

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 AND
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, 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.
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WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY
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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)**

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Proceeding under the *Class Proceedings Act, 1992*

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(COMMERCIAL LIST)**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
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**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
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PART I – OVERVIEW OF THE MOTION

1. The plaintiffs bring this motion for approval of the fees and disbursements of Siskinds LLP and Koskie Minsky LLP (“Canadian Class Counsel”) and insolvency counsel Paliare Roland Rosenberg Rothstein LLP in the amount of \$567,000 (exclusive of tax) for fees and \$634,299 for disbursements. The requested fee amounts to 15% of the class action settlement with David J. Horsley (“Horsley”) that is notionally attributable to Canadian claims. The requested fees and disbursements are consistent with the retainer agreement entered into with the plaintiffs, are supported by all of the plaintiffs, and are fair and reasonable under all of the circumstances.

2. In May 2014, the plaintiffs reached the settlement with Horsley and the Litigation Trust. The settlement provides for a total payment of \$5.6 million in full settlement of all claims that relate to Sino-Forest as against Horsley, which includes the following claims: (a) in settlement of the class action claims, the Horsley settlement provides for payment of \$4.2 million; and (b) in settlement of the Litigation Trust claims, Horsley and his insurers will make a payment of \$1.4 million, of which \$600,000 will be paid personally by Horsley.

3. There are two main factors in the determination of whether to approve a fee request of class counsel in a class proceeding: (a) the risks that class counsel assumed in acting on a contingency fee basis; and (b) the success achieved.

4. First, the requested fees here are below the range of percentages that Ontario courts have repeatedly endorsed as being fair and reasonable. As noted by Justice Strathy (as he then

was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, fees in the range of 20% to 30% are very common in class proceedings and are repeatedly approved as fair and reasonable.¹

5. Second, Canadian Class Counsel took on significant risk for claims against Horsley because of the multiple legal and practical impediments to establishing liability and recovering damages under Canadian and U.S. law, namely, (a) the statutory liability limits under section 130 and Part XXIII.1 of the Ontario *Securities Act*; (b) Horsley's capacity to pay; and (c) Sino-Forest's dwindling Directors and Officers insurance policies, which are eroded by defence costs and are quickly being depleted.

6. Third, Canadian Class Counsel took on the risk of no success and minimal recovery, while at the same time having to devote a massive commitment of time, money and other resources to the prosecution of this action. Canadian Class Counsel and insolvency counsel have already committed millions of dollars in resources to this action, including over 3,170 lawyer hours (with a time value of \$1.3 million) and out-of-pocket disbursements exceeding \$1.5 million *since the motion to approve of the Ernst & Young fee and disbursement request*.

7. Fourth, Canadian Class Counsel achieved significant success against Horsley by extracting a considerable sum from an individual defendant, and by stopping depletion of Sino-Forest's Directors and Officers insurance thereby preserving millions of dollars of insurance proceeds that would otherwise not be available for recovery from Sino-Forest or the remaining individual director and officer defendants.

¹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

8. In summary, the requested fees and disbursements are extremely fair and reasonable under the circumstances and ought to be approved.

PART II – THE FACTS

A. Background of These Proceedings and Settlement with Horsley

9. These proceedings relate to the precipitous decline of Sino-Forest Corporation following allegations on June 2, 2011 that there was fraud at the company and that its public disclosure contained misrepresentations regarding its business and affairs.²

10. On July 20, 2011, this action was commenced against Sino-Forest, Horsley and other defendants in Ontario under the *Class Proceedings Act, 1992*. Siskinds LLP and Koskie Minsky LLP are counsel to the plaintiffs in the Ontario class action.³

11. There were also class actions commenced in Québec and New York relating to Sino-Forest. Siskinds Desmeules is counsel to the plaintiffs in the Québec action styled as *Guining Liu v. Sino-Forest Corporation*. Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) is counsel to the plaintiffs in the New York action styled as *Leopard v. Sino-Forest Corporation*. Horsley is a defendant in both the Québec and New York actions.⁴

12. On March 30, 2012, Sino-Forest applied for and was granted protection from its creditors pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”).⁵

² Affidavit of Charles Wright (Fee Approval) at para. 3, Plaintiffs’ Motion Record for Fee Approval, Tab 2, p. 8.

³ Affidavit of Charles Wright (Fee Approval) at para. 4, Plaintiffs’ Motion Record for Fee Approval, Tab 2, p. 8.

⁴ Affidavit of Charles Wright (Fee Approval) at para. 6, Plaintiffs’ Motion Record for Fee Approval, Tab 2, pp. 8-9.

⁵ Affidavit of Charles Wright (Fee Approval) at para. 7, Plaintiffs’ Motion Record for Fee Approval, Tab 2, p. 9.

13. In July 2013, the Litigation Trust issued a statement of claim against Horsley and other senior executives of Sino-Forest.⁶

14. An agreement in principle was reached between the class action plaintiffs and Horsley in January 2014; however, it soon became apparent that any resolution of the class action claims against Horsley would require a simultaneous resolution of the Litigation Trust claims against him. This was due to a number of practical considerations, including: (a) any settlement within the Plan's framework required consent of the Litigation Trust; and (b) Horsley sought to resolve all outstanding litigation against him.⁷

15. Class Counsel, Horsley's counsel (and insurers), and counsel to the Litigation Trust continued to negotiate a resolution of all claims over the next several months.⁸

16. In May 2014 a settlement was negotiated between the plaintiffs, the Litigation Trust, and Horsley. The Horsley settlement provides for payment of \$4.2 million to Securities Claimants in full settlement of all claims that relate to Sino-Forest as against Horsley, and an additional \$1.4 million in settlement of the Litigation Trust claims, of which \$600,000 will be paid personally by Horsley. The protracted settlement negotiations with Horsley were conducted on an adversarial, arm's length basis.⁹

⁶ Affidavit of Charles Wright (Fee Approval) at para. 20, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 13.

⁷ Affidavit of Charles Wright (Fee Approval) at para. 21, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 13.

⁸ Affidavit of Charles Wright (Fee Approval) at para. 22, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 14.

⁹ Affidavit of Charles Wright (Settlement Approval) at paras. 11, 17, Plaintiffs' Motion Record for Settlement Approval, Tab 2, pp. 28, 29.

B. Notional Allocation of the Settlement Amount

17. The approved settlement with Horsley provides for a total payment of \$4.2 million to resolve the class actions. The plaintiffs and class counsel in the Ontario, Québec and New York actions have agreed to a notional allocation of that settlement amount between the Canadian and U.S. claims for the purposes of determining class counsel fees. They agreed that the fees of Canadian Class Counsel will be determined on the basis that 90% of the gross settlement is allocated to the Canadian claims and 10% of the gross settlement is allocated to the U.S. claims. This notional allocation is based on the relative class sizes of the Canadian and U.S. class actions and the work performed by the law firms.¹⁰

18. Accordingly, Canadian Class Counsel's requested fees are based on a recovery of \$3.78 million (90% of \$4.2 million) and Cohen Milstein's requested fees are based on a recovery of \$420,000 (10% of \$4.2 million).¹¹ This notional allocation does not determine the actual distribution of settlement proceeds to Securities Claimants, which will be based on claims which are ultimately made by class members.

C. Fees Pursuant to the Retainer Agreements

19. Siskinds LLP and Koskie Minsky LLP, along with insolvency counsel Paliare Roland Rosenberg Rothstein LLP, have acted in these proceedings on a contingency fee basis. Insolvency counsel will be paid out of the fees and disbursements of Canadian Class Counsel.

¹⁰ Affidavit of Charles Wright (Fee Approval) at para. 34, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 18-19.

¹¹ Affidavit of Charles Wright (Fee Approval) at para. 34, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 18-19.

20. The retainer agreements between the plaintiffs and Canadian Class Counsel were approved by order of this court dated December 27, 2013. The order provided that “[...] the contingency fee retainer agreement entered into between the plaintiffs and Canadian Class Counsel is approved [...]”.¹²

21. The retainer agreements provide for repayment without premium of all disbursements and for a sliding scale of fees depending on the monetary level of success and the stage of the litigation, as follows:¹³

	For the first \$20 million of any Recovery	For the portion of the Recovery between \$20 million and \$40 million	For the portion of the Recovery between \$40 million and \$60 million	For the portion of the Recovery in excess of \$60 million
If the Action is settled or there is judgment before the Court renders a decision on a certification motion	twenty-five percent (25%)	twenty percent (20%)	fifteen percent (15%)	ten percent (10%)
If the Action is settled or there is judgment after the Court renders a decision on a certification motion and before the commencement of the Common Issues trial;	twenty-seven and a half percent (27.5%)	twenty-two and a half percent (22.5%)	seventeen and a half percent (17.5%)	twelve and a half percent (12.5%)
If the Action is settled after the commencement of the Common Issues trial or is determined by judgment after the trial.	thirty percent (30.0%)	twenty-five percent (25.0%)	twenty percent (20.0%)	fifteen percent (15.0%)

22. This grid is meant to ensure that Canadian Class Counsel is paid in a manner that is tied directly to the degree of success achieved in the action, while at the same time ensuring

¹² Order of Justice Morawetz dated December 27, 2013, Plaintiffs’ Book of Authorities (Fee Approval) (“Plaintiffs’ Book of Authorities”), Tab 2.

¹³ Affidavit of Charles Wright (Fee Approval) at para. 37, Plaintiffs’ Motion Record for Fee Approval, Tab 2, p. 19.

the overall fees are not excessive. Accordingly, the grid ensured that the larger the recovery as against any one defendant, the less Canadian Class Counsel will be paid as a percentage of that recovery.¹⁴

23. In addition, the fee grid provides that Canadian Class Counsel is paid less if the claims against defendants settle early in the proceeding. There are three different time periods contemplated: (a) settlement before a certification decision; (b) settlement after a certification decision and before the commencement of the common issues trial; and (c) settlement after the commencement of trial or a judgment after trial.¹⁵

24. These different time periods are meant to reflect the resources that Canadian Class Counsel expended in pursuing the claims and securing recovery. For instance, had Horsley settled the claims against him within 30 days of its commencement in July 2011, Canadian Class Counsel would have committed far fewer resources to such claims. In contrast, had the claims against Horsley proceeded to a common issues trial and success achieved only through judgment, Canadian Class Counsel would have committed far greater resources to advancing the claims against him. The grid is meant to take into account this increasing level of resources, but uses the objective measure of stages in the proceeding in order to determine when the next level of compensation would be awarded.¹⁶

25. According to the retainer agreement, the second row of the grid applies as there was a certification decision in the Ontario class action in September 2012 (relating to the settlement

¹⁴ Affidavit of Charles Wright (Fee Approval) at para. 36, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 19.

¹⁵ Affidavit of Charles Wright (Fee Approval) at para. 38, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 20.

¹⁶ Affidavit of Charles Wright (Fee Approval) at para. 39, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 20.

with Pöyry (Beijing) Company Limited) for which there was an opt out period which ran for all class members in respect of all claims against all defendants. Additionally, the first column of the grid would apply, as the recovery from Horsley is under \$20 million.

26. Applying the grid to apply separately to each settlement obtained at various stages of the action is consistent with the purpose of this grid and the underlying principle of the retainer agreement, which is to reflect the resources that Class Counsel has to expend as against each defendant. If the second row and first column of the grid is applied, Canadian Class Counsel would be entitled to fees of \$1,039,500.

27. However, Canadian Class Counsel, in consultation with the plaintiffs, have decided to request a lower amount of fees. The lower amount sought is \$567,000, which is 15% of the notional allocation of \$3,780,000. Class Counsel and plaintiffs have agreed that a fee award that is 15% of the notional allocation is fair and reasonable in all of the circumstances at this time.¹⁷

D. Counsel's Efforts to Advance the Ontario and Québec Class Actions

28. There has been significant progress and considerable efforts by Canadian Class Counsel to advance the Ontario and Québec actions. The plaintiffs assert numerous common law and statutory claims against 26 defendants resident in Ontario, New York, Hong Kong and the People's Republic of China.

29. Canadian Class Counsel, along with insolvency counsel and counsel for the plaintiffs in the Québec action, have taken the following steps to advance claims against the defendants:

¹⁷ Affidavit of Charles Wright (Fee Approval) at para. 43, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 21.

- (a) undertook a preliminary investigation of the allegations against Sino-Forest;
- (b) prepared for and argued a motion for carriage of the Ontario action;
- (c) prepared for and argued a motion for directions in the Ontario action, including a request for an order for substituted services, compelling insurance information and requiring delivery of statements of defence;
- (d) undertook further investigations and prepared voluminous materials for the motion for certification of the Ontario action as a class proceeding under the *Class Proceedings Act, 1992* and the motion for leave to proceed with statutory misrepresentation claims under the *Securities Act*;
- (e) negotiated the litigation funding agreement between the plaintiffs in this action and CFI and brought a motion for approval of the agreement;
- (f) negotiated and settled with the defendant Pöyry (Beijing) Company Limited (“Pöyry (Beijing)”);
- (g) prepared for and argued the motions for certification for settlement purposes and approval of the Pöyry (Beijing) settlement in Ontario and Québec;
- (h) obtained and reviewed evidence from Pöyry (Beijing);
- (i) designed and implemented a notice program and opt out process for the Ontario and Québec actions;
- (j) prepared for, argued or attended approximately 26 motions and other appearances in the Sino-Forest *CCAA* proceeding;
- (k) prepared proofs of claim in the *CCAA* proceeding for the Ontario and Québec actions, including detailed claims submissions;
- (l) reviewed tens of thousands of Chinese and English documents in the Sino-Forest data-room for mediation;
- (m) prepared for and attended the two-day all-party mediation in August 2012;
- (n) undertook extensive negotiations over the course of more than six months in respect of the Sino-Forest plan of compromise and restructuring (the “Plan”) to ensure the claims in the Ontario and Québec class actions were minimally affected, particularly as it related to non-debtor defendants;
- (o) prepared for and attended at a two-day mediation with Ernst & Young in November 2012, which resulted in a settlement;
- (p) prepared for and made submissions in support of the motion to sanction the Plan, along with responding to a motion for leave to appeal from the sanction order by certain objectors;
- (q) designed and implemented a notice program for the Ernst & Young settlement approval hearing;

- (r) prepared for and argued the motion for settlement approval of the Ernst & Young settlement and responded to the efforts of certain objectors to appeal the settlement approval order including a motion for leave to appeal to the Court of Appeal, a motion to quash a purported direct appeal to the Court of Appeal and an application for leave to the Supreme Court of Canada;
- (s) review of more than 1 million Chinese and English documents;
- (t) have been served with responding records for the leave and certification motion;
- (u) retained U.S. bankruptcy counsel, attended in U.S. courts and designed a notice program for U.S. investors of Sino-Forest in order to obtain recognition of the Ernst & Young settlement in the United States;
- (v) moved for recognition of the Ernst & Young settlement in Québec and in the United States;
- (w) prepared plan of allocation to distribute the Ernst & Young settlement and other materials for approval of the plan of allocation and the within motion;¹⁸
- (x) proposed amendments to the statement of claim;
- (y) amended the Québec pleading;
- (z) delivered eight further expert reports;
- (aa) prepared for and cross-examined seven defendant experts and fact witnesses in Toronto and Hong Kong;
- (bb) prepared for and defended three experts and one proposed representative plaintiff from cross-examination;
- (cc) posed and responded to written interrogatories in respect of a clerk affidavit and a solicitor affidavit;
- (dd) delivered notices of motion to strike an expert report and a clerk affidavit;
- (ee) made extensive documentary requests to the underwriter defendants;
- (ff) responded to numerous class member inquiries;
- (gg) undertook extensive, protracted and hard-fought negotiations with Horsley and the Litigation Trust in order to reach the Horsley settlement;
- (hh) designed and implemented a notice program for Horsley settlement approval hearing; and
- (ii) prepared for the motion for settlement approval of the Horsley settlement.¹⁹

¹⁸ Affidavit of Charles Wright (Fee Approval) para. 17, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 11-13.

(1) Preliminary investigation leading to the commencement of this action

30. The allegations against Sino-Forest were made by Muddy Waters – a research firm that also engages in short selling. Given this context, the plaintiffs conducted a preliminary investigation of the allegations before commencing and pursuing this action.²⁰

31. For this preliminary investigation, Canadian Class Counsel retained and received advice from (i) a law firm in China (Dachen Law Firm) in relation to the various allegations in the Muddy Waters report; (ii) Hong Kong based investigators specializing in financial fraud who conducted extensive field work in China; (iii) accounting and damages experts; and (iv) an legal expert who provided advice regarding Sino-Forest’s operations in Suriname.²¹

32. As a result of these investigations, the initial statement of claim contained significant detail, running to 92 pages, of which a significant portion relates to Horsley. There has been further detail and amendments since that time as information regarding Sino-Forest’s affairs has become available.²²

(2) Motion for carriage of this action

33. A number of class proceedings were commenced against Sino-Forest and Horsley in response to the allegations against Sino-Forest on June 2, 2011, including this action and two other class proceedings in Ontario: *Northwest & Ethical Investments L.P. v. Sino-Forest*

¹⁹ Affidavit of Charles Wright (Fee Approval) at para. 27, Plaintiffs’ Motion Record for Fee Approval, Tab 2, pp. 16-17.

²⁰ Affidavit of Charles Wright (Settlement Approval) at para. 34, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, p. 33.

²¹ Affidavit of Charles Wright (Settlement Approval) at para. 34, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, p. 33.

²² Affidavit of Charles Wright (Settlement Approval) at para. 40, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, pp. 34-35.

Corporation and Smith v. Sino Forest Corporation. As a result, it was necessary for there to be a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed.²³

34. On January 6, 2012, the Honourable Justice Perell granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the *Northwest* and *Smith* actions.²⁴

(3) Motion for directions (service, defences, insurance and scheduling)

35. On February 1, 2012, the plaintiffs moved for various relief, including an order validating service of the statement of claim on certain defendants in China; requiring delivery of statements of defence; requiring production of responsive insurance policies; and setting a timetable for the hearing of the motions to approve funding, for certification under the *Class Proceedings Act, 1992* and for leave to proceed with statutory claims under section 138.3 of the *Securities Act*.²⁵

36. The plaintiffs succeeded in the motion. On March 26, 2012, Justice Perell ordered that a statement of defence be delivered by any defendant that delivers an affidavit pursuant to s. 138.8(2) of the *Securities Act*, and set a timetable for the funding approval motion and the leave and certification motion.²⁶

²³ Affidavit of Charles Wright (Settlement Approval) at para. 36, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 34.

²⁴ Affidavit of Charles Wright (Settlement Approval) at para. 36, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 34.

²⁵ Affidavit of Charles Wright (Fee Approval) at para. 17(c), Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 11.

²⁶ Affidavit of Charles Wright (Fee Approval) at para. 17(c), Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 11.

(4) The litigation funding agreement and motion for funding approval

37. Adverse costs in Ontario class proceedings have become significant and present a concern for any plaintiff advancing class claims. In this case, the adverse costs exposure could have been enormous given the complexity of this case and the 26 defendants. Accordingly, Canadian Class Counsel sought out a funder that would provide indemnity for adverse costs.²⁷ Canadian Class Counsel brought a motion to approve the CFI funding agreement. The motion was heard on May 17, 2012, and an order issued the same day approving the agreement.²⁸

(5) Motion for certification and motion for leave under the Securities Act

38. In March and April 2012, the Ontario plaintiffs brought (a) a motion for certification of the Ontario action as a class action under the *Class Proceedings Act, 1992*; and (b) a motion for leave to proceed with statutory claims under Part XXIII.1 of the *Securities Act*.²⁹

39. The plaintiffs filed motion records in support of their motions. This included:

- (a) an affidavit of Steven Chandler, a former senior law enforcement official in Hong Kong who was involved in investigating Sino-Forest in China;
- (b) two reports from Alan Mak, an expert in forensic accounting;
- (c) an expert affidavit of Dennis Deng, a lawyer qualified to practice law in the People's Republic of China, and a partner in the Dacheng law firm;
- (d) an expert affidavit of Carol-Ann Tjon-Pian-Gi, a lawyer qualified to practice in the Republic of Suriname; and
- (e) an expert affidavit of Frank Torchio setting out an estimate of damages and opining on the efficiency of the Toronto Stock Exchange.³⁰

²⁷ Affidavit of Charles Wright (Fee Approval) at para.17(e) , Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 11.

²⁸ Affidavit of Charles Wright (Fee approval) at para. 17(e), Plaintiffs' Motion Record for Fee approval, Tab 2, p. 11.

²⁹ Affidavit of Charles Wright (Settlement Approval) at para. 41, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 35.

40. These expert materials, or portions thereof, related directly to Horsley's liability and damages.

41. The motions were initially scheduled for November 21 to 30, 2012. However, as a result of, *inter alia*, Sino-Forest's insolvency and the *CCAA* stay of proceedings, they did not proceed as scheduled. The motions have been rescheduled to January 2015.³¹

42. In response to the plaintiffs' motion record, the defendants have delivered extensive responding material, and the plaintiffs have delivered a further eight expert reports from Professors Adam Pritchard and Patrick Borchers on U.S. federal and New York state law in reply.

43. In preparation for the motion for certification and leave, the plaintiffs have:

- (a) prepared for and cross-examined seven defendant experts and fact witnesses in Toronto and Hong Kong;
- (b) prepared for and defended three experts and one proposed representative plaintiff from cross-examination;
- (c) posed and responded to written interrogatories in respect of a clerk affidavit and a solicitor affidavit; and
- (d) made extensive documentary requests to the underwriter defendants.³²

³⁰ Affidavit of Charles Wright (Settlement Approval) at para. 42, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 35.

³¹ Affidavit of Charles Wright (Settlement Approval) at para. 43, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 35.

³² Affidavit of Charles Wright (Fee Approval) at para. 27, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 16-17.

44. The plaintiffs have also served motions to strike expert reports and a clerk affidavit filed by the underwriter defendants, and an affidavit responding to the expert report served by Horsley.³³

(6) Settlement with Pöyry (Beijing)

45. In March 2012, the plaintiffs in the Ontario and Québec actions reached a settlement with Pöyry (Beijing). On September 21, 2012, the Ontario court heard the motion for approval of the Pöyry (Beijing) settlement and the motion for certification of this action for the purposes of the settlement. The action was certified and the settlement was approved in Ontario on September 25, 2012. The settlement was approved in Québec on November 9, 2012. Soon after the approval in Québec, there was a notice of the settlement approval and certification.³⁴

(7) Sino-Forest's insolvency and CCAA proceeding

46. On March 30, 2012, Sino-Forest obtained an initial order under the *CCAA*, including a stay of proceedings in respect of Sino-Forest and certain of its subsidiaries. On May 8, 2012, following negotiations between Canadian Class Counsel and other stakeholders in the *CCAA* proceeding, the stay of proceedings was extended to the other defendants in this action.³⁵

³³ Affidavit of Charles Wright (Fee Approval) at para. 27, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 16-17.

³⁴ Affidavit of Charles Wright (Settlement Approval) at para. 49, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 40.

³⁵ Affidavit of Charles Wright (Settlement Approval) at para. 44, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 35.

47. Canadian Class Counsel and insolvency counsel were heavily involved in the *CCAA* proceeding and took a number of steps to protect the claims of purchasers of Sino-Forest securities. Among other things, they

- (a) negotiated amendments to the Claims Procedure Order to permit the filing of a single claim on behalf of class members persons in the Ontario, Québec and New York actions, among other amendments;
- (b) prepared and filed proofs of claim for the Ontario and Québec actions, including detailed claims submissions;
- (c) negotiated amendments to the Sino-Forest Plan to ensure claims of Securities Claimants against non-debtors, such as Horsley, and Sino-Forest's liability insurers were preserved as far as possible and to facilitate discovery from Sino-Forest; and
- (d) negotiated access to Sino-Forest's data-room for the purposes of mediation of the Ontario and Québec actions with the defendants, including Horsley.³⁶

48. Canadian Class Counsel and insolvency counsel brought or attended 26 motions in the *CCAA* proceeding, plus an appeal and two motions for leave to appeal.³⁷

(8) All-party mediation in September 2012

49. By order dated July 25, 2012, this court ordered mediation of the claims in the Ontario and Québec actions. There was substantial preparation for the all-party mediation.³⁸

50. The all-party mediation took place on September 4 and 5, 2012 and Horsley was in attendance. While it did not result in a settlement, it was the starting point for further negotiations with Horsley.³⁹

³⁶ Affidavit of Charles Wright (Settlement Approval) at para. 47, Plaintiffs' Motion Record for Settlement Approval, Tab 2, pp. 36 – 39.

³⁷ Affidavit of Charles Wright (Settlement Approval) at para. 47, Plaintiffs' Motion Record for Settlement Approval, Tab 2, pp. 36 – 39.

³⁸ Affidavit of Charles Wright (Settlement Approval) at para. 50, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 40.

(9) Sanction of the CCAA Plan and Ernst & Young settlement approval and distribution

51. On December 7, 2012 this court heard submissions on the sanctioning of the Sino-Forest Plan. Three former shareholders sought to challenge the sanctioning of the Plan (the “Kim Orr Objectors”). Their arguments were rejected and the court sanctioned the Plan without changes on December 10, 2012. The Kim Orr Objectors then sought leave to appeal the sanction order to the Court of Appeal. Canadian Class Counsel, among others, responded to the leave to appeal motion. The leave to appeal motion was dismissed on June 26, 2013.⁴⁰

52. On February 4, 2013, this court heard the plaintiffs’ motion for approval of the settlement with Ernst & Young. The Kim Orr Objectors (along with 3 other former shareholders) opposed settlement approval. The settlement was approved over their objection on March 20, 2013.⁴¹ The Kim Orr Objectors sought both leave to appeal to the Court of Appeal and a direct appeal to the Court of Appeal. Canadian Class Counsel responded to both appeal routes. The leave to appeal motion was dismissed on June 26, 2013 and the Court of Appeal quashed the direct appeal on June 28, 2013.⁴² The Kim Orr Objectors then sought leave to appeal to the Supreme Court of Canada. Again, Canadian Class Counsel responded, and leave to appeal to the Supreme Court of Canada was denied on March 12, 2014.⁴³

³⁹ Affidavit of Charles Wright (Settlement Approval) at para. 50, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, p. 40.

⁴⁰ *Sino-Forest Corporation (Re)*, 2012 ONSC 7041 (S.C.J.), Plaintiffs’ Book of Authorities, Tab 3; *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of)*, [2013] O.J. No. 3085 (C.A.), Plaintiffs’ Book of Authorities, Tab 4.

⁴¹ *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, [2013] O.J. No. 1339 (S.C.J.), Plaintiffs’ Book of Authorities, Tab 5.

⁴² *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of)*, [2013] O.J. No. 3085 (C.A.), Plaintiffs’ Book of Authorities, Tab 4.

⁴³ *Invesco Canada Ltd. v. Sino-Forest Corp.*, [2013] S.C.C.A. No. 395 (S.C.C.), Plaintiffs’ Book of Authorities, Tab 6.

53. On December 13, 2013, this court heard the plaintiffs' motion for approval of a claims distribution protocol for the Ernst & Young settlement. The plaintiffs' claims distribution protocol was approved by this court on December 27, 2013, and the plaintiffs, in conjunction with NPT RicePoint, the Ernst & Young settlement trustee, have been implementing the protocol since that time.⁴⁴

E. Context of Contingency Fee Retainers in Class Proceedings

54. A class proceedings practice creates unique challenges and benefits for counsel.

55. First, class proceedings involve a significant commitment of time and financial resources. These actions are typically taken on a contingency fee basis. It is common to dedicate thousands of lawyer hours and hundreds of thousands of dollars in disbursements to a particular case. Investigation and expert expenses are typical.⁴⁵

56. As stated by the Law Reform Commission:

While not receiving any remuneration for his or her work, the usual expenses of running an office are being incurred. Moreover, substantial advances must be made by counsel to pay for the enormous expenses incurred in the action, which would augment significantly the financial risk assumed by the class lawyer.⁴⁶

57. Second, class proceedings are highly adversarial and are often protracted. The concept that class proceedings often settle soon after the motion for certification is not correct. Cases are increasingly continuing beyond certification, through productions, examination for discovery and trial. The defendants tend to be well-resourced. The defendants bring motions

⁴⁴ *Labourer's Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, [2013] O.J. No. 6143 (S.C.J.), Plaintiffs' Book of Authorities, Tab 7.

⁴⁵ Affidavit of Charles Wright (Fee Approval) at para. 12, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 9-10.

⁴⁶ Ontario Law Reform Commission, *Report on Class Actions*, vol. 3, p. 676, Plaintiffs' Authorities, Tab 20.

for almost any dispute and appeal almost all decisions. A scorched-earth approach is common and even motion scheduling is hotly-contested. As a result, costs are high and litigation proceeds slowly.⁴⁷

58. Justice Strathy (as he then was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.* noted the inevitable resource disparity between class counsel and defendants in class proceedings. Defendants are well-resourced and represented by large firms. They tend to have “virtually unlimited resources and no incentive to roll over and play dead”. Defendants are able to “frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing.”⁴⁸

59. Third, there are unique risks arising from the class proceedings procedure, including

- (a) the risk that the action will not be certified as a class proceeding;
- (b) the risk that a large number of class members opt out;
- (c) the risk that the defendant successfully moves to decertify a class proceeding;
- (d) the risk that an award of aggregate damages on a class-wide basis is denied and individual issues trials are ordered;
- (e) the risk that individual issues trials are ordered but are not economically feasible;
- (f) the risk that the court does not approve a settlement agreement after lengthy, time-consuming and expensive negotiations; and
- (g) the risk that the court does not approve class counsel fees, or approves them only at a reduced rate.⁴⁹

⁴⁷ Affidavit of Charles Wright (Fee Approval) at para. 13, Plaintiffs’ Motion Record for Fee Approval, Tab 2, p. 10. See also *Labourers’ Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924 at paras. 1 and 80-83, Plaintiffs’ Authorities, Tab 8 where 17 counsel appeared to argue over the scheduling of leave and certification. The court discusses how class action decisions are inevitably appealed.

⁴⁸ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 65 and 66, Plaintiffs’ Authorities, Tab 1.

⁴⁹ Affidavit of Charles Wright (Fee Approval) at para. 14, Plaintiffs’ Motion Record for Fee Approval, Tab 2, p. 10.

60. Fourth, class counsel's obligation to the class do not end at settlement approval, even where all defendants settle and the litigation is at an end. Class counsel typically perform the following work as part of settlement administration, including

- (a) identifying class members;
- (b) advising and instructing class members with questions concerning the settlement agreement and claims process;
- (c) providing information to class members, including relevant documents;
- (d) assisting class members with claim forms, if necessary;
- (e) providing documentation to the accountants and financial advisors of class members to assist with determinations of tax implications of settlement proceeds;
- (f) facilitating the claims process;
- (g) monitoring settlement implementation to ensure the processed are be followed;
- (h) liaising with the claims administrator; and
- (i) overall coordination of the settlement distribution.⁵⁰

PART III – ISSUES AND THE LAW

APPROVAL OF COUNSEL FEES

61. The fees and disbursements requested are consistent with the retainer agreements with the plaintiffs which have been approved by this court, and are fair and reasonable in light of the significant risks that Canadian Class Counsel and insolvency counsel undertook in these proceedings and the success achieved.

⁵⁰ Affidavit of Charles Wright (Fee Approval) at para. 15, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 10-11.

A. Approach to Fee Approval in Class Proceedings

(1) Test for fee approval

62. The retainer agreement is the starting point for the approval of contingency fees. As stated by Justice Belobaba in *Cannon v. Funds for Canada Foundation*, “contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved.”⁵¹

63. In addition the court may determine whether the fees and disbursements as provided for in the retainer agreement are fair and reasonable, failing which the court has discretion to determine the amount owing to class counsel for fees and disbursements.⁵²

64. Courts assessing the fairness and reasonableness of fees focus on two main factors: the risk that class counsel undertook in conducting the litigation and the degree of success or result achieved.⁵³

65. Risk in this context is measured from the commencement of the action and as it continued, and includes all of the risks facing class counsel such as the liability risk, recovery risk and the risk that the action will not be certified as a class proceeding. As set out in paragraph 59 above, there are unique risks arising from the class proceedings procedure.⁵⁴

⁵¹ *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at para. 8 (S.C.J.), Plaintiffs’ Book of Authorities, Tab 9.

⁵² *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.32(2) and (4); *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs Authorities, Tab 1. *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 at paras. 59 and 63 (S.C.J.), Plaintiffs’ Authorities, Tab 10.

⁵³ *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.), Plaintiffs’ Authorities, Tab 11; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 12.

⁵⁴ *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 at para. 16 (C.A.), Plaintiffs’ Authorities, Tab 13; *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at para. 28, Plaintiffs’ Authorities, Tab 14.

(2) The importance of strong incentives for class counsel

66. Ontario courts have recognized that class proceedings depend on entrepreneurial lawyers willing to take on these cases and that class counsel compensation should reflect this. Compensation must be sufficiently rewarding to “provide a real economic incentive to lawyers to take on a class proceeding and do it well”.⁵⁵

67. The incentive must be large enough to justify the significant risks that class counsel undertake in class proceedings, which are often complex, aggressive and protracted.

68. The incentive must be large enough to justify the delayed payment for legal work. Even where there is recovery, it often comes after years of unpaid legal work and incurred disbursements. At the same time, counsel incurs the ongoing expenses of maintaining an office, paying salaries and paying for disbursements while receiving no pay in the interim and accumulating no interest on what would otherwise be billed time. Compensation in class proceedings must therefore be sufficiently appealing to justify counsel’s lost opportunity to take on paying clients and the carrying costs of a case without pay for years.

69. The incentive must be large enough when assessed in the context of counsel’s class action practice as a whole. Class counsel’s assessment of incentive does not hinge on each case, but the sum of successes and losses. “They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will

⁵⁵ *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 12; *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs’ Authorities, Tab 15; *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 at para. 53, Plaintiffs’ Authorities, Tab 16.

not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.”⁵⁶

70. *Andersen v. St. Jude Medical Inc.* provides an example of the significant financial consequences that class counsel may face when they lose. Class counsel acted for 11 years, through motions and appeals and 138 days of trial. The trial involved 2,293 documents in evidence and the testimony of 40 witnesses, including 23 experts from 14 different disciplines of science and medicine. The plaintiffs lost at trial. Subject to appeal, class counsel will receive no pay and will not be reimbursed for disbursements.⁵⁷

(3) Multiplier as a “check” on the reasonableness of fees claimed

71. It is appropriate for the court to consider metrics such as the effective multiplier on counsel’s docketed time as a check of the reasonableness of the fees claimed. However, Ontario class action judges have warned against an excessive focus on the multiplier: “courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate.” The result achieved, not the time expended by counsel, should generally be the most important test of the value of counsel’s services.⁵⁸

72. The effective multiplier in this case is .43 in respect of the time since the Ernst & Young fee approval and 1.8 since the commencement of this action (when taking into account

⁵⁶ *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs’ Authorities, Tab 15.

⁵⁷ *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at para. 8 and 9, Plaintiffs’ Authorities, Tab 17.

⁵⁸ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 22, Plaintiffs Authorities, Tab 18. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs Authorities, Tab 1; *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 at para. 60 (S.C.J.), Plaintiffs’ Authorities, Tab 10; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 25, Plaintiffs’ Authorities, Tab 15.

all time incurred, and prior fees recovered in settlements) . It is below the range that Ontario courts have found as reasonable where the retainer requires a multiplier approach. That range is “slightly greater than one (at the low end) to four or higher in the most deserving cases”.⁵⁹

B. Canadian Class Counsel’s Fees and Disbursements are Fair and Reasonable

73. The requested fees and disbursements are consistent with the retainer agreement entered into with the plaintiffs and are fair and reasonable.

(1) Fees as a percentage of recovery are within the appropriate range

74. The requested fees are below the range of percentages that Ontario courts have approved in the past and are lower than the percentage awarded by this court pursuant to the Ernst & Young settlement.⁶⁰

75. Justice Strathy (as he then was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, stated that fees in the range of 20% to 30% are “very common” in class proceedings and there have been a number of instances in recent years in which this court has approved fees that fall within that range:⁶¹

<i>Abdulrahim v. Air France</i> , [2011] O.J. No. 326:	30%
<i>Ainslie v. Afexa Life Sciences Inc.</i> , [2010] O.J. No. 3302:	19.4%
<i>Robertson v. ProQuest LLC</i> , [2011] O.J. No. 2013:	24%
<i>Osmun v. Cadbury Adams Canada Inc.</i> , [2010] O.J. No. 2093:	25%
<i>Pichette v. Toronto Hydro</i> , [2010] O.J. No. 3185:	28.5%
<i>Robertson v. Thomson Canada Ltd.</i> , [2009] O.J. No. 2650:	36%
<i>Cassano v. Toronto- Dominion Bank</i> , [2009] O.J. No. 2922:	20%

⁵⁹ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 31, Plaintiffs Authorities, Tab 18.

⁶⁰ *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2014 ONSC 62 at paras. 38, 49 (S.C.J.), Plaintiffs Authorities, Tab 19.

⁶¹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

76. Justice Strathy explained that compensating counsel through a percentage of recovery is “generally considered to reflect a fair allocation of risk and reward as between lawyer and client.” It induces the lawyer to maximize the recovery for the client and is fair to the client because there is no pay without success.⁶²

77. Justice Cullity (as he then was) in *Cassano v. Toronto Dominion Bank* also endorsed a percentage approach in approving a retainer agreement that provided fees of 20%, which in that case resulted in fees of \$11 million out of a \$55 million settlement. His Honour adopted the reasoning of Justice Cumming in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* in emphasizing the value of a percentage approach to fees: “[u]sing a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards “one imaginative, brilliant hour” rather than “one thousand plodding hours”.⁶³

78. In this case, the requested fees are 15% of the settlement that is notionally attributable to Canadian claims. This is below the range of fees that Ontario courts typically approve and, as set out below, there were considerable risks in this litigation and significant success as against Horsley.

⁶² *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

⁶³ *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 at paras. 50-63 (S.C.J.), Plaintiffs’ Authorities, Tab 10.

(2) Recovery risk was very high from the outset of the litigation

79. Canadian Class Counsel were always confident that they would establish liability against Sino-Forest and some senior insiders at Sino-Forest. However, from the outset, establishing liability against defendants who could actually satisfy a large judgment was the greatest risk for this litigation and thus for Canadian Class Counsel.

80. Canadian Class Counsel took on significant risk for claims against Horsley in part because of the legal and practical impediments to recovery, namely, (a) the statutory liability limits under section 130 and Part XXIII.1 of the Ontario *Securities Act* (the “*OSA*”); (b) the challenges in establishing common law claims; (c) Horsley’s capacity to pay; (d) the ability to establish liability against Horsley for whom the Ontario Securities Commission’s charges did not include conduct amounting to willful wrongdoing or fraud, unlike some other Sino-Forest officers and directors; and (e) Sino-Forest’s quickly dwindling Directors and Officers insurance policies. While damages alleged are in the billions of dollars, recovery from Horsley may be less than the settlement amount if the plaintiffs were successful at trial.

81. *First*, the statutory liability limits under section 130 and Part XXIII.1 of the *OSA* (which carry the benefit of “deemed reliance”) weigh strongly in our recommendation of the Horsley Settlement, and may potentially far exceed his liability limit under Part XXIII.1 of the *OSA*.

82. The Ontario Action advances claims against Horsley under section 130 of the *OSA*. According to the plaintiffs’ damages expert, the damages for these claims as against all defendants are limited in the aggregate to approximately \$78.5 million. Actual damages may be lower for a number of reasons: (a) defendants may produce opinions that make different

assumptions and put forth lower damages figures; (b) the damages alleged are for all losses suffered, including those attributable to Sino, the other individual defendants, and third party defendants; and (c) the actual damages to be paid may only be for claims filed, and for a variety of reasons, less than 100% of class members generally file claims.⁶⁴

83. It is very likely that if Horsley was found liable, responsibility would also be borne by Sino-Forest, its other officers and directors, and possibly the auditors and the underwriters. Based on a review of the information available to Canadian Class Counsel, including the allegations against Horsley in the Ontario Securities Commission (“OSC”) Proceeding and Litigation Trust claim, it is Class Counsel’s view that the settlement amount reflects Horsley’s several liability under the section 130 claims.⁶⁵

84. The Ontario Action also asserts statutory secondary market misrepresentation claims against Horsley pursuant to Part XXIII.1 of the *OSA*. Part XXIII.1 imposes limits on the amount recoverable from certain defendants. In the case of an officer or director of a responsible issuer, such as Horsley, the limit is the greater of \$25,000 and 50% of the individual's compensation from the responsible issuer (i.e. Sino-Forest) and its affiliates for the 12 month-period immediately preceding the day on which the misrepresentation was made.⁶⁶

85. According to Class Counsel’s estimates based on publicly available information, Horsley received approximately \$10.3 million in aggregate compensation from Sino-Forest in

⁶⁴ Affidavit of Charles Wright (Settlement Approval) at paras. 93 - 96, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, pp. 51 - 52.

⁶⁵ Affidavit of Charles Wright (Settlement Approval) at para. 99, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, p. 53.

⁶⁶ Affidavit of Charles Wright (Settlement Approval) at para. 101, Plaintiffs’ Motion Record for Settlement Approval, Tab 2, p. 53.

the years 2006 to 2010 (information not available for 2011), and approximately \$1.1 million in 2006. The liability limit provisions under Part XXIII.1 have not yet been interpreted by any court, and depending on the interpretation that is ultimately adopted, based on our estimates, it is possible that Horsley's liability limit could range as low as approximately \$600,000 - \$700,000 for the secondary market claims.⁶⁷

86. The only exception to this recovery under Part XXIII.1 would be for the plaintiffs to prove that Horsley made the alleged misrepresentations knowingly. However, Class Counsel has found no evidence of conduct that would support a finding of fraud by Horsley, and the OSC has not alleged fraud against Horsley.⁶⁸

87. *Second*, the Ontario Action also asserts claims against Horsley in oppression, unjust enrichment, negligence, and negligent misrepresentation. Each of these claims presents their own procedural and substantive challenges, including, among others: (a) uncertainty surrounding the certification of common law negligent misrepresentation; (b) the potential for significant individual issues following the common issues trial; (b) proving individual reliance.⁶⁹

88. *Third*, there was a real likelihood that Horsley could not personally satisfy any judgment and had limited and diminishing insurance coverage which was being depleted by the defence costs of multiple parties.

⁶⁷ Affidavit of Charles Wright (Settlement Approval) at para. 102, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 53.

⁶⁸ Affidavit of Charles Wright Settlement Approval) at para. 103, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 54.

⁶⁹ Affidavit of Charles Wright (Settlement Approval) at para. 105, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 54.

89. As a result, Canadian Class Counsel strenuously fought for and received a statutory declaration from Horsley confirming his limited combined net worth including his spouse. Horsley is paying a very significant portion of his available assets in addition to the payment by his insurers to settlement claims. In the absence of a settlement with the OSC (which is conditional upon approval of the Horsley Settlement), Horsley may have been found guilty in the OSC Proceeding and subject to a fine. A significant fine imposed on Horsley in the OSC Proceeding could have impinged on his ability to make any personal contribution to the settlement.⁷⁰

90. *Fourth*, unlike the OSC allegations against other defendants, the OSC allegations against Horsley do not contain allegations of fraud. The OSC issued a Statement of Allegations against Sino and certain of its senior executives, including Horsley (the "OSC Proceeding"). The Statement of Allegations clearly distinguishes the conduct of Horsley from the conduct of the rest of the respondent senior executives ("Overseas Management"). While the Statement of Allegations alleges fraud against Overseas Management, the allegations against Horsley are consistent with negligence only, and not fraud.⁷¹

91. *Fifth*, as described below, Sino-Forest's Directors and Officers insurance policies are quickly dwindling.⁷²

⁷⁰ Affidavit of Charles Wright (Settlement Approval) at para. 112, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 56.

⁷¹ Affidavit of Charles Wright (Settlement Approval) at para. 63, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 43.

⁷² Affidavit of Charles Wright (Settlement Approval) at paras. 107-108, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 55.

(3) The high risk of prosecuting a difficult and expensive case

92. Canadian Class Counsel took on the major risk that there would be little or no recovery from Horsley, while at the same time having to commit an incredible amount of time, money and resources to the prosecution of this action. Canadian Class Counsel and insolvency counsel have already expended more than \$10 million in docketed time (without HST) and more than \$1.6 million in disbursements.⁷³

93. There are at least four reasons the claims against Horsley have been and will continue to be difficult and costly to pursue:

94. *First*, this is a highly complex action and Sino-Forest is in organizational disarray. This case relates to a multi-billion dollar alleged fraud over the course of more than four years. The difficulty in mining Sino-Forest's records and prosecuting this action is best demonstrated by the challenges faced by Sino-Forest's "independent committee" of its directors (the "IC"). After the allegations of fraud in June 2011, Sino-Forest's directors formed the IC to investigate the allegations. They produced three reports and expended *in excess of \$50 million* attempting to determine the validity of the allegations. They were unable to complete their mandate given the poor records and lack of cooperation faced in China. Canadian Class Counsel has faced and will continue to face similar challenges to advancing this case.⁷⁴

95. *Second*, even with proper discovery, proving the facts in this case will be unusually difficult. Most of the key witnesses are likely in China. Their voluntary cooperation is

⁷³ Affidavit of Charles Wright (Fee Approval) at para. 24, Plaintiffs' Motion Record for Fee Approval, Tab 2, pp. 14-15.

⁷⁴ Affidavit of Charles Wright (Fee Approval) at para. 50, Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 23.

doubtful and the enforcement of letters rogatory by the courts of the People's Republic of China seems equally unlikely. Further, the documentary production in this action has already exceeded 1 million documents, and continues to grow. Many of these documents are in Chinese. Canadian Class Counsel has retained Chinese speaking lawyers and translators to assist in reviewing the documents. Canadian Class Counsel expects to receive a substantial number of additional documents as this action continues.⁷⁵

96. *Third*, this action raises novel and complex legal issues. This action advances various statutory claims and common law claims that are largely untested in Canadian courts. There has never been a trial of claims under Part XXIII.1 of the *Securities Act*. Its detailed provisions that create defences and place limits on damages are uncertain and will be contentious. There have also been few securities trials of negligent misrepresentation claims. Further, the claims on behalf of note purchases are made more complex by the terms of the offering memoranda. This will include legal disputes regarding the applicable law and restrictions on the ability to advance claims.

97. Finally, this case will require extensive and expensive expert evidence. In advancing this action, Canadian Class Counsel has already retained experts on financial accounting and audit standards, market efficiency and damages, Chinese law, Suriname law, US federal and New York state law, and the standards for underwriting due diligence. This has been tremendously costly.⁷⁶

⁷⁵ Affidavit of Charles Wright (Fee Approval) at para. 17(l)(s), Plaintiffs' Motion Record for Fee Approval, Tab 2, p. 12.

⁷⁶ Affidavit of Charles Wright (Settlement Approval) at para. 34, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 33.

98. Canadian Class Counsel undertook these challenges at the commencement of this action, knowing this action would be very expensive and resource intensive, all with the real possibility of little or no recovery after trial against the defendants who could satisfy a large judgment.

(4) Canadian Class Counsel achieved significant success against Horsley

99. Canadian Class Counsel achieved significant success against Horsley by extracting a considerable sum from an individual defendant and by stopping depletion of Sino's Directors and Officers insurance thereby preserving millions of dollars of insurance proceeds that would otherwise not be available for recovery from Sino-Forest and the remaining individual defendants.

100. Canadian Class Counsel has been provided with a statutory declaration from Horsley concerning the combined net worth of him and his spouse. It is Canadian Class Counsel's view that Horsley's personal contribution of \$600,000 to the Settlement Agreement represents a significant contribution in light of his assets.⁷⁷

101. In addition, the Horsley settlement stops the depletion of Sino's Directors and Officers insurance and preserves millions of dollars of insurance proceeds that would otherwise not be available for recovery from Sino and the remaining individual defendants.

102. Sino-Forest's Directors & Officers insurance policies that are responsive to the claims against Horsley provided coverage of \$60 million in aggregate, and are responsive to the claims against Sino-Forest and all other individual defendants named in the class actions, as

⁷⁷ Affidavit of Charles Wright (Settlement Approval) at para. 88(e), Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 50.

well as certain respondents in the OSC Proceedings. Accordingly, the insurance proceeds available to the plaintiffs as a potential source of recovery are quickly dwindling due to the many sets of defence lawyers being paid out of the policies, including Bennett Jones LLP; Miller Thomson LLP; Osler, Hoskin & Harcourt LLP; Davis LLP; McMillan LLP; and Wardle Daley Bernstein Bieber LLP (Horsley's counsel).⁷⁸ The following amounts of insurance were available under the policies on the following dates:

- (a) August 23, 2012 – approximately \$52 million;
- (b) March 4, 2013 – approximately \$47.5 million;
- (c) September 4, 2013 – approximately \$45 million;
- (d) February 2014 - approximately \$42 million; and
- (e) July 3, 2014 – approximately \$37 million.⁷⁹

103. This represents a burn rate of approximately \$1 million per month over the last five months.

104. The Horsley settlement prohibits Horsley from claiming any legal fees or disbursements from the insurance policies after the Effective Date, save and except for any criminal charges that may be laid against him, thereby preserving millions of dollars of insurance proceeds that would otherwise not be available for recovery from Sino-Forest and the remaining individual defendants.⁸⁰

⁷⁸ Affidavit of Charles Wright (Settlement Approval) at para. 106, Plaintiffs' Motion Record for Settlement Approval, Tab 2, pp. 54-55.

⁷⁹ Affidavit of Charles Wright (Settlement Approval) at para. 107, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 55.

⁸⁰ Affidavit of Charles Wright (Settlement Approval) at para. 109, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 55.

105. In the absence of a settlement, Horsley's counsel would be involved in continued cross examinations in the Ontario Action, the certification and leave motions in the Ontario Action, (scheduled for January 2015), and a lengthy trial in the OSC Proceedings (presently scheduled to begin September 2014). It is estimated that Horsley's legal costs to defend the OSC Proceedings and the Class Actions would exceed \$2 million which would otherwise draw on Sino's Directors & Officers liability insurance.⁸¹

OBJECTIONS

106. Canadian Class Counsel has engaged in a broad notice program to provide notice of the proposed fee and disbursement request, including direct notice to securities claimants and sought any objections relating to fees. None of these objections relate to the quantum of fees sought by Canadian Class Counsel.⁸²

CONCLUSION

107. Given all of the factors outlined above, including the multiple legal and practical impediments to establishing liability and recovering damages under Canadian and U.S. law, the time and expense devoted to pursuing the claims against Horsley, Canadian Class Counsel's risk of no success and minimal recovery, and the significant success achieved against Horsley, the requested fees and disbursements are extremely fair and reasonable under the circumstances and ought to be approved.

⁸¹ Affidavit of Charles Wright (Settlement Approval) at para. 110, Plaintiffs' Motion Record for Settlement Approval, Tab 2, p. 56.

⁸² Exhibit "D" to the Affidavit of Daniel Bach, Plaintiffs' Motion Record for Fee Approval, Tab 3(D), pp. 126-177.

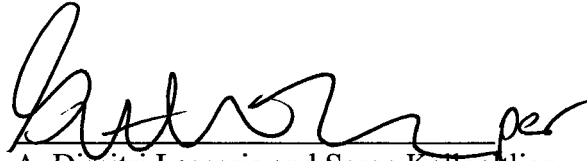
PART IV – ORDER REQUESTED

108. Canadian Class Counsel and insolvency counsel request that this court make an order approving their fees of \$567,000 (exclusive of tax) and disbursements of \$634,299.


ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of July, 2014.



Kirk Baert, Jonathan Ptak, and Garth Myers
Koskie Minsky LLP



A. Dimitri Lascaris and Serge Kalloghlian
Siskinds LLP



Ken Rosenberg and Massimo Starnino
Paliare Roland Rosenberg Rothstein LLP

Class Counsel

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
2. Order of Justice Morawetz dated December 27, 2013
3. *Sino-Forest Corporation (Re)*, 2012 ONSC 7041 (S.C.J.)
4. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of)*, [2013] O.J. No. 3085 (C.A.)
5. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, [2013] O.J. No. 1339 (S.C.J.)
6. *Invesco Canada Ltd. v. Sino-Forest Corp.*, [2013] S.C.C.A. No. 395 (S.C.C.)
7. *Labourer's Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, [2013] O.J. No. 6143 (S.C.J.)
8. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924
9. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
10. *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.)
11. *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)
12. *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962
13. *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 (C.A.)
14. *Endean v. Canadian Red Cross Society*, 2000 BCSC 971
15. *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602
16. *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292
17. *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660
18. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752
19. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2014 ONSC 62 (S.C.J.)
20. Ontario Law Reform Commission, *Report on Class Actions*, vol. 3, p. 676, Plaintiffs' Authorities

SCHEDULE "B" - RELEVANT STATUTES

Class Proceedings Act, 1992, S.O. 1992, c. 6.

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

- (4) If an agreement is not approved by the court, the court may,
 - (a) determine the amount owing to the solicitor in respect of fees and disbursements;

- (b) direct a reference under the rules of court to determine the amount owing; or
- (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

- (2) For the purpose of subsection (1), success in a class proceeding includes,
 - (a) a judgment on common issues in favour of some or all class members; and
 - (b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

- (3) For the purposes of subsections (4) to (7),

“base fee” means the result of multiplying the total number of hours worked by an hourly rate; (“honoraires de base”)

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”) 1992, c. 6, s. 33 (3).

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

- (5) A motion under subsection (4) shall be heard by a judge who has,
 - (a) given judgment on common issues in favour of some or all class members; or
 - (b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

- (a) shall determine the amount of the solicitor’s base fee;
- (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as

totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

Securities Act, R.S.O. 1990, c. S.5

Limits on damages

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

- (a) the aggregate damages assessed against the person or company in the action; and
- (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 16.

Same

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure. 2002, c. 22, s. 185.

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 COMPRISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

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

The Trustees of the Labourer's Pension Fund of
Central and Eastern Canada, et al.

and Sino-Forest Corporation, et al.

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

Plaintiffs

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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(Approval of Canadian Counsel Fees,
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