

*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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**FACTUM OF FTI CONSULTING CANADA INC.,**  
**in its capacity as Monitor**

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**I. OVERVIEW**

1. FTI Consulting Canada Inc., in its capacity as monitor (the “**Monitor**”), appointed pursuant to the initial order issued by this Honourable Court on March 30, 2012 (the “**Initial Order**”), has prepared this factum in order to:

- (a) summarize the motions sought to be returned before the Court on May 8, 2012;
- (b) summarize the positions of the parties with respect to these motions, as the Monitor understands them;
- (c) provide the Monitor’s views with respect to these motions; and
- (d) summarize the materials relating to each of the motions.

2. In brief, there are four motion proceedings sought to be returned on May 8, 2012:
  - (a) Sino-Forest Corporation's motion concerning the scope of the stays of proceedings under the Initial Order (the "CCAA Stay") ;
  - (b) The Ontario Plaintiffs' (as defined below) motion concerning the impact of the CCAA Stay on the Pöyry Settlement Motion (as defined below);
  - (c) The Ontario Plaintiffs' motion for other relief on a variety of issues; and,
  - (d) Sino-Forest Corporation's motion for approval of a claims procedure.
3. As set out below, it is the Monitor's view that only the motions described in paragraphs 2(a) and 2(b) above should proceed on May 8, 2012.
4. The Monitor and all parties have engaged in extensive discussions in an attempt to resolve matters and narrow issues prior to the hearing of the motions. However, as of the date of writing, significant unresolved issues remain, as described below. This said, the Monitor understands that dialogue will continue until this matter is heard.
5. For ease of reference, a list of the materials that the Monitor understands have been filed in relation to the motions described above is attached as Schedule "A".

## II. SINO-FOREST'S SCOPE OF STAY MOTION

### A. Relief Sought

6. Sino-Forest Corporation (“SFC”) has brought a motion returnable May 8, 2012, for an Order for the advice and direction of this Court confirming that the stays of proceedings under the Initial Order (the “**CCAA Stay**”) apply to all defendants in the litigation to which SFC is a defendant (the “**Class Actions**”), including the action styled as Trustees of the Labourers’ Pension Fund of Central and Eastern Canada, et al. (the “**Ontario Plaintiffs**”) versus Sino-Forest Corporation et al., bearing Court File No. CV-11-43153-00CP (the “**Ontario Class Action**”), or, in the alternative, extending the scope of the CCAA stay to all proceedings against all defendants in the Class Actions.

### B. Positions of Parties

#### (i) Underwriters

7. 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. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Bank of America Securities LLC) are defendants in the Ontario Class Action and other proceedings (the “**Underwriters**”). The claims against the Underwriters are founded in alleged misrepresentations made by SFC in its equity and note offerings in the primary market through prospectuses and offering memoranda. The

Underwriters have asserted claims for indemnity against SFC in relation to the claims made against them in the Class Actions.

8. It is the position of the Underwriters that the CCAA Stay already extends to the Underwriters or should be ordered to extend to the Underwriters. The Underwriters take the position that proceedings in the Class Actions against them are prohibited under the Initial Order as proceedings either in respect of SFC or affecting the Business (as defined in the Initial Order) or the Property (as defined in the Initial Order).

9. In the alternative, the Underwriters take the position that the CCAA Stay should be extended to them because this is needed to permit SFC a respite from litigation during its restructuring; to ensure that the Ontario Plaintiffs will not have an advantage over other claimants while the company attempts to restructure; and, to prevent the Underwriters from being prejudiced if the Class Actions proceed against them while they are stayed against SFC and its directors, since the claims and defences are intertwined both from a legal and an evidentiary point of view.

10. As is set out in more detail below, if this Court rules that the CCAA Stay does not prohibit or should be lifted to permit the Ontario Plaintiffs to seek relief in relation to the Pöyry Settlement (as defined below), the Underwriters take the further position that the CCAA Stay should not apply in any way to Pöyry and that any cross claims or other proceedings against Pöyry in relation to the Class Actions may be commenced and continued.

(ii) Ernst & Young

11. Ernst & Young LLP (“**Ernst & Young**”) is a defendant in the Class Actions, on the basis that it allegedly failed in its duties as auditor in relation to the misrepresentations allegedly made by SFC.

12. In common with the Underwriters, it is the position of Ernst & Young that the CCAA Stay already extends to Ernst & Young in connection with the Class Action or should be ordered to extend to Ernst & Young. The grounds for Ernst & Young’s positions concerning the CCAA Stay are similar to those set out by the Underwriters.

(iii) BDO

13. BDO Limited (“**BDO**”) is a defendant in the Class Actions, on the basis that it allegedly failed in its duties as auditor in relation to the misrepresentations allegedly made by SFC.

14. In common with the Underwriters and Ernst & Young, it is the position of BDO that the CCAA Stay already extends to BDO or should be ordered to extend to BDO. The grounds for BDO’s position concerning the extent of the CCAA Stay are similar to those put forward on behalf of the Underwriters and Ernst & Young.

(iv) Directors

15. The members of the Board of Directors of SFC support the position that the CCAA Stay already extends the Underwriters, Ernst & Young and BDO (together, the “**Third Party Defendants**”) or should be ordered to extend to the Third Party Defendants.

(v) Ontario Plaintiffs

16. As indicated above, the Ontario Plaintiffs are the plaintiffs in the Ontario Class Action. The Ontario Plaintiffs take the position that the CCAA Stay does not apply and should not be extended to the Third Party Defendants. As is set out in more detail below, it is the position of the Ontario Plaintiffs that whatever the extent of the CCAA Stay, it should not apply to prevent the Ontario Plaintiffs from taking steps in the Ontario Class Action and a related action in Quebec to implement a settlement of the relevant proceedings (the “**Pöyry Settlement**”) with the defendant Pöyry (Beijing) Consulting Company Limited (“**Pöyry**”).

(vi) Pöyry

17. Pöyry is a defendant in the Class Actions and is party to a settlement agreement with the Ontario Plaintiffs. Pöyry’s position concerning the overall extent of the CCAA Stay as it pertains to the Third Party Defendants is not clear. As is described below, Pöyry supports the position of the Ontario Plaintiffs concerning the Pöyry Settlement Motion.

**C. Monitor’s View**

18. It is the Monitor’s view that it is not in the interest of stakeholders to permit management and advisor time to be diverted from the restructuring and sales process to the demands of the Class Actions. It is the Monitor’s further view that it would be both unfair and prejudicial to permit the Class Actions to proceed against the Third Party Defendants while they are stayed against the company and the directors. As is set out in greater detail below, it is also the Monitor’s view that, with the exception of limited relief permitting the commencement of notification of a fairness hearing concerning the Pöyry Settlement, the stay ought not to be lifted

to permit the Ontario Plaintiffs or any other litigants in the Class Actions to proceed with any other step.

19. In the event that this Honourable Court determines that the CCAA Stay extends to all defendants in the Class Actions or makes an order extending the CCAA Stay in this way, it is the Monitor's view that arrangements should be made for the tolling of certain limitation periods in relation to the Class Actions. The Monitor is of the view that these tolling arrangements should maintain the status quo with regard to limitation periods, as it existed on date of the Initial Order, and prevent the parties to the Class Actions from being prejudiced by the lapse of time during the pendency of the CCAA Stay. The Monitor is of the further view that such tolling arrangements should include the tolling of the period to bring claims under s. 138.14 of the *Securities Act* (Ontario) and of the applicable limitation periods for the commencement of cross claims amongst the Class Action defendants.

### **III. ONTARIO PLAINTIFFS MOTION RE PÖYRY SETTLEMENT**

#### **A. Relief Sought**

20. In a notice of motion dated April 10, 2012 (the "**Original Notice of Motion**"), the Ontario Plaintiffs sought a variety of relief, including the advice and direction of this Court concerning the impact of the CCAA Stay on a motion in the Ontario Class Action seeking certain relief in relation to the Pöyry Settlement (the "**Pöyry Settlement Motion**"). Subject to this Court's determination concerning the impact of the CCAA Stay, the Pöyry Settlement Motion is scheduled for May 17, 2012 before the Honourable Justice Perell, the judge supervising the Ontario Class Action.

21. If this Court permits, the relief to be sought before Justice Perell on May 17<sup>th</sup>, 2012 on the Pöyry Settlement Motion, includes the following:

- (a) Certifying the Ontario Class Action as a class proceeding for the purposes of the Pöyry Settlement;
- (b) Defining the class of claimants;
- (c) The defining the common issues in relation to Pöyry;
- (d) Appointing the Ontario Plaintiffs as representatives of the class of claimants;
- (e) Requiring SFC to deliver shareholder information as of June 2, 2011;
- (f) Approving and directing the dissemination and publication of notices in relation to a settlement approval hearing concerning the Pöyry Settlement; and,
- (g) Granting leave to bring the Pöyry Settlement Motion in advance of the overall certification motion and motion for leave under the *Securities Act* (Ontario).

22. The Ontario Plaintiffs take the position that permitting the Pöyry Settlement to be heard will narrow the issues in the Ontario Class Action; will not have a material impact on SFC; and, will not prejudice the Third Party Defendants.

23. The Ontario Plaintiffs have advised that on the hearing of the Pöyry Settlement Motion before Justice Perell (if this Court permits) they will seek an order barring future claims against Pöyry with regard to the matters raised in the Ontario Class Action.



**B. Positions of Parties**

(i) SFC

24. The company takes no position on the impact of the CCAA Stays on the Pöyry Settlement Motion, provided that SFC is not affected by relief obtained on the Pöyry Settlement Motion

(ii) Underwriters

25. The Underwriters oppose any determination that the CCAA Stay does not apply to the Pöyry Settlement Motion or that it should be lifted to permit the Pöyry Settlement Motion. The Underwriters support their position on the basis that there is a heavy onus on parties seeking relief from a stay; that class actions stayed against companies and directors ought not to be permitted to proceed against other defendants as this would be unfair and a waste of judicial resources; that given existing tolling arrangements the stay of the Pöyry Settlement Motion will not prejudice the Ontario Plaintiffs; and, that the balance of prejudice and the dangers of proceeding on a partial or an unbalanced evidentiary basis favour staying the Pöyry Settlement Motion.

(iii) Ernst & Young

26. In common with the Underwriters, Ernst & Young takes the position that the Pöyry Settlement Motion is or should be stayed in accordance with the CCAA Stay as it exists or as it ought to be extended if necessary. The grounds for Ernst & Young's position concerning the

effect of the CCAA Stay on the Pöyry Settlement Motion are similar to those put forward on behalf of the Underwriters. In addition, the Monitor understands that Ernst & Young is opposed to leave being granted with respect to the Pöyry Settlement Motion since it may result in information asymmetries as between the Ontario Plaintiffs and the Third Party Defendants and changes the status quo in that regard.

(iv) BDO

27. In common with the Underwriters and Ernst & Young it is the position of BDO that the Pöyry Settlement Motion ought not to be permitted to proceed. The grounds for BDO's position concerning the effect of the CCAA Stay on the Pöyry Motion are similar to those put forward on behalf of the Underwriters and Ernst & Young.

(v) Directors

28. The Directors take the position that the Pöyry Settlement Motion ought not to proceed.

(vi) Pöyry

29. Pöyry supports the position of the Ontario Plaintiffs concerning the impact of the CCAA Stay on the Pöyry Settlement Motion and asserts that it has an agreement with the Ontario Plaintiffs that it seeks to have made effective by the Court supervising the Ontario Class Action

**C. Monitor's View**

30. It is the Monitor's view that proceeding with the Pöyry Settlement Motion at present may change the status quo. In particular, the Monitor is concerned that certifying a class for the purposes of the Pöyry Settlement may have an effect on the claims procedure to be proposed by

the company. The Monitor is also concerned that seeking claims bar relief with respect to Pöyry is, at present, inconsistent with a resolution of the claims asserted in the class actions as part of this restructuring.

31. It is the Monitor's view that the Motion should only proceed to the extent required to permit an order for the dissemination and publication of the notices required in relation to a fairness hearing for the settlement. The Monitor is of the further view that the balance of the relief sought in relation to the Pöyry Settlement should be adjourned to a date following the expiry of the CCAA Stay.

#### **IV. ONTARIO PLAINTIFFS' OTHER RELIEF**

32. In the Original Notice of Motion, the Ontario Plaintiffs sought a wide range of other relief, including an order terminating the CCAA proceedings and appointing a receiver.

33. It is the Monitor's general understanding in these proceedings that the Court has requested that the Monitor play a gatekeeping function with respect to motions. In this regard, at the last attendances before this Court, the motions scheduled to be heard on May 8<sup>th</sup> were the SFC's "scope of stay motion" and the Ontario Plaintiffs' motion concerning the impact of the CCAA Stay on the Pöyry Settlement Motion.

34. On May 2<sup>nd</sup>, 2012, the Ontario Plaintiffs delivered a First Amended Notice of Motion, amending the relief sought in the Original Notice of Motion. In addition the Ontario Plaintiffs delivered a notice of return of motion seeking to make all of the relief sought in the First Amended Notice of Motion returnable on May 8<sup>th</sup>. This relief includes orders permitting the hearing of the overall certification motion for the Ontario Class Action; permitting the hearing of

the leave motion contemplated by s.138.14 of the *Securities Act* (Ontario) in relation to the Ontario Class Proceeding; appointing the Ontario Plaintiffs as representatives for the purposes of SFC's proceedings under the CCAA; relating to the Restructuring Support Agreement and transactions involving the Applicant's assets; directing a mediation; directing the creation of a data room; relating to fees; and, addressing certain other matters (the "**Other Relief**").

**A. Monitor's Position**

35. By letter dated May 2<sup>nd</sup>, 2012, counsel for the Monitor advised the Service List of the Monitor's view that, with the exception of the relief sought from this Court in relation to the Pöyry Settlement Motion, the Other Relief sought by the Ontario Plaintiffs in the First Amended Notice of Motion was not properly before the Court. Subsequently, counsel for the Ontario Plaintiffs responded to this position with their own letter of May 3<sup>rd</sup>, 2012.

36. The Monitor maintains the position that, with the exception of the relief sought in relation to the Pöyry Settlement Motion, none of the Other Relief sought by the Ontario Plaintiffs should be before this Honourable Court on May 8<sup>th</sup>, 2012. Pending the resolution of the scope of stay and other matters, the balance of the relief sought by the Ontario Plaintiffs is premature. The Monitor understands that both the Third Party Defendants and the Ad Hoc Committee of Bondholders support this position.

**V. COMPANY'S MOTION FOR APPROVAL OF A CLAIMS PROCEDURE ORDER**

37. By notice of motion dated April 30, 2012, SFC has sought this Court's approval of a claims procedure. The company scheduled the claims procedure motion with the concurrence of

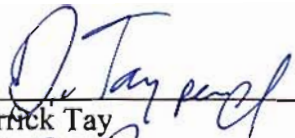
the Monitor at a time when it appeared possible that the scope of stay and Pöyry stay motions would be resolved consensually.


38. Considerable discussions have occurred with all parties following the service of the company's claims procedure motion. At present, the Monitor is of the view that it is premature to proceed with the claims procedure motion and suggests that this motion be adjourned to the first available date for hearing.


39. In this regard, the Monitor notes that it is critical to maintain an expedited schedule for a claims procedure in this matter since the restructuring itself must be accomplished on very tight timelines.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 7, 2012

  
Derrick Tay

  
Clifton P. Prophet

  
Jennifer Stam

Schedule "A"

**Sino-Forest Corporation - Court File No. CV-12-9667-00-CL**

**Summary of materials for Justice Morawetz for matters returnable on May 8, 2012:**

**A. Motion regarding Scope of Stay**

**1. Applicant:**

- a. Motion Record (Motion for Directions Regarding Scope of Stay, Returnable May 8, 2012) – April 23, 2012 (Bennett Jones LLP);
- b. Factum of the Applicant – May 3, 2012 (Bennett Jones LLP);
- c. Brief of Authorities of the Applicant – May 3, 2012 (Bennett Jones LLP);

**2. Ontario Plaintiffs:**

- a. Responding Motion Record of the Ad Hoc Committee of Purchasers of the Applicant's Securities (motion returnable May 8, 2012) (Koskie Minsky LLP);
- b. Factum of the Ad Hoc Committee of Purchasers of the Applicant's Securities (motion returnable May 8, 2012) – May 4, 2012 (Paliare Roland Rosenberg Rothstein LLP);
- c. Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities (motion returnable May 8, 2012) – May 4, 2012 (Paliare Roland Rosenberg Rothstein LLP);

**3. Underwriters:**

- a. Responding Motion Record of the Underwriters named in Class Actions - April 23, 2012 (Torys LLP);
- b. Factum of the Underwriters named in Class Actions – May 3, 2012 (Torys LLP);
- c. Book of Authorities of the Underwriters named in Class Actions – May 3, 2012 (Torys LLP);

**4. BDO:**

- a. Responding Motion Record of BDO Limited - April 23, 2012 (Affleck Greene McMurtry LLP);
- b. Factum of BDO Limited – May 4, 2012 (Affleck Greene McMurtry LLP);

**5. E&Y:**

- a. Responding Motion Record of Ernst & Young LLP - April 24, 2012 (Lenczner Slaght Royce Smith Griffin LLP);
- b. Responding Factum of Ernst & Young LLP – May 4, 2012 (Lenczner Slaght Royce Smith Griffin LLP);
- c. Responding Factum of Ernst & Young LLP – April 19, 2012 (Lenczner Slaght Royce Smith Griffin LLP);
- d. Responding Brief of Ernst & Young LLP – April 19, 2012 (Lenczner Slaght Royce Smith Griffin LLP);

**6. Board of Directors:**

- a. Factum of the Board of Directors of Sino-Forest Corporation – May 3, 2012 (Osler, Hoskin & Harcourt LLP);
- b. Book of Authorities of the Board of Directors of Sino-Forest Corporation – May 3, 2012 (Osler, Hoskin & Harcourt LLP);

**7. Monitor:**

- a. Factum of the Monitor - May 7, 2012 (Gowling Lafleur Henderson LLP);

**B. Motion regarding Claims Procedure Order**

**1. Applicant:**

- a. Motion Record (Motion Approving Claims Procedure Order, Returnable May 8, 2012) – April 30, 2012 (Bennett Jones LLP);

**2. Monitor:**

- a. Second Report of the Monitor - April 30, 2012 (Gowling Lafleur Henderson LLP);

**3. Ontario Plaintiffs:**

- a. Responding Motion Record of the Ad Hoc Committee of Purchasers of the Applicant's Securities (motion approving claims procedure order, returnable May 8, 2012) (Koskie Minsky LLP);

**C. Motion of the Ontario Plaintiffs**

**1. Ontario Plaintiffs:**

- a. Notice of Return of Motion and First Amended Notice of Motion of the ad hoc committee of purchasers of the Applicant's securities - May 2, 2012 (Paliare Roland Rosenberg Rothstein LLP);
- b. Paliare Roland Rosenberg Rothstein LLP responding letter addressed to Gowling Lafleur Henderson LLP dated May 3, 2012 with respect to PRRR's notice of return of motion and First Amended Notice of Motion of the ad hoc committee of purchasers of the Applicant's securities served on May 2, 2012;

**2. Monitor:**

- a. Gowling Lafleur Henderson LLP letter addressed to Paliare Roland Rosenberg Rothstein LLP with respect to their notice of return of motion and First Amended Notice of Motion of the ad hoc committee of purchasers of the Applicant's securities served on May 2, 2012;



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

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

**FACTUM OF FTI CONSULTING CANADA INC.,**  
in its capacity as Monitor

**GOWLING LAFLEUR HENDERSON LLP**  
Barristers and Solicitors  
1 First Canadian Place  
100 King Street West, Suite 1600  
Toronto ON M5X 1G5

**Derrick Tay (LSUC No. 21152A)**  
Tel: (416) 369-7330 / Fax: (416) 862-7661  
Email: [derrick.tay@gowlings.com](mailto:derrick.tay@gowlings.com)

**Jennifer Stam (LSUC No. 46735J)**  
Tel: (416) 862-5697 / Fax: (416) 862-7661  
Email: [jennifer.stam@gowlings.com](mailto:jennifer.stam@gowlings.com)

Lawyers for the Proposed Monitor,  
FTI Consulting Canada Inc.