Motion Record, Tab 8.

³² Affidavit of Charles Wright at para. 44, Plaintiffs' Motion Record, Tab 8.

³³ Affidavit of Charles Wright at para. 45, Plaintiffs' Motion Record, Tab 8.

³⁴ Affidavit of Charles Wright at paras. 47 and 48, Plaintiffs' Motion Record, Tab 8.

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.³⁵

43. 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 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.³⁶

44. Canadian Class Counsel and insolvency counsel brought or attended 26 motions in the *CCAA* proceeding, plus an appeal and two motions for leave to appeal.³⁷

(8) All-party mediation in September 2012

45. By order dated July 25, 2012, this court ordered mediation of the claims in the Ontario and Québec actions. There was substantial preparation for the all-party mediation.³⁸

³⁵ Affidavit of Charles Wright at para. 49, Plaintiffs' Motion Record, Tab 8.

³⁶ Affidavit of Charles Wright at para. 51, Plaintiffs' Motion Record, Tab 8.

³⁷ Affidavit of Charles Wright at para. 52, Plaintiffs' Motion Record, Tab 8.

³⁸ Affidavit of Charles Wright at para. 53, Plaintiffs' Motion Record, Tab 8.

46. Canadian Class Counsel reviewed tens of thousands of English and Chinese documents in the Sino-Forest data-room, had four expert opinions prepared and prepared a detailed mediation brief (169 pages) with hundreds of documents attached. In response, there were seven mediation briefs served by various defendants.³⁹

47. The all-party mediation took place on September 4 and 5, 2012. While it did not result in a settlement, it was a catalyst for further negotiations with Ernst & Young.⁴⁰

(9) Mediation and settlement with Ernst & Young

48. On November 27 and 28, 2012, Clifford Lax, Q.C. conducted the mediation between the plaintiffs and Ernst & Young, which led to a tentative settlement as to quantum. The parties finalized the minutes of settlement in the evening of November 29, 2012. The discussions were protracted and challenging.⁴¹

(10) Sanction of the CCAA Plan and settlement approval

49. 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 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, 2013.⁴²

³⁹ Affidavit of Charles Wright at paras. 54-56, Plaintiffs’ Motion Record, Tab 8.

⁴⁰ Affidavit of Charles Wright at para. 57, Plaintiffs’ Motion Record, Tab 8.

⁴¹ Affidavit of Charles Wright at para. 59, Plaintiffs’ Motion Record, Tab 8.

⁴² Affidavit of Charles Wright at para. 61, Plaintiffs’ Motion Record, Tab 8.

50. 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. 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. The Court of Appeal quashed the direct appeal on June 28, 2013. The Kim Orr Objectors have sought leave to appeal to the Supreme Court of Canada.⁴³

E. Context of Contingency Fee Retainers in Class Proceedings

51. A class proceedings practice creates unique challenges and benefits for counsel.

52. 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.⁴⁴

53. As stated by the Ontario 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.⁴⁵

54. Second, class proceedings are highly adversarial and are often protracted. The perception that class proceedings often settle soon after the motion for certification is not

⁴³ Affidavit of Charles Wright at para. 62, Plaintiffs' Motion Record, Tab 8.

⁴⁴ Affidavit of Charles Wright at para. 13, Plaintiffs' Motion Record, Tab 8.

⁴⁵ Ontario Law Reform Commission, *Report on Class Actions*, vol. 3, p. 676, Plaintiffs' Authorities, Tab 2.

correct. Cases are increasingly continuing beyond certification, through productions, examination for discovery and trial. The defendants tend to be 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.⁴⁶

55. Justice Strathy (as he then was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.* 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.”⁴⁷

56. 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

⁴⁶ Affidavit of Charles Wright, at para. 14, Plaintiffs’ Motion Record, Tab 8. 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 3, where 17 counsel appeared to argue over the scheduling of leave and certification. The court discusses how class action decisions are inevitably appealed.

⁴⁷ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 65 and 66, Plaintiffs’ Authorities, Tab 1.

- (g) the risk that the court does not approve class counsel fees, or approves them only at a reduced rate.⁴⁸

57. Fourth, class counsel's obligations 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;
- (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.⁴⁹

PART III – ISSUES AND THE LAW

APPROVAL OF COUNSEL FEES

58. The fees and disbursements requested are consistent with the retainer agreements with the plaintiffs and are fair and reasonable in light of the very significant risks that Canadian Class Counsel and insolvency counsel undertook in these proceedings and the success achieved.

⁴⁸ Affidavit of Charles Wright at paras. 15, Plaintiffs' Motion Record, Tab 8.

⁴⁹ Affidavit of Charles Wright at paras. 16, Plaintiffs' Motion Record, Tab 8.

A. Approach to Fee Approval in Class Proceedings

(1) Test for fee approval

59. The retainer agreement is the starting point for the approval of contingency fees. The court determines whether the fees and disbursements as provided for in the retainer agreement are fair and reasonable, failing which the court has discretion to determine the amount owing to class counsel for fees and disbursements.⁵⁰

60. 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.⁵¹

61. Risk in this context is measured from the commencement of the action and as it continued, and includes 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 paragraph 56 above, there are unique risks arising from the class proceedings procedure.⁵²

(2) The importance of strong incentives for class counsel

62. Ontario courts have recognized that class proceedings depend on entrepreneurial lawyers willing to take on these cases and that class counsel compensation should reflect this. According to the Court of Appeal in *Gagne v. Silcorp Ltd.*, compensation must be sufficiently

⁵⁰ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.32(2) and (4); *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs Authorities, Tab 1. *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at paras. (S.C.J.) 59 and 63, Plaintiffs' Authorities, Tab 4.

⁵¹ *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.), Plaintiffs' Authorities, Tab 5; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs' Authorities, Tab 6.

⁵² *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 at para. 16 (C.A.), Plaintiffs' Authorities, Tab 7; *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at para. 28, Plaintiffs' Authorities, Tab 8.

rewarding to “provide a real economic incentive to solicitors in the future to take on this sort of case and do it well”.⁵³

63. The incentive must be large enough to justify the significant risks that class counsel undertake in class proceedings, which are often complex and protracted.

64. The incentive must 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, counsel incurs the ongoing expenses of maintaining an office, paying salaries and paying for disbursements while receiving no pay 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 carrying costs of a case without pay for years.

65. The incentive must 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. “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.”⁵⁴

66. *Andersen v. St. Jude Medical Inc.* provides an example of the significant financial consequences that class counsel may face when they lose. Class counsel acted for 11 years,

⁵³ *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 at para. 26 (C.A.), Plaintiffs’ Authorities, Tab 7; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 6; *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs’ Authorities, Tab 9; *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 at para. 53, Plaintiffs’ Authorities, Tab 10.

⁵⁴ *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs’ Authorities, Tab 9.

through motions and appeals and 138 days of trial. The trial involved 2,293 documents in evidence and the testimony of 40 witnesses, including 23 experts from 14 different disciplines of science and medicine. The plaintiffs lost at trial. Subject to appeal, class counsel will receive no fees whatsoever and will not be reimbursed for their millions of dollars of disbursements.⁵⁵

(3) Multiplier as a “check” on the reasonableness of fees claimed

67. It is appropriate for the court to consider 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.⁵⁶ Value, not time, is the best measure.

68. Accordingly, by way of example, Justice Cullity (as he then was) approved fees equal to 20% of recovery in *Cassano v. Toronto-Dominion Bank* even though the effective multiplier was approximately 5.5.⁵⁷

⁵⁵ *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at para. 8 and 9, Plaintiffs’ Authorities, Tab 11.

⁵⁶ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 22, Plaintiffs Authorities, Tab 12; *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 58 and 63, Plaintiffs Authorities, Tab 1; *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at para. 60 (S.C.J.), Plaintiffs’ Authorities, Tab 4; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 25, Plaintiffs’ Authorities, Tab 9.

⁵⁷ *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 25, Plaintiffs’ Authorities, Tab 9; *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at para. 59-63 (S.C.J.), Plaintiffs’ Authorities, Tab 4.

69. The effective multiplier in this case is 2.06. It is within the range that Ontario courts have found as reasonable where the 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”.⁵⁸

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

70. The requested fees and disbursements are consistent with the retainer agreement entered into with the plaintiffs and are fair and reasonable.

(1) Fees as a percentage of recovery are within the appropriate range

71. The requested fees are within the range of percentages that Ontario courts have approved in the past.

72. In *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, Justice Strathy (as he then was) stated that fees in the range of 20% to 30% are “very common” in class proceedings and there have been a number of instances in recent years in which this court has approved fees that fall within that range.⁵⁹

73. The percentages may be lower where the recovery is very large. However, even in such cases, courts have approved percentages in the range of 20 to 25%:⁶⁰

Case	Recovery	Fees	Percentage	Multiplier
<i>Hislop v. Canada (AG)</i>	Up to \$81 million ⁶¹	\$14.7 million	18% or greater	4.8

⁵⁸ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 31, Plaintiffs Authorities, Tab 12.

⁵⁹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

⁶⁰ *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 at paras. 26-28 (S.C.J.), Plaintiffs’ Authorities, Tab 13; *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (S.C.J.), Plaintiffs’ Authorities, Tab 14; *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at paras. 50-63 (S.C.J.), Plaintiffs’ Authorities, Tab 4.

⁶¹ Maximum possible recovery was estimated at \$81 million. This assumed that 100% of possible claims were made. However, as of the date of the motion, there had only been 33% participation. (*Hislop*, para. 7 and ft. 5)

<i>Wilson v. Servier Canada Inc.</i>	Up to \$40 million ⁶²	\$10.0 million (minimum) ⁶³	25% or greater	1.8 or greater
<i>Cassano v. TD Bank</i>	\$55 million	\$11.0 million	20%	5.5

74. For instance, Justice Cullity (as he then was) in *Cassano v. Toronto Dominion Bank* approved a retainer agreement that provided fees of 20%, which in that case resulted in fees of \$11 million out of a \$55 million settlement. His Honour adopted the reasoning of Justice Cumming in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* in emphasizing the value of a percentage approach to fees: “[u]sing a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards “one imaginative, brilliant hour” rather than “one thousand plodding hours”.⁶⁴

75. In this case, the requested fees are 16.9% of the settlement that is notionally attributable to Canadian claims. This is within the range of fees that Ontario courts have approved and, as set out below, there were considerable risks in this litigation and significant success as against Ernst & Young.

76. Furthermore, as the litigation proceeds against the other defendants, Canadian Class Counsel’s fees as an overall percentage of recovery may decrease if there is further recovery.

⁶² Recovery was capped at \$40 million. However, if the claims did not exhaust the settlement fund, there would be reversion to the defendants of remaining settlement amounts. (*Wilson*, paras. 17-19)

⁶³ The court stated that “\$10 million ... are approved and to be paid at this time.” This was the minimum fees. The balance of fees to class counsel would depend on the outcome of the claims process. (*Wilson*, paras. 98-100)

⁶⁴ *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at paras. 50-63 (S.C.J.), Plaintiffs’ Authorities, Tab 4. See also *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

This is because the retainer provides for declining percentage fees as the overall recovery increases and future fee requests will account the fees paid in this settlement.⁶⁵

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

77. Canadian Class Counsel took on significant risk for claims against Ernst & Young because of the multiple legal impediments to establishing liability and recovering damages against an auditor under Canadian and U.S. law even where there was wrongdoing.

78. Canadian Class Counsel were always confident that they would establish liability against Sino-Forest and the senior insiders at Sino-Forest. However, from the outset, establishing liability against defendants who could actually satisfy a large judgment was the greatest risk for this litigation and thus for Canadian Class Counsel.⁶⁶

79. The defendants that are most culpable (Sino-Forest, Allen Chan, Kai Kit Poon and David Horsley) are also the defendants that became insolvent (Sino-Forest), have limited personal means (Mr. Horsley) or are individuals living in the People's Republic of China (Messrs. Chan and Poon), where enforcement of Canadian judgments is doubtful.⁶⁷

80. In contrast, while Ernst & Young may have the means to satisfy a substantial judgment, recovery was still a major challenge. The damages recoverable from Ernst & Young after a trial might have been less than the settlement amount. This is because Canadian law provides many protections for auditors from liability and significant damage awards. The

⁶⁵ Fees depend on both the quantum of recovery and stage of the litigation. Fees may be increased to an overall higher percentage if either the second or third rows of the fee grid are applied in respect of a future recovery.

⁶⁶ Affidavit of Charles Wright at para. 69, Plaintiffs' Motion Record, Tab 8.

⁶⁷ Affidavit of Charles Wright at para. 70, Plaintiffs' Motion Record, Tab 8.

result is that investors in a securities case can expect to either fail to establish any liability against the auditor or recover only a tiny proportion of actual damages.⁶⁸

81. The plaintiff would first have had to establish that Ernst & Young was liable in conducting its audits, particularly where Ernst & Young asserts that Sino-Forest deliberately misled its auditors.⁶⁹

82. Once liability was established, the plaintiffs would then have to overcome the many legal impediments in Canadian law to recovery for claims against auditors. In this case, had the action proceeded against Ernst & Young, recoverable damages may have been minimal despite actual damages of more than \$4 billion:

- (a) primary market share claims against Ernst & Young are limited to approximately \$78.8 million, and would be reduced further to the extent such liability is shared among Sino-Forest, BDO Limited, the underwriters and the individual defendants based on their respective responsibility.
- (b) secondary market (shares and notes) claims may be worth as little as \$10 million (i.e. 0.25% of actual damages). Statutory Part XXIII.1 claims may succeed, but they are subject to a low liability limit, which in this case may be \$10 million.⁷⁰ In contrast, common law claims (which have no limits) face considerable difficulties. They must overcome the Supreme Court of Canada's decision in *Hercules Managements Ltd. v. Ernst & Young LLP* (which found no duty of care for auditors in that case).
- (c) there is no statutory claim for primary market note purchases as against an auditor. Accordingly, these claims could only have succeeded if the plaintiffs could succeed in Ontario common law claims (which had difficulties) or through U.S. law claims (which required proof of *scienter*, fraudulent intent).⁷¹

⁶⁸ Affidavit of Charles Wright at para. 71, Plaintiffs' Motion Record, Tab 8.

⁶⁹ Affidavit of Charles Wright at para. 72, Plaintiffs' Motion Record, Tab 8.

⁷⁰ The liability limit is lifted if the plaintiff shows Ernst & Young knew of the misrepresentations. (s. 138.7(2) of the *Securities Act*)

⁷¹ Affidavit of Charles Wright at para. 73, Plaintiffs' Motion Record, Tab 8.

83. Similar or greater challenges face Canadian Class Counsel in advancing the claims advanced against the other solvent defendants with the means to satisfy a large judgment.⁷²

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

84. Canadian Class Counsel took on the major risk that there would be little or no recovery from the defendants with the means to satisfy a judgment, while at the same time having to commit an incredible amount of time, money and resources to the prosecution of this action. Canadian Class Counsel and insolvency counsel have already expended more than \$8.6 million in docketed time (without HST) and more than \$1.7 million in disbursements.⁷³

85. There are at least four reasons why this action has been and will continue to be difficult and costly to pursue:

86. *First*, this is a highly complex action and Sino-Forest is in organizational disarray. This case relates to a multi-billion dollar alleged fraud over the course of more than four years. Sino-Forest's operations included 149 subsidiaries in nine (9) countries. Compounding this complexity is the fact that Sino-Forest's records are in disarray and incomplete.⁷⁴

87. 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

⁷² Affidavit of Charles Wright at para. 75, Plaintiffs' Motion Record, Tab 8.

⁷³ Affidavit of Charles Wright at para. 76, Plaintiffs' Motion Record, Tab 8.

⁷⁴ Affidavit of Charles Wright at para. 78, Plaintiffs' Motion Record, Tab 8.

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.⁷⁵

88. *Second*, even with proper discovery, proving the facts in this case will be unusually difficult. Most of the key witnesses are likely in China. Their voluntary cooperation is doubtful and the enforcement of letters rogatory by the courts of the People's Republic of China seems equally unlikely. Further, the documentary production in this action has already exceeded 1 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.⁷⁶

89. *Third*, this action raises novel and complex legal issues. This action advances various statutory claims and common law claims that are largely untested in Canadian 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 purchasers 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.⁷⁷

⁷⁵ Affidavit of Charles Wright at para. 79, Plaintiffs' Motion Record, Tab 8.

⁷⁶ Affidavit of Charles Wright at para. 80, Plaintiffs' Motion Record, Tab 8.

⁷⁷ Affidavit of Charles Wright at para. 81, Plaintiffs' Motion Record, Tab 8.

90. Finally, 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 and the standards for underwriting due diligence. This has been tremendously costly.⁷⁸

91. 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.⁷⁹

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

92. Canadian Class Counsel achieved significant success against Ernst & Young. They negotiated and extracted a settlement from Ernst & Young that is: (a) is the largest securities settlement involving a Canadian issuer, the shares of which were not listed on a U.S. stock exchange; (b) the largest settlement paid by a Canadian audit firm in a securities class action; and (c) the fifth largest paid by any audit firm in a class action worldwide.⁸⁰

93. The settlement with Ernst & Young is *more than double* the second largest settlement with a Canadian audit firm in a securities class action. Previously, the largest recovery to shareholders by a Canadian auditing firm was a US\$50.5 million settlement paid by the Canadian branch of Deloitte & Touche in *In Re Philip Services Corp Securities Litigation*.⁸¹

⁷⁸ Affidavit of Charles Wright at para. 82, Plaintiffs' Motion Record, Tab 8.

⁷⁹ Affidavit of Charles Wright at para. 83, Plaintiffs' Motion Record, Tab 8.

⁸⁰ Affidavit of Charles Wright at para. 84, Plaintiffs' Motion Record, Tab 8.

⁸¹ January 2013 Affidavit of Charles Wright at para. 121, Exhibit D to Affidavit of Charles Wright, Plaintiffs' Motion Record, Tab 8.

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

95. A settlement of \$117 million with Ernst & Young was a very significant success.

C. Objections Received

96. To date, Canadian Class Counsel has received 17 objections to the requested counsel fees.⁸² 11 of the objections provide no reason. The remaining 6 objections state the fees are too high. One of those 6 objections also states the notice did not provide enough information. There are no substantive criticisms of the requested fees.

HONOURARIUM PAYMENT FOR ROBERT WONG

97. Apart from the above fee request, Canadian Class Counsel request an honourarium payment of \$15,000 to the plaintiff Robert Wong in recognition of his assistance in the prosecution of this action.

98. Ontario courts may compensate a representative plaintiffs on a *quantum meruit* basis for their time and expenses in relation to prosecuting a class proceeding. Courts have found

⁸² A copy of notices of objections will be filed in advance of the motion in a supplementary motion record. Note: there were 10 objection forms received that do not indicate any objection to the claims process.

that “honoraria should be reserved for those cases where, considering all of the circumstances, the contribution of the plaintiff has been exceptional”.⁸³ Factors in this assessment include:

- (a) active involvement in the initiation of the litigation and retainer of counsel;
- (b) exposure to a real risk of costs;
- (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
- (d) time spent and activities undertaken in advancing the litigation;
- (e) communication and interaction with other class members; and
- (f) participation at various stages of the litigation, including discovery, settlement negotiations and trial.⁸⁴

99. Mr. Wong has been a committed representative and has been engaged and offered input at every state of the litigation.⁸⁵

100. Mr. Wong lives in Kincardine, Ontario, which is approximately 220 kilometres from Toronto. He has met with Canadian Class Counsel in person on at least six occasions to discuss matters relating to this action. Mr. Wong also attended the hearings of the carriage motion and the motion to approve the E&Y settlement, as well as the global mediation in September 2012. In addition, Mr. Wong was frequently in touch with Canadian Class Counsel via email and telephone to offer his input on various matters related to this action.⁸⁶

⁸³ *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911 at para. 26-43, Plaintiffs’ Authorities, Tab 15.

⁸⁴ *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911 at para. 26-43, Plaintiffs’ Authorities, Tab 15.

⁸⁵ Affidavit of Charles Wright at para. 89, Plaintiffs’ Motion Record, Tab 8.

⁸⁶ Affidavit of Charles Wright at para. 90, Plaintiffs’ Motion Record, Tab 8.

101. Mr. Wong swore affidavits on the motions for carriage, for certification, for leave under Part XXIII.1 of the *Securities Act*, in support of a funding agreement, and on the motion for approval of the proposed Claims and Distribution Protocol.⁸⁷

102. Mr. Wong provided useful documents and information to Canadian Class Counsel regarding his experience visiting Sino-Forest in 2005. Mr. Wong also advised Canadian Class Counsel regarding the funding agreement with CFI, the settlement with Pöyry (Beijing) Consulting Company Ltd., the global mediation, the mediation with E&Y, and offered significant input into the proposed Claims and Distribution Protocol. Mr. Wong has recorded the time spent fulfilling his duties as representative plaintiff, which is well in excess of 500 hours.⁸⁸

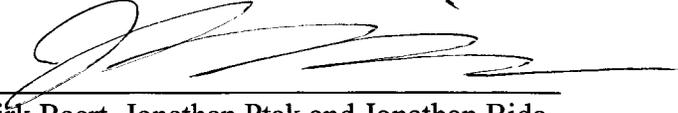
PART IV – ORDER REQUESTED

103. Canadian Class Counsel and insolvency counsel request that this court make an order
- (a) approving their fees of \$17,846,250, plus \$2,320,013 in HST, and disbursements of \$1,737,650.84; and
 - (b) awarding an honourarium payment of \$15,000 to Robert Wong.

⁸⁷ Affidavit of Charles Wright at para. 91, Plaintiffs' Motion Record, Tab 8.

⁸⁸ Affidavit of Charles Wright at para. 92, Plaintiffs' Motion Record, Tab 8.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Kirk Baert, Jonathan Ptak and Jonathan Bida
Koskie Minsky LLP


A Dmitri Lascaris and Daniel Bach
Siskinds LLP


Ken Rosenberg and Massimo Starnino
Paliare Roland Rosenberg Rothstein LLP

Lawyers for the plaintiffs and CCAA
Representative Counsel pursuant to the
settlement approval order dated March 20, 2013

SCHEDULE “A” - LIST OF AUTHORITIES

1. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
2. Ontario Law Reform Commission, *Report on Class Actions*, vol. 3.
3. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924
4. *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.)
5. *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)
6. *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962
7. *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 (C.A.)
8. *Endean v. Canadian Red Cross Society*, 2000 BCSC 971
9. *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602
10. *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292
11. *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660
12. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752
13. *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (S.C.J.)
14. *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (S.C.J.)
15. *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911

SCHEDULE "B" - RELEVANT STATUTES

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

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

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

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

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

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

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

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

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

- (a) a judgment on common issues in favour of some or all class members; and
- (b) a settlement that benefits one or more class members.

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

“base fee” means the result of multiplying the total number of hours worked by an hourly rate;

“multiplier” means a multiple to be applied to a base fee.

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

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

- (a) given judgment on common issues in favour of some or all class members; or
- (b) approved a settlement that benefits any class member.

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

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

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

Securities Act, R.S.O. 1990, CHAPTER S.5

Limits on damages

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

- (a) the aggregate damages assessed against the person or company in the action; and
- (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

Same

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

**FACTUM OF THE PLAINTIFFS
(Approval of Counsel Fees,
returnable December 13, 2013)**

KOSKIE MINSKY LLP

20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Kirk Baert (LSUC# 30942O)

Jonathan Ptak (LSUC#: 45773F)

Jonathan Bida (LSUC#: 54211D)

Tel: (416) 595-2117 / Fax: (416) 204-2889

SISKINDS LLP

680 Waterloo Street

London, ON N6A 3V8

A. Dimitri Lascaris (LSUC#: 50074A)

Daniel Bach (LSUC#: 52087E)

Tel: (519) 660-7844 / Fax: (519) 660-7845

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

250 University Avenue, Suite 501

Toronto, ON M5H 3E5

Ken Rosenberg (LSUC#: 21101H)

Massimo Starnino (LSUC#: 41048G)

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

Lawyers for the plaintiffs and CCAA Representative Counsel