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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable July 30, 2012)

July 24, 2012

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

TO: THE ATTACHED SERVICE LIST AT SCHEDULE "D"

PART I – NATURE OF THE MOTIONS

1. On this motion, the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action (the "Ontario Plaintiffs"), seek on their behalf and on behalf of the plaintiffs in the Quebec Class Action (the "Quebec Plaintiff," together with the Ontario Plaintiffs, the "Class Action Plaintiffs"), disclosure of documents relevant to this CCAA proceeding and the creation of an electronic data room where they and other material stakeholders can access relevant confidential documents.

2. Based upon discussions with Sino-Forest and the Monitor, the Class Action Plaintiffs are prepared to limit their current production request to the following:

(a) the data rooms established by Sino-Forest, to which Sino-Forest has agreed to provide access;

(b) bids submitted in the sale process;

(c) the unconsolidated financial statements of Sino-Forest and its subsidiaries;

(d) the list of specific documents relating to Sino-Forest audits, attached as Schedule "C" hereto;

(e) updates regarding the D&O insurance available, including:

(i) confirmation of the insurer's position regarding the policy limits which apply to the class members' claims, and copies of all coverage letters which relate to this; and

(ii) confirmation of how much of the limit has been eroded by fees to date, and in respect of which fees;

(f) un-redacted copies of the Independent Committee reports and of the schedules thereto ("IC Reports"); and

(g) a list of claims.

3. As set out in the notice of motion, the Class Action Plaintiffs are prepared to receive such documents subject to a reasonable confidentiality agreement.

PART II – OVERVIEW

4. The strong preference of the Class Action Plaintiffs is to be unaffected by these proceedings, but they are not. The Class Actions, which seek billions of dollars in damages, have been stayed; the Class Action Plaintiffs have been required to file proofs of claim in the proceedings to protect their interests and the interests of the Class. Thus far, the Applicant ("Sino-Forest") and other stakeholders have yet to acknowledge that this is not an appropriate case to attempt to cram down any compromise of the Class Action Plaintiffs' claims against third parties. The Monitor proposes a mediation on the basis that a mediation is the most efficient way to achieve a successful restructuring.

5. In the circumstances described above, the Class Action Plaintiffs (particularly the Ontario Plaintiffs, who have been given exclusive carriage of litigation on behalf of bondholders and shareholders by order of Justice Perell dated January 6, 2012), have an interest and obligation to be fully engaged in these proceedings. This requires reasonable access to relevant documents that are within the exclusive possession of the Applicant. Access to these documents is necessary to enable the Class Action Plaintiffs to make reasonably informed judgments as to the value of the class claims, and therefore would facilitate a mediated resolution of those claims.

6. The CCAA temporarily insulates Sino-Forest from attacks by its creditors during the pendency of the stay, but it is not a shroud. To the contrary, the *quid pro quo* for court protection is transparency and full and plain disclosure to material stakeholders and to the court and on a timely basis.

PART III - THE FACTS

Context

The Class Actions

7. On June 2, 2011, allegations emerged that Sino-Forest was a fraud and a ponzi scheme and that its public disclosure contained numerous misrepresentations.[1]

8. The Class Action Plaintiffs commenced class actions in Ontario and Quebec in June and July 2011 alleging misrepresentations, conspiracy and oppression on behalf of purchasers of Sino securities in the period from March 19, 2007 to June 2, 2011. The defendants are Sino-Forest, certain of its current and former directors and officers, its former auditors and the underwriters in various offerings of Sino-Forest's securities.[2]

9. On December 20 and 21, 2011, a motion was heard to determine which plaintiffs should have carriage over the class proceedings in Ontario against Sino-Forest and the other defendants. Justice Perell considered three potential plaintiff groups, each of

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[1] Muddy Waters Report, Exhibit "M" to Affidavit of W. Judson Martin sworn March 30, 2012 ("First Martin Affidavit"), at para. 7, Compendium of the Ad Hoc Committee of Purchasers of the Applicant's Securities, Including the Representative Plaintiffs in the Ontario Class Action ("Compendium"), Tab 1.

[2] Affidavit of Daniel Bach, sworn April 11, 2012, at paras. 4-7, 37-53, 58, ("April 11, 2012 Bach Affidavit"), Compendium, Tab 2.

whom had commenced actions in Ontario. Justice Perell, in deciding the motion, considered a number of factors, including the attributes of the representative plaintiffs, the class definition in each action, the theory of the case, the causes of action and prospects of certification. The court also considered the experience of class counsel in acting on behalf of security holders, the retainer and the legal and forensic resources available to prosecute the claim.

10. In reasons dated January 6, 2012, spanning 332 paragraphs over 52 pages, the court granted carriage of the class action to the Ontario Plaintiffs (the "Ontario Class Action").[3]

11. The court ordered that no other class actions may be commenced in Ontario in respect of the subject matter of the Ontario Class Action without leave.

12. The Ontario Plaintiffs have filed a Fresh as Amended Statement of Claim in the Ontario Class Action (the "Amended Claim"). The Amended Claim incorporates information revealed to the public for the first time by the IC and also incorporates information obtained through class counsel's own ongoing investigation and analysis, which was aided by various experts and by investigators based in Hong Kong.[4]

13. The Amended Claim alleges that Sino-Forest, certain of its officers and directors, its auditors and its underwriters made material misrepresentations regarding the

[3] April 11, 2012 Bach Affidavit at para. 7, Compendium, Tab 2.

[4] April 11, 2012 Bach Affidavit at para. 15, Compendium, Tab 2.

operations and assets of Sino-Forest. The Amended Claim seeks in excess of $9 billion in damages and is brought on behalf of the following Class:

> [A]ll persons and entities, wherever they may reside who acquired Sino-Forest's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons (the "Class" or "Class Members").[5]

14. The Class Period is "the period from and including March 19, 2007 to and including June 2, 2011."[6] "Excluded Persons" are the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of an individual defendant.

The IC Reports

15. Following the release of the Muddy Waters report, Sino-Forest struck an independent committee ("IC") whose mandate was to "thoroughly examine and review the allegations contained in Muddy Waters' report".[7]

16. Allen Chan, in a press release dated June 3, 2011, stated:

> It is important that our independent committee thoroughly address Muddy Waters' allegations, and they will have my full support and those of the management team in doing so. However, let me say clearly that the allegations contained in this report are inaccurate and unfounded. Muddy Waters' shock-jock approach is transparently self-interested and we look forward to providing

[5] April 11, 2012 Bach Affidavit at para. 16, Compendium, Tab 2.

[6] April 11, 2012 Bach Affidavit at para. 17-18, Compendium, Tab 2.

[7] April 11, 2012 Bach Affidavit at para. 73-76, Compendium, Tab 2.

> our investors and other stakeholders with additional information to rebut these allegations.[8]

Ultimately, however, the IC failed to produce sufficient information to rebut the vast majority of the Muddy Waters allegations. The IC also disclosed, among other things, that Sino-Forest did not have plantation rights certificates (i.e. registered title) in respect of the vast majority of its purported timber assets.

17. The IC produced three reports (the "IC Reports").[9] Not surprisingly, the IC Reports are artfully worded. The executive summaries to the IC Reports generally cast the IC's findings in the most positive light. However, a deeper examination of the body of those reports and of their schedules (a number of which have been redacted to withhold what appears to be key information), demonstrates that the IC has been unable to refute many of the allegations levelled by Muddy Waters, notwithstanding months of investigation and the expenditure of $50 million. Many tens of millions have been spent since then to no avail.

18. In attempting to excuse its inability to refute many of the allegations made in the Muddy Waters Report, the IC outlined a number of challenges that it faced. These included:

(a) The Chinese legal regime for forestry, which appears to suffer from among other things, corruption in its dealings with Sino-Forest;

(b) Difficulty in obtaining information from non-compellable third parties; and

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[8] Exhibit "H" to April 11, 2012 Bach Affidavit, Compendium, Tab 3.

[9] First Interim IC Report, Compendium, Tab 11; Second Interim IC Report, Compendium Tab 4; Final IC Report, Compendium Tab 12.

(c) Corporate governance and operational weaknesses, including a lack of full cooperation from certain members of management, operational and administration systems that are generally not sophisticated having regard to the size and complexity of Sino-Forest's business and in relation to North American practices.[10]

19. The IC does not explain how Sino-Forest's board, senior officers, auditors and underwriters had managed to perform their duties (or not) in light of these challenges, which appear to have existed for many years prior to release of the Muddy Waters Report.

Since the Commencement of the Class Actions

20. On August 26, 2011, the Ontario Securities Commission ("OSC") issued a temporary cease trade order prohibiting all trading in the securities of Sino-Forest in Ontario, currently effective to October 15, 2012.[11] The order has been extended a number of times since.

21. On December 12, 2011, Sino-Forest announced that it would not be filing its Q3 2011 financial results on a timely basis and that the board of directors had determined not to make the US $9.775 million interest payment for the 2016 convertible notes that was due on December 15, 2011. Sino-Forest's press release indicates that these omissions constituted a breach of certain covenants under its senior and convertible note indentures.[12]

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[10] Second IC Report, Exhibit "R" to the First Martin Affidavit, Compendium, Tab 4.

[11] April 11, 2012 Bach Affidavit at para. 85, Compendium, Tab 2.

[12] Affidavit of Daniel E.H. Bach, sworn July 11, 2012, Moving Party's Motion Record, Tab 3 ("July 11, 2012 Bach Affidavit") at para. 8.

22. On January 10, 2012, Sino-Forest issued a press release stating that it was continuing its efforts to resolve the outstanding issues involving relationships between Sino-Forest and certain of its counterparties in sales and purchases of timber, among other issues. Sino-Forest "caution[ed] that the Company's historical financial statements and related audit reports should not be relied upon."[13]

23. In March 2012, the OSC released a Report entitled, "Emerging Markets Issuer Review".[14] The purpose of the review was to assess the quality and adequacy of selected emerging market issuers' disclosure and corporate governance practices, as well as the adequacy of the gatekeeper roles played by auditors, underwriters and the exchanges, and to identify any broad policy issues and entity-specific concerns.[15]

24. In its final report, the OSC identifies four principal concerns with the emerging market companies they reviewed:

(i) The level of EM issuer governance and disclosure;

(ii) The adequacy of the audit function for an EM issuer's annual financial statements;

(iii) The adequacy of the due diligence process conducted by underwriters in offerings of securities by EM issuers; and

(iv) The nature of the exchange listing approval process.[16]

25. The language used by the OSC is damning:

> One of our central concerns was the apparent "form over substance" approach to compliance with applicable standards for disclosure, issuer

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[13] July 11, 2012 Bach Affidavit at para. 31, Moving Party's Motion Record, Tab 3.

[14] Ontario Securities Commission Staff Notice 51-719, "Emerging Markets Issuer Review" dated March 20, 2012, Compendium, Tab 5.

[15] *Ibid.* at 2.

[16] *Ibid.* at 8.

> governance, board oversight, audit practices and due diligence practices. In our view, the level of rigor and independent-mindedness applied by boards, auditors and underwriters in doing their important jobs – management oversight, audit, due diligence on offerings – should have been more thorough.[17]

26. The Report specifically addresses the OSC's concern about the auditors' lack of professional scepticism:

> The level of professional scepticism exhibited by auditors when examining the information gathered in the course of their audit was generally lacking. **We were concerned that in some instances the auditor accepted management's representations at face value and did not perform sufficient alternative procedures to independently verify the information they received.** There were also instances where, in our view, auditors should have been uncomfortable based on the work performed and information received -- for example if responses received were unusual or unexpected, we would have expected an auditor to further challenge or examine the response to ensure they understood the situation.[18]

27. On April 5, 2012, Sino-Forest's auditor, Ernst & Young, resigned.[19]

28. On April 17, 2012, Allen Chan, who had previously resigned his position as a director and chief executive officer of Sino-Forest but continued as "Founding Chairman Emeritus", resigned from the company entirely. David Horsely resigned as chief financial officer.[20]

29. On May 9, 2012, Sino-Forest shares were delisted from the Toronto Stock Exchange.

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[17] *Ibid.*

[18] *Ibid.* at p. 13 [emphasis added].

[19] April 11, 2012 Bach Affidavit at para. 83, Compendium, Tab 2.

[20] July 11, 2012 Bach Affidavit at para. 32, Moving Party's Motion Record, Tab 3.

30. On May 22, 2012, the OSC commenced enforcement proceedings against Sino-Forest, Allen Chan, David Horsley and other executives. The statement of allegations alleges that Sino-Forest and its senior executives "engaged in a complex fraudulent scheme to inflate the assets and revenue of Sino-Forest and made materially misleading statements in Sino-Forest's public disclosure record related to its primary business."[21]

31. Among other detailed allegations, it alleges that "Sino-Forest falsified the evidence of ownership for the vast majority of its timber holdings by engaging in a deceitful documentation process. This dishonest process included the fraudulent creation of deceitful Purchase Contracts and Sales Contracts, including key attachments and other supplemental documentation." It alleges that Allen Chan and other management materially misled OSC staff during their investigation.[22] Further proceedings against "gatekeepers" are possible.[23]

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[21] July 11, 2012 Bach Affidavit at para. 34, Moving Party's Motion Record, Tab 3. OSC staff allege that Horsley did not comply with Ontario securities law and acted contrary to the public interest.

[22] July 11, 2012 Bach Affidavit at para. 34, Moving Party's Motion Record, Tab 3.

[23] See a CBC news article dated May 22, 2012, wherein the OSC's Director of Enforcement, Tom Atkinson, notes that the OSC investigation is continuing, "including an examination of the role of the gatekeepers." Compendium, Tab 13.

Lack of Disclosure

32. These proceedings were commenced on March 30, 2012. On that date, the court also issued an Order authorizing Sino-Forest to conduct a sale process pursuant to sale process procedures ("SPP").[24]

33. The purpose of the sale process was to determine whether any parties were willing to purchase substantially all of Sino-Forest's business operations.[25]

34. Pursuant to the SPP, upon receipt of a number of non-binding letters of intent ("LOIs"), Sino-Forest, in consultation with its financial advisor and the Monitor, was required to determine whether any of the LOIs constituted "Qualified Letters of Intent".[26]

35. Sino-Forest determined that none of the LOIs constituted a Qualified Letter of Intent.[27]

36. As a result, on July 10, 2012, Sino-Forest issued a press release announcing the termination of the SPP, and its intention to proceed with the restructuring transaction contemplated by the Restructuring Support Agreement.[28]

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[24] Sale Process Order, Compendium, Tab 6.

[25] Fourth Report of the Monitor, para. 17, Compendium, Tab 7.

[26] *Ibid* at para. 20.

[27] *Ibid* at para. 23.

[28] July 10, 2012 Press Release, Compendium, Tab 8.

37. Sino-Forest has yet to provide major stakeholders, including the Class Action Plaintiffs, with material disclosure in respect of the sale process and other matters impacting Sino-Forest's restructuring effort.[29]

38. On or about May 2, 2012, the Class Action Plaintiffs brought a motion seeking to compel disclosure of information as part of a mediation, but agreed to adjourn their motion pending the Monitor's efforts to arrange for mediation in late July or early August.[30] However, it now appears that a mediation will not take place until September, and Sino-Forest may be intending to file a plan and hold a meeting of creditors as early as August.[31] Moreover, the disclosure proposed by the Monitor and Sino-Forest is inadequate for the purposes of either mediation or to respond to litigation that may arise in these proceedings.

PART IV - ISSUES AND THE LAW

39. The issue on this motion is whether an order should be made directing Sino-Forest to provide the requested information to the Class Action Plaintiffs and possibly to other material stakeholders in these proceedings.

40. This order should be made for at least three reasons:

(a) transparency is critically important to CCAA proceedings;

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[29] July 11, 2012 Bach Affidavit at para. 24, Moving Party's Motion Record, Tab 3.

[30] First Amended Notice of Motion, dated May 2, 2012, Compendium, Tab 9.

[31] July 11, 2012 Bach Affidavit at para. 26, Moving Party's Motion Record, Tab 3.

(b) the Class Action Plaintiffs are material stakeholders in this process as it is presently constituted and there remains the potential that these proceedings could fatally undermine the Class Actions; and

(c) the requested disclosure is relevant to these proceedings, and would facilitate a mediation resolution of the class' claims.

Transparency is critically important in CCAA proceedings

41. Transparency is of key importance in CCAA proceedings; full and plain disclosure is the first step in resolving competing claims and formulating restructuring options. This is especially true in the circumstances of this proceeding, given the numerous compelling allegations of fraud and serious misconduct.

42. The Supreme Court of Canada has repeatedly emphasized that openness and transparency are foundational principles in our legal system.[32] As Justice Fish stated in *Toronto Star Newspapers Ltd. v. Ontario*, "the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."[33]

43. The CCAA is a court-supervised process precisely to ensure that the fundamental principles of fairness, transparency and openness are respected. In *Mecachrome*, Justice Gascon of the Quebec Superior Court emphasized that while CCAA proceedings give a debtor company privileges, there are also corresponding responsibilities:

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[32] See e.g. *Re Vancouver Sun*, 2004 SCC 43; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41; *MacIntyre v. Nova Scotia (Attorney General)*, 1982 CarswellNS 21, Moving Party's Book of Authorities at Tabs 1, 2, 3, respectively.

[33] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 1, Moving Party's Book of Authorities at Tab 4.

> A CCAA process does insulate a debtor company from the attacks of its creditors. However, at the same time, the Act places the process under the Court's supervision. This has meaning and consequences. **The benefits that the Act gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders.**[34]

44. Justice Gascon's comments echo similar sentiments expressed by Justice Romaine in *Calpine Canada Energy Ltd.* where Her Honour criticized the lack of transparency in settlement negotiations:

> What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, **and be seen to be done**, when the process is supervised by the court. While a more open process may not lead to greater value [...] the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness.[35]

45. In *Re Arclin*, Justice Hoy also noted that the CCAA process should be open and transparent to the greatest extent possible.[36]

46. Recently, the Supreme Court of Canada in *Century Services* expressed the CCAA court's mandate this way:

> Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and **all**

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[34] *Re Mecachrome Canada Inc.*, 2009 CarswellQue 9963 (S.C.) at para. 48, Moving Party's Book of Authorities at Tab 5.

[35] *Re Calpine Canada Energy Ltd.*, 2007 CarswellAlta 156 (Q.B.) at para. 31 (emphasis added), Moving Party's Book of Authorities at Tab 6.

[36] *Re Arclin Canada Ltd.*, [2009] O.J. No. 4260 (S.C.J.) at para. 17, Moving Party's Book of Authorities at Tab 7.

> stakeholders are treated as advantageously and fairly as the circumstances permit.[37]

47. The common thread in all of these cases is that a CCAA proceeding is a court-supervised process that requires openness, transparency and accountability. Transparency is of even greater importance in this case, in which the insolvency is brought about by Sino-Forest's misconduct.

48. The Class Action Plaintiffs are attempting to lift the cloud of secrecy that hovers over these proceedings. Lopsided information is not in the best interests of all material stakeholders and does not further the remedial objectives of the CCAA.

49. A "data room" or bank of relevant shared information, subject to appropriate undertakings to maintain confidentiality, is needed to permit stakeholders to appreciate the full landscape of this complex, multi-party proceeding. The stakeholders cannot reach a meaningful settlement or compromise without having reviewed adequate relevant information, and the public and the court cannot have confidence in any outcome achieved without access to such information.

50. Disclosure serves to enhance the fairness and reasonableness of any settlement. Indeed, if and when this court is called upon to approve a plan, Sino-Forest and the Monitor will need to satisfy this court that they have "proceeded in a manner

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[37] *Century Services v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 70 (emphasis added), Moving Party's Book of Authorities at Tab 8.

where the transparency, credibility and fairness of the process is beyond reproach."[38] They cannot do so while key stakeholders are being denied full and plain disclosure.

The Class Action Plaintiffs are material stakeholders

51. Courts supervising CCAA proceedings have recognized that they have discretion to require disclosure of information. The jurisprudence suggests that access to confidential data room information should only be provided to genuine stakeholders who come to the court with clean hands.[39] The Class Action Plaintiffs meet both of these requirements.

52. The Class Action Plaintiffs have legitimate, thoroughly researched, supportable claims against Sino-Forest and its auditors and underwriters seeking billions of dollars in damages. These claims are neither speculative nor remote, and the Class Action Plaintiffs have demonstrated credible and reliable evidence to support their allegations throughout this proceeding.[40] The OSC's emerging markets issuer report, the resignation of Sino-Forest's auditors, the qualifications attached to information provided in this process, and the fact that the OSC has commenced enforcement proceedings against Sino-Forest and several of its current and former officers and directors lends even more credibility to the Class Actions.

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[38] *Re Mecachrome Canada Inc.*, 2009 CarswellQue 9963 (S.C.) at para. 33, Moving Party's Book of Authorities at Tab 5.

[39] *Re AbitibiBowater Inc.*, 2009 CarswellQue 11821 (S.C.), Moving Party's Book of Authorities at Tab 9.

[40] See e.g. the affidavits of Alan T. Mak, Steven Gowan Chandler, Carol-Ann Tjon-Pian-Gi and Dennis Deng, all sworn in support of the Ontario Plaintiffs' Leave Motion, Compendium, Tab 10.

53. The materiality of the Class Action Plaintiffs' interests in these proceedings is clear when one considers that the animating principles of the *CCAA* reflect society's interest in efficient economic markets.[41] In the rather unusual circumstances of this case, that means the goal of liquidating assets must be measured against the public interest in ensuring the efficiency of Canadian capital and securities markets through the accountability of its participants.

54. Even putting aside the broader public interest objectives of the CCAA, one can hardly question the materiality of the Class Action Plaintiffs' interests in this proceedings when one considers the fact that they have already been affected by the CCAA proceeding, and may yet be the subject of future litigation in the CCAA. Notably:

(a) The Class Actions have been stayed and the schedule set by order of Justice Perell has been rendered moot;

(b) The claims of the Class Action Plaintiffs against Sino-Forest have been made subject to the claims procedure;

(c) The Monitor has expressed the view that that the most efficient way to achieve a successful restructuring in this matter is to provide an opportunity to the parties to achieve a mediated resolution to all Claims; and

(d) Sino-Forest and its stakeholders have yet to acknowledge that this is not an appropriate case to consider an involuntary release of the Class Action Plaintiffs' claims against the non-debtor defendants in the Class Actions.

55. In these circumstances, the Class Action Plaintiffs are obviously materially affected by these proceedings. They require access to the requested information so

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[41] *Century Services v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 70, where Justice Deschamps (for a majority of the Supreme Court of Canada) held that the purpose of the *CCAA* "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets." Moving Party's Book of Authorities at Tab 8.

that they can meaningfully participate in any mediation, and are able to make full and informed submissions to this court on, among other things, the reasonableness of any settlement, the *bona fides* of these proceedings, the propriety of the stay, whether the stay should be continued, whether it should be extended, the fairness and reasonableness of any CCAA plan, and any alternative restructuring options.

The Disclosure Sought is Necessary, Appropriate and Not Burdensome

56. Based upon the discussions had with Sino-Forest and the Monitor, the Class Action Plaintiffs are willing to limit their production request to the following additional documents:

(a) The data rooms established by Sino-Forest, to which Sino-Forest has agreed to provide access;

(b) bids submitted in the sale process;

(c) the unconsolidated financial statements of Sino-Forest and its subsidiaries;

(d) the list of specific Documents relating to Sino-Forest audits, attached as Schedule "C" hereto;

(e) updates regarding the D&O insurance available, including:

(i) confirmation of the insurer's position regarding the policy limits which apply to the class members' claims, and copies of all coverage letters which relate to this; and

(ii) confirmation of how much of the limit has been eroded by fees to date, and in respect of which fees;

(f) un-redacted copies of the IC reports; and

(g) a list of claims.

57. The requested information is relevant to the proposed mediation, which is the most efficient way to achieve a successful restructuring in this matter as it provides an opportunity to the parties to achieve a resolution to all claims. It will also shed light on the merits of these proceedings, including whether a future plan, particularly one that includes global releases of third party claims, is fair and reasonable.

(a) General

58. Generally, the sought after information is relevant in that it is necessary to the approval of any settlement that the Class Action Plaintiffs may propose in these proceedings, and may also be relevant to the approval of any CCAA Plan that is presented.

59. The Monitor says that a mediation of the Class Action Plaintiffs' claims is the most efficient way to achieve a successful restructuring. However, any settlement in principle that might be achieved through the mediation will need to be approved within the class proceedings framework. For that purpose, the court must be convinced that the settlement is fair, reasonable, and in the best interests of the class. In coming to this determination, the court will consider, among other things, the amount and nature of discovery evidence as well as information as to the dynamic of the negotiations of the settlement.[43]

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[43] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) paras 71 and 72, Moving Party's Book of Authorities at Tab 14.

60. The court must have before it sufficient evidence to assess the fairness of the settlement:

> 15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.
>
> 16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.[44]

61. Justice Winkler similarly noted these requirements in *Parsons v. Canadian Red Cross Society*:

> 70 Sharpe J. stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390 (note) (S.C.C.)], (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation. [emphasis added]
>
> 72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the

> court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.[45]

62. Class counsel have not had the benefit of examinations for discovery, or even the documents or evidence that would ordinarily be produced as part of the motions for certification or leave to assert the Part XXIII.1 cause of action under the *OSA*. In order for class counsel to fulfill their fiduciary duty to their class members, they must be and have to be reasonably informed. Moreover, even if the parties were able to come to a settlement, the judge on the settlement approval motion requires "sufficient information to permit the court to exercise its function of independent approval."[46] That information should be produced now, not later.

63. Similar concerns apply in the context of the approval of a settlement in the CCAA proceedings or in approving a CCAA plan.

64. In approving any settlement, the CCAA court must be satisfied that the transaction is fair and reasonable, beneficial to the debtor and other stakeholders generally, and that it is consistent with the purpose and spirit of the CCAA.[47] This court will further want assurances that that the value of the settlement is proportionate to the

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[45] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) paras. 71 and 72, Moving Party's Book of Authorities at Tab 14.

[46] *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 1598 (Gen.Div.) at para. 16, Moving Party's Book of Authorities at Tab 15.

[47] *Robertson v. ProQuest Information and Learning Company,* 2011 ONSC 1647 (S.C.J.) at para. 22, Moving Party's Book of Authorities at Tab 13.

litigation risk.[48] Such assurances cannot be provided to the court in the absence of meaningful disclosure of the facts underlying the claims of the Class Action Plaintiffs.

65. In determining whether a plan is fair and reasonable, the court may look to the following factors, set out by Justice Pepall in *Canwest Global Communications*:

> **21** In assessing whether a proposed plan is fair and reasonable, considerations include the following:
>
> (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
> (b) **what creditors would have received on bankruptcy or liquidation as compared to the plan;**
> (c) **alternatives available to the plan and bankruptcy**;
> (d) oppression of the rights of creditors;
> (e) **unfairness to shareholders;** and
> (f) **the public interest.**[49]

66. Accordingly, the disclosure sought by the Class Action Plaintiffs on the motion may be critical to assessing the fairness of a CCAA plan, particularly if it incorporates global third party releases.

(b) Bids

67. The bids submitted in the sales process reflect the market's assessment of the value of Sino-Forest's assets. As such they are relevant to the reasonableness of Sino-Forest's historical financial statements, the value of what is sought to be preserved through this process, the balancing exercise that a court must undertake as part of a

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[48] *Robertson v. ProQuest Information and Learning Company,* 2011 ONSC 1647 (S.C.J.) at para. 33, Moving Party's Book of Authorities at Tab 13.

[49] *Re Canwest Global Communications*, 2010 ONSC 4209 (S.C.J.), Moving Party's Book of Authorities at Tab 16 [emphasis added].

plan containing third party releases, and whether alternatives exist to the plan being proposed.

(c) Unconsolidated Financial Statements

68. The unconsolidated financial statements are relevant to the bona fides of Sino-Forest's business. Their existence and accuracy (or lack thereof) speak to the reasonableness of treating Sino-Forest and its subsidiaries on a consolidated basis, and the diligence exercised by Sino-Forest's gatekeepers, including its board and its auditors.

(d) Audit Information

69. The question of whether the auditors have met the requisite standard of care in their audits of Sino-Forest or were wilfully blind to Sino-Forest's misrepresentations is central to the class claims against the auditors. In order to properly assess the value of these claims for the purpose of any mediation or to assess the fairness and reasonableness of any CCAA plan incorporating a global release, the Class Action Plaintiffs require access to the specific information listed at Schedule "C".[50] An inability to access these documents directly affects the Class Action Plaintiffs' ability to negotiate and recommend a settlement to class members and this court. The information sought is also relevant to the court's assessment of the fairness and reasonableness of any CCAA plan incorporating releases of such claims.

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[50] See *OPSEU v. Clark*, 2006 CanLII 20839 (Ont. C.A.) at paras. 23 and 24, Moving Party's Book of Authorities at Tab 17.

(e) Insurance

70. Information that reflects the insurance position of Sino-Forest, its current and former directors and officers, and its subsidiaries will be critical to any potential settlement.[51] The practical reality is that the amount of available insurance will inform all of the parties' approach to settlement. It is in the best interest of all parties to share information pertaining to the ongoing value of applicable insurance policies as a way of moving settlement negotiations forward.[52]

(f) Un-redacted IC Reports

71. The IC reports have been redacted for public release. For instance, in the redacted version of the Second Interim Report of the IC released to the public, the IC conceals the identities of various authorized intermediaries ("AI"). There is mention of AI interviews and supplier interviews that are available for Board review only. This information is relevant to assessing the statements and conclusions made in the reports.

72. The redacted information is not privileged in that the IC reports were not prepared for the predominant purpose of litigation. Rather, the IC was created prior to

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[51] See *Seaway Trust Co. v. Markle*, [1992] O.J. No. 1602 (Gen. Div.) at p.4, Moving Party's Book of Authorities at Tab 20, where the court held that "the examiner is entitled to disclosure in full of the terms of any agreement, understanding, notice or position taken, written or oral, that may affect the availability of the insurance proceeds but no more than that."

[52] See *Sharma v. Timminco*, 2010 ONSC 790 (CanLII), Moving Party's Book of Authorities at Tab 19, where the court emphasized at para. 19 that "requiring disclosure of insurance information encourages the parties to make practical or pragmatic decisions about the likelihood of recovery on the claims, which, in turn, may influence their decisions about prosecuting or attempting to settle the litigation."

the commencement of any regulatory proceeding or securities class actions against Sino-Forest or its directors and officers. The IC's predominant purpose was to protect the reputation of Sino-Forest in the face of the Muddy Waters allegations.[53]

73. In any event, when Sino-Forest put the reports into evidence, it waived any privilege that attached to the underlying investigative process.[54] The Supreme Court of Canada has stated that a party cannot "pick and choose" disclosure and then claim the remaining undisclosed parts are privileged. Disclosure of part of a document is waiver over the whole.[55]

(g) List of Claims

74. Under s.23(1)(ii)(C) of the *CCAA*, the Monitor has an obligation to prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner. This information is relevant to determining interests in the proceedings and facilitating negotiations in a furtherance of a CCAA plan.

75. Now that a claims process has been run, the Monitor should update this information.

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[53] See *Silver v. Imax* (6 May 2008), Court File No. CV-06-3257-00, Endorsement of van Rensburg J (Ont. Sup. Ct.) at para. 27-28, Moving Party's Book of Authorities at Tab 12. In *Silver*, Justice van Rensburg held that all documents reviewed, all reports created and specific recommendations made in the course of a company investigation were producible and not subject to litigation privilege.

[54] See *Pearson v. Inco*, 2008 CanLII 46701 (S.C.J.) at para. 16, Moving Party's Book of Authorities at Tab 18.

[55] *R. v. Stone*, [1999] 2 S.C.R. 290 at paras. 98, Moving Party's Book of Authorities at Tab 10; *Browne (Litigation Guardian of) v. Lavery*, [2002] O.J. No. 564 at paras. 18-20 (S.C.J.), Moving Party's Book of Authorities at Tab 11.

PART V - ORDER REQUESTED

76. The Class Action Plaintiffs request that the court direct Sino-Forest to produce the requested documents forthwith, subject to execution of a confidentially agreement in the form appended to the Class Action Plaintiffs' Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 24, 2012

Kirk Baert

Max Starnino

Jonathan Bida

SCHEDULE "A" - AUTHORITIES

1. *Re Vancouver Sun*, 2004 SCC 43.
2. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.
3. *MacIntyre v. Nova Scotia (Attorney General)*, 1982 CarswellNS 21.
4. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41.
5. *Re Mecachrome Canada Inc.*, 2009 CarswellQue 9963 (S.C.)
6. *Re Calpine Canada Energy Ltd.*, 2007 CarswellAlta 156 (Q.B.)
7. *Re Arclin Canada Ltd.,* [2009] O.J. No. 4260 (S.C.J.)
8. *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, [2010] 3 S.C.R. 379.
9. *Re AbitibiBowater Inc.*, 2009 CarswellQue 11821 (S.C.).
10. *R. v. Stone*, [1999] 2 S.C.R. 290.
11. *Browne (Litigation Guardian of) v. Lavery*, [2002] O.J. No. 564 (S.C.J.).
12. *Silver v. Imax* (6 May 2008), Court File No. CV-06-3257-00, Endorsement of van Rensburg J (Ont. Sup. Ct.)
13. *Robertson v. ProQuest Information and Learning Company,* 2011 ONSC 1647 (S.C.J.)
14. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
15. *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 1598 (Gen.Div.)
16. *Re Canwest Global Communications*, 2010 ONSC 4209 (S.C.J.)
17. *OPSEU v. Clark*, 2006 CanLII 20839 (Ont. C.A.)
18. *Pearson v. Inco*, 2008 CanLII 46701 (Ont. S.C.J.)
19. *Sharma v. Timminco*, 2010 ONSC 790 (S.C.J.)
20. *Seaway Trust Co. v. Markle*, [1992] O.J. No. 1602 (Gen. Div.)

SCHEDULE "B"

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

Monitors

Duties and functions

23. (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed

information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable
(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

SCHEDULE "C" – AUDIT DOCUMENTS

For each of the fiscal years 2006 through 2010, inclusive, for each audited entity:

1. Information request list for each year's audit, detailing the documents to be provided by the company to the auditor.

2. The Year End Communication or Report of the Auditor to the Audit Committee from BDO or E&Y, including:

    a) Audit scope and findings report

    b) Significant matters discussed with management

    c) Management's analysis and response

    d) Significant judgments and estimates

    e) Audit risks encountered/identified and audit response

    f) Summary of corrected and uncorrected financial statement misstatements

3. Communications between the auditors and the company regarding any disagreements with management

4. The unadjusted (pre-audit) trial balance.

5. Proposed Adjustments presented by the auditor following each year's audit (listing adjusting journal entries, analysis and explanations).

6. List of related parties provided to the auditor each year.

7. Correspondence with the auditor concerning related parties and related party transactions.

8. Accounting policy manuals or documented accounting policies of the company for each year.

9. Process and procedure manuals of the company for each year, particularly pertaining to the sales cycle and purchase/acquisition cycle.

10. Ledgers and subledgers for the following accounts:

    a) Cash
    b) Sales
    c) Timber Inventory

d) Cost of Goods Sold

11. Sale transaction documents provided to (requested by) the auditors in respect of timber transactions:

    a) Sales order (or purchase order from customer) or Sales contract/agreement
    b) Invoice
    c) Proof of collection

12. Purchase transaction documents provided to (requested by) the auditors in respect of timber transactions:

    a) Purchase order (or contract/agreement)
    b) Invoice
    c) Proof of payment

13. Transaction documents provided to auditor in respect of Sino's "set-off" agreements on timber transactions.

14. Correspondence with auditors regarding confirmation of transactions with authorized intermediaries and suppliers (or authorization provided to Auditors to confirm directly with the AIs and Suppliers).

15. Documentation concerning the auditors' procedures to independently examine timber assets, including on-site physical inspection, inventory counts, examination of transaction documentation, etc.

16. Internal worksheets, analyses and calculations supporting the "related party transactions" disclosure in each year's financial statements (e.g., see Note 23 of the 2009 financial statements).

17. Any additional information provided to/requested by the auditor regarding related party transactions.

18. Drafts and correspondence regarding the preparation of the Cash Flow Statement.

19. Invoices for all services rendered by BDO and E&Y (not limited to the 2006 – 2010 period. Should be for all services rendered, regardless of time).

20. Minutes of all meetings in which the auditors and members of management participated.

21. BDO and E&Y presentations to the board of directors and management.

SCHEDULE "D" – SERVICE LIST

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 OR ARRANGEMENT OF SINO-FOREST CORPORATION

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION
(Motion Returnable July 30, 2012)

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