Court File No. M42068

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

FACTUM OF THE CLASS ACTION PLAINTIFFS
(Motion for Leave to Appeal from CCAA Plan Sanction Order)

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street South, 35th Floor
Toronto, ON M5V 3H1
Ken Rosenberg (LSUC #: 21102H)
Massimo Starnino (LSUC #: 41048G)
Tel: 416.646.4300 / Fax: 416.646.4301

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Jonathan Ptak (LSUC #45773F)
Jonathan Bida (LSUC #54211D)
Tel: 416.595.2149 / Fax: 416.204.2903

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
Charles M. Wright (LSUC #36599Q)
A. Dimitri Lascaris (LSUC #50074A)
Tel: 519.672.2121 / Fax: 519.672.6065

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

TO: **APPEAL SERVICE LIST**

TABLE OF CONTENTS

	PAGE
PART I - THE FACTS	1
Overview	1
Sino-Forest's Decline	3
The Insolvency	4
The *CCAA* Plan	7
Sanction of the Plan	11
This Motion and Implementation of the Plan	12
PART II - ISSUES AND THE LAW	14
A. The Significance of the Proposed Appeal to *CCAA* Practice	15
B. Significance of the Proposed Appeal to the Sino-Forest Insolvency	17
C. Merits Of The Proposed Appeal	17
(i) Amending a sanctioned and implemented plan on appeal	18
(ii) No demonstrable error	20
D. The Proposed Appeal Risks Unraveling the Plan	21
PART III - ADDITIONAL ISSUES	22
SCHEDULE "A" - LIST OF AUTHORITIES	23
SCHEDULE "B" - RELEVANT STATUTES	24

PART I - THE FACTS

Overview

1. The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Class Action Plaintiffs") submit that leave to appeal from the order of Justice Morawetz dated December 10, 2012 sanctioning the Sino-Forest plan of compromise and reorganization under the federal *Companies Creditors Arrangement Act* ("*CCAA*") should be dismissed.

2. The sanctioned plan was the culmination of months of negotiations among all of Sino-Forest's major stakeholders. It contained various compromises with give and take from all stakeholders. Consistent with the scheme of the *CCAA*, every stakeholder compromised.

3. The plan was overwhelming supported. 99% of affected creditors voted for the plan and every major stakeholder supported the plan. The sole opponents of the plan were the moving parties (the "Kim Orr Objectors"). The Kim Orr Objectors are three former shareholders who collectively held a 1.5% equity interest, who did not participate in any of the many appearances in the insolvency prior to the sanctions hearing and who chose not to file a claim in the *CCAA*. In contrast, there was no opposition to the plan from any other current or former shareholders and no opposition to the plan from any of Sino-Forest's creditors, including the noteholders with debt of $1.8 billion.

4. The plan has been implemented and cannot be undone. An appeal from the sanction of the plan is therefore moot.

5. The Kim Orr Objectors seek leave to appeal only a portion of the plan. They seek to 'sever' article 11 of the plan, which provides a framework for third party settlements of Sino-Forest related litigation claims.[1] This cannot be done.

6. Article 11 of the plan was integral to the support of the plan and to Sino-Forest's insolvency. Sino-Forest was a holding company with very few trade creditors. Accordingly, the litigation claims against Sino-Forest and against the third party defendants in the class actions were at the centre of the insolvency. The plan that was ultimately approved, including article 11, was the result of extensive negotiations among all major creditors and stakeholders, including the third party defendants. Article 11 was one of a host of interconnected compromises that are contained in the plan.

7. The Class Action Plaintiffs support the plan in its entirety. The Class Action Plaintiffs participated extensively in this insolvency and appeared throughout to act for and represent the interests of shareholders and noteholders who asserted litigation claims against Sino-Forest and the third party defendants.[2] The Class Action Plaintiffs did so because of the prominence of litigation claims to the issues in the insolvency. It was necessary to be actively involved in the insolvency to ensure it would not eliminate or severely curtail the substantive claims of securities claimants, including claims against third party defendants. The Class Action Plaintiffs achieved, through arduous negotiations, a favourable set of compromises for securities claimants:

---

[1] Factum of the Appellants at para. 6.

[2] Reasons of Morawetz J. dated December 12, 2012 at para. 26, Motion Record at tab 7.

(a) the plan permits recovery directly from Sino-Forest's insurance proceeds even though there is a release of claims against Sino-Forest and certain directors and officers (article 2.4 of the plan);

(b) the claims of note purchasers are permitted to proceed against the third party defendants, but are limited to a maximum of $150 million (article 4.4(b) of the plan);[3]

(c) the claims of share purchasers are permitted to proceed against the third party defendants without limit (article 7.5 of the plan); and

(d) there are no third party releases of litigation claims, unless and until there is court approval of a settlement (article 11 of the plan).

8. The Kim Orr Objectors suggest that approval of the plan without article 11 was a *fait-accompli*. This is false and is speculation about what might have occurred. Before article 11 was included, there was major opposition to key elements of the plan from the third party defendants Ernst & Young, BDO Limited and the underwriters. Article 11 was the pivot point by which the plan, including the compromises that benefited securities claimants, turned from being highly contested to largely consensual.

Sino-Forest's Decline

9. Sino-Forest was an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations in China. It was a holding company and carried on business through its subsidiaries.[4]

---

[3] The ad hoc committee of current noteholders would have preferred these claims be fully released. A limit of $150 million for such claims is a reasonable and appropriate compromise. Justice Morawetz found that this limit reflects the risks faced by both sides. His Honour found it was within the "general range of acceptability on a commercially reasonable basis". Reasons of Morawetz J. dated December 12, 2012 at para. 69, Motion Record at tab 7.

[4] Reasons of Morawetz J. dated December 12, 2012 at paras. 13 and 14, Motion Record at tab 7.

10. On June 2, 2011, allegations of fraud arose against Sino-Forest. Sino-Forest, its senior executives and directors, its auditors and underwriters became defendants in multiple class actions in Canada and the United States. This includes class actions in Ontario and Quebec brought by the Class Action Plaintiffs.[5]

11. Following the allegations, there was a precipitous decline in Sino-Forest's financial circumstances. Sino-Forest failed to file its 2011 third quarter financial statements, resulting in a default under the note indentures for Sino-Forest notes. Continued default would permit an acceleration of the outstanding debt under the notes.[6]

12. On March 30, 2012, Sino-Forest applied for and was granted protection from its creditors pursuant to an initial order under the *CCAA*. The initial order also granted a stay of proceedings in respect of Sino-Forest's subsidiaries. It was contemplated that there would be a restructuring of Sino-Forest commercially designed to separate Sino-Forest's business operations, which are carried out through subsidiaries, from the problems facing the parent holding company. The intention was to save and preserve the value of the underlying business.[7]

The Insolvency

13. Litigation claims were at the centre of the Sino-Forest insolvency. Sino-Forest was a holding company and did not have many, if any, trade creditors. Instead, aside from the claims in respect of Sino-Forest notes, it was anticipated from the outset that

---

[5] Reasons of Morawetz J. dated December 12, 2012 at para. 15, Motion Record at tab 7.

[6] Reasons of Morawetz J. dated December 12, 2012 at para. 16, Motion Record at tab 7; Affidavit of W. Judson Martin sworn November 29, 2012 at para. 16, Motion Record at tab 3N.

[7] Reasons of Morawetz J. dated December 12, 2012 at paras. 18 and 19, Motion Record at tab 7.

most or all of the remaining claims would be either litigation claims by current and former securityholders or indemnity claims from the third party defendants in the class action litigation. The third party defendants, such as Ernst & Young, advanced contractual and statutory claims for indemnity from Sino-Forest and its subsidiaries.[8]

14. On May 14, 2012, the court granted the claims procedure order. It provided that persons with claims against Sino-Forest, directors and officers or subsidiaries were to file proofs of claim with the court-appointed monitor on or before June 20, 2012. The claims procedure order provided that any persons that did not file a proof of claim would be barred from making such claims against Sino-Forest or against another person who could claim contribution and indemnity from Sino-Forest. In addition, any person who did not file a claim would not be entitled to participate in the *CCAA* proceeding.[9]

15. There were 232 claims filed. There were only three trade claims. Other than claims in respect of the notes, the overwhelming balance of the claims filed in the claims process were litigation claims by the plaintiffs for the Canadian and U.S. class actions and claims by the third party defendants in those class actions.[10] None of the Kim Orr Objectors filed a proof of claim.[11]

---

[8] Thirteenth Report of the Monitor dated November 22, 2012 at paras. 27 and 28, Ernst & Young Record at tab 18; Summary extract of the Proof of Claim of Ernst & Young LLP, Ernst & Young Record at tab 16H; Affidavit of W. Judson Martin sworn November 29, 2012 at para. 88, Motion Record at tab 3N.

[9] Claims Procedure Order dated May 14, 2012 at paras. 16 and 17, Ernst & Young Record at tab 6.

[10] Thirteenth Report of the Monitor dated November 22, 2012 at paras. 46 and 57, Ernst & Young Record at tab 18; Reasons of Morawetz J. dated December 12, 2012 at paras. 25-31, Motion Record at tab 7.

[11] Reasons of Morawetz J. dated December 12, 2012 at para. 25, Motion Record at tab 7.

16. As the *CCAA* process continued, it became apparent that the nature, complexity and number of parties involved in the litigation claims surrounding Sino-Forest had the potential to cause extensive delay and additional cost in the *CCAA* proceeding. As such, there was merit in a global resolution of not only the claims against Sino-Forest, but also the claims against the other defendants named in the class actions.[12]

17. On July 25, 2012, the court granted the mediation order, specifically directing a mediation of the class action claims against Sino-Forest and against the third party defendants. The Class Action Plaintiffs were directed to participate.[13]

18. The mediation was conducted on September 4 and 5, 2012. Although a settlement was not achieved at the mediation, the parties continued to negotiate and remained focussed on determining whether a resolution within the *CCAA* proceeding was possible.[14]

19. On November 29, 2012, the Class Action Plaintiffs and Ernst & Young entered a settlement for $117 million, subject to several conditions, including court approval in the *CCAA* proceeding.[15] In addition, as described below, compromises of class action claims and a framework for settlements were incorporated into the plan in exchange for the support of the plan by third party defendants and in particular, Ernst & Young, BDO

---

[12] Thirteenth Report of the Monitor dated November 22, 2012 at para. 30, Ernst & Young Record at tab 18.

[13] Order of Morwetz J. dated July 25, 2012, Ernst & Young Record at tab 9.

[14] Thirteenth Report of the Monitor dated November 22, 2012 at para. 31, Ernst & Young Record at tab 18.

[15] Minutes of Settlement dated November 29, 2012, Motion Record at tab 8.

Limited and a group of 11 former underwriters[16] for Sino-Forest. These creditors were defendants in the class actions and had filed in the *CCAA* proceeding multi-billion dollar indemnity claims against Sino-Forest and its subsidiaries.[17]

The *CCAA* Plan

20. The *CCAA* plan in respect of Sino-Forest had always included provisions relating to litigation claims against Sino-Forest, subsidiaries, current and former officers and directors, Ernst & Young, BDO Limited and the underwriters.[18] The sanctioned plan reflected a compromise of these litigation claims among all major stakeholders.

21. On August 14, 2012, Sino-Forest filed a draft plan with the court and brought a motion for a meeting order. Following negotiations with the third party defendants, the

---

[16] The former underwriters that had participated in the insolvency are 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).

[17] Thirteenth Report of the Monitor dated November 22, 2012 at para. 51, Ernst & Young Record at tab 18.

[18] Sino-Forest's liability insurance: section **2.4** of the final plan creates a mechanism whereby the class action plaintiffs and third party defendants can claim directly against the insurance proceeds from Sino-Forest's liability insurer despite releases in the plan for Sino-Forest and the directors and officers. Section 2.4 also maintains rights of subrogation for the insurer. The August version of the plan did not provide for a claim from the insurers and the liability insurance may have been irrecoverable.
Releases of directors and officers: sections **7.1(a)**, **(c)** and **(d)** of the plan provide releases of class action claims and third party defendant claims against former and current officers and directors. 8 of these individuals are defendants in the Class Action Plaintiffs' actions and 11 of these individuals are defendants in the action advanced by two of the Kim Orr Objectors (Amended Statement of Claim, *Northwest & Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.,* Motion Record at tab 3A). The plan has always provided releases for these individual defendants.
Releases of third party defendants for note purchaser claims: section **7.1(e)** always provided releases for note purchaser claims in excess of $150 million (in aggregate) against Ernst & Young, BDO Limited and the underwriters where those third party defendants had a valid and enforceable indemnity claim. The final plan amended this release by deeming the third party defendants' claims as valid and enforceable.
Releases of claims against subsidiaries: section **7.1(k)** of the plan always provided releases of all claims, litigation or otherwise, against subsidiaries.
Plan of Compromise and Reorganization dated August 14, 2012, Ernst & Young Record at tab 25
Amended Plan of Compromise and Reorganization dated November 28, 2012, Motion Record at tab 3L.
Plan of Compromise and Reorganization dated December 3, 2012, Motion Record at tab 4A.

meeting order was granted on the understanding that the third party defendants would reserve their rights to, among other things, challenge the jurisdiction of the court to approve the plan and challenge whether the plan was fair and reasonable.[19]

22. Amendments to the plan were made over the following months, leading to further revised versions in October and November, and a final version on December 3, 2012.[20]

23. In their factum for this motion, the Kim Orr Objectors make inflammatory assertions regarding the reasons for including the impugned article 11 in the plan. Among other suggestions, they assert article 11 was included for the sole objective of allowing the Class Action Plaintiffs to obtain a settlement premium from Ernst & Young and other third party defendants in exchange for extinguishing opt out rights.[21] This is false. Sino-Forest, the noteholders holding $1.8 billion in Sino-Forest debt and the court-appointed monitor, with its statutory obligations to the court and to act in the interest of all creditors, did not postpone the meeting of creditors and amend the plan gratuitously as a favour to the Class Action Plaintiffs. The final amendments reflected a crucial compromise among all major stakeholders that brought consensus to what had been acrimonious proceedings and permitted the restructuring to succeed.

24. Until the December 3, 2012 version of the plan, Ernst & Young, BDO Limited and the underwriters vigorously opposed the plan. One of their key criticisms was that the plan not only released their claims against Sino-Forest Corporation (the Canadian

---

[19] Thirteenth Report of the Monitor dated November 22, 2012 at paras. 35, 37 and 38, Ernst & Young Record at tab 18.

[20] Reasons of Morawetz J. dated December 12, 2012 at para. 38, Motion Record at tab 7.

[21] Factum of the Appellants at para. 69.

debtor), but went farther and released their indemnification claims against Sino-Forest subsidiaries (non-debtors) without the right to vote on such releases. This opposition was significant as a plan for Sino-Forest could not succeed without releases for the subsidiaries.[22]

25. The opposition, had it continued, might have resulted in no plan being approved or substantial and prejudicial delay to plan implementation. Delay was a significant concern because Sino-Forest had dwindling resources to continue in the insolvency. Throughout its insolvency, Sino-Forest's business relationships were under considerable strain and its ability to collect sizable accounts receivable was significantly constrained. Sino-Forest did not have sufficient cash to exist to February 1, 2013.[23]

26. The final amendments that were incorporated into the December 3 version of the plan were made to obtain the support of Ernst & Young and the underwriters. BDO Limited availed itself of those terms on December 5, 2012.[24]

27. The final amendments to the plan included the following compromises:

(a) excluding Ernst & Young, BDO Limited and the underwriters from any distributions under the plan to which that they would otherwise be entitled to receive as creditors and releasing their claims against Sino-Forest and its subsidiaries;

(b) releasing claims against the underwriters by Sino-Forest and current noteholders;

---

[22] Reasons of Morawetz J. dated December 12, 2012 at paras. 72 and 74, Motion Record at tab 7.

[23] Affidavit of W. Judson Martin sworn November 29, 2012 at para. 165, Motion Record at tab 3N; Thirteenth Report of the Monitor dated November 22, 2012 at paras. 20, 22 and 110, Ernst & Young Record at tab 18.

[24] Reasons of Morawetz J. dated December 12, 2012 at para. 38, Motion Record at tab 7.

(c) restricting litigation claims in respect of notes against Ernst & Young, BDO Limited, the underwriters to a maximum of $150 million;[25]

(d) incorporating a framework for the Ernst & Young settlement and a framework for potential future settlements with other defendants; and

(e) incorporating obligations on Sino-Forest for the preservation and production of documents that are relevant to the class action claims.[26]

28. In essence, the amendments reflected a resolution and compromise among all of Sino-Forest's major creditors and stakeholders and eliminated all major opposition to the plan.[27]

29. The December 3 version of the plan was approved by an overwhelming majority of affected creditors. In total, 98.81% of creditors by the number of creditors, and 99.97% of creditors by the value of their claims, voted in favour of the plan.[28]

30. The Kim Orr Objectors were the sole objectors to the plan.[29]

---

[25] The prior versions of the plan recognized there was a dispute about the validity of the third party defendants' indemnity claims against Sino-Forest. Accordingly, there was a limit of $150 million for note purchaser claims, but only where it was established that there was a valid and enforceable indemnity. There was no limit for note purchaser claims where the indemnity claim was not valid. However, this changed with the compromises in the December 3, 2012 plan. The indemnities as they related to note purchaser claims were deemed valid and enforceable. Given that the auditors and underwriters claimed an indemnity for their entire liability for note purchaser claims, the practical result is that note purchaser claims are limited to $150 million.

[26] Supplemental Report to the Thirteenth Report of the Monitor dated December 4, 2012 at paras. 5 to 10, Ernst & Young Record at tab 19.

[27] Reasons of Morawetz J. dated December 12, 2012 at paras. 3, 4, 8 and 9, Motion Record at tab 7.

[28] Reasons of Morawetz J. dated December 12, 2012 at paras. 10 and 46, Motion Record at tab 7.

[29] Reasons of Morawetz J. dated December 12, 2012 at paras. 3 and 4, Motion Record at tab 7.
Note: British Columbia Investment Management Corporation (bcIMC) is also a plaintiff in the action advanced by two of the Kim Orr Objectors (Amended Statement of Claim, *Northwest & Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, Motion Record at tab 3A). However, bcIMC did not oppose sanction of the plan and did not opt out of the Ontario class proceedings.

Sanction of the Plan

31. Justice Morawetz issued the order sanctioning the plan on December 10, 2012, with reasons following on December 12, 2012. The sanction order provided that the plan and all of its terms and conditions were fair and reasonable.[30]

32. In his reasons, Justice Morawetz found that Sino-Forest had met the test for the sanctioning of the plan. There was strict compliance with statutory requirements and court orders. Sino-Forest had entered insolvency having met the statutory criteria under the *CCAA*. Sino-Forest had regularly filed affidavits and the court-appointed monitor had provided regular reports. The monitor consistently opined that Sino-Forest was acting in good faith and with due-diligence.[31]

33. Justice Morawetz noted that the monitor had considered the possibility of liquidation and bankruptcy alternatives and had determined these were not preferable alternatives to the plan. His Honour accepted that there were no other viable alternatives presented that would be acceptable to Sino-Forest and to the affected creditors.[32]

34. Justice Morawetz found that the plan provided a "fair and reasonable balance" among stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.[33]

---

[30] Order of Morawetz J. dated December 10, 2012, Motion Record at tab 4.

[31] Reasons of Morawetz J. dated December 12, 2012 at para. 60, Motion Record at tab 7.

[32] Reasons of Morawetz J. dated December 12, 2012 at para. 62, Motion Record at tab 7.

[33] Reasons of Morawetz J. dated December 12, 2012 at para. 64, Motion Record at tab 7.

35. His Honour found the plan removed uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provided a path for recovery of the debt owed to unsecured creditors.[34]

36. Justice Morawetz commented on the Ernst & Young settlement and noted that it did not form part of the sanction order. His Honour distinguished between (i) approval of a framework for the Ernst & Young settlement; and (ii) approval of the settlement itself. Justice Morawetz noted that the plan contained provisions that "provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met." One of those conditions was further court approval of the settlement. Accordingly, Justice Morawetz noted that any issues relating to the Ernst & Young settlement, "including fairness, continuing discovery rights …, or opt out rights" would be dealt with at a further court-approval hearing.[35]

37. That further hearing took place on February 4, 2013 with a full evidentiary record. The Kim Orr Objectors made extensive submissions at the approval hearing, including the arguments raised in the within motion.

This Motion and Implementation of the Plan

38. The Sino-Forest plan has been implemented. This implementation occurred with notice to and without opposition from the Kim Orr Objectors.

---

[34] Reasons of Morawetz J. dated December 12, 2012 at para. 65, Motion Record at tab 7.

[35] Reasons of Morawetz J. dated December 12, 2012 at paras. 47-49, Motion Record at tab 7.

39. The sanction order was issued on December 10, 2012. On December 27, 2012, the Kim Orr Objectors served a notice of motion for leave to appeal. They served a revised notice of appeal on December 31, 2012.

40. On January 3, 2013, there was an exchange of correspondence between counsel for Sino-Forest and counsel for the Kim Orr Objectors relating to plan implementation. It was confirmed that the Kim Orr Objectors were not seeking a stay pending appeal of the sanctions order or an expedited appeal. It was also confirmed that the Kim Orr Objectors were not seeking to prevent or stay implementation of the *CCAA* plan.[36]

41. Counsel for Kim Orr Objectors expressed their view that article 11 of the plan (relating to the frameworks for settlements) did not appear connected or integral to the plan. Counsel for Ernst & Young responded to this particular comment by letter of January 3, 2013, noting that others would not necessarily share the Kim Orr Objector's views relating to article 11 of the plan.[37]

42. On January 29, 2013, more than 7 weeks after the sanctions order, the Kim Orr Objectors perfected their motion for leave to appeal.

43. On January 30, 2013, the plan was implemented, completing the restructuring.

---

[36] Letter from R. Staley to W.J. Kim dated January 3, 2013, Ernst & Young Record at tab 30; Letter from W.J. Kim to R. Staley dated January 3, 2013, Ernst & Young Record at tab 31.

[37] Letter from W.J. Kim to R. Staley dated January 3, 2013, Ernst & Young Record at tab 31; Letter from P. Griffin to W.J. Kim dated January 3, 2013, Ernst & Young Record at tab 32.

PART II - ISSUES AND THE LAW

44. The Kim Orr Objectors should be denied leave to appeal from sanction order.

45. Leave to appeal from a *CCAA* order is to be granted "sparingly" and "only where there are serious and arguable grounds that are of real and significant interest to the parties." This Court undertakes a four-part inquiry to determine leave:

(a) whether the point on the proposed appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the proposed appeal is *prima facie* meritorious or frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.[38]

46. These four factors militate against granting leave to appeal in this case:

(a) The issues raised in the proposed appeal are not significant to the *CCAA* practice. The availability of third party releases in a CCCA plan is not a new issue or one for which there is no appellate direction. Third party releases are a frequent feature in Canadian restructurings. In any event, the impugned article 11 in the plan only provides a framework for a third party release of Sino-Forest related claims in the context of settlements. There is no release without further court approval.

(b) The proposed appeal has no support from any major creditor or stakeholder in this multi-billion dollar restructuring.

(c) The proposed appeal has no merit, particularly because it seeks to appeal only a part of a plan that has now been implemented.

(d) The proposed appeal risks undermining the now implemented plan. One part of the plan cannot be excised in these circumstances and thus the effective relief on appeal may be the rejection of the entire plan. This is not possible and even if it were, it would be extremely prejudicial. The plan has been implemented and Sino-Forest has insufficient cash assets to return to insolvency (if even possible) so as to allow the creditors and stakeholders to renegotiate the plan.

---

[38] *Timminco Ltd. (Re)*, 2012 ONCA 552 at para. 2, Class Action Plaintiffs' Authorities at tab 1.

47. The proposed appeal faces a fundamental defect. The order proposed for appeal sanctioned the plan in its entirety and the plan has already been implemented without opposition from the Kim Orr Objectors. In fact, the Kim Orr Objectors made an explicit choice not to expedite the proposed appeal or seek a stay of the sanction order.

48. Plan implementation cannot be undone. An appeal from the sanction of the plan is now moot. The Kim Orr Objectors seek to circumnavigate this problem by proposing an appeal of a 'part' of the plan. This is neither appropriate nor fair. The meeting of creditors did not consider and Justice Morawetz did not sanction portions of the plan. The creditors voted for and His Honour sanctioned an entire plan and it is that decision that the Kim Orr Objectors seek to challenge. Leave to appeal should be denied.

A. The Significance of the Proposed Appeal to *CCAA* Practice

49. The issues in the proposed appeal are not significant to the *CCAA* practice.

50. The Kim Orr Objectors challenge the availability of third party releases in the plan. However, this is not a new issue or one for which there is no appellate direction. Third party releases are a frequent feature in Canadian restructurings and have been for more than a decade. This Court in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* ("*Metcalfe*") recently considered and provided direction on the availability of third party releases under the *CCAA*.[39] The issue does not need to be revisited.

---

[39] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 40 to 105, Class Action Plaintiffs' authorities at tab 2.

51. The Kim Orr Objectors attempt to create novelty in the proposed appeal by arguing that this is the first case to consider whether third party releases in the *CCAA* can eliminate provincial statutory protections guaranteeing investors the right to individually pursue remedies through the class action opt out procedures.[40]

52. This mischaracterizes the issue in this proposed appeal. The plan does not eliminate opt out rights. The plan provides a framework for the release of claims, regardless of the procedures that may be available to pursue such claims. The procedures to pursue claims have no bearing on whether a release of claims is appropriate.

53. The ability to opt out of class proceedings and pursue an individual claim is entirely procedural. It does not create substantive rights. The plaintiff is merely choosing between pursuing claims in individual proceedings or class proceedings.[41] In contrast, a third party release under the *CCAA* involves a release of substantive claims. A release is (or is not) appropriate pursuant to the test that this Court set out in *Metcalfe*, regardless of the procedures that might be used to pursue such claims.

54. Finally, the Kim Orr Objectors are only challenging a framework for third party releases in the context of settlements. They are not challenging a release that has been granted. There is no release without further court approval. The hearing to consider approval of the Ernst & Young settlement and release took place on February 4, 2013. The Kim Orr Objectors made extensive submissions at the approval hearing, including the arguments raised for the proposed appeal. An appeal relating to a framework for

---

[40] Factum of the Appellants at para. 3.

[41] *Bisaillon c. Concordia University*, [2006] 1 S.C.R. 666 at paras. 15-22, Class Action Plaintiffs' authorities at tab 3.

settlements and releases that are subject to further court approval is of little significance to the *CCAA* practice.

B. Significance of the Proposed Appeal to the Sino-Forest Insolvency

55. The proposed appeal is not significant to this insolvency, particularly as the plan has already been implemented. None of the major creditors or stakeholders in Sino-Forest's insolvency support this proposed appeal.

56. The Kim Orr Objectors are alone in challenging the sanctioning of the plan. The Kim Orr Objectors are three former shareholders who held only 1.5% of Sino-Forest's shares, who did not participate in the insolvency and who chose not to file a claim in the *CCAA*.[42] In contrast, there was no opposition to the plan from any other current or former shareholders and no opposition to the plan from any of Sino-Forest's creditors, including the noteholders with debt of $1.8 billion.

57. The only significance of the proposed appeal is that it seeks to undermine a plan that was overwhelmingly supported by all major stakeholders.

C. Merits Of The Proposed Appeal

58. The proposed appeal has no merit, particularly because it seeks to sever only a part of an implemented plan.

59. The order proposed for appeal sanctioned the Sino-Forest plan in its entirety. The plan has been implemented and cannot be undone. Thus, in *Resurgence Asset*

---

[42] The motions judge was advised at the hearing that the objectors held 1.5% of the shares. See Affidavit of Eric J. Adelson at para. 1, Motion Record at tab 2 and the total outstanding shares as referenced in the Thirteenth Report of the Monitor dated November 22, 2012 at para. 9, Ernst & Young Record at tab 18.

Management LLC v. Canadian Airlines Corp., the Alberta Court of Appeal refused leave to appeal from the sanction of a plan because it had already been implemented:

> If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the CCAA supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at a minimum, because the certificate issued by the Registrar cannot be revoked. As stated in Norcan, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.[43]

60. Perhaps to avoid this problem, the Kim Orr Objectors indicate that, if granted leave, they would seek an order to 'sever' article 11 of the plan.

61. The proposed appeal will not succeed.

(a) It would be inappropriate and unfair to sever only one provision out of a comprehensive plan. The Sino-Forest plan was an amalgam of compromises from all creditors and stakeholders.

(b) Justice Morawetz's did not make a "demonstrable error" in the exercise of his discretion to approve the plan.

(i) Amending a sanctioned and implemented plan on appeal

62. The relief on the proposed appeal is to 'sever' one provision out of a comprehensive and now implemented CCAA plan. Such relief is not appropriate.

63. This Court in *Algoma Steel Corp. v. Royal Bank* held that, while the court has jurisdiction to amend a *CCAA* plan, such jurisdiction "is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in

---

[43] *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at para. 30 (C.A.), Class Action Plaintiffs' authorities at tab 4.

merely a technical way." The court ought not interfere with the plan and amend it where to do so would prejudice the interests of the company or the creditors.[44]

64. An amendment severing article 11 of the Sino-Forest plan would not be insignificant or merely technical. Severing article 11 would prejudice Sino-Forest's creditors, particularly Ernst & Young and the other third party defendants. Ernst & Young and the other third party defendants relied on article 11 and in exchange abandoned their claims against subsidiaries and any distributions under the plan. This exchange cannot be undone. As the plan has been implemented, claims against subsidiaries have been released, assets have been conveyed and there is no longer an opportunity for Ernst & Young and the other third party defendants to receive the distributions or levy executions to which they would otherwise have been entitled.

65. The Sino-Forest plan is made up of compromises among creditors and stakeholders, including compromises from Ernst & Young and other third party defendants. Their acceptance of the unfavourable compromises in the plan and support of the plan as a whole were predicated on all of the compromises remaining in the plan. One cannot fairly remove a compromise that is favourable to one party without undoing other compromises in the plan. The plan is the sum of its many compromises, which cannot be dismantled from each other.

---

[44] *Algoma Steel Corp. v. Royal Bank*, [1992] O.J. No. 889 at paras. 7 and 8 (C.A.), Class Action Plaintiffs' authorities at tab 5. See also *Pine Valley Mining Corp.* (Re.), 2007 BCSC 926 at paras. 12-20, Class Action Plaintiffs' authorities at tab 6.

66. As Justice Morawetz noted in his reasons, the plan as a whole (including article 11) was presented to the meeting of creditors, the whole plan was subject to the vote of creditors and the whole plan was the subject of the sanctions motion.[45]

(ii) No demonstrable error

67. The essence of the proposed appeal is the argument that Justice Morawetz erred in finding the plan, including article 11, was fair and reasonable.

68. Justice Morawetz's sanctioning of the plan and the assessment of the plan as fair and reasonable was a discretionary decision by an experienced judge sitting on the commercial list. As such, on any appeal, his decision would be entitled to substantial deference: "in the absence of demonstrable error an appellate court will not interfere". [46]

69. Thus, to succeed in the proposed appeal, the Kim Orr Objectors would have to establish Justice Morawetz made a "demonstrable error". This standard will not be met.

70. Justice Morawetz found that the plan provided a fair and reasonable balance among stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders. Further, His Honour found the plan removed uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provided a path for recovery of the debt owed to unsecured creditors.

---

[45] Reasons of Morawetz J. dated December 12, 2012 at para. 78, Motion Record at tab 7.

[46] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 107, Class Action Plaintiffs' authorities at tab 2.

71. The Kim Orr Objectors go to great lengths to exaggerate the significance of including a framework for settlements. Justice Morawetz recognized that such concerns were premature. His Honour noted that any issues relating to the Ernst & Young settlement, "including fairness, continuing discovery rights ..., or opt out rights" would be dealt with at a further court approval hearing.[47]

72. Justice Morawetz's decision is correct and free from demonstrable error. The framework in article 11 includes limits to ensure fairness. In particular, there will be no third party release for a settlement until there is court approval of the settlement and the release. If that court does not approve the settlement, then the release is not triggered. The plan, including the impugned article 11 framework, is fair and reasonable.

D. The Proposed Appeal Risks Unraveling the Plan

73. The proposed appeal risks unraveling the now implemented plan. It would be incorrect and unfair to excise only one compromise in the plan from the rest. Similarly, the rejection of the entire plan is not possible[48] and even if it were, it would be extremely prejudicial. The plan has been implemented and Sino-Forest has insufficient cash assets to return to insolvency (if even possible) so as to allow the creditors and stakeholders to renegotiate the plan.

---

[47] Reasons of Morawetz J. dated December 12, 2012 at paras. 47-49, Motion Record at tab 7.

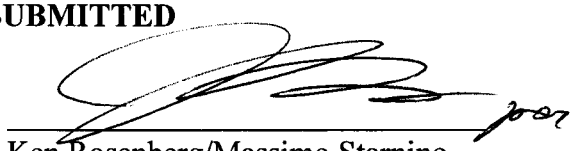
[48] *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at para. 30 (C.A.), Class Action Plaintiffs' authorities at tab 4.

74. The plan has been implemented with notice to and without opposition from the Kim Orr Objectors. There would be significant prejudice to Sino-Forest's stakeholders if this proposed appeal went forward and risked unraveling the entire plan.

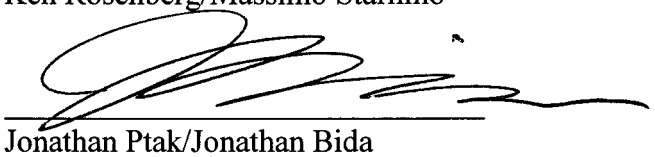
PART III - ADDITIONAL ISSUES

75. There are no additional issues for this motion.

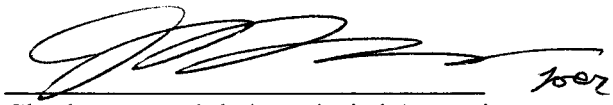
ALL OF WHICH IS RESPECTFULLY SUBMITTED



Ken Rosenberg/Massimo Starnino



Jonathan Ptak/Jonathan Bida



Charles M. Wright/A. Dimitri Lascaris

Lawyers for the Class Action Plaintiffs

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Timminco Ltd. (Re)*, 2012 ONCA 552
2. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
3. *Bisaillon c. Concordia University*, [2006] 1 S.C.R
4. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 (C.A.)
5. *Algoma Steel Corp. v. Royal Bank*, [1992] O.J. No. 889 (C.A.)
6. *Pine Valley Mining Corp.* (Re.), 2007 BCSC 926

SCHEDULE "B" - RELEVANT STATUTES

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

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

[...]

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

Court File No. M42068

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE CLASS ACTION PLAINTIFFS
(Motion for Leave to Appeal from CCAA Plan Sanction Order)

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street South, 35th Floor
Toronto, ON M5V 3H1
Ken Rosenberg (LSUC #: 21102H)
Massimo Starnino (LSUC #: 41048G)
Tel: 416.646.4300 / Fax: 416.646.4301

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Jonathan Ptak (LSUC #45773F)
Jonathan Bida (LSUC #54211D)
Tel: 416.595.2149 / Fax: 416.204.2903

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
Charles M. Wright (LSUC #36599Q)
A. Dimitri Lascaris (LSUC #50074A)
Tel: 519.672.2121 / Fax: 519.672.6065

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