

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, 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,
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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

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S
SECURITIES, INCLUDING THE CLASS ACTION PLAINTIFFS
Settlement Approval - Horsley Settlement
(Motion Returnable July 24, 2014)**

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**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

1. This motion is to approve a settlement with David Horsley (“Horsley”), a defendant in a number of class actions concerning Sino-Forest Corporation (“Sino”) commenced in North America. It is the product of hard-fought and protracted negotiations, which were conducted by counsel having extensive experience in securities class actions and CCAA proceedings, and who had the benefit of extensive investigations.
2. On June, 2011, the Ontario Plaintiffs¹ commenced the above-captioned class proceeding (the “Ontario Action”) against Sino and various other defendants, including Horsley. Horsley was the company’s Chief Financial Officer (“CFO”) from October 2005 until his resignation in April 2012.
3. In the same month as the Ontario Action was commenced, a parallel action was commenced in the Quebec Superior Court (the “Quebec Action”, together with the Ontario Action, the “Canadian Actions”) by an individual shareholder of Sino (together with the Ontario Plaintiffs, the “Canadian Plaintiffs”). In January 2012, an action was commenced by certain plaintiffs against Sino, Horsley, and others in the New York Supreme Court (the “US Action”).
4. The class actions allege in essence that Sino, Horsley and others misstated Sino’s financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors. They further allege that, as a result of Sino’s misrepresentations, Sino’s securities traded at artificially inflated prices for

¹ 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.

many years and that, when the truth was revealed, Sino's security holders were injured by the collapse in market value of their Sino holdings.

5. The plaintiffs in the Ontario Action, Quebec Action, and US Action (the "Class Actions") have entered into Minutes of Settlement (the "Horsley Settlement") with Horsley to settle all claims against him in exchange for a payment of \$4.2 million (the "Class Settlement Fund"). In addition to settling the claims in the Class Actions, the Horsley Settlement also resolves the claims advanced against Horsley by Sino's Litigation Trust. In settlement of the Litigation Trust claims, Horsley and his insurers will also make a payment of \$1.4 million, of which \$600,000 will be paid personally by Horsley.² Therefore, the total amount payable by Horsley and his insurers is \$5.6 million.
6. In addition, Horsley (i) is giving up claims against all other current or former defendants or anyone that may claim over against a defendant; (ii) is providing cooperation to the plaintiffs in the continued prosecution of the Ontario Action; and (iii) will cease to seek reimbursement from his insurers for legal fees.³
7. The Horsley Settlement is subject to court approval in Ontario and recognition the United States.⁴

2 Affidavit of Charles Wright, sworn July 4, 2014 ("Wright Affidavit") paras. 11 and 17, Motion Record of the Plaintiffs (Settlement Approval – Horsley Settlement) ("Plaintiffs' Motion Record") at Tab 2, pp. 28, 29; Minutes of Settlement paras 1, 15, and 16 – Exhibit "A" to Wright Affidavit ("Minutes of Settlement"), Plaintiffs' Motion Record at Tab 2A, pp. 59, 62, 63.

3 Horsley may still seek reimbursement for any legal fees incurred as a result of criminal proceedings that may be laid against him.

4 Wright Affidavit, para 12, Plaintiffs' Motion Record at Tab 2, p. 28; Minutes of Settlement para 14, Plaintiffs' Motion Record at Tab 2A, p. 62.

8. The litigation will continue against the remaining defendants other than Pöyry (Beijing) Consulting Company Limited (“Pöyry”) and Ernst & Young. The claims against Pöyry and Ernst & Young were released pursuant to Court-approved settlement agreements.
9. The net settlement fund is to be distributed to persons who purchased Sino securities, other than the defendants and their affiliates. The manner in which the net settlement fund will be allocated among different groups of security holders will be the subject of a subsequent allocation approval hearing, if the Horsley Settlement is approved.
10. Under all of the circumstances, the Horsley Settlement is a very good settlement. In particular:
 - (a) The funds available under Sino’s Directors & Officers liability insurance policies are quickly dwindling as they are being used to fund the defense of several defendants in this litigation. The Horsley Settlement will likely preserve millions of dollars in insurance proceeds that would otherwise be spent on Horsley’s defense. Those funds will now potentially be available for recovery from Sino and the remaining individual defendants;
 - (b) Although losses to Securities Claimants caused by all of the defendants could run into the billions of dollars, there are numerous legal and practical impediments to recovery from Horsley which weigh strongly in favour of the Horsley Settlement. As discussed in detail below, Class Counsel’s view is that the recovery from Horsley in this settlement is consistent with his several liability for primary market share purchaser claims, and may potentially far exceed his liability limit under Part XXIII.1 of the Ontario Securities Act (the “OSA”);
 - (c) The extensive investigations done by class counsel and the OSC did not reveal any evidence of fraud or knowing misrepresentation and any such allegation (which was not made by the OSC or the Litigation Trust) would be very unlikely to succeed.
 - (d) There are significant procedural and substantive challenges to advancing the common law claims;
 - (e) Class Counsel have reviewed a statutory declaration concerning the combined net worth of Horsley and his spouse and his personal contribution of \$600,000 represents a significant contribution in light of his assets and is commensurate with his alleged conduct;

- (f) There is significant value in Horsley's cooperation in the continued prosecution of the Ontario Action against the remaining defendants;
- (g) The approval of the Horsley Settlement is a condition of Horsley's proposed settlement of the OSC Proceedings (defined below). In the absence of a settlement, it is possible that Horsley would be subject to a significant fine that would not benefit Securities Claimants and which would impinge on his ability to satisfy any judgment in the class actions.; and
- (h) The settlement assists in moving towards the final resolution of all claims related to Sino-Forest. Obtaining a contribution from, and eliminating one defendant and one set of defence counsel makes the resolution of other claims incrementally easier.

11. The Horsley Settlement ought to be approved.

PART II. THE FACTS

(A) Background of the Action

12. Sino was a forestry company with shares that were traded publicly on the Toronto Stock Exchange ("TSX"), on the Berlin exchange, on the over-the-counter market in the United States, and on the Tradedgate market. Sino shares also traded on alternative trading venues in Canada and elsewhere including, without limitation, AlphaToronto and PureTrading. Sino also had various notes outstanding which were offered to investors by way of offering memoranda and which also traded on the secondary market.⁵

13. On June 2, 2011, Muddy Waters Research ("Muddy Waters") released a report alleging fraud against Sino and alleging that it "massively exaggerates its assets". The release of this report was immediately followed by a dramatic decline in Sino's share price. The value of Sino's notes also fell in value following the release of the report.⁶

⁵ Wright Affidavit, paras. 24-25, Plaintiffs' Motion Record at Tab 2, p. 31.

⁶ Wright Affidavit, paras. 26-28, Plaintiffs' Motion Record at Tab 2, pp. 31-32.

14. On August 26, 2011, the Ontario Securities Commission (the “OSC”) issued a temporary cease trade order in respect of Sino’s securities. The recitals to the cease-trade order reflect that Sino appeared to the OSC to have engaged in significant non-arms’ length transactions which may have been contrary to Ontario securities laws and the public interest, that Sino and certain of its officers and directors appeared to have misrepresented some of Sino’s revenue and exaggerated some of its timber holdings, and that Sino and certain of its officers and directors appeared to be engaging or participating in acts, practices or a course of conduct related to Sino’s securities which they (or any of them) knew or ought reasonably to know would perpetuate a fraud.⁷

15. On March 30, 2012, Sino filed for protection from its creditors under the CCAA and obtained a stay of proceedings against it, its subsidiaries and directors and officers, including the Ontario Action.⁸

16. On May 9, 2012, Sino’s shares were delisted from the TSX. The delisting was imposed due to Sino’s failure to meet the continued listing requirements of the TSX as a result of the CCAA Proceedings (discussed below), and for failure to file on a timely basis certain of its interim financial statements and the audited financial statements for the year ended December 31, 2011. Sino has not filed audited financial statements for any period subsequent to 2010. Ernst & Young resigned as Sino’s auditors effective April 4, 2012. No new auditors were appointed.⁹

7 Wright Affidavit para. 29, Plaintiffs’ Motion Record at Tab 2, p. 32.

8 Wright Affidavit para. 31, Plaintiffs’ Motion Record at Tab 2, p. 32.

9 Wright Affidavit para. 32, Plaintiffs’ Motion Record at Tab 2, pp. 32-33.

(B) Class Actions against Sino, Horsley and Others

17. On July 20, 2011, the Ontario Action was commenced under the *Class Proceedings Act, 1992* (the “CPA”) against Sino, Horsley, and other defendants on behalf of persons that had purchased Sino securities in the period from March 19, 2007 to June 2, 2011. In this action, the plaintiffs allege that Sino misstated its financial statements, overstated the value of its assets, and concealed material information about its business and operations from investors in its public filings. As a result, Sino’s securities allegedly traded at artificially inflated prices for many years.¹⁰

18. Before commencing the Ontario Action, Class Counsel conducted an investigation into the Muddy Waters allegations with the assistance of the Dacheng law firm, one of China’s largest law firms (“Dacheng”). Dacheng was retained on the day after the Muddy Waters report was issued. Class Counsel’s investigation into the Muddy Waters allegations continued since that time, and has been aided not only by Dacheng, but also by Hong-Kong based investigators specializing in financial fraud; two separate Toronto-based firms that specialize in forensic accounting, generally accepted accounting principles and generally accepted auditing standards; a lawyer qualified to practice in the Republic of Suriname, where Sino purported to own, through an affiliate, certain timber assets; and a financial economist who specializes in the treatment of damages in securities class actions.¹¹

¹⁰ Wright Affidavit para. 33, Plaintiffs’ Motion Record at Tab 2, p. 33.

¹¹ Wright Affidavit para. 34, Plaintiffs’ Motion Record at Tab 2, p. 33.

19. On June 9, 2011, Siskinds Desmeules (“Desmeules”), a Quebec City law firm affiliated with Siskinds, commenced the Quebec Action against Sino, Horsley, and certain other defendants in the Quebec Superior Court.¹²
20. There were also two other proposed class proceedings commenced in Ontario relating to Sino. In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed. By Order dated January 6, 2012, the Honourable Justice Perell granted carriage to the Ontario Plaintiffs, and appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario Action on behalf of the proposed class.¹³
21. On January 27, 2012, the Washington, DC-based law firm of Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) commenced the US Action against Sino, Horsley, and other defendants in the New York Supreme Court. The US Action was transferred from the New York state court to the federal District Court for the Southern District of New York in March 2012.¹⁴
22. By way of Order of the United States District Court Southern District of New York dated January 4, 2013, David Leopard, IMF Finance SA and Myong Hyoon Yoo were appointed as the lead plaintiffs and Cohen Milstein as lead counsel to represent the interests of the proposed class.¹⁵

12 Wright Affidavit para. 35, Plaintiffs’ Motion Record at Tab 2, p. 34.

13 Wright Affidavit para. 36, Plaintiffs’ Motion Record at Tab 2, p. 34.

14 Wright Affidavit para. 37, Plaintiffs’ Motion Record at Tab 2, p. 34.

15 Wright Affidavit para. 38, Plaintiffs’ Motion Record at Tab 2, p. 34.

23. Class Counsel, Desmeules, and Cohen Milstein have been working together in a coordinated manner in all three of the proceedings.¹⁶

(C) Steps Taken in the Actions

(i) Motions for Certification and Leave in the Ontario Action

24. In March and April 2012, the Ontario Plaintiffs brought (a) a motion for certification of the Ontario Action as a class action under the CPA; and (b) a motion for leave to proceed with statutory claims under Part XXIII.1 of the OSA.¹⁷

25. The plaintiffs filed voluminous motion records in support of their motions, comprising evidence from their investigations and expert reports. The motion records included:

- (a) an affidavit of Steven Chandler, a senior law enforcement official from Hong Kong who was involved in investigating Sino in China;
- (b) an affidavit of Alan Mak, an expert in forensic accounting;
- (c) an affidavit of Dennis Deng, a lawyer qualified to practice in the People's Republic of China, and a partner in the Dacheng law firm; and
- (d) an affidavit for Carol-Ann Tjon-Pian-Gi, a lawyer qualified to practice in the Republic of Suriname.¹⁸

26. The certification and leave motions were scheduled for November 21-30, 2012, but were not heard at that time due to Sino's insolvency.¹⁹

(ii) Sino's Insolvency

27. On March 30, 2012, Sino filed an application for protection from its creditors under the CCAA (the "CCAA Proceedings"), and thereby secured an interim stay of proceedings

16 Wright Affidavit para. 39, Plaintiffs' Motion Record at Tab 2, p. 34.

17 Wright Affidavit para. 41, Plaintiffs' Motion Record at Tab 2, p. 35.

18 Wright Affidavit para. 42, Plaintiffs' Motion Record at Tab 2, p. 35.

19 Wright Affidavit para. 43, Plaintiffs' Motion Record at Tab 2, p. 35.

against the company, its subsidiaries, and its directors and officers. Pursuant to an order dated May 8, 2012, the stay of proceedings was extended to all other defendants in the action, including Horsley.²⁰

28. The CCAA Proceedings presented a material risk to investors on whose behalf the class actions were being prosecuted. In particular, the CCAA Proceedings could have resulted in an order approving a plan of arrangement that had the effect of imposing an unfavourable settlement on the Ontario Plaintiffs and the other securities claimants (the “Securities Claimants”).²¹

29. In the course of the CCAA Proceedings, counsel to the Ontario Plaintiffs appeared numerous times to protect the interests of purchasers of Sino’s securities. These attendances included motions, among other things, (i) to lift the CCAA stay partially or fully; (ii) regarding the claims procedure and obtaining the right to file a representative claim; (iii) to permit a motion to approve a litigation funding arrangement for the Ontario Action; (iv) for a representation order; (v) to effect a settlement with one of the defendants to the Ontario Action, Pöyry (Beijing) Consulting Company Ltd. (“Pöyry (Beijing)”); (vi) to secure access to non-public documents that were relevant to the claims advanced in the Ontario Action; and (vii) to schedule a mediation in the CCAA Proceedings.²²

20 Wright Affidavit para. 44, Plaintiffs’ Motion Record at Tab 2, p. 35.

21 Wright Affidavit para. 45, Plaintiffs’ Motion Record at Tab 2, p. 36.

22 Wright Affidavit paras. 44-47, Plaintiffs’ Motion Record at Tab 2, pp. 35-39.

(iii) Settlement with Pöyry (Beijing)

30. The Ontario Plaintiffs engaged in settlement discussions with Pöyry (Beijing) a defendant in the Ontario Action, starting in January 2012. Following arms-length negotiations, the Ontario Plaintiffs entered into a settlement with Pöyry (Beijing) in March 2012.²³

31. On September 25, 2012, the Ontario Action was certified as a class proceeding as against Pöyry (Beijing) for settlement purposes and the settlement was approved between the class and Pöyry (Beijing).²⁴ The opt-out period ran in respect of all claims against all defendants. The opt-out deadline was January 15, 2013.

(iv) Court-Ordered Mediation

32. On July 25, 2012, this Court ordered the various constituencies in the CCAA Proceedings to attend a mediation. On September 4 and 5, 2012, the Ontario Plaintiffs attended an all-parties mediation, which included Horsley. The mediation was conducted with the assistance of the Honourable Justice Newbould, acting as mediator. Extensive mediation briefs were filed by all parties. The position of each of the parties was set out in the briefs and at the mediation, including Horsley's position. The mediation did not result in a settlement with any of the parties, including Horsley, at that time.²⁵

33. It is Class Counsels' opinion that, given the defendants' negotiating stance as the mediation, the Ontario Plaintiffs could not have negotiated a significant all-party settlement at that mediation.²⁶

23 Wright Affidavit para. 48, Plaintiffs' Motion Record at Tab 2, pp. 39-40.

24 Wright Affidavit para. 49, Plaintiffs' Motion Record at Tab 2, p. 40.

25 Wright Affidavit para. 50, Plaintiffs' Motion Record at Tab 2, p. 40.

26 Wright Affidavit para. 51, Plaintiffs' Motion Record at Tab 2, p. 40.

34. Following the mediation, settlement discussions continued with the defendants. However, those settlement discussions did not come close to bridging the significant difference between the positions of the parties.²⁷

(v) Settlement with Ernst & Young

35. In November 2012, the Ontario Plaintiffs engaged in a further mediation with Ernst & Young, which resulted in a settlement with Ernst & Young (the “Ernst & Young Settlement”).²⁸

36. The framework of the Ernst & Young Settlement is contained at Article 11.1 of the Plan and was the template for a similar framework for Named Third Party Defendants contained at Article 11.2 of the Plan.²⁹

37. Pursuant to a motion brought by the Ontario Plaintiffs, the Ernst & Young Settlement was approved by this Court on March 20, 2013. The Ontario Plaintiffs then brought a motion for approval of the method of distribution of the Ernst & Young Settlement funds to Securities Claimants and claims filing procedure. The motion was granted on December 27, 2013.³⁰

38. In connection with both of these hearings, extensive notice was given to Securities Claimants of these proceedings. To date, over 47,000 claims have been filed in connection with the Ernst & Young Settlement.³¹

27 Wright Affidavit para. 52, Plaintiffs’ Motion Record at Tab 2, p. 40.

28 Wright Affidavit para. 53, Plaintiffs’ Motion Record at Tab 2, p. 41.

29 Wright Affidavit para. 54, Plaintiffs’ Motion Record at Tab 2, p. 41.

30 Wright Affidavit para. 55, Plaintiffs’ Motion Record at Tab 2, p. 41.

31 Wright Affidavit para. 56, Plaintiffs’ Motion Record at Tab 2, p. 41.

(D) Other Proceedings Against Horsley

(i) OSC Statement of Allegations Against Horsley

39. On May 22, 2012, 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”).³²

40. While the Statement of Allegations alleges fraud against Overseas Management, the allegations against Horsley are consistent with negligence only, and not fraud.³³

41. The Horsley Settlement is conditional upon the OSC approving a conditional settlement of the OSC Proceeding against Horsley. Likewise, the proposed settlement of the OSC Proceeding against Horsley is conditional upon approval of the Horsley Settlement.³⁴

(ii) Litigation Trust Claim Against Horsley

42. In July 2013, the Litigation Trust issued a statement of claim against Horsley and other senior executives of Sino. As with the OSC Proceeding, the Litigation Trust claim clearly distinguishes the conduct of Horsley from the conduct of the other defendants.³⁵

43. In our view, the allegations against Horsley in the Litigation Trust are generally consistent with Class Counsel’s understanding of his role with respect to Sino and the rationale in recommending the Horsley Settlement.³⁶

32 Wright Affidavit para. 62, Plaintiffs’ Motion Record at Tab 2, p. 42.

33 Wright Affidavit para. 63, Plaintiffs’ Motion Record at Tab 2, p. 43.

34 Wright Affidavit paras. 65-66, Plaintiffs’ Motion Record at Tab 2, p. 43.

35 Wright Affidavit para. 67, Plaintiffs’ Motion Record at Tab 2, p. 43.

36 Wright Affidavit para. 68, Plaintiffs’ Motion Record at Tab 2, p. 43.

44. Pursuant to Article 4.11 of the Plan, the Litigation Trust Interests (as defined in the Plan) in the Litigation Trust are allocated as follows:

- (a) the Affected Creditors (as defined in the Plan) shall be collectively entitled to 75% of such Litigation Trust Interests; and
- (b) the Noteholder Class Action Claimants (as defined in the Plan) shall be collectively entitled to 25% of such Litigation Trust Interests.

45. Accordingly, 25% of the \$1.4 million being paid in settlement of the Litigation Trust claims will be to the benefit of certain Securities Claimants that acquired Sino notes.

(E) The Horsley Settlement

(i) Background to and Terms of Settlement

46. The negotiations leading to the Horsley Settlement were conducted on an adversarial, arm's-length basis.³⁷

47. Following the failed court-ordered mediation in September 2012, Class Counsel continued settlement discussions with counsel to Horsley. An agreement in principle was reached in January 2013; 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 Article 11.2 framework required consent of the Litigation Trust; and (b) Horsley sought to resolve all outstanding litigation against him.³⁸

³⁷ Wright Affidavit para. 71, Plaintiffs' Motion Record at Tab 2, p. 44.
³⁸ Wright Affidavit para. 72, Plaintiffs' Motion Record at Tab 2, p. 44.

48. 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, finally entering into the Minutes of Settlement in late May 2014.³⁹

49. The key terms of the Horsley Settlement are as follows:

- (a) Horsley's insurers will pay \$4.2 million in respect of the claims of the class members;
- (b) Horsley will contribute \$600,000 personally, and his insurers will contribute \$800,000 in respect of the Litigation Trust claims;
- (c) all claims or possible claims against Horsley relating to Sino will be released;
- (d) Horsley will not seek reimbursement from his insurers for legal fees after the Effective Date, except for any legal fees incurred as a result of criminal proceedings that may be laid against him, therefore Horsley must continue to pay out-of-pocket for his legal expenses incurred to assist the plaintiffs in advancing the class action against the other non-settling defendants in connection with his cooperation obligations under the settlement agreement;⁴⁰
- (e) Horsley will provide cooperation to the plaintiffs in the Ontario Action, including being interviewed by the plaintiffs and giving evidence at trial if requested to do so;⁴¹
- (f) none of the parties in the Class Actions (as defined in the Settlement Order) or any other actions in which the Horsley Claims (as defined in the Settlement Order) have been or could have been asserted shall be permitted to claim from any of the other defendants that portion of any damages, restitutionary award or disgorgement of profits that corresponds with the liability of Horsley proven at trial or otherwise;⁴²
- (g) any claims that Horsley may have had against (i) any other current or former defendant in the Ontario Action; (ii) any other current or former defendant in any Class Actions (as defined in the Settlement Order); (iii) any other current or former defendants' insurers, or any affiliates thereof; or (iv) any other persons who may claim over against the other current or former defendants in

³⁹ Wright Affidavit para. 73, Plaintiffs' Motion Record at Tab 2, p. 44.

⁴⁰ Minutes of Settlement, para. 21, Plaintiffs' Motion Record at Tab 2A, p. 59.

⁴¹ Minutes of Settlement, para. 22, 23, 25, 27, Plaintiffs' Motion Record at Tab 2A, pp. 64, 65, 66, 67.

⁴² Settlement Order, Plaintiffs' Motion Record Tab 2A, p. 77.

respect of contribution, indemnity or other claims that relate to the allegations made in the Class Actions will be released.⁴³

50. The Horsley Settlement is subject to the issuance of the Settlement Order and the US Recognition Order.⁴⁴

(ii) Settlement Framework in Article 11.2 of the Plan

51. Article 11.2 of the Plan provides the Ontario Plaintiffs with the ability to complete further settlements within the context of CCAA Proceedings, subject to further court approval.⁴⁵

52. Article 11.2 contains a framework by which an Eligible Third Party Defendant may become a named Third Party Defendant for the purpose of entering into a Named Third Party Defendant Settlement and Obtaining a Named Third Party Defendant Release.⁴⁶

53. The Horsley Settlement contemplates that the settlement will be effected through Article 11.2 of the Plan, and the parties have obtained the necessary consents required by Article 11.2 to do so.⁴⁷

(iii) Factors Supporting the Settlement

54. Class Counsel have substantial experience in class actions, particularly securities class actions. In the view of Class Counsel, the Horsley Settlement is fair, reasonable and in the best interests of Securities Claimants.⁴⁸

43 Settlement Order para 15, Plaintiffs' Motion Record Tab 2A, p. 77.

44 Wright Affidavit para. 12, Plaintiffs' Motion Record at Tab 2, p. 28.

45 Wright Affidavit para. 57, Plaintiffs' Motion Record at Tab 2, p. 41.

46 Wright Affidavit para. 58, Plaintiffs' Motion Record at Tab 2, p. 42.

47 Wright Affidavit paras. 59-60, Plaintiffs' Motion Record at Tab 2, p. 42.

48 Wright Affidavit paras. 79-86, 90, Plaintiffs' Motion Record at Tab 2, pp. 47-50.

55. Class Counsel's view is informed by its extensive investigations, document review, and the input and opinions of experts, including:

- (a) all of Sino's public disclosure documents and other publicly available information with respect to Sino;
- (b) the available trading data for Sino's securities;
- (c) extensive non-public documentation uploaded by Sino into the data-room established in the CCAA Proceedings for purposes of the global mediation;
- (d) Horsley's responsive insurance policies;
- (e) a statutory declaration from Horsley confirming the net worth of Horsley and his spouse;
- (f) Sino's Management Information Circulars, which contain information regarding the amount of compensation received by Horsley from Sino;
- (g) the input and opinions of accounting experts, insolvency law experts, and insurance coverage experts;
- (h) the input and opinion of Frank C. Torchio, the President of Forensic Economics Inc., who has consulted or given independent damage opinions in securities fraud lawsuits for over 20 years;
- (i) the Statement of Allegations issued against Horsley and others by the OSC;
- (j) the mediation briefs provided by the parties, including Horsley, at the global mediation in September 2012;
- (k) input from experienced US securities counsel, Kessler Topaz Meltzer & Check, LLP, and discussions with counsel the plaintiffs in the US Action; and
- (l) the Litigation Trust claim against Horsley and others.⁴⁹

56. Although the parties entered into the Horsley Settlement prior to formal discovery, Class Counsel had at its disposal an abundance of information available from which to make an appropriate recommendation concerning the resolution of the claims against Horsley.

Actual Damages Far Exceed Recoverable Damages

⁴⁹ Wright Affidavit para. 88, Plaintiffs' Motion Record at Tab 2, pp. 49-50.

57. The Ontario Action asserts against Horsley (i) statutory liability in respect of primary market share purchaser claims pursuant to s. 130 of the OSA; (ii) statutory liability in respect of secondary market share and note purchaser claims pursuant to Part XXIII.1 of the OSA; (iii) oppression; and (iv) common law and equitable claims for negligent misrepresentation, negligence, conspiracy, and unjust enrichment.

58. If successful, these claims could result in an award for significant damages against all defendants. Frank Torchio, the plaintiffs' damages expert, has estimated that total damages to Securities Claimants caused by all defendants run into the billions of dollars. While Class Counsel was guided by the advice of Mr. Torchio, in the course of the settlement discussions in this case, certain defendants insisted that far more conservative damages figures would be appropriate.⁵⁰

59. Mr. Torchio opines on total estimated damages for all losses suffered, including those attributable to Sino, the other individual defendants, and third party defendants. However, the extent of damages which were caused, and which could be proven and collectible against any one defendant would be far lower.

60. Moreover, actual damages to be paid may only be for claims filed. For a variety of reasons, less than 100% of class members generally file claims. Although claims rates vary from case to case, it is never the case in a matter of this nature that all class members file claims. Therefore, actual payable damages could be some portion of Mr. Torchio's figures if the

50 Wright Affidavit paras. 92-93, Plaintiffs' Motion Record at Tab 2, p. 51.

matter proceeded to trial and the defendants succeeded in establishing that damages should be based only on claims filed.⁵¹

61. More importantly, according to Mr. Torchio, the aggregate damages for the s. 130 OSA claims against all defendants are limited to approximately \$78.5 million.⁵² This is of note because the OSA claims contain a deemed reliance provision which is not available in common law claims.

62. In addition, it is very likely that if Horsley was found liable, liability would also be borne by Sino, the other officers and directors, BDO Limited, and the Underwriters. Based on the review of available information, including the allegations against Horsley in the OSC Proceeding and Litigation Trust claim, Class Counsel's view is that the settlement amount reflects Horsley's several liability under the s. 130 claims.⁵³

63. With respect to the secondary market claims, Part XXIII.1 of the OSA 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 and its affiliates for the 12 month-period immediately preceding the day on which the misrepresentation was made. According to Class Counsel's estimates based on Sino's disclosures, it is possible that Horsley's liability limit could range as low as approximately \$600,000 - \$700,000 for the secondary market claims.⁵⁴

51 Wright Affidavit paras. 95-96, Plaintiffs' Motion Record at Tab 2, p. 52.

52 Wright Affidavit para. 98, Plaintiffs' Motion Record at Tab 2, p. 52.

53 Wright Affidavit para. 99, Plaintiffs' Motion Record at Tab 2, p. 53.

54 Wright Affidavit paras. 101-102, Plaintiffs' Motion Record at Tab 2, p. 53.

64. The only exception to this recovery would be for the plaintiffs to prove that Horsley made the alleged misrepresentations knowingly. This would be a very difficult standard to meet, one which Horsley denies and which Horsley will assert requires proof of fraud. Class Counsel has found no evidence of conduct that would support a finding of fraud by Horsley. Class Counsel's view is supported by the OSC Statement of Allegations and the Litigation Trust Claim, which makes allegations consistent with negligence and no allegation amounting to knowledge, intentional misrepresentation, or fraud.⁵⁵
65. 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; and (c) proving individual reliance.⁵⁶
66. Furthermore the action against Horsley raises novel and complex legal issues 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.

⁵⁵ Wright Affidavit paras, 103-104, Plaintiffs' Motion Record at Tab 2, p. 54.

⁵⁶ Wright Affidavit at para. 105, Plaintiffs' Motion Record at Tab 2, p. 54.

Horsley's Insurance and Capacity to Pay

67. The insurance policies responsive to the claims against Horsley provide coverage of \$60 million in aggregate, are eroded by defence costs, and are also responsive to the claims against Sino and all other individual defendants named in the class actions, as well as certain respondents in the OSC Proceedings. 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.⁵⁷

68. Furthermore the multiplicity of proceedings against the many different defendants (represented by different counsel) in various courts and at the OSC further erodes the insurance funds.

69. Class Counsel has monitored the amount of funds available under Sino's Directors & Officers insurance policies, which are quickly depleting. 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 13, 2014 – approximately \$42 million; and
- (e) July 3, 2014 – approximately \$37 million.⁵⁸

⁵⁷ Wright Affidavit para. 106, Plaintiffs' Motion Record at Tab 2, pp. 54-55.
⁵⁸ Wright Affidavit paras. 107-108, Plaintiffs' Motion Record at Tab 2, p. 55.

70. This represents a burn rate of the insurance funds of approximately **\$1 million per month** over the last five months.

71. One of Class Counsel's goals in entering the Horsley Settlement was to preserve to the greatest extent possible the amount of insurance proceeds available as potential recovery to Securities Claimants. Accordingly, 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.⁵⁹

72. 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 in 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.⁶⁰

73. The Horsley Settlement will therefore likely preserve millions of dollars of insurance proceeds that would otherwise not be available for recovery from Sino and the remaining individual defendants.⁶¹

74. Moreover, in the absence of a settlement with the OSC (which is conditional upon approval of the Horsley Settlement), Horsley may have been subject to a fine. Class Counsel has reviewed a statutory declaration from Horsley concerning the combined net worth of him and his spouse, and Class Counsel's view is that a significant fine imposed on Horsley in the

59 Wright Affidavit para. 109, Plaintiffs' Motion Record at Tab 2, p. 55.

60 Wright Affidavit para. 110, Plaintiffs' Motion Record at Tab 2, p. 56.

61 Wright Affidavit para. 111, Plaintiffs' Motion Record at Tab 2, p. 56.

OSC Proceedings could impinge on his ability to make any personal contribution to a settlement.⁶²

Horsley's Ability to Pay and the Settlement with Litigation Trust

75. As indicated, Noteholder Class Action Claimants are entitled to 25% of the \$1.4 million being paid in Horsley's settlement of the Litigation Trust claim against him. Of this amount, Horsley is making a personal contribution of \$600,000. Having reviewed the statutory declaration concerning the combined net worth of Horsley and his spouse, payment of \$600,000 by Horsley is a significant contribution relative to the net assets that the plaintiffs could reasonably expect to collect on, particularly if a trial had occurred in the OSC Proceeding and a significant fine had been levied against him.⁶³

Objections to the Settlement

76. To date, Class Counsel has received 35 objections from individuals⁶⁴ regarding the Horsley Settlement:

- (a) Seventeen of the objections provided no reason. For example, one simply stated "I object [to] the Horsley Settlement", another stated "I do not like the Ho[r]sley settlement". Nine did not write anything at all, calling into question whether those persons actually intended to object.⁶⁵
- (b) Fourteen individuals objected to the quantum of the settlement. These individuals did not have access to the extensive investigations, document review, and the input and opinions of experts that led Class Counsel to reach this settlement with Horsley.
- (c) One objector stated that no money should be distributed until all the defendants have been investigated and the class action is finalized. This argument is contrary to the purpose and spirit of the CPA and the CCAA,

62 Wright Affidavit para. 112, Plaintiffs' Motion Record at Tab 2, p. 56.

63 Wright Affidavit para. 113, Plaintiffs' Motion Record at Tab 2, p. 56.

64 One individual, Deborah Ann Wilson, submitted two separate notices of objection.

65 Exhibit "D" to the Affidavit of Daniel E. H. Bach, sworn July 14, 2014, Plaintiffs' Motion Record (Fee Approval), pp. 139-178.

which encourage settlement after a reasonable investigation and hard look at the merits, costs and risks of continuing litigation.

- (d) One objection stated that Horsley needs to admit to wrongdoing and liability and should voluntarily resign all professional designations and complete remediation for his actions before he is re-instated. This concern is properly addressed by the Ontario Securities Commission. The settlement agreement between Class Counsel and Horsley reflects a compromise between the parties that achieves compensation for Sino-Forest security holders while preserve millions of dollars in insurance proceeds that would otherwise be spent on Horsley's defense.
- (e) One objector stated that there is no guarantee that Horsley will provide information to aid in the class action. Pursuant to the settlement agreement, Horsley must provide cooperation to the plaintiffs in the Ontario Action, including being interviewed by the plaintiffs and giving evidence at trial if requested to do so.
- (f) One objector argues that Sino-Forest is *innocent* any wrongdoing, and this settlement punishes current shareholders.

77. As discussed above, Class Counsel considered these types of concerns in reaching the settlement with Horsley.

PART III. ISSUES AND THE LAW

(A) Settlement Approval

(i) Settlements in the CCAA Context

78. In assessing a settlement within the CCAA context, the court looks at the following three factors: (a) whether the settlement is fair and reasonable; (b) whether it provides substantial benefit to other stakeholders; and (c) whether it is consistent with the purpose and spirit of the CCAA.⁶⁶

⁶⁶ *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 ("E&Y Settlement Approval Decision") at para 49, Plaintiffs' Book of Authorities (Settlement Approval – Horsley Settlement) ("Plaintiffs' Book of Authorities"), Tab 1.

79. Where a settlement also provides for a release, courts assess whether there is “a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.”

Applying this “nexus test” requires consideration of the following factors:

- (a) are the claims to be released rationally related to the purpose of the plan?
- (b) are the claims to be released necessary for the plan of arrangement?
- (c) are the parties who have claims released against them contributing in a tangible and realistic way?
- (d) will the plan benefit the debtor and the creditors generally?⁶⁷

80. As set out below, the CCAA tests to approve a settlement and release are met.

(ii) Settlements in the CPA Context

81. The test for whether a class action settlement ought to be approved is substantially similar to the test for approval of a settlement under the CCAA. The class action principles can provide guidance to this Court with respect to the approval of a settlement in both contexts.

82. To approve a class action settlement, the test is whether “in all the circumstances, the settlement is fair, reasonable, and in the best interests of those affected by it.”⁶⁸ The class action cases establish additional principles relevant on a settlement approval motion:

- (a) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
- (b) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval;

⁶⁷ *Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 at para 50, Plaintiffs’ Book of Authorities Tab 1.

⁶⁸ *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ No 1598 (OCJ Gen Div) at para 9, Plaintiffs’ Book of Authorities Tab 2.

- (c) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonableness;
- (d) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a range of reasonableness. All settlements are the product of a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection; and
- (e) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the actions or simply rubber-stamp a proposed settlement.⁶⁹

83. The "range of reasonableness" test is flexible. It permits the court to apply an objective standard, allowing for variation between settlements, depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.⁷⁰ In fact, even a "less than perfect settlement may be in the best interests of those affected...when compared to the alternative of the risks and costs of litigation."⁷¹

84. Courts have developed a list of factors that are useful in assessing the reasonableness of a proposed settlement. It is not necessary that all factors be present or equally weighted; some may even be disregarded, depending on the circumstances of the case. They include:

- (a) the likelihood of recovery or likelihood of success;
- (b) the amount and nature of discovery, evidence, or investigation;
- (c) the proposed settlement terms and conditions;
- (d) the recommendation and experience of counsel;

⁶⁹ *Nunes v Air Transat AT Inc* (2005), 20 CPC (6th) 93 (On Sup Ct) at para 7, Plaintiffs' Book of Authorities Tab 3; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para 31, Plaintiffs' Book of Authorities Tab 4.

⁷⁰ *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151 at para 70, Plaintiffs' Book of Authorities Tab 5.

⁷¹ *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at para 25 and 33, Plaintiffs' Book of Authorities Tab 6.

- (e) the risk, future expense, and likely duration of litigation;
- (f) the number of objectors and nature of objections;
- (g) the presence of arm's-length bargaining and the absence of collusion; and/or
- (h) information conveying to the courts the dynamics of, and the positions taken by the parties during, the negotiations.⁷²

85. In the CPA context and in the absence of evidence to the contrary, “the recommendation of experienced counsel is entitled to considerable weight given their ability to weigh the factors bearing on the reasonableness of the settlement.”⁷³

86. A class actions judge can approve or reject the settlement, but cannot modify its terms.⁷⁴ In deciding whether to reject a settlement, the Court should consider if whether doing so would put the settlement in “jeopardy of being unraveled.” There is no obligation on parties to resume settlement discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely-held view that the resolution of complex litigation through settlement is to be encouraged by the courts and favored by public policy.⁷⁵

87. As set out below, the test under the CPA to approve a settlement and release is met as well.

⁷² *Marcantonio v TVI Pacific Inc* (2009), 82 CPC (6th) 305 at para 12, Plaintiffs’ Book of Authorities Tab 7; *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151 at paras 71-73, Plaintiffs’ Book of Authorities Tab 5.

⁷³ *Metzler Investment GmbH v Gildan Activewear Inc.*, 2011 ONSC 1146 at para 31, Plaintiffs’ Book of Authorities Tab 8; *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911 at para 20 (Cautioning against the Court “substituting [its] view of the prospects of success for the views of class counsel, who have lived with this action since its outset and who are familiar with the risks and benefits of continuing with the action”, Plaintiffs’ Book of Authorities Tab 9.

⁷⁴ *Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No 1598 (Gen Div) at paras 10 and 14, Plaintiffs’ Book of Authorities Tab 2.

⁷⁵ *Semple v Canada (Attorney General)*, 2006 MBQB 285 at para 26, Plaintiffs’ Book of Authorities Tab 10; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para 34, Plaintiffs’ Book of Authorities Tab 4.

(iii) The Settlement is Fair and Reasonable and Should be Approved

88. As outlined above, the Horsley Settlement provides for payment of \$5.6 million in total in settlement of all claims against Horsley in relation to Sino. In addition, Horsley (i) is giving up claims against all other current or former defendants or anyone that may claim over against a defendant; (ii) is providing cooperation to the plaintiffs in the continued prosecution of the Ontario Action; and (iii) will cease to seek reimbursement from his insurers for legal fees.

89. In all of the circumstances, the Horsley Settlement is a very good settlement.

90. The Horsley Settlement is fair and reasonable under all of the circumstances, provides substantial benefit to other stakeholders and is consistent with both the purpose and spirit of the CPA and the CCAA, which encourage settlement after a reasonable investigation and hard look at the merits, costs and risks of continuing litigation.

91. The release is also “justified as part of the compromise or arrangement between the debtors and its creditors.... [There is] a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan.”⁷⁶

92. Although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to Sino’s creditors.⁷⁷ In order to effect any distribution, the Horsley Release must be approved as part of the Horsley Settlement.

⁷⁶ *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 70, Plaintiffs’ Book of Authorities Tab 11.

⁷⁷ *Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 at para. 60, Plaintiffs’ Book of Authorities Tab 1.

93. Article 11.2 of the Plan of Arrangement which permitted Horsley (and other defendants) to be named as Third Party Defendants, and which provides the framework for the Horsley settlement, created value for stakeholders (including class members and beneficiaries of the litigation trust) by facilitating settlements with the defendants. They are an integral and important part of the Plan. Without the addition of such provision, the Plan would have faced opposition from certain stakeholders, as well as potential appeals. These delays would have been detrimental to the restructuring. In the Monitor's words, Sino could "not afford to remain in a CCAA process for much longer." As found by this court, timing and delay were specifically identified as elements that would impact on maximization of the value and preservation of Sino's assets.⁷⁸

94. Furthermore, the Named Third Party defendants (of which Horsley is one) were required to release cross-claims against Sino which assisted in the restructuring.

95. In addition, Class Counsel had the benefit of its own extensive investigation aided by experts from a variety of relevant disciplines and jurisdiction, the investigation of Sino's independent committee and its advisers, Class Counsel's review of non-public relevant documents from the confidential data room, the allegations of OSC Staff, and the allegations of the Litigation Trust.⁷⁹

96. In reaching the settlement, Class Counsel considered, among other things:

- (a) **Horsley's proportionate liability with respect to the s. 130 OSA claims:** it is Class Counsel's view that the settlement amount reflects Horsley's several liability under the section 130 claims;

⁷⁸ *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 at para. 69, Plaintiffs' Book of Authorities Tab 1.

⁷⁹ Wright Affidavit para. 88, Plaintiffs' Motion Record at Tab 2, pp. 49-50.

- (b) **Horsley's liability limit with respect to the Part XXIII.1 OSA claims:** 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.
- (c) **The unlikelihood that fraud or knowing misrepresentation could be established:** The extensive investigations done by class counsel and the OSC did not reveal any evidence of fraud or knowing misrepresentation and any such allegation (which was not made by the OSC or the Litigation Trust) would be very unlikely to succeed.
- (d) **Horsley's net worth and limited capacity to pay:** Canadian Class Counsel has been provided with a statutory declaration from Horsley concerning the combined net worth of him and his spouse. Horsley's personal contribution of \$600,000 to the Horsley Settlement represents a significant contribution in light of his assets, and Horsley must continue to pay out-of-pocket for ongoing expenses in connection with his cooperation obligations under the settlement agreement.⁸⁰
- (e) **The quickly dwindling available insurance proceeds remaining;** 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. Almost half of the insurance proceeds have already been exhausted in defence costs and the "burn rate" has reached approximately \$1 million per month over the last five months.
- (f) **The difficulty in advancing the common law claims of 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; and (c) proving individual reliance.
- (g) **The value of Horsley's cooperation in the continued prosecution of the Ontario Action against the remaining defendants.**

97. Furthermore, a policy objective of Ontario's class proceedings regime is of general and specific deterrence or "behaviour modification." This objective will be advanced if Horsley's settlement of the OSC Proceeding is approved and includes a permanent ban on Horsley from acting as a director or officer of a public issuer of securities, as stated in the recitals to the draft settlement approval order appended to the Minutes of Settlement. In

⁸⁰ Wright Affidavit at paras. 22 and 113, Plaintiffs' Motion Record at Tab 2, p. 30, 56.

addition, Horsley's \$600,000 personal contribution to the settlement of the Litigation Trust claims will send a signal to directors and officers of public companies that personal financial consequences will attach to the type of conduct alleged against Horsley. Neither a settlement with the OSC nor with the Litigation Trust would have been possible without the Horsley Settlement.

98. Finally, the settlement assists in moving towards the final resolution of all claims related to Sino-Forest. The class actions include multiple intertwined claims, and multiple potential draws on the relevant insurance policies. Obtaining a contribution from, and eliminating one defendant and one set of defence counsel makes the resolution of other claims incrementally easier.

(v) The Horsley Settlement Fairly Compromises the US Claims

99. The Horsley Settlement also meets US standards for approval, because it is fair, reasonable, and adequate.⁸¹

100. The US Action faced challenges to continued litigation that are similar to those described above, and the US class members will substantially benefit from the Horsley Settlement. Moreover, US plaintiffs faced challenges in addition to the risks described above and under the Exchange Act, which requires them to prove *scienter* (fraudulent intent). This is a standard, as the United States Supreme Court has stated, that mandates “[e]xacting pleading requirements....”⁸² As held in controlling law for the District where the US Action is pending, allegations supporting *scienter* must satisfy the heightened pleading requirements of

81 In the jurisdiction where the US Action is pending, “there is a ‘strong judicial policy in favor of settlements, particularly in the class action context’” and settlements may be approved so long as they are “‘fair, reasonable and adequate.’” In re IMAX Sec. Litig., 283 F.R.D. 178, 188 (S.D.N.Y. 2012), Plaintiffs’ Book of Authorities Tab 12.
82 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), Plaintiffs’ Book of Authorities Tab 13.

Rule 9(b) of the US Federal Rules of Civil Procedure and the US Private Securities Litigation Reform Act (“PSLRA”), and plead facts with sufficient particularity to prove a state of mind behind knowing or reckless conduct.⁸³ As noted above at paragraph 40, class counsel and the OSC did not reveal any evidence of intentional fraud or knowing misrepresentation, and so proving *scienter* would have posed a substantial challenge in the US litigation: Where plaintiffs do not meet the heightened pleading standard requiring a showing of *scienter*, the PSLRA mandates dismissal under 15 U.S.C. § 78u-4(b)(3)(A).

101. Another risk in the US Action is that the doctrine of joint and several liability applies under the Exchange Act “only if the trier of fact specifically determines” that the defendant “knowingly committed a violation of the securities laws.”⁸⁴ Given the challenges in this case in proving knowledge against Horsley, US plaintiffs faced the risk that Horsley would eventually be found only proportionately liable and that his proportionate fault was much smaller than the amount achieved in the Horsley Settlement. A finding of proportionate liability, in turn, would pose additional limitations to recovery, as Horsley’s net worth could restrict the collectability of any judgment obtained against him. The Horsley Settlement also precludes any challenges faced by enforcing a US judgment overseas in a foreign jurisdiction.

102. Finally, courts in the US favor preserving funds available to class recovery.⁸⁵ Here, the Horsley Settlement resolves risks of protracted litigation and appeal.

⁸³ *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001), Plaintiffs’ Book of Authorities Tab 14.

⁸⁴ This is provided for under U.S. Code as amended by the PSLRA, 15 U.S.C. § 78u-4(f)(2)(A).

⁸⁵ See *In re Amer. Bus. Fin. Services, Inc. Noteholders Litig.*, No. 05–232, 2008 WL 4974782, at *8 (Nov. 21, 2008) (“Continuing to trial in the hopes of obtaining a higher penalty would merely deplete the insurance policy proceeds and increase the risk that the proceeds will further deplete due to the litigation costs of the other pending

(B) Proposed Bar Order

103. As part of the Horsley Settlement, the parties seek an order barring any claims for contribution or indemnity against Horsley, in accordance with section 11.2 of the Plan of Arrangement. The proposed bar order provides, as is standard that the class shall restrict its joint and several claims against the non-settling defendants to those damages arising from the conduct of the non-settling defendants.⁸⁶

104. The form of the bar order is fair and properly balances the competing interests of Securities Claimants, Horsley, and the non-settling defendants:

- (a) Securities Claimants are not releasing their claims to a greater extent than necessary;
- (b) Horsley is assured that his obligations in connection with the settlement will conclude his liability in the class proceeding; and
- (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Horsley remained as a defendant in the action (i.e. the plaintiffs have agreed not to look to the non-settling defendants for any loss attributable to Horsley).

105. These orders are standard where a defendant settles and others remain.⁸⁷

106. In addressing any non-settling defendant's objection to a bar order, the Court must be careful not to give the non-settling defendant a "tactical advantage." An unreasonable non-settling defendant "can hold the other parties at ransom, virtually dictating the terms of the

cases, leaving the class, if successful, with a lesser judgment, not a greater one."), Plaintiffs' Book of Authorities Tab 15.

⁸⁶ Settlement Order para 14(d), Plaintiffs' Motion Record Tab 2A, p. 77.

⁸⁷ *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (Ont Sup Ct), Plaintiffs' Book of Authorities, Tab 16; *Eidoo v Infineon Technologies AG*, 2012 ONSC 380, Plaintiffs' Book of Authorities, Tab 17.

settlement." This would be inconsistent with the strong public policy reasons favouring settlement.⁸⁸

107. The bar order is reasonable and appropriate under the circumstances.

Conclusion

108. Under all of the circumstances, the Horsley Settlement is a very good settlement. It reflects the significant legal and practical impediments to recovery and was reached after extensive investigation and arms' length bargaining. It is fair and reasonable, provides tangible benefits to stakeholders, and was reached within the framework of the Plan of Arrangement. It ought to be approved.

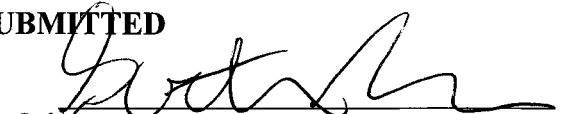
⁸⁸ *Amoco Canada Petroleum Co v Propak System Ltd*, 2001 ABCA 110 at para 25, Plaintiffs' Book of Authorities Tab 18; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para 58, Plaintiffs' Book of Authorities Tab 4.

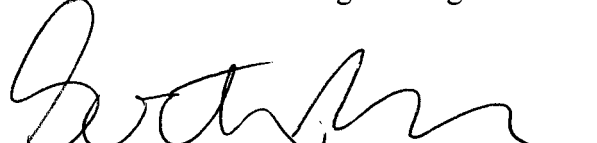
PART IV. ORDER REQUESTED


109. In light of all of the above, the Ontario Plaintiffs respectfully request an order approving the Horsley Settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 17, 2014


A. Dimitri Lascaris / Serge Kalloghlian


Kirk Baert / Jonathan Ptak / Garth Myers


Ken Rosenberg / Massimo Starnino

Class Counsel

SCHEDULE “A”

1. *Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078
2. *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ No 1598 (OCJ Gen Div)
3. *Nunes v Air Transat AT Inc* (2005), 20 CPC (6th) 93 (On Sup Ct)
4. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643
5. *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151
6. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
7. *Marcantonio v TVI Pacific Inc* (2009), 82 CPC (6th) 305
8. *Metzler Investment GmbH v Gildan Activewear Inc.*, 2011 ONSC 1146
9. *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911
10. *Semple v Canada (Attorney General)*, 2006 MBQB 285
11. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587
12. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012)
13. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)
14. *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001)
15. *In re Amer. Bus. Fin. Services, Inc. Noteholders Litig.*, No. 05–232, 2008 WL 4974782
16. *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (Ont Sup Ct)
17. *Eidoo v Infineon Technologies AG*, 2012 ONSC 380
18. *Amoco Canada Petroleum Co v Propak System Ltd*, 2001 ABCA 110

SCHEDULE "B"

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

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

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

PART XXIII CIVIL LIABILITY

Liability for misrepresentation in prospectus

130. (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

- (a) the issuer or a selling security holder on whose behalf the distribution is made;
- (b) each underwriter of the securities who is required to sign the certificate required by section 59;
- (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;

(d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and

(e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter. R.S.O. 1990, c. S.5, s. 130 (1); 2004, c. 31, Sched. 34, s. 6; 2006, c. 33, Sched. Z.5, s. 13.

Joint and several liability

(8) All or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable. R.S.O. 1990, c. S.5, s. 130 (8).

Liability for misrepresentation in offering memorandum

130.1 (1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.
2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company. 2004, c. 31, Sched. 34, s. 7.

PART XXIII.1

CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

INTERPRETATION AND APPLICATION

Definitions

138.1 In this Part,

...

“liability limit” means,

- (a) in the case of a responsible issuer, the greater of,
 - (i) 5 per cent of its market capitalization (as such term is defined in the regulations), and
 - (ii) \$1 million,
- (b) in the case of a director or officer of a responsible issuer, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director’s or officer’s compensation from the responsible issuer and its affiliates,
- (c) in the case of an influential person who is not an individual, the greater of,
 - (i) 5 per cent of its market capitalization (as defined in the regulations), and
 - (ii) \$1 million,
- (d) in the case of an influential person who is an individual, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the influential person’s compensation from the responsible issuer and its affiliates,
- (e) in the case of a director or officer of an influential person, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director’s or officer’s compensation from the influential person and its affiliates,
- (f) in the case of an expert, the greater of,
 - (i) \$1 million, and
 - (ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and
- (g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the person’s compensation from the responsible issuer and its affiliates; (“limite de responsabilité”)

...

LIABILITY

Liability for secondary market disclosure

Documents released by responsible issuer

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and
- (e) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (1, 2).

...

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

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

**Settlement Approval – Horsley Settlement
(Motion Returnable July 24, 2014)**

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