

Court of Appeal File No.: M42399
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

**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 of Appeal File No.: M42399
Court File No. CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Plaintiffs

- and -

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

Defendants

**FACTUM OF THE UNDERWRITERS
(Responding to Motion for Leave to Appeal from
E&Y Settlement Approval Order and Representation Order)**

May 17, 2013

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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)

PART I - OVERVIEW

1. The Underwriters¹ oppose the consolidated motion brought by the Objectors² for leave to appeal from the orders of Justice Morawetz: (i) approving the settlement (the “E&Y Settlement”) between Ernst & Young LLP (“E&Y”) and the Plaintiffs (the “E&Y Settlement Order”); and (ii) dismissing the Objectors’ motion for appointment as representatives of the investors in Sino-Forest Corporation (“Sino-Forest”) who object to the E&Y Settlement (the “Representation Order”), each made on March 20, 2013.

2. Leave to appeal is granted sparingly in *Companies’ Creditors Arrangement Act*³ proceedings, and the Objectors have failed by a wide margin to satisfy any of the parts of the test for leave. The Objectors’ motion for leave to appeal should be dismissed.

PART II - FACTS

3. The Underwriters adopt the facts as set out in the Factum of E&Y (Motion for Leave to Appeal from Settlement Approval Order), filed on May 17, 2013 (the “E&Y Factum”). The following supplementary facts explain the particular interests of the Underwriters in this motion.

¹ The Underwriters 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.

² The Objectors are Invesco Canada Ltd., Northwest & Ethical Investment L.P. and Comite Syndical National de Retraite Batirente Inc., Matrix Asset Management Inc., Gestion Ferique and Montrusco Bolton Investments Inc. The Objectors are represented by Kim Orr Barristers P.C.

³ R.S.C. 1985, c. C-36.

The Underwriters

4. The Underwriters are among the defendants in proposed class action lawsuits that have been filed in both the United States and Canada pertaining to certain equity and debt offerings by Sino-Forest. The proposed class proceedings include the Ontario class action proceeding (the “Ontario Class Action”) consolidated pursuant to Justice Perell’s January 6, 2012 Order.⁴

The E&Y Settlement and Production Protocol

5. A key issue at any trial in respect of the Ontario Class Action will be the proportionate liability of E&Y. Under the E&Y Settlement, the Plaintiffs are barred from claiming or collecting from the non-settling defendants (including the Underwriters) and damages caused by E&Y. Therefore, the Underwriters’ discovery rights and related rights to obtain evidence from E&Y for this purpose are of critical importance to the Underwriters. The Production Protocol (as defined below) is intended to preserve those important rights.

6. At the motion below, the Underwriters supported the approval of the E&Y Settlement on the condition that the E&Y Settlement Order was made at the same time as the order (the “Production Protocol Order”) approving a production protocol (the “Production Protocol”), which codify the Underwriters’ important procedural rights, including discovery rights regarding E&Y. Absent the Production Protocol, certain of the Underwriters’ discovery and other rights would have been compromised by the E&Y Settlement.

⁴ Affidavit of Judson W. Martin, sworn November 29, 2012 at paras. 45-46, Ernst & Young Motion Record, Tab 10, pp. 254-255.

7. The Underwriters' factum (the "Underwriters' Factum Below") filed in connection with the motion below included an express reservation of rights, which provided that in the event that the E&Y Settlement Order, in the form approved by the Underwriters, and the Production Protocol Order, substantially in the form attached to the Underwriters' Factum Below, are not issued at the same time, the Underwriters reserve the right to take an alternate position, including opposing approval of the E&Y Settlement (the "Underwriters' Reservation of Rights").⁵

PART III – ISSUE AND LAW

8. The sole issue on this motion is whether the Objectors should be granted leave to appeal from the E&Y Settlement Order and the Representation Order.

9. Leave to appeal should not be granted. The Underwriters agree with and adopt the submissions as set out in the E&Y Factum opposing the Objectors' consolidated motion for leave to appeal.

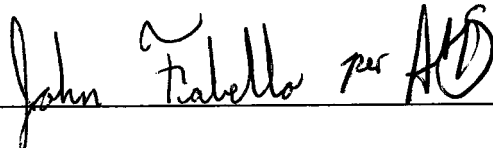
10. Further to the Underwriters' Reservation of Rights, the Underwriters reserve their right to file additional materials and make submissions in the event that leave is granted.

⁵ Factum of the Underwriters filed in connection with the Ernst & Young LLP Settlement Approval and Certification Motion (Returnable February 4, 2013), Schedule "A".

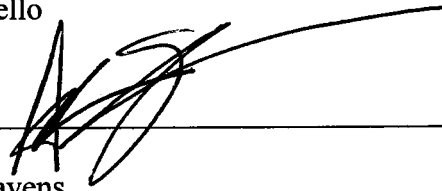
PART IV – ORDER REQUESTED

11. For the reasons set out above, the Underwriters request that the Objectors' consolidated motion for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



John Fabello



Adam Slavens

Lawyers for the Defendants, 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)

TAB A

SCHEDULE "A"

UNDERWRITERS' FACTUM BELOW

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN
CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO,
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POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E.
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DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC.,
MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON
PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL
LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of
America Securities LLC)

Defendants

**FACTUM OF THE UNDERWRITERS
Ernst & Young LLP Settlement Approval and Certification Motion
(Returnable February 4, 2013)**

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PART I - OVERVIEW

1. On the condition that the Settlement Approval Order, in the form approved by the Underwriters¹, and an Order substantially in the form attached as Schedule “B” to this Factum (the “Production Protocol”) are issued at the same time, the Underwriters do not oppose the approval of the proposed settlement between the Plaintiffs and the Defendant, Ernst & Young LLP (“E&Y”) (the “Proposed Settlement”). Should either of those Orders not be issued then the Underwriters reserve the right to take an alternate position, including opposing approval of the settlement.
2. On November 29, 2012, the Plaintiffs settled their claim against E&Y. Pursuant to the terms of the Proposed Settlement, the action will be dismissed against E&Y and certain of the Underwriters’ discovery and other rights will be extinguished. The Production Protocol preserves these rights. The Production Protocol is generally consistent with (a) the rights of non-settling defendants generally, as set out in relevant case law and (b) rights the Underwriters obtained pursuant to the settlement approved between the Plaintiffs and the Pöyry (Beijing) Consulting Company Limited and other Pöyry entities (“Pöyry”).
3. It would be manifestly unfair for the court to approve the Proposed Settlement without at the same time issuing the Production Protocol. Approval of the Proposed Settlement absent the Production Protocol would deprive the Underwriters of their ability to obtain the evidence necessary to establish a key issue at trial – namely, the liability of E&Y, which under the Proposed Settlement the Plaintiffs are barred from claiming or collecting from the non-settling defendants (including the Underwriters).

PART II - FACTS

A. The Proposed Settlement and Production Protocol

4. E&Y began auditing the financial statements of Sino-Forest Corporation (“Sino”) in 2007. It is available to the Underwriters’ to argue at trial that E&Y was negligent in performing

¹ Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated.

its audits and related work, thereby making E&Y liable for the misrepresentation claims made pursuant to the statutory causes of action in the *Securities Act*.

5. From the Underwriters' perspective, the relevant aspects of the Proposed Settlement are as follows:

- (a) it contemplates that the action will be dismissed against E&Y;
- (b) it releases E&Y and provides that any recovery by the Plaintiffs at trial shall exclude the amount for which E&Y may be found liable; and
- (c) it contemplates that the Underwriters' discovery rights and other rights to obtain evidence for trial will be extinguished.

6. The Underwriters' discovery rights and other rights to obtain evidence are of critical importance in order to prove E&Y's liability at trial. The Production Protocol is intended to preserve those important rights. In particular, the Production Protocol provides for the following:

- (a) E&Y will preserve all documents in its power, possession or control which are relevant to the action ("Documents");
- (b) E&Y will make the Documents available for inspection and, upon request, produce copies of the Documents;
- (c) on a motion to this Court, the Underwriters may seek to enforce any pre-existing or subsequently acquired rights to obtain evidence from E&Y; and
- (d) the Underwriters may obtain, on a motion to the Court, Orders for:
 - (1) documentary discovery and an affidavit of documents, to the extent that such rights are not otherwise provided for in the Production Protocol;
 - (2) oral discovery of a representative of E&Y, the transcript of which may be read in at trial;
 - (3) leave to serve a request to admit on E&Y in respect of factual matters; and
 - (4) an undertaking to produce an E&Y representative to testify at trial, with such witness to be subject to cross-examination by counsel for the non-settling defendants.

B. Similarities of Proposed Settlement to Pöyry Settlement

7. Shortly prior to the commencement of the *CCAA* proceeding, the Plaintiffs settled their claim with Pöyry, a forestry valuator that prepared expert forestry valuation reports for Sino during the class period (the “Pöyry Settlement”). The settlement was approved in Ontario on September 25, 2012.

Affidavit of Charles Wright sworn January 10, 2013 (“Wright Affidavit”), para. 51, Plaintiffs’ Motion Record, p. 48

8. Like the Proposed Settlement, the Pöyry Settlement contemplated that the action would be dismissed against Pöyry and released Pöyry from any further claims. As a condition to its non-opposition to the Pöyry Settlement, the Underwriters negotiated a similar bundle of procedural rights to those which are set out in the E&Y Production Protocol, including the right to documentary discovery, oral discovery, leave to serve a request to admit and production of a Pöyry representative to testify at trial. Unlike the Production Protocol, however, each of these procedural rights under the Pöyry Settlement are absolute, in the sense that the Underwriters are not required to obtain a further court order in order to exercise these rights.

Pöyry Settlement Approval Order, Exhibit “Y” to Wright Affidavit, Plaintiffs’ Motion Record, pp. 697-711

PART III - LAW AND ARGUMENT

9. On the condition that the Settlement Approval Order, in the form approved by the Underwriters, and an Order substantially in the form of the Production Protocol are issued at the same time, the Underwriters do not oppose the approval of the Proposed Settlement. The Production Protocol preserves the Underwriters’ important procedural rights, including discovery rights, which would otherwise be available to them under the *Rules of Civil Procedure*. The Production Protocol is consistent with both the rights obtained by the Underwriters pursuant to the Pöyry Settlement and with a number of recent cases that have considered this issue. If the Proposed Settlement is approved absent the Production Protocol, the settlement would be manifestly unfair to the Underwriters and will prevent the fair and proper adjudication of this matter in the event there is a trial.

A. Test on Settlement Approval Motions

10. Before approving a class action settlement, the court must be satisfied that in all the circumstances the settlement is fair, reasonable and in the best interests of all those affected by it. The court must balance all the relevant interests, including those of the plaintiffs, the settling defendants and the non-settling defendants.

Dabbs v. Sun Life Assurance Company of Canada (1998), 40 O.R. (3d) 429 at para. 30 (S.C.J.), aff'd (1998), 41 O.R. (3d) 1997 (C.A.), Brief of Authorities of the Underwriters, Tab 1

Airia Brands Inc. v. Air Canada, 2011 ONSC 6286 at para. 62, Brief of Authorities of the Underwriters, Tab 2

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 at para. 69, Brief of Authorities of the Underwriters, Tab 3

11. Approving a settlement with only one or some parties cannot create an unfairness for non-settling defendants.

Lau v. Bayview Landmark Inc. [2006] O.J. No. 600 (SCJ) at paras. 13 – 21, Brief of Authorities of the Underwriters, Tab 4

B. The Production Protocol is Necessary to Protect the Underwriters' Rights

12. Partial settlements should not deprive non-settling defendants of their right to obtain evidence to establish an element of proof essential to a just resolution of the action. A key issue in this case, should it proceed to trial, is the liability of E&Y. The Proposed Settlement – absent the Production Protocol – would deprive the Underwriters of their extant procedural rights to discover representatives of E&Y, to seek to obtain evidence by way of admission, and to cross-examine witnesses at trial. Absent these procedural rights, the Underwriters will be prejudiced in respect of proving the liability of E&Y, and the Court will be constrained in its ability to adjudicate this key issue.

Ontario New Home Warranty Program v. Chevron Chemical Co., *supra* at para. 66 per Wood J.A., *British Columbia Ferry Corp. v. T&N plc*, [1996] 4 W.W.R. 161 at 175-176 (B.C.C.A.)

13. In order to address the procedural objections of non-settling defendants, a number of recent class action settlement approval orders have essentially been conditional on the right of

the non-settling defendants to obtain, on a subsequent motion to the court, a bundle of procedural rights, including: (a) documentary discovery and an affidavit of documents, (b) oral discovery, (c) leave to serve a request to admit and (d) an undertaking to produce a representative to testify at trial. Absent any of these procedural rights, a settlement should not be approved by the court.

Ontario New Home Warranty Program v. Chevron Chemical Co.
(1999), 46 O.R. (3d) 130 at para. 71, 77, Brief of Authorities of the Underwriters, Tab 3


Airia Brands Inc. v. Air Canada, 2011 ONSC 6286 at para. 55, 58, 60, 62, Brief of Authorities of the Underwriters, Tab 2

14. The Production Protocol is consistent with the recent settlement approvals referred to in paragraph 13 above. The Underwriters are not seeking to obtain through the Production Protocol any novel procedural rights – they are simply seeking to preserve the rights necessary (and otherwise available to them) to obtain evidence to establish a key issue which is essential to the fair resolution of the action.


PART IV - CONCLUSION

15. For the reasons set out above, on the condition that the Settlement Approval Order, in the form approved by the Underwriters, and an Order substantially in the form of the Production Protocol are issued at the same time, the Underwriters do not oppose the approval of the proposed settlement between the Plaintiffs and E&Y. Should either of those Orders not be issued, the Underwriters reserve the right to take an alternate position, including opposing approval of the settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



John Fabello



Andrew Gray



Rebecca L. Wise

Lawyers for the Defendants, 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)

SCHEDULE "A"

AUTHORITIES

1. *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (S.C.J.), aff'd (1998), 41 O.R. (3d) 1997 (C.A.)
2. *Airia Brands Inc. v. Air Canada*, 2011 ONSC 6286
3. *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.)
4. *Lau v. Bayview Landmark Inc.*, [2006] O.J. No. 600 (S.C.J.)

SCHEDULE "B"
PRODUCTION PROTOCOL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) MONDAY, THE
)
MR. JUSTICE MORAWETZ) 4TH DAY OF FEBRUARY, 2013

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE AND
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Court File No.: CV-11-431153-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
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WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY
LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC.,
DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC.,
SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH
CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS
CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH,
PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of
America Securities LLC)**

Defendants

ORDER

THIS MOTION made by the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the plaintiffs in the action commenced against Sino-Forest Corporation ("Sino-Forest") in the Ontario Superior Court of Justice, bearing (Toronto) Court File No. CV-11-431153-00CP (the "Ontario Plaintiffs" and the "Ontario Class Action", respectively), in their own and proposed representative capacities, for an order providing for the preservation and production of certain documents in the possession of Ernst & Young LLP.

WHEREAS the Ontario Plaintiffs and Ernst & Young (as defined in the Plan) entered into Minutes of Settlement dated November 29, 2012.

AND WHEREAS this Honourable Court issued the Sanction Order containing the framework and providing for the implementation of the Ernst & Young Settlement and the Ernst & Young Release, upon further notice and approval;

AND WHEREAS the Supervising CCAA Judge in this proceeding was designated on December 13, 2012 by Regional Senior Justice Then to hear this motion for settlement approval pursuant to both the CCAA and the *Class Proceedings Act, 1992*;

AND WHEREAS this Honourable Court approved the form of notice and the plan for distribution of the notice to any Person with an Ernst & Young Claim, as defined in the Plan, of this settlement approval motion by Order dated December 21, 2012 (the "Notice Order");

AND WHEREAS this Honourable Court approved the Ernst & Young Settlement and the Ernst & Young Release, as defined in the Plan, including the bar orders sought by Order dated February 4, 2013 (the "Settlement Order");

AND WHEREAS paragraph 12(c) of the Settlement Order provides that none of the plaintiffs in the Class Actions, as defined in the Settlement Order, shall be permitted to claim from any of the other defendants that portion of any damages that corresponds with the liability of Ernst & Young, proven at trial or otherwise, that is the subject of the Ernst & Young Settlement.

AND ON READING the Ontario Plaintiffs' Motion Record, including the affidavits of Charles Wright, counsel to the plaintiffs, and the exhibits thereto, Joe Redshaw and the exhibits thereto, Frank C. Torchio and the exhibits thereto, Serge Kalloghlian and exhibits thereto, and the affidavit of Mike P. Dean and the exhibits thereto, and the affidavit of Judson Martin and the exhibits thereto and the Responding Motion Record of the Objectors to this motion (Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc, Gestion Férique and Montrusco Bolton Investments) including the affidavits of Eric J. Adelson and exhibits thereto, Daniel Simard and exhibits thereto and Tanya J. Jemec and the exhibits thereto, and on reading the Fourteenth and Fifteenth Reports of FTI Consulting Canada Inc., in its capacity as Monitor of the Applicants (in such capacity, the "Monitor") dated January 22 and 28, 2013 including any notices of objection received, and on hearing the submissions of counsel for the Ontario Plaintiffs, Ernst & Young LLP, the Ad Hoc Committee of Sino-Forest Noteholders and the Applicant, the Underwriters, BDO Limited, the Monitor and those other parties present, no one appearing for any other party

although duly served as appears from the affidavit of service of ● sworn ●, 2013 and such other notice as required by the Notice Order,

1. **THIS COURT ORDERS** that the time for service and manner of service of the Notice of Motion and the Motion Record and the Fourteenth and Fifteenth Reports of the Monitor on any Person are, respectively, hereby abridged and validated, and any further service thereof is hereby dispensed with so that this Motion is properly returnable today in both proceedings set out in the styles of cause hereof.
2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this order shall have the meanings attributed to those terms in the Plan.
3. **THIS COURT ORDERS** that for the purposes of paragraph 12(c) in the Settlement Order made by this Honourable Court on today's date and commencing on the Ernst & Young Settlement Date, Ernst & Young and all other parties to the Ontario Action shall be bound by the terms of the Production Protocol attached to this Order as **Appendix "A"**.
4. **THIS COURT ORDERS** that the document production as set out in the Production Protocol shall proceed pursuant to an agreement between the parties to the Ontario Class Action and Ernst & Young in respect of a discovery plan pursuant to Rule 29.1.03(1) of the *Rules of Civil Procedure*, or failing such agreement, a further order of the court in respect of a discovery plan.
5. **THIS COURT ORDERS** that the non-settling parties may, on a motion to this Honourable Court, seek to enforce any pre-existing or subsequently acquired rights to obtain evidence from Ernst & Young and may obtain on motion to this Honourable Court, as against Ernst & Young as a non-party, subject to Ernst & Young's ability to resist a further order of the Court, Orders for:
 - a. documentary discovery and an affidavit of documents in accordance with the Rules of Civil Procedure from Ernst & Young LLP, to the extent it is not provided for in the Order or Appendix "A" thereto;

- b. oral discovery of a representative of Ernst & Young LLP, the transcript of which may be read in at trial;
- c. leave to serve a request to admit on Ernst & Young LLP in respect of factual matters; and
- d. an undertaking to produce an Ernst & Young LLP representative to testify at trial, with such witness to be subject to cross-examination by counsel for the non-settling defendants.

APPENDIX "A"
PRODUCTION PROTOCOL

This document production protocol is intended to describe the process for obtaining production of documents from Ernst & Young LLP ("Ernst & Young") in Ontario Superior Court of Justice, Court File No. CV-11-431153CP ("the Action"). The protocol assumes that the Ernst & Young Settlement and Ernst & Young Release will have been finally approved by the courts, including the bar orders sought, and that confirmation to the Monitor in writing by Ernst & Young of the fulfillment of all conditions precedent in the Ernst & Young Settlement and the fulfillment by the Ontario Class Action Plaintiffs of all of their obligations thereunder, and, where necessary, upon the recognition of these matters by appropriate courts in other jurisdictions all shall have occurred and/or been completed.

Ernst & Young has confirmed that to the best of its knowledge documents related to Sino-Forest Corporation and its subsidiaries ("Sino-Forest") in its power, possession and control have been preserved in response to a document preservation memorandum dated June 9, 2011 and will continue to be preserved until the Action has been finally resolved.

After all appeals or times to appeal from certification of the Action against the non-settling defendants have been exhausted, following the close of pleadings, following production of documents by the then parties (not including Ernst & Young) to the Action and following delivery of affidavits of documents by the parties (not including Ernst & Young) to the Action, and in accordance with the timetable set out in the Discovery Plan (referenced in paragraph 3 below):

- 1) Ernst & Young will identify and produce the documents relevant to the Action, as determined by reference to the pleadings in the Action, such relevance to be determined as if Ernst & Young were still a party to the Action, subject to the principles of proportionality and reasonableness and subject to privilege and other lawful confidentiality claims (the "Documents");

- 2) The Documents referred to in paragraph (1) hereof shall be made available to the parties for inspection upon request and, if requested, copies shall be produced to the parties to the Action;
- 3) Ernst & Young shall be consulted about the proposed schedule for production and discovery with respect to productions pursuant to this protocol before the finalization of the Discovery Plan pursuant to Rules 29.1.03(1) of the *Rules of Civil Procedure*. Ernst & Young shall thereafter make the Documents available for inspection in accordance with the established schedule. Any dispute with respect to the schedule as it affects Ernst & Young may be referred to the Ontario Superior Court pursuant to paragraph 9 hereof;
- 4) Ernst & Young shall be provided notice of all motions affecting Ernst & Young, including but not limited to any motion in respect of this Production Protocol;
- 5) The parties to the Action will be permitted to access the aforementioned Documents for an agreed duration during which any such party may request copies of them;
- 6) Ernst & Young will arrange for copies of the Documents to be made and thereafter provided to, not only the party to the Action requesting copies of the documents, but also every other party to the Action. In the case of documents that are now in electronic form, production of such documents will be by electronic copies;
- 7) Any party to the Action that requests copies of documents pursuant to paragraphs 2 and 5 hereof agrees to pay all reasonable expenses relating to the copying or scanning of the requested documents incurred by Ernst & Young (including the costs incurred as a result of Ernst & Young retaining a third party vendor for such copying or scanning) for both the party requesting the documents and all other parties to the Action who are entitled to receive a duplicate copy, subject to the rights of the parties to the Action to recover the same from the other parties to the Action as costs in the Action. Nothing in this paragraph is intended to prevent the

parties to the Action from allocating the costs referred to among themselves in any way they agree is appropriate;

- 8) All other costs of Ernst & Young relating to the preparation for inspection and the production of documents shall be in the discretion of the Court pursuant to rule 30.10 of the *Rules of Civil Procedure* and s. 131 of the *Courts of Justice Act* and Ernst & Young or any party to the Action may refer the issue of the responsibility for payment of such costs to the Court pursuant to paragraph 9 hereof;
- 9) The parties to the Action and Ernst & Young may seek the assistance of the Ontario Superior Court, in case managing or resolving any issues that may arise during implementation of the abovementioned document production protocol, including the application and/or waiver of privilege, privilege generally, claims of confidentiality claims, the determination of relevance and the responsibility for costs incurred by Ernst & Young referred to in paragraph 8 hereof;
- 10) The deemed undertaking, as described in Rule 30.1 of the *Rules of Civil Procedure* shall apply to all documents made available for inspection or produced by Ernst & Young;
- 11) Nothing in this document protocol waives or prejudices the rights that the parties to the Action and Ernst & Young might have pursuant to Rules 30.10, 31.10 and 53.07 of the *Rules of Civil Procedure* and section 131 of the *Courts of Justice Act (Ontario)*.

THE TRUSTEES OF THE LABOURERS'
PENSION FUND OF CENTRAL AND
EASTERN CANADA et al.

v.

SINO-FOREST CORPORATION et al.

Plaintiffs

Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

FACTUM OF THE UNDERWRITERS
Ernst & Young LLP Settlement Approval
and Certification Motion
(returnable February 4, 2013)

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**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 of Appeal File No.: M42399

COURT OF APPEAL FOR ONTARIO

**RESPONDING FACTUM OF THE
UNDERWRITERS**

**(Responding to Motion for Leave to Appeal from
E&Y Settlement Approval Order and
Representation Order)**

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Placements Canada Inc., Credit Suisse Securities
(USA) LLC and Merrill Lynch, Pierce, Fenner &
Smith Incorporated (successor by merger to Banc of
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