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, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE OBJECTORS

(Motion for Settlement Approval returnable February 4, 2013)

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TO: THE SERVICE LIST

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Part I – OVERVIEW

1. Invesco Canada Ltd. ("Invesco"), Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. (the "Objectors") are leading Canadian investment funds that held shares in Sino-Forest Corporation ("Sino-Forest") on June 2, 2011, and were injured when the market in those shares plunged upon publication of the Muddy Waters securities analyst report alleging that Sino-Forest was a "near total fraud".[1]

2. The Objectors oppose the settlement of claims against E&Y (the "E&Y Settlement") proposed by the named plaintiffs ("Ontario Plaintiffs") in the putative Superior Court class action titled above (the "Class Action") and supported by some or all of the other parties in the Sino-Forest *CCAA*[2] proceeding titled above. The Objectors particularly oppose the no-opt-out and full *CCAA* third party release features of the Settlement. The Objectors also oppose the motion for a Representation Order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the E&Y Settlement.

3. Evidence has just come to the attention of the Objectors showing that E&Y had actual knowledge as early as April 2010 that Sino-Forest was refusing to provide sufficient information to verify the composition of its timber holdings.[3] At a meeting among high level E&Y partners, Sino-Forest officers Allen T.Y. Chan ("Chan") and David Horsley, and key employees of Pöyry (Beijing) Consulting Company Limited

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[1] Muddy Waters Report dated June 2, 2011 ("Muddy Waters Report"), Exhibit "G" to Affidavit of Charles Wright, sworn January 10, 2013, ("Wright Aff"), **Plaintiffs' Motion Record, Volume 1, Tab 2G, pp. 239-279.**

[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("*CCAA*").

[3] Responses to Questions on Written Cross Examination on Affidavit of Christina Doria, dated January 29, 2013 ("Doria Written Cross Examination") at para.1.

("Pöyry"), E&Y appears to have defended Sino-Forest's lack of informational forthrightness by pointing out that "Sino-Forest's business model is truly unique" because the "purchasers of Sino-Forest stock are financial players that purchase and hold, betting on timber prices to increase".[4] Whatever E&Y's explanation was, the evidence from Pöyry suggests that E&Y was aware at least as early as April 2010 that Sino-Forest would not corroborate its asset valuations -- yet E&Y continued to provide clean audit reports.

4. The present objections in a sense pick up where this Court left off in its Reasons, dated December 12, 2012,[5] released in support of the Endorsement of the Sanction Order of Sino-Forest's *CCAA* plan of compromise and reorganization (the "Plan").[6] At the time, the Court dismissed the Objectors' concerns about the no-opt out E&Y Settlement in conjunction with the "third party" releases in the Plan on the basis that the concerns were premature.[7] The Objectors renew their strenuous objection and opposition to the approval of this settlement.[8]

5. In the Plan Sanction Reasons, this Court found (among many other things) that the release of the Subsidiaries of Sino-Forest was justified according to the standards set forth for allowing such *CCAA* "third party" releases in *Metcalfe & Mansfield Alternative*

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[4] Minutes of Meeting dated April 9, 2010, Schedule A to the Doria Written Cross Examination ("Minutes of Pöyry meeting"), *ibid.*

[5] Plan Sanction Reasons, dated December 12, 2012 ("Sanction Reasons-Dec. 12"), Exhibit "E2" to the Affidavit of Charles Wright, sworn January 10, 2013, ("Wright Aff"), **Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 220-233.**

[6] Plan of Compromise and Reorganization ("Plan"), **Plaintiffs' Motion Record, Volume 6 Tab 7, pp. 1411-1505.**

[7] Plan Sanction Endorsement dated December 10, 2012 "(Plan Sanction Endorsement-Dec. 10)", at paras. 20, 22-25,Exhibit "E1" to Wright Aff, **Plaintiffs Motion Record, Volume 1, Tab E1, pp. 215-216.**

[8] Affidavit of Eric J. Adelson, sworn January 18, 2012 ("Adelson Aff") at para. 15., **Responding Motion Record of the Objectors, Tab 2C, p. 13.**

Investments II Corp., (Re)[9] (*"Metcalfe"*). This Court noted and accepted the submissions of Sino-Forest's counsel that there "can be no effective restructuring of SFC's business" without the releases of the Subsidiaries; that such releases were "necessary and essential" to the restructuring; and that it was "difficult to see how any viable plan could be made" without the releases.[10] This Court found that the Plan "cannot succeed without the releases of the Subsidiaries" and that the releases thus were "fair and reasonable and … rationally connected to the overall purpose of the Plan".[11] Those criteria are, the Objectors respectfully submit, the ones this Court should apply in analyzing the propriety of any proposed third party releases in a *CCAA* plan.

6. The proposed E&Y Settlement includes a requirement that E&Y receive a full *CCAA* release of all Sino-Forest-related claims that could be asserted against it – in other words, a full third party release.[12] But the criteria for proper third party releases are not satisfied here.

7. *No party has even asserted – let alone provided evidence -- that the Plan cannot succeed without the releases or the settlement.* The version of the Plan submitted to, and obviously on the verge of approval by, the creditors in late November 2012 did not make any mention of the E&Y Settlement or of the "framework" for third party releases now relied upon. That demonstrates, more clearly than any legal argument could, that the E&Y Settlement is not integral to the success of the Plan, and that the third party release called for by the Settlement does not qualify for approval under the *Metcalfe* factors.

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[9] *Metcalfe & Mansfield Alternative Investments II Corp.(Re),* 2008 ONCA 587, 45 C.B.R. (5th) 163, leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337 (*"Metcalfe"*).

[10] Sanction Reasons-Dec. 12, *supra* note 5 at para. 72. **Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 219**

[11] *Ibid.*, at para. 74, **Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 231.**

[12] Fifteenth Report of the Monitor, dated January 28, 2013 at paras. 13 and 31.

8. The Objectors thus submit that the proposed E&Y Settlement represents a simple case of overreaching. E&Y and Class Counsel seek to effectuate their settlement in this *CCAA* proceeding, using a full third party release, when in fact they instead should proceed by using the Class Action, as was done for the Pöyry settlement.

9. The salient difference between a *CCAA* settlement and a Class Action settlement here is that the former would extinguish or render illusory the right of investors to opt out of the settlement, whereas the latter would preserve and give effect to that important right.

10. The case precedents are unanimous in recognizing that opt out rights are fundamental to the entire structure of class actions, as described fully below.[13] The Objectors have opted out through the certification and settlement opt out process in connection with the prior settlement with another third party defendant, Pöyry; and according to the notice distributed in connection with that settlement the opt outs were effective as opt outs from the entire Class Action. The Objectors now wish, and should have the right, to pursue their claims against E&Y (and the other defendants) individually, and to have the results of that litigation not rendered illusory by third party *CCAA* releases in E&Y's favor obtained, we submit, without coming close to satisfying the *Metcalfe* criteria.

11. The Objectors understand that the parties and their counsel in the *CCAA* proceeding worked hard and devoted long hours to devising the Plan, which came to include the E&Y Settlement at the last moment. The Objectors also are aware of Class Counsel's position that the amount to be paid by E&Y -- $117 million – is very large for

[13] *See* p. 23 of factum; *see also Fischer v. IG Investment Management Ltd*, 2012 ONCA 47 at para. 69 (C.A.) ("*Fischer*"); *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399 at paras. 2 and 19 (S.C.J.) ("*Sauer*").

a Canadian settlement of claims against an auditor. With respect, however, we submit that those considerations do not address the fundamental issue raised by the present objections: whether such a settlement, when it is only incidental to a *CCAA* plan, can be "crammed down" as against class members in derogation of their opt out rights.

12. Many serious securities fraud cases have in the past involved, and will in the future involve, insolvency proceedings for the company at the center of the alleged misconduct. These situations also commonly include the presence of additional third parties asserting multiple and overlapping cross claims and claims over against the applicant, subsidiaries, and each other.

13. The Objectors submit that it would be a highly troubling precedent, from the viewpoint of investors deciding whether to trust in the integrity of Canadian securities markets, for such a "cram down" of a third party settlement and release to be countenanced by this Court. [14]

14. The alternative – use of normal class action procedures to effectuate such a settlement – is obviously appropriate, and would not, in the present situation at least, impose any unwarranted or problematic burdens. The Objectors should be free, as provided in class action procedures, to test their contention that the E&Y Settlement amount is really not so ample, in light of the gravity of defendants' apparent misconduct and the magnitude of losses suffered by investors, by opting out.

15. Accordingly, the Objectors oppose the proposed release of E&Y, as described in Article 11.1 of the Plan and sections 8, 9 and 12 of the proposed Settlement Approval

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[14] Adelson Aff, supra note 8 at para. 24, **Responding Motion Record of the Objectors, Tab 2, p. 16.**

Order[15], which would extinguish the right of all Security Claimants to pursue individual opt-out litigation against E&Y in connection with Sino-Forest.

16. For similar reasons, the Objectors oppose the Ontario Plaintiffs' motion for a representation order.[16] Clearly, the interests of the Ontario Plaintiffs and of persons who filed objections to the E&Y Settlement are divergent. The Objectors will more appropriately represent the other objectors' interests.

Part II – FACTS

17. The background facts concerning Sino-Forest, the class actions, and the *CCAA* proceedings have been recited by multiple parties. The Objectors here set forth some other facts that may deserve attention or emphasis.

18. The Objectors are Securities Claimants. Collectively they held 3,995,932 shares[17] of Sino-Forest on June 2, 2011 when Muddy Waters LLC publicized a report that accused Sino-Forest of being a "near total fraud". In comparison, the Ontario Plaintiffs who are seeking to represent all purchasers of Sino-Forest securities, have reported holdings of 1,110,898 shares as of the end of day on June 1, 2011.[18]

19. Sino-Forest's year-end market capitalization for 2010 was approximately $5.7 billion and its market capitalization in early 2011 was approximately $6.2 billion. The market decline in Sino-Forest stock, over the two days following the release of the

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[15] Settlement Approval Order, Exhibit A to Notice of Motion dated January 11, 2013, **Plaintiffs' Motion Record, Volume 1, Tab 1A, pp. 21-22.**

[16] *Ibid.,* in the event this Court nevertheless grants representation to the Ontario Plaintiffs, the Objectors request that they be relieved of the binding effect of the Representation Order and Settlement Approval Order, relieved of any release, and allowed to opt out of the E&Y Settlement.

[17] The Supplemental Affidavit of Charles Wright calculates the holdings of the Objectors at 3,921,618. The 74,314 difference in the calculation is the holding of Invesco. Supplemental Affidavit of Charles M. Wright, sworn January 23, 2013, **Plaintiffs' Reply Motion Record, Volume 1, Tab1, pp. 3-4.**

[18] Class Counsel declined to respond to the Objectors' interrogatory requesting evidence that any investors other than the Ontario Plaintiffs support the settlement.

Muddy Waters report alleging the company was a "near total fraud," was from $18.21 to $5.23 per share.[19]

E&Y's Knowledge of the Sino-Forest Fraud

20. E&Y acted as the auditor of Sino-Forest for the majority of time that it was a public company,[20] including the years 2007-2012.[21] E&Y issued unqualified ("clean") audit reports on Sino-Forest from 2007 to 2010 and specifically authorized Sino-Forest to use the audit reports in public filings and offering documents. E&Y represented that it had performed its audits in accordance with relevant industry standards, namely, Generally Accepted Auditing Standards ("GAAS").[22]

21. From late 2007, Pöyry progressively raised concerns with Sino-Forest in relation to the quality and sufficiency of the information and data from Sino-Forest concerning the physical composition of the forest holdings to be valued.[23]

22. On April 9, 2010, shortly after E&Y issued an unqualified audit report on the 2008 and 2009 consolidated financial statements of the company, a high level meeting took place between Pöyry, E&Y and Sino-Forest.[24] The purpose of the meeting was to discuss Sino-Forest's unwillingness to provide sufficient information to confirm its timber holdings, to provide an overview of Sino-Forest's valuation requirements, and to develop an action plan that would allow Pöyry to verify Sino-Forest timber holdings with

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[19] Muddy Waters Report, supra note 1, **Plaintiffs' Motion Record, Volume 1, Tab 2G, pp. 239-279**; Statement of Claim issued in *Northwest & Ethical Investments L.P. et al. v. Sino-Forest Corporation et. al.*, at para. 9, Exhibit "T" to Wright Aff, **Plaintiffs' Motion Record, Volume 2, Tab 2T, p. 362.**

[20] Muddy Waters Report, *Ibid.*, **Plaintiffs' Motion Record, Volume 1, Tab 2G, p. 239-279.**

[21] Affidavit of Mike P. Dean, sworn January 11, 2013 ("Dean Aff"), at paras. 8-9, **Motion Record of Ernst & Young LLP, Tab 1, pp. 3-4 ;** Statement of Allegations of Ontario Securities Commission, dated December 3, 2012 ("OSC Allegations-Dec. 3, 2012"), at para. 1, Exhibit "FF" to Wright Aff, **Plaintiffs' Motion Record, Volume 3, Tab 2FF, p. 826.**

[22] *Ibid.*, OSC Allegations-Dec. 3, 2012 at para. 1, Exhibit "FF" to Wright Aff, **Plaintiffs' Motion Record, Volume 3, Tab 2FF, p. 826.**

[23] Doria Written Cross-Examination, *supra* note 3 at para. 1.

[24] Minutes of Pöyry meeting, *supra* note 4.

confidence.[25] The Minutes of Meeting taken by Pöyry clearly show that E&Y knew that there was a gap between the market capitalization value and forest resource valuation estimate, which Pöyry could not effectively verify at any rate.

23. Notwithstanding the concerns of Pöyry, it appears that E&Y took no steps to exercise reasonable skepticism as required by GAAS before providing Sino-Forest with unqualified audits. In fact, evidence of Pöyry suggests that E&Y intended to avoid probing Sino-Forest for sufficient evidence to corroborate its alleged timber valuations.

OSC Investigation

24. In August 2011, shortly after the collapse in price of Sino-Forest shares, the Ontario Securities Commission ("OSC") commenced regulatory proceedings and an investigation against Sino-Forest and some of its officers and directors.

25. On May 22, 2012, the Ontario Securities Commission formally alleged that Sino-Forest, and its former senior executives, engaged in a "complex fraudulent scheme" to inflate the assets and revenue of Sino-Forest, and made materially misleading statements in Sino-Forest's public disclosure record related to its primary business.[26] Allegations were made against Mr. Chan, former Chairman and Chief Executive Officer of Sino-Forest, for committing fraud and making "materially misleading statements".[27] Horsley was alleged to have failed to comply with Ontario securities laws and to have authorized, permitted or acquiesced in the commission of fraud.[28]

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[25] *Ibid.*, See also email from Horsely to Chan dated March 26, 2010, Schedule A to the Doria Written Cross Examination, *Ibid.*

[26] Statement of Allegations of the Ontario Securities Commission, dated May 22, 2012 ("OSC Allegations-May 22")., at para 11, Exhibit "EE" to Wright Aff, **Plaintiffs' Motion Record, Volume 3, Tab 2EE, p. 789.**

[27] *Ibid.*, at paras. 12, 27-31, 142, 150-156, **Plaintiffs' Motion Record, Volume 3, Tab 2EE, pp. 789, 792, 814, 816-817.**

[28] *Ibid.*, at paras. 14, 40, 119, 141, **Plaintiff's Motion Record, Volume 3, Tab 2EE, pp. 789, 793, 809, 814.**

26. The OSC allegations remain outstanding.

Sino-Forest's CCAA Proceedings

27. The Ontario Plaintiffs participated in the *CCAA* proceedings as the "Ad Hoc Committee of Purchasers of the Applicant's Securities".

28. In its Reasons in support of the Sanction Order, this Court stated that the Committee, represented by Class Counsel, "has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others."[29] Class Counsel moved in the *CCAA* proceeding on April 10, 2012 for a Representation Order pursuant to Rule 10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*").[30] The proposed Representation Order contained an Opt-Out Letter by which putative class members could have opted out from having Class Counsel represent them in these proceedings.[31] However, the Ontario Plaintiffs did not obtain the requested Representation Order and the motion was adjourned *sine die.*[32] Certain Objectors have previously stated in affidavits that they do not view Class Counsel as having represented their interests in these proceedings.[33]

29. During the *CCAA* proceedings, the Ontario Plaintiffs moved to lift the *CCAA* stay against Pöyry and its affiliated companies in order to move for settlement approval and

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[29] Sanction Reasons-Dec. 12, *supra* note 5 at para. 26., **Plaintiffs' Motion Record, Volume 1, Tab 2E2, p. 224.**

[30] Draft Representation Order of the Ad Hoc Committee of Purchasers of the Applicant's Securities dated April 13, 2012 ("Draft Representation Order"), Exhibit "D" to Affidavit of Daniel Simard sworn January 18, 2013 ("Simard Aff"), **Responding Motion Record of the Objectors, Tab 3D, pp. 155-160.**

[31] *Ibid.*,

[32] Order of Honourable Mr. Justice Morawetz, dated August 31, 2012 & October 9, 2012, Exhibit "E" to Simard Aff, **Responding Motion Record of the Objectors, Tab 3E, pp. 161-162.**

[33] Adelson Aff, *supra* note 8, **Responding Motion Record of the Objectors, Tab 2, p. 8-18.;** Affidavit of Daniel Simard, sworn on January 10, 2013 ("Simard Aff"), **Responding Motion Record of the Objectors, Tab 3, p. 131-140.**

certification for settlement purposes with Pöyry before the Class Action Court.[34] The settlement called for cooperation by Pöyry with Class Counsel but did not provide for any payment by Pöyry, other than sharing part of the notice costs. Notice of the proposed settlement and of a settlement approval hearing was disseminated to the class.[35] On September 25, 2011, Justice Perell, the Class Action case management judge, certified the claims against Pöyry for settlement purposes and approved the settlement.[36] A further notice was disseminated, which included opt out rights.[37] The notice stated that class members opting out of the settlement would also be opting out of the entire class proceeding:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.[38]

30. The Objectors opted out of the Pöyry certification for settlement by the January 15, 2013 deadline.[39]

31. The first version of Sino-Forest's Plan was filed in August 2012. Revised versions of the Plan were filed on October 19, 2012 and November 28, 2012.[40] These

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[34] Order of the Honourable Mr. Justice Morawetz entered May 11, 2012, Exhibit "C" to the Simard Aff, **Responding Motion Record of the Objectors, Tab 3C, pp. 151-154.**

[35] Notice of Settlement, Exhibit "X" to Wright Aff, **Plaintiff's Motion Record, Volume 3, Tab 2X, pp. 694-696.**

[36] Reasons of the Honourable Mr. Justice Morawetz, dated September 25, 2012, Exhibit "F" to Simard Aff, **Responding Motion Record of the Objectors, Tab 3F, pp. 164-175.**

[37] Pöyry Notice, Schedule B to the Order of the Honourable Mr. Justice Perell, dated September 25, 2012, Exhibit "G" to Simard Aff, **Responding Motion Record of the Objectors, Tab 3G, pp. 228-231**.

[38] *Ibid.*, **Responding Motion Record of the Objectors, Tab 3G, pp. 230.**

[39] Opt out form of Invesco Canada Ltd., Exhibit "D" to Adelson Aff, January 18, 2013, **Responding Motion Record of the Objectors, Tab 2D, pp. 111**; Opt out form of Comité Syndical National de Retraite Bâtirente Inc., Exhibit "H" to Simard Aff, **Responding Motion Record of the Objectors, Tab 3H, pp. 236-237;** Opt out form of Northwest &Ethical Investments L.P., Matrix Asset Management Inc., Gestion FÉRIQUE, and Montrusco Bolton Investments Inc., Exhibits "E" to "H" to the Jemec Aff, **Responding Motion Record of the Objectors, Tabs 4E-4H, pp. 255-261.**

[40] Fifteenth Report of the Monitor, dated January 28, 2013 at para. 24.

versions contained standard language providing that all claims against Sino-Forest and certain claims against officers and directors would be barred (excepting claims described in section 5.1(2) of the *CCAA*, claims of fraud, claims of conspiracy and insured claims). Claims against Subsidiaries were released as necessary and essential to the restructuring, as described above. Any Equity Claims – which this Court had determined included defendants' claims for indemnification with respect to share purchaser claims in the Class Action[41] -- would be released as of the Plan Implementation Date or Equity Cancellation Date.

32. The Creditors' Meeting and vote on the Plan was scheduled to occur on November 29, 2012. When the Plan was amended on November 28, 2012 the Creditors' Meeting was adjourned to November 30, 2012. Up to this point, none of the versions of the Plan, including the version mailed to creditors along with their proxy forms, included or mentioned the E&Y Settlement; indeed, Article 7.5 of the Plan provided that claims against third party defendants were <u>not</u> being addressed:

> Notwithstanding anything to the contrary in this Plan, **any Class Action Claim against the Third Party Defendants that relates to the purchase, sale or ownership of Existing Shares or Equity Interests**: (a) is unaffected by this Plan; **(b) is not discharged, released, cancelled or barred pursuant to this Plan**; (c) shall be permitted to continue as against the Third Party Defendants; (d) shall not be limited or restricted by this Plan in any manner as to quantum or otherwise (including any collection or recovery for any such Class Action Claim that relates to any liability of the Third Party Defendants for any alleged liability of SFC); and (e) does not constitute an Equity Claim or an Affected Claim under this Plan.[42]
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> [Emphasis added]

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[41] *Sino-Forest Corp. (Re),* 2012 ONSC 4377, aff'd 2012 ONCA 816.

[42] Plan of Compromise and Reorganization, dated December 3, 2012 ("Plan-Dec. 3"), Exhibit "C" to Wright Aff, **<u>Plaintiffs' Motion Record, Volume 1, Tab 2C, pp. 99-188</u>.**

Thus, in these earlier versions of the Plan there were no provisions barring claims against, or providing releases in favour of, "Third Party Defendants" named in the Class Action - i.e., E&Y, BDO Limited or the Underwriters.

The Proposed E&Y Settlement

33. On November 29, 2012, counsel for E&Y and Class Counsel concluded the proposed E&Y Settlement. The Creditors' Meeting was again adjourned, to December 3, 2012. On December 3, 2012, a new Plan revision was released in the morning[43] and the fact of the settlement was publicly announced.[44]

34. The Minutes of Settlement were not disclosed to the Objectors until December 5, 2012. The Minutes of Settlement provided, among other terms:

> ¶10 It is the intention of the Parties that this settlement shall be approved and implemented in the Sino-Forest Corporation CCAA Proceedings. **The settlement shall be conditional upon full and final releases and claims bar orders in favour of EY and which satisfy and extinguish all claims against EY, and without opt-outs,** and as contemplated by the additional terms attached hereto as Schedule B hereto and incorporated as part of these Minutes of Settlement.[45]
>
> [Emphasis added]

35. The Plan now contained a new Article 11, reflecting the "framework" for the proposed E&Y Settlement and for third party releases for Named Third Party Defendants as identified at that time as the Underwriters or in the future. Section 7.5 was later amended to reflect Article 11's provisions.[46]

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[43] Plan-Dec. 3, *Ibid.*,, **Plaintiffs' Motion Record, Tab 2C, pp. 99-188.**
[44] Adelson Aff, *supra* note 8 at para. 9, **Responding Motion Record of the Objectors, Tab 2, pp. 11.**
[45] Minutes of Settlement at para. 10, Exhibit "A" to Wright Aff, **Plaintiff's Motion Record, Volume 1, Tab 2A, p. 70**. The attached Schedule "B" contains a cryptic reference (p.2) to a Final Order to be issued in the Ontario Class Action, to include an "opt-out threshold agreeable to E&Y." The Objectors have sought an explanation of that reference, but none has been furnished.
[46] Plan, Article 7.5, *supra* note 6 **Plaintiffs' Motion Record, Volume 6, Tab 7, pp. 1474-1475.**

36. On December 3, 2012, a large majority of creditors approved the Plan. The number of votes cast by proxy as opposed to in person has not been disclosed. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting. It is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan.

37. No equity claimants, such as the Objectors were entitled to vote on the Plan.[47]

38. Also on December 3, 2012, the OSC released a Statement of Allegations, asserting that E&Y had failed to perform its audit work on Sino-Forest's financial statements in accordance with GAAS, in violation of ss. 78(2), 78(3) and 122(1)(b) of the Ontario *Securities Act,* R.S.O. 1990, c. S-5, as amended.[48] The document did not set forth extensive evidence, but did include some samples, including:

> ¶58 Some of these limitations were acknowledged by Ernst & Young staff in the course of performing their audits of the Material Financial Statements but were never adequately addressed. For example, in an e-mail exchange between the members of Ernst & Young's audit team, one auditor posed the question "**[h]ow do we know that the trees that Poyry is inspecting (where we attend) are actually trees owned by the company? E.g. could they show us trees anywhere and we would not know the difference?**" Another auditor answered "**I believe they could show us trees anywhere and we would not know the difference...**"[49]

39. On December 6, 2012, the Plan was further amended, adding E&Y and BDO Limited to Schedule A, thereby defining them as Named Third Party Defendants.

40. On December 7, 2012, the Sanction Hearing to approve the Plan was held.

41. Three of the Objectors -- Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc., at the time referred to as

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[47] Fifteenth Report of the Monitor, dated January 28, 2013, at para. 27.
[48] OSC Allegations-Dec. 3, *supra* note 21 , Exhibit "FF" to Wright Aff, **Plaintiffs' Motion Record, Volume 3, Tab 2FF , pp.825-840.**
[49] *Ibid.*, at para. 58, **Plaintiffs' Motion Record, Volume 3, Tab 2FF, pp. 838-839.** **[emphasis added].**

the "Funds" -- opposed the sanctioning of the Plan insofar as it included Article 11, the framework for the release of E&Y and other third party defendants. The Plan was nevertheless sanctioned on December 10, 2012 with Article 11.[50] The opposition of the Funds was dismissed as premature and on the basis that nothing in the Sanction Order affected their rights.[51]

42. At the Plan Sanction Hearing, counsel for Sino-Forest made it clear that the Plan itself did not embody the E&Y Settlement[52], and that the parties' request that the Plan be sanctioned did not also cover approval of the settlement. Moreover, according to the Plan and the Minutes of Settlement, the settlement would not be consummated (i.e. money paid and releases effective) unless and until several conditions had been satisfied in the future.

43. In sanctioning the Plan, the Court reasoned that the implementation of the Plan was not conditional on the E&Y matter being successfully settled, and that any concerns with respect to the effect of the releases on the rights of the Funds could be addressed when settlements were presented for approval.[53]

44. Following the sanctioning of the Plan, three directors and officers were added as Named Third Party Defendants, making them eligible for broad no-opt-out releases under Article 11.2 of the Plan. On January 11, 2013, Chan and Poon were added.[54] On January

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[50] Plan Sanction Order, dated December 10, 2012 ("Plan Sanction Order"), Exhibit "D" to Wright Aff, **Plaintiffs' Motion Record, Volume 2, Tab 2D, pp. 189-209.**

[51] Plan Sanction Endorsement-Dec. 10, *supra* note 7 at para. 25, **Plaintiffs' Motion Record, Volume 1, Tab E1, p. 216**

[52] *Ibid.*, at paras. 19-20, **Plaintiffs' Motion Record, Volume 1, Tab E1, p. 215.**

[53] Plan Sanction Endorsement-Dec. 10, *supra* note 7, at para. 25, **Plaintiffs' Motion Record, Volume 1, Tab E1, p. 216**

[54] Correspondence between Mr. James Orr and Ms. Jennifer Stam, Exhibits " F" to "H" to Adelson Aff, **Responding Motion Record of the Objectors, Tabs 2F-2H, pp.117-125**; OSC Allegations-May 22, *supra* note 26, **Plaintiffs' Motion Record, Volume 3, Tab 2EE, pp. 786-824.**

22, 2013, Horsley was added.[55] The OSC has accused both Chan and Horsley of unlawful conduct in connection with the Sino-Forest fraud.

45. Since obtaining the Sanction Order, Sino-Forest has taken and is taking further steps to implement the Plan.[56] It is now estimated that Plan Implementation will occur on January 29, 2013, and in any event prior to the end of January 2013.[57] Clearly, implementation is intended to occur prior to this Court's determination of the present objections, and prior to consummation of the E&Y Settlement.

46. On December 13, 2012, the Court directed that its hearing on the E&Y Settlement take place on January 4, 2013, under both the *CCAA* and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), as assigned to the Court by the Regional Senior Justice.[58]

47. The Ontario Plaintiffs proposed a notice program for the settlement approval hearing that in effect provided only a one-day period between the deadline for notice dissemination and the deadline for submitting objections. The proposed Notice made no reference to the no-opt-out feature of the proposed E&Y Settlement. In response to the Funds' protests, E&Y and the Ontario Plaintiffs revised the contents of the notice to reflect the no-opt-out provision, and obtained a one-month adjournment of the hearing, to February 4, 2013.

48. On December 31, 2012, Class Counsel publicized in a memorandum to institutional investors that they believed that a "substantial premium" was negotiated with E&Y in exchange for extinguishing class members' statutory opt out rights.[59]

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[55] Appendix P to the Fifteenth Report of the Monitor, dated January 28, 2013.
[56] On January 21, 2013 Sino-Forest obtained a further order from the Court intended to facilitate the transfer of shares between a Sino-Forest subsidiary and Newco II. Order of the Honourable Mr. Justice Morawetz re Plan Implementation, entered January 21, 2013.
[57] Fifteenth Report of the Monitor, dated January 28, 2013 at para. 31.
[58] Fifteenth Report of the Monitor, dated January 28, 2013 at para. 39.

49. The Objectors submitted timely objections to the E&Y Settlement to the Monitor.[60] The objections were that: it is improper to trade away opt out rights, or render opt out rights illusory through a full and final release for a substantial premium; it is improper to approve a release to E&Y; it is improper to approve the E&Y Settlement to bind putative class members who have opted out and without certification, notice and opt out rights; it is improper to provide the Ontario Plaintiffs with a representation order; and, it is improper to approve the E&Y Settlement in installments in the absence of any plan for distribution or allocation.[61]

50. The Monitor received 93 objections (including the Objectors'). Eighty-four objections were counted as valid and timely.[62] Outside of the objections filed by the Objectors, 25 objections cited the proposed settlement amount as inadequate and six objections state that consideration of the settlement is premature in light of the ongoing investigation by the OSC and the lack of publicly available information. Nine investors objected on the ground that they purchased outside of the class period, never considered themselves represented by Class Counsel or the Ontario Plaintiffs, and yet would be bound by the proposed release.[63]

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[59] Memorandum by Siskinds LLP dated December 31, 2012 ("Siskinds Memo"), Exhibit "E" to Adelson Aff, **Responding Motion Record of the Objectors, Tab 2E, pp. 112-116.**

[60] Notice of Objection of Invesco Canada Ltd., Exhibit "A" to Adelson Aff-Jan 18, 2012, **Responding Motion Record of the Objectors, Tab 2A, pp. 19-21;** Notice of Objection of Comité Syndical National de Retraite Bâtirente Inc., Exhibit "A" to Simard Aff, **Responding Motion Record of the Objectors, Tab 3A, pp. 141-143;** Notice of Objections of Northwest & Ethical Investments L.P., Matrix Asset Management Inc., Gestion FÉRIQUE, and Montrusco Bolton Investments Inc., Exhibits "A" to "D" to Affidavit of Tanya T. Jemec ("Jemec Aff"), **Responding Motion Record of the Objectors, Tab 4A-4D, pp. 242-253.**

[61] Adelson Aff, *supra* note 8 at para. 5, **Responding Motion Record of the Objectors, Tab 2C, pp. 8-10.**

[62] Fourteenth Report of the Monitor, dated January 22, 2013, p. 2.

[63] Fourteenth Report of the Monitor, dated January 22, 2013; While 93 notices of objections were received, the Monitor counted a total of 91objections.

Part III – ISSUES AND THE LAW

A. The Proposed Full Release of E&Y Is Not Integral or Necessary to the Success of Sino-Forest's Restructuring Plan, and Therefore the Standards for Granting Third Party Releases in *CCAA* Proceedings Are Not Satisfied

51. E&Y is obviously not the applicant in this *CCAA* proceeding; nor is it a subsidiary of the applicant; nor is it seeking a director or officer release of the type treated specifically in Article 4.9. E&Y is a "third party" and the present motion includes at its core a request that this Court approve a third party release of all claims by anyone against E&Y relating to Sino-Forest.

52. As this Court has recognized, the authority of a court to sanction a *CCAA* plan incorporating a third party release is governed by the Court of Appeal's decision in *Metcalfe*.[64] More recently, the Superior Court has reiterated that such third party *CCAA* releases are permissible when they are necessary and integral to the restructuring of the applicant company, in furtherance of the purpose of the *CCAA*.[65] The British Columbia Supreme Court has observed that the purpose of the *CCAA* is to facilitate compromises and arrangements between a company and its creditors, "not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute."[66]

53. Accordingly, as noted above, this Court was careful to point out the ways in which the proposed third party releases of Sino-Forest's Subsidiaries were essential to the

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[64] *Metcalfe*, *supra* note 9.
[65] *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017 at para. 61 (S.C.J.). The third party release was approved in this case only because class counsel had not objected to it on a timely basis.
[66] *Pacific Coastal Airline Ltd. v. Air Canada*, 2001 BCSC 1721 at para. 24 (S.C.).

restructuring, rendering that aspect of the proposed Plan "fair and reasonable".[67] That was the correct analytical framework for assessing a third party release.

54. When the objecting Funds raised this issue at the sanction hearing, the parties objected that it was premature to do so, and that the objection should await the settlement approval hearing; and the Court agreed.[68] Thus it is clear the issue has not yet been decided by this Court.

55. Whatever terms are used to describe the standard – whether the third party release is "necessary," "integral," or "essential" to the success of the restructuring plan, such that the plan "cannot succeed without" the release – the proposed E&Y release, and thus the settlement, does not measure up.[69]

56. The most obvious evidence is the fact that all parties to the restructuring were fully ready to proceed with the Plan without the E&Y Settlement. The Affidavit of W. Judson Martin, Sino-Forest's CEO and vice chairman, sworn November 29, 2012, does not say anything about the E&Y Settlement or about any possible exceptions to Section 7.5 of the Plan, as it then was, confirming that claims against third party defendants, including in the Class Action, were not affected.[70]

57. No one has asserted that the parties needed the E&Y Settlement or release to allow the Plan to go forward. In fact, there remains the possibility that the E&Y Settlement might not be approved by this Court, or other conditions precedent might fail – yet still the Plan would proceed (in fact, it will probably be implemented by the time of

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[67] Sanction Reasons-Dec. 12, *supra* note 5 at paras. 70-74. **Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 231-232.**

[68] Plan Sanction Endorsement-Dec. 10, *supra* note 7 at paras. 20 and 25, **Plaintiffs Motion Record, Volume 1, Tab E1, pp. 215-216.**

[69] See Schedule C for a number of definitions of the word "integral".

[70] Affidavit of W. Judson Martin, sworn Nov. 29, 2012, Exhibit "C" to the Affidavit of W. Judson Martin sworn January 11, 2013, **Responding Motion Record of Sino-Forest Corporation, Tab 1C, pp. 93-143**.

the February 4 hearing), confirming again that the Settlement and release are not integral to the success of the Plan.

58. The Court made this disconnect clear in its December 10 and December 12, 2012 Endorsements, when it held that E&Y's Settlement and release is not a condition of Plan Implementation:

> ¶48 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order …[71]
>
> …
>
> ¶20 Essentially, if certain conditions are met and further court approval and order are obtained, it is conceivable that E&Y will get a release. However, such a release is not being requested at this time. Further, it is not a condition of Plan Implementation that the E&Y matter be settled.[72]
>
> [Emphasis added]

59. E&Y's affiant, Mike Dean, attempts to fill this void by describing a number of benefits E&Y provided to the *CCAA* proceeding, including supporting the Plan, releasing its indemnification claims, waiving leave to appeal the Equity Claims Order, and agreeing not to receive any distributions under the Plan.[73] However, he does not describe any of those benefits as being essential to the restructuring, and in fact they are all being provided regardless of whether the E&Y Settlement is approved and regardless of whether the requested *CCAA* release of E&Y is obtained.

60. The fact is that none of the benefits described by Mr. Dean were sufficiently important to convince any party to condition the implementation of the Plan on the approval of the E&Y Settlement and issuance of a third party release to E&Y.

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[71] Sanction Reasons-Dec. 12 at para. 48, *supra* note 5 **Plaintiffs' Motion Record, Volume 1, Tab 2E2, pp. 220-233.**

[72] Plan Sanction Endorsement-Dec. 10 at para. 20, *supra* note 7, **Plaintiffs Motion Record, Volume 1, Tab 2E1, p. 215.**

[73] Dean Aff, *supra* note 21 , **Motion Record of Ernst & Young LLP, Tab 1, pp. 1-23.**

61. Nor is the $117 million settlement payment described as essential, or even related, to the restructuring. In fact, the $117 million is to be paid into a Settlement Trust for the purpose of paying Securities Claimants who have not yet been identified, but who certainly include primarily share purchaser class members in the Class Action, whose equity claims against Sino-Forest are being barred in the Plan.

62. Lastly, it is questionable that varying the E&Y Settlement and release to accommodate opt outs would spell the end of the settlement. Notwithstanding the intention of the parties to effect a no-opt-out settlement, E&Y retained discretion to accept opt outs up to a certain threshold number.[74] E&Y has since confirmed that this provision, while it may be discretionary, is not just theoretical:

> The conditions precedent to the Ernst & Young Settlement and the Ernst & Young Release as defined in the Plan are set out in the Sanction Order. The opt-out threshold referred to at Schedule B of the Minutes of Settlement, if it ever became operative, is at the discretion of Ernst & Young and would be set by it at such time.[75]

63. In summary, the E&Y settlement and release do not come close to resembling the extraordinary situations when these types of third party releases have been approved over objections.

64. Third party releases have been approved to avoid chaos in the Canadian airline industry or the collapse of the Canadian ABCP market.[76] In particular, the Court of Appeal in *Metcalfe* carefully noted that the releases at issue were vital to the restructuring of the participants in the ABCP market and indeed the market itself; [77] that the parties

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[74] Schedule B to Minutes of Settlement, Exhibit "A" to Wright Aff, **Plaintiffs' Motion Record, Volume 1, Tab 2A , pp. 75-76.**

[75] Answers of Written Examination of Mike Dean,

[76] *Metcalfe, supra* note 9 ; see also *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, leave to appeal ref'd, 2000 ABCA 238.

[77] *Metcalfe, Ibid.,* at para. 118 .

required to "give" releases were also creditors of the applicant market participants and thus were benefited by the plan; that the parties "receiving" releases were contributing in a tangible and realistic way to the plan; and that the creditors giving the releases were in the class of creditors that voted to approve the plan.[78] None of those characteristics could fairly be said to apply to the proposed release of E&Y in the present situation, directly or even by analogy.

65. Accordingly, the proposed third party Release of E&Y is not justified and the settlement is not fair and reasonable if it is implemented as proposed.

B. The E&Y Settlement Should Not Be Approved Because It Would Negate the Objectors' Opt Out Rights

66. As described above in the Overview, if a Class Action settlement with E&Y is being proposed, it should be approved solely under the *Class Proceedings Act,* as the Pöyry settlement was, and not through misuse of a third party release procedure under the *CCAA.* However, since the Minutes of Settlement make it clear that E&Y retains discretion not to accept or recognize normal opt outs even if the *Class Proceedings Act* procedures are invoked, the E&Y Settlement should not be approved in this respect either.

67. The E&Y Settlement, as conceived by its proponents, would negate opt out rights of class members. The Minutes of Settlement state that the settlement is to be "approved and implemented in the Sino-Forest Corporation *CCAA* proceedings" "and without opt outs" (paragraph 10); as noted, however, the attached Schedule "B" (described in paragraph 10 as "additional terms ... incorporated as part of these Minutes of Settlement") refers to approvals in all forums and to an "opt-out threshold agreeable to

[78] *Ibid.,* at para. 113

E&Y" in the Ontario Class Action.[79] In any event, the proposed Release, as described in Article 11.1(b) of the sanctioned Plan, provides that "[n]otwithstanding anything to the contrary herein, upon receipt by the Settlement Trust of the settlement amount in accordance with the Ernst & Young Settlement: (i) **all Ernst & Young Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied an extinguished as against Ernst & Young ...**"[80] There is no exception in the release and discharge for objectors or opt outs.

68. The parties' intention to eliminate or negate any opt out right is exemplified in the case of the Objectors -- who have opted out from the Pöyry settlement, clearly would opt out from the E&Y Settlement (if a separate opt out were necessary or available), and yet clearly are not intended to retain any ability to assert their claims against E&Y in the wake of the proposed approval of the E&Y Settlement.[81]

69. The right to opt out is explicitly set forth in section 9 of the *CPA*: "Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order."[82]

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[79] Recent responses to interrogatories by E&Y state that "the conditions precedent to the Ernst & Young Settlement and the Ernst & Young Release as defined in the Plan are set out in the Sanction Order. The opt-out threshold referred to at Schedule B of the Minutes Settlement, if it ever became operative, is at the discretion of Ernst & Young and would be set by it at such time." See Answers to Written Examination of Mike Dean.

[80] Plan, *supra* note 6 Article 11.1(b). Alternatively, if that direct method fails, the Plan also provides a framework for E&Y to obtain a full release as a Named Third Party Defendant through Article 11.2(c). Plan, Article 11.1(c). The conditions precedent under Article 11.2 only require the granting of the Sanction Order, the granting of the Named Third Party Defendant Settlement Order and the satisfaction or waiver of all conditions precedent in the settlement. Plan, *supra* note 6, Article 11.2(b).

[81] As noted in the Overview, the Objectors' opt out forms included a condition that it was intended to be effective only to the extent that any defendant did not obtain a final release of any claim, such as the release sought by E&Y. The Affidavit of Eric Adelson of Invesco explained the reason: "It appeared to us that the Pöyry opt out procedure might involve a 'Catch 22' provision – if we opted out to pursue our remedies individually, we might be giving up our ability to share in any settlement proceeds, but the proposed full Release of E&Y might prevent us from seeking remedies on our own, thus making the opt out right illusory. Accordingly, in an effort to avoid such a trap," the opt out form included the stated condition. Adelson Aff, *supra* note 8 at para 18, **Responding Motion Record of the Objectors, Tab 2C, p. 13.**

[82] *Class Proceedings Act*, S.O.1996, C. 6, s. 9

70. The right to opt out of a class action is a fundamental element of procedural fairness in the Ontario class action regime.[83] It is not a mere technicality or an illusory right; rather, it is the foundation for the court's jurisdiction over class members and it is the mechanism by which the class members are bound by the court's decision. It has been described as absolute.[84] Contracting out of the opt-out right is objectionable in principle and impermissible in light of the *CPA*.[85] The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions.[86]

71. In *Western Canadian Shopping Centres v. Dutton*[87], the Supreme Court of Canada held that the right to opt out is the foundation for a court's jurisdiction over class members in a class action – class members are bound only after proper notice has been given to the class and the right to opt out has been granted:

> ...A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. ...[88]

72. The principle was further explained by the Supreme Court in *Canada Post Corp. v. Lepine*[89]:

> ... In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — **in particular the possibility of opting out**

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[83] *Fischer, supra* note 13 at para. 69.
[84] *Durling v. Sunrise Propane Energy Group Inc.* 2011 CarswellOnt 77 at para. 19 (S.C. J.); *Cheung v. Kings Land Developments Inc.*, 2001 CarswellOnt 3227 at para. 12 (S.C.J.).
[85] *Davies v. Clarington (Municipality)*, 2010 ONSC 418 at para. 32. (S.C.J.)
[86] *Mangan* v. *Inco Ltd.*, [1998] O.J. No. 551 at para. 36 (Ct J.(Gen. Div.)).
[87] *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46.
[88] *Ibid.*, at para. 49; see also *Sauer, supra* note 13 at paras. 2, 19
[89] *Canada Post Corp.v. Lepine*, 2009 SCC 16 [emphasis added]

> **of the class action** — they have under the judgment, and sometimes, as here, about a settlement in the case.[90]
>
> [Emphasis added]

73. The Ontario Court of Appeal has recognized that the right to opt out is fundamental and should not be negated by the courts:

> While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. **It is not an illusory right that should be negated by speculation, judicial or otherwise.**[91]
>
> [Emphasis added]

74. That Court has also described the opt out right as an important procedural protection afforded to unnamed class action plaintiffs:

> The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding.[92]

75. There are no exceptions to these principles for situations in which class counsel and a settling defendant have devoted long hours to negotiating a class settlement and feel strongly that the settlement is a signal achievement for the class.

C. Other Aspects of the Proposed E&Y Settlement Are Not "Fair and Reasonable"

76. The E&Y Settlement is not fair or reasonable for reasons in addition to those stated above. The "fair and reasonable" standard for approving proposed settlements applies in both *CCAA* proceedings[93] and under the *CPA*.[94]

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[90] *Ibid.*, at para 42.
[91] *Fischer, supra* note 16 at para. 69 [emphasis added].
[92] *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] 74 OR (3d) 321 at para. 28 (C.A.).
[93] *Robertson v. ProQuest Information and Learning Company,* 2011 ONSC 1647 at para. 22 (S.C.J.).

1. The proposed release of E&Y does not include any carve-out for fraud and is therefore not fair and reasonable under the *CCAA*

77. The Court of Appeal in *Metcalfe* was careful to note that the releases at issue there included limited "carve-outs" so that certain fraud claims were not released.[95] The Release to be provided to E&Y is exceptionally broad in overriding the exclusions preventing release of fraud claims found elsewhere in the Plan.[96] The only exception to the proposed Release of E&Y is for claims by the Ontario Securities Commission; otherwise, the Release covers all claims, with no fraud exception whatsoever.[97]

78. The failure of the proposed Release to exclude at least the type of fraud claims identified in the *Metcalfe* carve-out means the Plan, if implemented in that way, is not fair and reasonable.

2. Class Counsel's acknowledgement that E&Y paid a "substantial premium" in order to be released from all claims without opt out rights demonstrates that the proposed settlement is not fair to opt outs

79. As noted above, the memorandum circulated by Siskinds LLP on December 31, 2012, stated that "[t]he absence of opt-out rights has long been a standard feature of Canadian insolvency proceedings. Moreover, Siskinds-Koskie believe that E&Y paid a substantial premium in order to be released from all claims through the Insolvency Proceeding."[98]

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[94] *Ibid.*, at para. 24 (S.C.J.).
[95] *Metcalfe, supra* note 9 at paras. 109-112.
[96] Plan, supra note 6, Article 7.2, **Plaintiffs' Motion Record, Volume 6, Tab 7, pp. 1473-1474.**
[97] Plan, *supra* note 6.
[98] Siskinds Memo, *supra* note 59. **Responding Motion Record of the Objectors, Tab 2E, pp. 112-116;** *See also* Affidavit of Charles Wright, sworn January 10, 2013 ("Wright Aff") at para 66, **Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 50-51** (E&Y "would not have offered the large settlement amount" but for the *CCAA* proceedings, which is conditional upon full and final release of E&Y by order of the *CCAA* court); paragraph 70 (Plan Article 11.2 provides for the ability to complete further settlements,

80. This passage indicates, or at least strongly implies, that the Ontario Plaintiffs traded away the opt out rights of Class Members (or allowed them to be rendered illusory) in return for more consideration ("a substantial premium") to be paid by E&Y into the proposed Settlement Trust fund. Put more bluntly, E&Y paid more to rid themselves of having to deal with opt outs, and Class Counsel countenanced that bargain.

81. In view of the fundamental nature of opt out rights described in the previous section, it is clear that settlement payments to negate opt out rights are improper, and cannot be considered fair and reasonable under any circumstances.[99]

82. The fact that the Pöyry settlement was effectuated on a normal class action basis, with effective opt out rights, during the pendency of the *CCAA* proceedings, provides a clear counterpoint example of how the E&Y settlement should have been handled.

3. The partial information available from Class Counsel at a minimum calls the fairness and reasonableness öö of the E&Y Settlement into question

83. Other information that has become available, or whose availability has been withheld, calls the proposed settlement into further question.

84. In recommending the E&Y Settlement, Class Counsel had access to E&Y's responsive insurance policies and took coverage into account in assessing what could be reasonably recoverable from E&Y.[100] However, Class Counsel and E&Y decline to

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which could have the "benefit" of a full release for the Underwriters or BDO Limited "and would likely result in those parties paying a premium for settlement to resolve all claims against them").

[99] Siskinds' statement that "the absence of opt-out rights has long been a standard feature of Canadian insolvency proceedings" is itself misleading. Obviously, *CCAA* releases normally do not reflect opt out rights – but in the present situation, we are dealing with opt outs by putative class members, who have appeared to object to the deprivation of opt out rights, with respect to claims asserted against third parties to a *CCAA* proceeding – ingredients that have not often arisen together previously. As the Court of Appeal's *Metcalfe* decision makes clear, a third party release cannot plausibly be called a "standard feature" when such situations do appear.

[100] Wright Aff, *supra* note 98 at paras. 87(d) and 118, **Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 56 and 65.**

disclose the amount of available coverage.[101] One would expect, in a case involving audit failure as severe as alleged by the OSC, and involving losses as large as here, at least the insurance coverage would be exhausted. If that is not the case, the reasonableness of the amount of the proposed settlement would be highly dubious.

85. As described above, the OSC released its allegations against E&Y on the same day the proposed settlement was announced. Any fair reading of the allegations leads to the conclusion that they are a scathing indictment of E&Y's likely audit failures.

86. Class Counsel, however, concluded that the OSC's statement of allegations "does not include any allegations that amount to knowledge or recklessness with regards to a representation."[102] This conclusion casts doubt on Class Counsel's assessment of their own case, for two reasons: (a) Class Counsel apparently view the OSC allegations as a *negative* for their recovery prospects against E&Y, which seems implausible in light of the content of the allegations, as stated above; and, (b) Class Counsel has apparently concluded, after negotiations with E&Y, that "recklessness" will suffice as a type of "knowledge" for avoiding the secondary market (Part XXIII.1) liability cap applicable to experts (which is avoided if the defendant made a misrepresentation "knowing" it was false):

> (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.[103]

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[101] Answers on Written Examinations of Mike Dean & Answers on Written Examinations of Charles Wright.

[102] Wright Aff, *supra* note 98 at para 112, **Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 63.**

[103] *Securities Act*, R.S.O. 1990, c. S-138.7(2).

[Emphasis added]

87. Contrary to Class Counsel's assertions, the OSC's description of E&Y's alleged audit failures could readily lead to the conclusion that the failures were "reckless".

88. E&Y provided Class Counsel with "the opinion of an auditing expert, who opines that Ernst & Young complied" with GAAS and was "not negligent in the preparation of its 2010 audit report"[104] – but the opinion has not been furnished and the expert has not been identified.[105]

89. The Objectors and their legal counsel in these proceedings have not, as of this date at least, been privy to any of the documents generated while E&Y was doing its audit work, whether from E&Y or from other parties who were on the scene. However, based on logic and, to some extent, the account of the parties' negotiations, it appears that E&Y must have been persuaded by some powerful evidence that it could not rely on the liability cap applicable to the secondary market claim against it (it asserted the applicable cap was far below the amount it has agreed to pay[106]) – i.e., that it had a real risk that its misconduct could be proved to have been "knowing".

90. Finally, the lack of any plan of distribution of the proposed Settlement Trust fund makes it unrealistic to expect claimants to assess whether the outcome would be fair and reasonable as to them (including the Objectors, if they were eligible to receive distributions). This is a result of the parties' decision to handle this settlement "by installments" -- the framework for the Release was approved in the Plan, the E&Y Settlement itself is now being considered for approval, E&Y will contribute the

[104] Wright Aff, *supra* note 98 at para 106, **Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 61-62.**
[105] Answers on Written Examinations of Mike Dean.
[106] Wright Aff, *supra* note 98 at para 110, **Plaintiffs' Motion Record, Volume 1, Tab 2, pp. 61-63.**

consideration to the Settlement Fund if and when conditions are satisfied in the future, and a plan for allocating or distributing the settlement monies has not yet been devised. The Securities Claimants who are potential recipients include purchasers of notes and shares, purchasers on the primary and secondary market, purchasers across Canada and abroad, those who purchased within the class period as well as those who purchased outside of the class period. Such an installment-based approach has been criticized.[107]

D. The Ontario Plaintiffs' Request for a Representation Order Should Be Dismissed

91. The Ontario Plaintiffs are seeking a Representation Order to try to distract from the fact that there is substantial dissent from the E&Y Settlement.

92. As described earlier, they previously sought such an order but let the application lapse. Now, even though the negotiation of the proposed settlement is a *fait accompli,* the Ontario Plaintiffs want retroactive cover.[108] The motion should be dismissed, and if anyone is appointed, it should be the Objectors, at least for all persons who have objected to the settlement.

93. The general authority of a *CCAA* court to grant a Representation Order derives from Rule 10.01 of the *Rules of the Civil Procedure*, which allows a court to appoint one or more persons to represent any person or a class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or

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[107] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 90.

[108] E&Y and the Ontario Plaintiffs assert that the Mediation Order and the Data Room Order gave Class Counsel the authority to enter into settlement discussions: Dean Aff, *supra* note 21 at para. 51, **Motion Record of Ernst & Young LLP, Tab 1, pp. 17-19.** Those orders did not purport to go so far as to authorize Class Counsel to bind putative class members to any settlements; if they had, presumably the Ontario Plaintiffs would not have sought a Representation Order previously or now.

served.[109] The factors to be considered in deciding on a representation order in *CCAA* proceedings include: vulnerability and resources of the group; benefit to the debtor; social benefit to be derived from representation; facilitation of administration; avoidance of multiplicity of legal retainers; balance of convenience; whether it is fair and just to the parties; whether the representative counsel has already been appointed for those have similar interests; and the position of other stakeholders and the Monitor.[110] A representation order is not appropriate when the class of persons is overly broad, already represented by counsel, there is no issue with respect to ascertaining the members of the class, or conflicts of interests are present between class members.[111] The interest of judicial economy does not override persons' rights to have their representative or counsel of choice and to pursue their own litigation or settlement strategy against a common defendant.[112]

94. The Ontario Plaintiffs do not qualify under these standards. The six Objectors represent about three and half times as many shares as the Ontario Plaintiffs. There is a clear divergence among class members, with the Objectors and other objectors and opt outs taking positions at odds with the Ontario Plaintiffs and Class Counsel. The Objectors are represented by counsel (Kim Orr Barristers P.C.) who have appeared in

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[109] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 10.01; *Nortel Networks Corp., Re.*, 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196 at para. 10 (S.C.J.) ("*Nortel*")

[110] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 ("*Canwest-2009*"); *Nortel, Ibid.*; *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152.

[111] *Bruce (Township) v. Thornburn*, 1986 CarswellOnt 2124, 57 O.R. (2d) 77 at para. 24 (Div. Ct.); *Ravelston Corp. (Re)*, 2007 CarswellOnt 7288, O.J. No. 4350 at para. 9 (S.C.J.); *McGee v. London Life Insurance Co.*, 2008 CarswellOnt 2534, 63 C.P.C. (6th) 107 at para. 38 (S.C.J.)

[112] *Attard* v. *Maple Leaf Foods Inc.*, 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 at para. 4 (Ont. Gen. Div.)

these proceedings. The Objectors have strongly indicated that they do not view Class Counsel as representing them or their interests.[113]

95. Plaintiffs' counsel in a putative class action do not have a solicitor-client relationship with any putative class member with whom they do not have a retainer agreement until a court has certified the case as a class action. However, the law does recognize that class counsel owes certain duties to class members pre-certification. In *Canada Post Corp. v. Lepine,* the Supreme Court held that the representative plaintiff's duty extends to informing potential class members of the right to opt out.[114] It follows that there is a duty to protect the right to opt out as well. The Ontario Plaintiffs and Class Counsel evidently recognized exactly that when they moved for a Representation Order in April 2012 and included an "opt out letter" for claimants to execute if they did not desire the proposed representation.

96. Recent events – specifically, Class Counsel's agreement to relinquish class members' opt out rights in return for a premium payment by E&Y – create a further reason for denying the Ontario Plaintiffs' requested Representation Order: Class Counsel have a conflict of interest. As stated by Eric Adelson of Objector Invesco:

> We became definitively dissatisfied on December 3, 2012, when it was revealed that Class Counsel, without authority, had purported to bargain away absent Class members' opt out rights. This was a clear conflict as Class Counsel will be seeking as fees a percentage of the amount received for bargaining away those rights. ...[115]

And as stated by Daniel Simard of Objector Bâtirente:

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[113] Adelson Aff, *supra* note 8 at paras 25-29, **Responding Motion Record of the Objectors, Tab 2, pp. 16-17;** Affidavit of Eric. J. Adelson, sworn December 6, 2012 at para. 6, Exhibit "C" to Adelson Aff, **Responding Motion Record of the Objectors, Tab 2C, pp. 104**

[114] *Canada Post Corp.v. Lepine,* 2009 SCC 16 at para. 42.

[115] Answers to Written Examination of Eric J. Adelson at para. 29.

> ¶12 In my view, the Ontario Plaintiffs and Class Counsel have violated their duties to class members by acceding to a settlement with E&Y in which class members' opt out rights will be negated and/or rendered illusory.[116]

97. Under these circumstances, it would be highly improper to impose representation by Class Counsel on class members who object, wish to opt out, and believe Class Counsel do not represent their interests and are indeed in conflict with them.

98. For the same reasons and at the very least, if the Court does appoint the Ontario Plaintiffs as representatives of Security Claimants, the Objectors and all other objectors and opt outs should be relieved of the binding effect of the Representation Order and Settlement Approval Order. This is specifically contemplated by Rule 10.03, which states:

> **10.03** Where a person or an estate is bound by reason of a representation order . . . a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,
>
> (a) the order or approval was obtained by fraud or non-disclosure of material facts;
>
> (b) the interests of the person or estate were different from those represented at the hearing; or
>
> (c) for some other sufficient reason the order or approval should be set aside.[117]

99. The three criteria are met here. (a) As described above, many material facts concerning the E&Y Settlement have been withheld from disclosure to the Objectors, including insurance coverage, the content of E&Y's working papers and other documents

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[116] Simard Aff at para. 15, **Responding Motion Record of the Objectors, Tab 3, pp. 135.**

[117] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 10.03.

concerning its knowledge.[118] (b) There is a stark divergence of interest, and indeed a conflict of interest, between the interests of the Ontario Plaintiffs and the Objectors, as described above. (c) In general, it would be unacceptable to allow the Ontario Plaintiffs to obtain a representation order for the purpose of negating the Objectors' opt out rights and cramming down a controversial settlement.

100. The purpose of a Rule 10 Representation Order in the *CCAA* is to protect vulnerable and unsophisticated stakeholders who may not be able to protect their rights.[119] It should not be used to prejudice the rights of unwilling parties who are already represented. Relieving the Objectors from the binding effect of the Proposed Settlement Approval Order, offered by the Ontario Plaintiffs who do not represent the Objectors' interests, would be consistent with the overall purpose of the *CPA* and Rule 10.

101. For similar reasons, the Objectors move for appointment as representatives on behalf of all Security Claimants who filed an objection to the E&Y Settlement, pursuant to Rules 10.01(1)(c) and 10.01(1)(f). Many of those objectors evidently lack separate legal representation, and by virtue of their objections it is apparent that their interests align with those of the Objectors. It would be appropriate to appoint the Objectors and their counsel Kim Orr as representatives for all such objectors.

E. The Objectors Have Standing to Assert Their Objections

102. E&Y apparently intends to argue, as set out at paragraph 51 of the Dean Affidavit, that the Objectors have waived their positions here or lack standing to assert them, basically because they did not detect at an earlier point in the *CCAA* proceedings that a

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[118] Adelson Aff, *supra* note 8 at paragraph 23, **Responding Motion Record of the Objectors, Tab 2, p. 15.**

[119] *Canwest-2009, supra* note 110 at para. 14; *Nortel, supra* note 109 at para. 13.

move was afoot to consummate a settlement between the Ontario Plaintiffs and E&Y on a third party release basis and without opt outs. E&Y's argument is not credible.

103. We doubt there is any authority or case precedent for the proposition that absent class members cannot raise objections at a settlement fairness hearing – unless they have opted out of the class action, which of course is the major problem here: the Objectors are being denied their effective opt out rights. In general, of course, class members who are affected by a class action settlement have standing to object at a fairness hearing.[120]

104. Mr. Dean contends (as "advised by counsel to E&Y") that the Objectors' failure to "participate" in the Third Party Stay Order, the Claims Procedure Order, the Mediation Order, and the Data Room Order – all entered in the period May through July 2012 – "may affect the ability of the Funds [Objectors] to maintain standing to oppose the Ernst & Young settlement at this time."[121] This is tantamount to asserting that the Objectors, as absent class members, should have been second-chairing the Ontario Plaintiffs and Class Counsel as they participated in the *CCAA* proceedings, and if they did not, they would be disabled from objecting to any settlement or arrangement put forward by the Ontario Plaintiffs later in the proceeding. Even the Ontario Plaintiffs do not make such a suggestion – presumably because they are well aware, as experienced class counsel, that the continued participation of thousands of absent class members and their counsel in litigation activities after carriage is awarded would be unwise and unworkable. As discussed above, class counsel are supposed to represent the interests of the class, even pre-certification, and class members are entitled to rely on class counsel's fulfillment of that duty.

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[120] *Kidd v. Canada Life Insurance*, 2011 ONSC 6324 at para. 66 (S.C.J.)

[121] Dean Aff, *supra* note 21 at para. 51, **Motion Record of Ernst & Young LLP, Tab 1, pp. 17-19.**

105. In any event, as a general matter, failure to challenge previous court orders in commercial matters does not create an estoppel.[122] Similarly, waiver (in this case of standing) can only be found where the party against whom waiver is asserted had (1) a full knowledge of rights and (2) an unequivocal and conscious intention to abandon them.[123] E&Y would not be able to come close to satisfying that standard. Certainly, none of the four cited orders explicitly said anything about standing. The Ontario Plaintiffs lacked authority to bind anyone other then themselves to the E&Y Settlement, as acknowledged by the parties themselves (including E&Y) at paragraph 14 of the Minutes of Settlement:

> ¶14. The Parties shall use all reasonable efforts to obtain all court approvals and/or orders necessary for the implementation of the Minutes of Settlement, including an order in the CCAA proceedings granting the plaintiffs appropriate representative status to affect the terms herein; [124]
>
> [Emphasis added]

106. Moreover, as a matter of common sense, there was nothing in the events occurring in the CCAA proceeding in 2012 until December 3, 2012 -- when the terms of the E&Y Settlement were publicly described as including a "full" third party release designed to exclude opt out rights – that would have alerted class members that their opt out rights might be infringed in this way.

107. Entry by the Ontario Plaintiffs into tolling agreements with defendants; the Ontario Plaintiffs' submission of a class *CCAA* proof of claim against the applicant; the

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[122] *Livent Inc.*, 2010 ONSC 2267 at paras. 108 and 109. (S.C.J.)
[123] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at paras. 19, 20 and 24
[124] Minutes of Settlement, *supra* note at para. 45, **Plaintiff's Motion Record, Volume 1, Tab 2A, p. 71.**

Ad Hoc Purchasers' participation in the mediation[125]; and their access to Data Room documents – none of those orders and events gave any indication that a third party release of E&Y without opt out rights was contemplated.

108. If third party releases of the type sought by E&Y here were granted in *CCAA* proceedings as a matter of routine, perhaps class members could be expected to be on guard against usurpation of opt out rights. Since the *Metcalfe* case makes it clear that such releases are to be granted only in the most exceptional cases, and certainly not as a matter of routine, the parties' suggestion that the Objectors should have foreseen the objected-to aspects of the E&Y Settlement long before, and actively moved to block them, is simply not credible.

[125] The July 25, 2012 Mediation Order included the Ad Hoc Purchaser group formed by Siskinds and Koskie Minsky as a party, and referred to that group as "Plaintiffs". The mediation occurred soon after the Pöyry settlement was announced, and particularly referred to negotiations with other third party defendants in that context. Since the Pöyry settlement was proceeding according to normal class action procedures, including opt out rights, and without third party *CCAA* releases, nothing in the mediation process could reasonably have alerted onlookers that opt out rights could be defeated. Mr. Dean cannot plausibly maintain that the order's grant of "full authority to settle" to the parties, including the Ad Hoc Purchasers, gave notice that class members' opt out rights could be defeated, and required other class members to insert themselves into the mediation process if they wanted to preserve opt out rights. Order of the Honourable Mr. Justice Morawetz, dated July 25, 2012, **Plaintiffs' Motion Record, Vol. 3, Tab 2AA, pp. 763-770.**

Part IV – ORDER SOUGHT

109. The Objectors request that the Court dismiss the motion to approve the E&Y Settlement and the request for a Representation Order.

110. In the event that this Court grants a Representation Order to the Ontario Plaintiffs, the Objectors request an Order that the Objectors are not bound by any such Representation Order.

111. The Objectors request an Order declaring that the Objectors are representatives of all Securities Claimants who objected to the E&Y Settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 30TH DAY OF JANUARY, 2013

per James C. Orr

Won J. Kim P.C.

Megan B. McPhee

Michael C. Spencer

Lawyers for Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc.

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Schedule A- Authorities

Tab	Authority
1.	*Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017 (S.C.J.)
2.	*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 45 C.B.R. (5th) 163, leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337.
3.	*Attard* v. *Maple Leaf Foods Inc.*, 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 (Gen. Div.)
4.	*Bruce (Township) v. Thornburn*, 1986 CarswellOnt 2124, 57 O.R. (2d) 77 (Div. Ct.).
5.	*Canada Post Corp. v. Lepine,* 2009 SCC 16
6.	*Canadian Airlines Corp. (Re)*, 2000 ABQB 442, leave to appeal ref'd, 2000 ABCA 238
7.	*Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (S.C.J.)
8.	*Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (S.C.J.)
9.	*Cheung v. Kings Land Developments Inc.*, 2001 CarswellOnt 3227 (S.C.J.)
10.	*Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] 74 OR (3d) 321 (C.A.)
11.	*Davies v. Clarington (Municipality)*, 2010 ONSC 418 (S.C.J.)
12.	*Durling v. Sunrise Propane Energy Group Inc.* 2011 CarswellOnt 77 (S.C.J.)
13.	*Fischer v. IG Investment Management Ltd*, 2012 ONCA 47
14.	*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629
15.	*Kidd v. Canada Life Insurance*, 2011 ONSC 6324 (S.C.J.)
16.	*Livent Inc. (Special Receiver and Manage of) v. Deloitte & Touche*, 2010 ONSC 2267 (S.C.J.)
17.	*Mangan* v. *Inco Ltd.,* [1998] O.J. No. 551 (Ct. J.(Gen. Div.))
18.	*McGee v. London Life Insurance Co.*, 2008 CarswellOnt 2534, 63 C.P.C. (6th) 107 (S.C. J.)

Tab	Authority
19.	*Nortel Networks Corp., Re.*, 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196 (S.C.J.)
20.	*Pacific Coastal Airline Ltd. v. Air Canada*, 2001 BCSC 1721 (S.C.)
21.	*Ravelston Corp. (Re)*, 2007 CarswellOnt 7288, O.J. No. 4350 (S.C.J.)
22.	*Robertson v. ProQuest Information and Learning Company,* 2011 ONSC 1647 (S.C.J.)
23.	*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490
24.	*Sauer v. Canada (Attorney General),* 2010 ONSC 4399 (S.C.J.)
25.	*Sino-Forest Corporation (Re)*, 2012 ONSC 4377, aff'd 2012 ONCA 816
26.	*Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46

Schedule B-Legislation

***Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, s. 5.1(2)**

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors

***Securities Act*, R.S.O. 1990, c. S-5, s. 78(2), 78(3), 122(1), 138.7(2)**

78. (1) Every reporting issuer that is not a mutual fund and every mutual fund in Ontario shall file annually within 140 days from the end of its last financial year comparative financial statements relating separately to,

(a) the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer or mutual fund has completed a financial year, the last financial year, as the case may be; and

(b) the period covered by the financial year next preceding the last financial year, if any,

made up and certified as required by the regulations and in accordance with generally accepted accounting principles.

(2) Every financial statement referred to in subsection (1) shall be accompanied by a report of the auditor of the reporting issuer or mutual fund prepared in accordance with the regulations

(3) The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make the report required by subsection (2).

122(1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is

made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(c) contravenes Ontario securities law,

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

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.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 10**

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or

administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;

(b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03.

***Class Proceedings Act*, S.O.1996, C. 6, s. 9.**

(9) Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

Schedule "C" – Definitions of the word "Integral"

1. In the 6th edition of *Black's Law Dictionary,* the word integral is defined as

> "Term in ordinary usage means part or constituent component necessary or essential to complete the whole. "

2. In Words & Phrases Judicially Defined in Canadian Courts and Tribunals, the definition of integral is drawn from the *Oxford Dictionary* (see below) and *Webster's New Collegiate Dictionary.* Webster's Collegiate Dictionary defines integral as including:

> "essential to completeness; constituent; formed as a unit with another part; lacking nothing essential. "

3. The second edition of the *Oxford English Dictionary* defines integral as

1. Of or pertaining to a whole. Said of a part or parts: Belonging to or making up an integral whole; constituent, component; *spec.* necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage.
2. Made up of component parts which together constitute a unity; in Logic, said of a whole consisting of or divisible into parts external to each other, and therefore actually (not merely mentally) separable.
3. Having no part or element separated, taken away, or lacking; unbroken, whole, entire, complete.

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

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

Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al.	- and -	SINO-FOREST CORPORATION, et al.
Plaintiffs		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE OBJECTORS

(Motion for Settlement Approval returnable February 4, 2013)

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