

**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 UNDERWRITERS
NAMED IN CLASS ACTIONS
(motion for a Sanction Order,
returnable December 7 and 10, 2012)**

TORYS LLP
79 Wellington Street West
Suite 300, TD Centre
Toronto, Ontario M5K 1N2

Fax: 416.865.7380

David Bish (LSUC#: 41629A)
Tel: 416.865.7353
Email : dbish@torys.com

Adam M. Slavens (LSUC#: 54433J)
Tel: 416.865.7333
Email : aslavens@torys.com

Lawyers for the Underwriters
named in Class Actions

**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 UNDERWRITERS
NAMED IN CLASS ACTIONS
(motion for a Sanction Order,
returnable December 7 and 10, 2012)**

1. This brief factum is filed by the Underwriters¹ in connection with the motion of Sino-Forest Corporation (“SFC”) for an order (the “Sanction Order”), among other things, sanctioning the Plan of Compromise and Reorganization pursuant to the *Companies’ Creditors Arrangement Act* and the *Canada Business Corporations Act* concerning, affecting and involving SFC (the “Plan”).²
2. The Underwriters are among the Third Party Defendants in the Class Actions, with enforceable rights of indemnification against SFC and its subsidiaries in respect of claims in the Class Actions made by certain Noteholders (i.e., the “Noteholder Class Action Claims”).
3. The Underwriters consent to the granting of the Sanction Order in respect of the Plan. This position is based on, among other things, the following features of the Plan and, where applicable, corresponding provisions in the Sanction Order:

The “Cap” on Noteholder Class Action Claims

- (a) The Plan includes a “cap” on the liability that Underwriters and other Third Party Defendants have in the Class Actions in respect of the Noteholder Class Action Claims.

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. (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 Banc of America Securities LLC.

² Unless otherwise defined, capitalized terms used herein have the meanings attributed to those terms in the Plan.

- (b) The collective aggregate amount of all rights and claims asserted or that may be asserted against the Third Party Defendants in respect of any Noteholder Class Action Claims for which any there is a valid and enforceable Class Action Indemnity Claim against SFC shall not exceed, in the aggregate, the Indemnified Noteholder Class Action Limit of \$150 million, and all Persons shall be permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, from seeking to enforce any liability in respect of the Indemnified Noteholder Class Action Claims that exceeds the Indemnified Noteholder Class Action Limit.
- (c) The “cap” is also subject to downward adjustment. In the event that any Third Party Defendant is found to be liable for or agrees to a settlement in respect of a Noteholder Class Action Claim (other than a Noteholder Class Action Claim for fraud or criminal conduct) and amounts are paid by or on behalf of the applicable Third Party Defendant, then the amount of the Indemnified Noteholder Class Action Limit applicable to the remaining Third Party Defendants will be reduced.
- (d) To ensure the “cap” is effective, it is agreed that the Claims of the Underwriters for indemnification in respect of any Noteholder Class Action Claims (other than Noteholder Class Action Claims against the Underwriters for fraud or criminal conduct) shall, for purposes of the Plan, be deemed to be valid and enforceable Class Action Indemnity Claims against SFC, and that: (i) any and all indemnification rights and entitlements of Ernst & Young at common law and any and all indemnification agreements between Ernst & Young and SFC shall be deemed to be valid and enforceable in accordance with their terms for the purpose of determining whether the Claims of Ernst & Young for indemnification in respect of Noteholder Class Action Claims are valid and enforceable; and (ii) any and all indemnification rights and entitlements of BDO Limited at common law and any and all indemnification agreements between BDO Limited and SFC shall be deemed to be valid and enforceable in accordance with their terms for the purpose of determining whether the Claims of BDO Limited for indemnification in respect of Noteholder Class Action

Claims are valid and enforceable. In addition, all indemnification rights and entitlements of the Named Third Party Defendants at common law and any and all indemnification agreements between the Named Third Party Defendants and SFC shall be deemed to be valid and enforceable in accordance with their terms for the purpose of determining whether the Claims of the Named Third Party Defendants for indemnification in respect of Noteholder Class Action Claims are valid and enforceable.

Release of Noteholder Class Action Claims Against the Underwriters in Excess of the "Cap"

- (e) Noteholder Class Action Claims that exceed the "cap" are released as against the Underwriters.
- (f) Any portion or amount of liability of the Underwriters for the Noteholder Class Action Claims (other than any Noteholder Class Action Claims against the Underwriters for fraud or criminal conduct), on a collective, aggregate basis in reference to all Noteholder Class Action Claims together, that exceeds the Indemnified Noteholder Class Action Limit shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.

Release from Litigation Trust Claims

- (g) The Underwriters are released from Litigation Trust Claims, and therefore face no litigation opposite the Litigation Trust (and claims it will have from Noteholders or SFC), subject only to claims for fraud or criminal conduct.
- (h) Litigation Trust Claims exclude Causes of Action (other than claims for fraud or criminal conduct) against the Underwriters by SFC or the Trustees (on behalf of the Noteholders), and all such Causes of Action shall be deemed to be Excluded Litigation Trust Claims that are fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.

- (i) Excluded Litigation Trust Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.
- (j) The Underwriters, together with their respective present and former affiliates, partners, associates, employees, servants, agents, contractors, directors, officers, insurers and successors, administrators, heirs and assigns, excluding any Director or Officer and successors, administrators, heirs and assigns of any Director or Officer in their capacity as such, are Named Third Party Defendants.
- (k) Upon delivery of a Monitor's Named Third Party Settlement Certificate and to the extent provided for by the terms of the applicable Named Third Party Defendant Release, the applicable Causes of Action against the applicable Named Third Party Defendant shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against the applicable Named Third Party Defendant.

Document Preservation

- (l) SFC has document preservation obligations to protect the Underwriters in their defence of the Class Actions.
- (m) Prior to the Effective Time, SFC shall: (i) preserve or cause to be preserved copies of any documents (as such term is defined in the *Rules of Civil Procedure* (Ontario)) that are relevant to the issues raised in the Class Actions; and (ii) make arrangements acceptable to SFC, the Monitor, the Initial Consenting Noteholders, counsel to Ontario Class Action Plaintiffs, counsel to Ernst & Young, counsel to the Underwriters and counsel to the Named Third Party Defendants to provide the parties to the Class Actions with access thereto, subject to customary commercial confidentiality, privilege or other applicable restrictions, including lawyer-client privilege, work product privilege and other privileges or immunities, and to restrictions on disclosure arising from s. 16 of the *Securities Act* (Ontario) and comparable restrictions on disclosure in other relevant

jurisdictions, for purposes of prosecuting and/or defending the Class Actions, as the case may be, provided that nothing in the foregoing reduces or otherwise limits the parties' rights to production and discovery in accordance with the *Rules of Civil Procedure* (Ontario) and the *Class Proceedings Act, 1992* (Ontario).

- (n) The Underwriters will seek discovery rights as against Ernst & Young if the Ernst & Young Settlement of the Class Actions is subsequently approved by the court. The discovery rights the Underwriters will seek will be at least as expansive as those ordered in respect of an earlier settlement of the Class Actions.

Chapter 15 Recognition

- (o) The Plan contemplates an application for Chapter 15 recognition of the Plan and Sanction Order.
- (p) As promptly as practicable, but in no event later than the third Business Day following the Plan Implementation Date, a foreign representative of SFC (as agreed by SFC, the Monitor and the Initial Consenting Noteholders) shall commence a proceeding in a court of competent jurisdiction in the United States seeking recognition of the Plan and the Sanction Order and confirming that the Plan and the Sanction Order are binding and effective in the United States, and the Foreign Representative shall use its best efforts to obtain such recognition order.

The Ernst & Young Settlement and the Underwriters' Class Action Defence

- (q) The Plan preserves the Underwriters' right to apportion liability in respect of Ernst & Young's fault as proven in trial or otherwise in the Class Actions.
- (r) To the extent that the Third Party Defendants are found to have any liability, the Underwriters are entitled to seek to have liability apportioned to Ernst & Young to reduce the damages the Underwriters may be required to pay, subject to the limitation on the right of the plaintiffs in the Class Actions to collect any damages from Ernst &

Young in excess of the amount paid by way of the Ernst & Young Settlement. The Underwriters will also require that this be a term of any approval of the Ernst & Young Settlement by the court.

4. On the basis of the foregoing, the Underwriters consent to the granting of the Sanction Order. The Underwriters' position may change if the Plan is amended in any manner prejudicial to their interests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David Bish per ATB

David Bish

Adam M. Slavens

Adam M. Slavens

Lawyers for the Underwriters
named in Class Actions

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 UNDERWRITERS
NAMED IN CLASS ACTIONS**
(motion for a Sanction Order,
returnable December 7 and 10, 2012)

TORYS LLP
79 Wellington Street West
Suite 300, TD Centre
Toronto, Ontario M5K 1N2

Fax: 416.865.7380

David Bish (LSUC#: 41629A)
Tel: 416.865.7353
Email : dbish@torys.com

Adam M. Slavens (LSUC#: 54433J)
Tel: 416.865.7630
Email : aslavens@torys.com

Lawyers for the Underwriters
named in Class Actions