

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE
AND ARRANGEMENT OF SINO-FOREST CORPORATION

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly
known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN,
KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND,
JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J.
WEST, 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 U.S. CLASS ACTION PLAINTIFFS
(Motion for Approval of U.S. Counsel Fees,
returnable May 11, 2015)

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Action

TO: THE ATTACHED SERVICE LIST

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PART I – OVERVIEW OF THE MOTION

1. Subject to consideration of and approval of the Dealer Settlement,¹ the U.S. Class Action plaintiffs bring this motion for approval of the fees and disbursements of U.S. Class Counsel Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) in the amount of (CAD) \$194,620 for fees and (US) \$89,477.11 for outstanding unreimbursed disbursements. This fee and disbursement request is made in accordance with the retainer agreements between U.S. Class Counsel and the plaintiffs in the U.S. Class Action and is in compliance with U.S. (and Canadian) law.

2. On May 11, 2015, this Court will consider a (CAD) \$32.5 million settlement of the class action claims with Underwriter Defendants and the establishment of a settlement trust for the settlement proceeds. The proposed settlement approval order provides that the net settlement proceeds (net of class counsel fees and other specified expenses) shall be distributed among certain persons who purchased Sino-Forest securities (“Securities Claimants”), excluding the defendants and their affiliates after all conditions are satisfied. Plaintiffs and class members in the U.S. Class Action are among the Securities Claimants.

3. In connection with the terms of the Dealer Settlement, U.S. Class Counsel participated in proceedings before the U.S. Bankruptcy Court with their local U.S. Bankruptcy counsel, Lowenstein Sandler, to develop an appropriate notice program for recognition of the Dealer Settlement in the U.S. through the pending Chapter 15 proceeding of Sino-Forest. On February 25, 2015, Bankruptcy counsel filed a Motion to Approve Manner of Service of Motion Seeking Recognition and Enforcement of the Order of the Ontario Superior Court

¹ The Underwriter Defendants are listed in detail in the Affidavit of Charles Wright (Settlement Approval), Plaintiffs’ Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, paras. 9-10.

Approving the Dealer Settlement, which the Bankruptcy court approved on March 12, 2015. This will be followed with the filing of a motion for recognition of the order approving the Dealer Settlement, which is scheduled to be heard in a in the Chapter 15 proceeding in the U.S., on June 9, 2015.²

4. The retainer agreement is the starting point for the approval of counsel fees in class proceedings. The court determines whether the fees and disbursements as provided for in the retainer agreement are fair and reasonable, following which the court has discretion to determine the amount owing to class counsel for fees and disbursements. There are two main factors in these determinations: (a) the risks that class counsel assumed in acting on a contingency fee basis; and (b) the success achieved.

5. In this case, the requested fees and disbursements are consistent with the retainer agreement entered into with the U.S. Class Action plaintiffs, comply with U.S. and Canadian law, and are otherwise fair and reasonable based on the risks undertaken by U.S. Counsel and the success achieved.

6. The requested fees of U.S. Class Counsel (CAD) \$194,620.00 reflect a percentage of 20% of the notional amount of the Dealer Settlement. In our view, this amount is fair and reasonable and falls within the range of reasonableness for awards of attorneys' fees in class action securities cases as reflected in decisions both in Canada and the U.S. In its role as Class Counsel to the Lead Plaintiffs in the U.S. Class Action, Cohen Milstein undertook this case on a contingent fee basis. For its pursuit of the litigation in the U.S. Class Action and also for its assistance to Canadian Class Counsel in the Ontario Class Action as well as the

² Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 23.

proceedings in this action, Cohen Milstein seeks approval of (CAD) \$194,620.00 in respect of legal fees. This sum represents 20% of the notional Dealer Settlement for U.S. plaintiffs and is consistent with both Canadian and U.S. case law, which has commonly found that fees often exceeding 20% of the recovery obtained in similar cases is reasonable. Moreover, this fee is consistent with Canadian and U.S. case law, as more fully explained below. Each of the Lead Plaintiffs in the U.S. Class Action has agreed to the requested fee under their respective retainer agreements.

7. First, the requested fees are within the range of percentages that Ontario courts, as well as U.S. courts, have approved in the past. In this case, the requested fees are 20% of the notional value of the Dealer Settlement with respect to the U.S. Class Action.³

8. Second, U.S. Class Counsel took on significant risk for claims against Underwriters because of the multiple legal impediments to establishing liability and recovering damages against Underwriters, as described more fully below.

9. Third, U.S. Class Counsel took on the risk of no success and minimal recovery, while at the same time having to devote a substantial commitment of time, money and other resources to the prosecution of this action. U.S. Class Counsel has already committed over (USD) \$1,640,105.00 in docketed time to this action, including 3,098.25 hours of attorney and legal support staff time and out-of-pocket disbursements exceeding (USD) \$300,000, which includes over (USD) \$112,032.50 in attorneys' fees subsequent to the approval of the most recent Dealer Settlement.

³ The Court previously approved a 20% fee award, with respect to the E&Y Settlement, by Order on December 27, 2013, as well as a 20% fee award with respect to the Horsley Settlement on in July 2014.

10. Fourth, the settlement obtained, (CAD) \$32.5 million is a substantial result considering that it may be one of the largest underwriter settlements in Canadian history.⁴

PART II – THE FACTS

A. Background of These Proceedings and Settlement with Underwriters

11. These proceedings relate to the precipitous decline of Sino-Forest Corporation following allegations on June 2, 2011 that there was fraud at the company and that its public disclosure contained misrepresentations regarding its business and affairs.⁵

12. On July 20, 2011, this action was commenced against Sino-Forest, Ernst & Young LLP and other defendants in Ontario under the *Class Proceedings Act, 1992*.⁶

13. There were also class actions commenced in Québec and New York relating to Sino-Forest. Cohen Milstein Sellers & Toll PLLC is counsel to the plaintiffs in the New York action styled as *Leopard v. Sino-Forest Corporation*. Siskinds Demeules is counsel to the plaintiffs in the Québec action styled as *Guining Liu v. Sino-Forest Corporation*. E&Y is a defendant in both the Québec and New York actions.⁷

14. The Dealer Settlement also resolves claims advanced against Underwriters by the Ontario Plaintiffs and U.S. Plaintiffs. The Underwriters will make a payment of (CAD)

⁴ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 80.

⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 3.

⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 4.

⁷ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 20.

\$32.5 million.⁸ U.S. Class Counsel participated in achieving the Dealer Settlement, and support the Dealer Settlement for the reasons set forth in their the Affidavit of Richard A. Speirs and in the Affidavit of Charles Wright, sworn April 13, 2015, and supporting exhibits.⁹

15. On March 30, 2012, Sino-Forest applied for and was granted protection from its creditors pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").¹⁰

16. In November 2012 the E&Y Settlement was negotiated with E&Y, providing for (CAD) \$117 million in full settlement of all claims that relate to Sino-Forest as against Ernst & Young LLP, Ernst & Young Global Limited and their affiliates, subject to court approval. E&Y subsequently filed a motion in the U.S. Bankruptcy Court for an order recognizing the E&Y Settlement. An order recognizing the E&Y Settlement was issued by the U.S. Bankruptcy Court on November 26, 2013.¹¹

17. In July 2014, the Ontario Superior Court approved a settlement between David Horsley, Sino-Forest's former CEO, the Ontario Plaintiffs, and the Litigation Trust (the "Horsley Settlement"). The Horsley Settlement also utilized the framework contained in Article 11.2 of the Plan. The Horsley Settlement provided for payment of (CAD) \$4.2 million in respect of the claims advanced in the Class Actions.¹² Subsequently, the Horsley Settlement was also presented for approval in both this Court and in the U.S. pursuant to the

⁸ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 40.

⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11.

¹⁰ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, para. 7.

¹¹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 6.

¹² Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 37.

Chapter 15 proceeding. The Horsley Settlement was recognized by the U.S. Bankruptcy Court on July 25, 2014.¹³

18. Following final approval of the Dealer Settlement by this Court, scheduled for hearing on May 11, 2015, the Dealer Settlement will be presented to the U.S. Bankruptcy Court for recognition pursuant to the pending Chapter 15 proceeding.¹⁴

B. Notional Allocation of the Settlement Amount

19. The settlement and proposed distribution protocol allocates (CAD) \$22.5 million to primary market share claims and \$10 million to primary market note claims. The US action did not include primary market share claims, and the plaintiffs in that action did not make a claim against TD Securities, Inc. (“TD”), one of the Note Underwriters who underwrote approximately 2.7% of the Note offerings. Consequently, the settlement funds allocated by Class Counsel to primary market share claims and to TD in respect of its note offering do not form part of the notional allocation to US claims. Canadian and US counsel have agreed to a gross allocation of (CAD) \$31,526,900 to Canada and (CAD) \$973,100 to the United States solely for the purpose of determining class counsel fees, which reflects a 90% / 10% split for the claims asserted in the two actions. This is consistent with prior settlements and is appropriate under all the circumstances.¹⁵

20. This notional allocation is based on the relative class sizes of the Canadian and US class actions and the work performed by the law firms. Accordingly, Canadian Class

¹³ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 7.

¹⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 23.

¹⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 10.

Counsel request fees based on a recovery of (CAD) \$31,526,900 million and US Class Counsel request fees based on a notional allocation recovery of (CAD) \$973,100.¹⁶

C. Proposed Claims and Distribution Protocol

21. The proposed claims and distribution protocol is set forth in significant detail in the Affidavit of Charles Wright (Settlement Approval), and is incorporated herein. Counsel for Ontario Plaintiffs have retained of Frank C. Torchio, the President of Forensic Economics who assisted Class Counsel and U.S. Class Counsel in establishing the methodology to distribute funds fairly for the E&Y Settlement. As part of this process, Mr. Torchio advised on how to determine which shares are deemed sold when securities are sold in a given period and the use of netting, whereby losses are offset by profits of sales of securities during the period when such securities were inflated – a methodology that is equally applicable to the Dealer Settlement. The adjusted cost base (“ACB”) of the Claimant's securities must first be determined by applying the “first-in-first-out” methodology (“FIFO”) to the securities on a per-security, per account basis. The securities will then be divided into the different categories set out at paragraphs 88-90 of the Affidavit of Charles Wright (Settlement Approval). There are six categories of securities purchases in the Claims and Distribution Protocol. Depending on the relevant risk factor associated with each one, the Protocol may apply a discount to certain categories of claims.¹⁷

¹⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 39.

¹⁷ Affidavit of Charles Wright (Settlement Approval), Plaintiffs’ Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 93.

22. The claims administrator will review claims pursuant to the above protocol and determine a claimant's share of the net settlement fund. Claims assessed at less than \$5 will not be paid out as it will likely cost more than \$5 to process and pay such claims.

23. Class Counsel proposes to appoint NPT RicePoint ("NPT") as the Administrator of the Settlement Trust. NPT provides notice and administrative services for class actions and was appointed the administrator of the Ernst & Young Settlement Trust by Court order. For the purposes of this settlement and providing the Notice to US investors of the Dealers Settlement, NPT has affiliated with Gilardi & Co., an experienced notice and administrative services firm in the US, to provide Notice to those Securities Claimants who are US investors. The qualifications of NPT and the appropriateness of their proposed appointment is discussed in further detail in Affidavit of Charles Wright (Settlement Approval).¹⁸

D. Fees Pursuant to the Retainer Agreements

24. Cohen Milstein has acted as lead counsel in the U.S. proceedings and provided litigation services in these proceedings pursuant to a contingency fee agreement with the U.S. Class Action plaintiffs. Cohen Milstein has assisted Canadian Class Counsel in the Ontario Class Action and have also worked jointly with Canadian Counsel on achieving the E&Y and Horsley Settlements, and working with U.S. Bankruptcy Counsel to seek recognition of the E&Y and Horsley Settlements in the U.S. Bankruptcy Court. Cohen Milstein continues to work with Canadian Class counsel in seeking court approval of the Dealer Settlement and implementing various settlements, including the Dealer Settlement, through Chapter 15 proceedings in the U.S. Bankruptcy Court.

¹⁸ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable May 11, 2015 at Tab 2, para. 105.

25. Cohen Milstein undertook this case on a contingent fee basis and seeks approval of (CAD) \$194,620 in respect of legal fees. U.S. Class Counsel fees and disbursements are governed by the retainer agreements entered into with the plaintiffs in the U.S. Class Action.¹⁹

26. The requested fees accord with the Lead Plaintiffs' contingency fee retainer agreement with U.S. Class Counsel and is equivalent to 20% of the notional settlement. Lead Plaintiffs' retainer agreement with U.S. Class Counsel does not specify a particular percentage for fees. Instead, the retainer is based on a customary contingency fee whereby Lead Plaintiffs do not pay any fees or costs throughout the course of the litigation. Instead, the retainer agreement provides for the repayment of disbursements and fees as approved by a court after review and as consistent with applicable legal precedent. U.S. Lead Plaintiffs have approved the requested fee under the retainer agreements, subject to court approval.²⁰

27. This agreement is meant to reflect the resources that U.S. Class Counsel expended in pursuing the claims and securing recovery. For instance, had the defendants all settled the action within 30 days of the commencement of the U.S. Class Action in March 2012, U.S. Class Counsel would have committed relatively few resources to the action. In contrast, had the action proceeded to a common issues trial and success achieved only through judgment in either the Ontario Class Action or the U.S. District Court for the Southern District of New York, U.S. Class Counsel would have committed an enormous amount of resources to this litigation. The requested fee is meant to take into account the substantial risks taken on by U.S. Class Counsel and the time expended in prosecuting the claims of U.S. investors.

¹⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 43.

²⁰ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 47.

E. Counsel's Efforts to Advance the Ontario, Québec, and U.S. Class Actions

28. U.S. Class Counsel has expended significant efforts to advance the U.S. Class Action while simultaneously acting to protect class members' interests in connection with ongoing proceedings in Canada, including implementation of the Dealer Settlement. As described in detail below, lead plaintiffs in the U.S. Class Action have taken the following steps to advance the litigation since its beginning and also with regard to the Dealer Settlement:

- (a) undertook a thorough investigation of the allegations against Sino-Forest that emanated from a variety of sources, including the Muddy Waters Report, *The Globe and Mail*, the Ontario Securities Commission, and the Independent Committee of the Board of Directors of Sino-Forest, which included a review of hundreds of reports, exhibits, public filings, and other documents related to the investigations;
- (b) conducted an in-depth analysis of the unique cross-border legal issues related to the scope of the Québec, Ontario and U.S. Class Actions and the basis for claims asserted in the U.S. Class Action;
- (c) consulted with clients and class members regarding possible class action; researched, drafted and filed the initial Verified Class Action Complaint on January 27, 2012 in the Supreme Court of the State of New York, County of New York,²¹ which was removed to federal court in the Southern District of New York on March 8, 2012;
- (d) researched and drafted memoranda regarding to the consequences of the removal to federal court and possible remand, and related jurisdictional issues;
- (e) researched opposition to defendants' proposed motion to dismiss and negotiated tolling agreement;
- (f) researched and investigated additional legal claims and factual developments, and prepared an Amended Complaint in the U.S. Class Action alleging claims under the Securities Act of 1933 and Securities Exchange Act of 1934;
- (g) prepared Private Securities Litigation Reform Act ("PSLRA") notice which was disseminated to class members as required under the U.S.

²¹ *Leopard v. Chan, et al*, Index No. 650258/2012.

Securities Act at 15 U.S.C. § 77z-1(a)(3) as well as the U.S. Exchange Act at 15 U.S.C. § 78u-4(a)(3);

- (h) researched and briefed lead plaintiff motion and supporting pleadings in December 2012 for appointment as lead plaintiff and lead counsel in the U.S. Class Action;
- (i) monitored developments in the Canadian Class Actions and the *CCAA* proceeding; retained and consulted with both U.S. Bankruptcy counsel and insolvency counsel in Canada, Davies Ward Phillips Vineberg LLP, regarding the potential effects of those proceedings and the various settlements on the U.S. Class Action;²²
- (j) appeared at certain hearings in Sino-Forest's *CCAA* proceeding through the participation of the Davies Firm;
- (k) consulted with Canadian Class Counsel regarding the terms and conditions of the various settlements;
- (l) reviewed and analyzed terms of various settlements and its impact on U.S. Class Members which included the review of documents, interviews and discussions with key participants;
- (m) retained expert to prepare damage analysis for U.S. investors and to review damage analysis prepared by Canadian Class Counsel;
- (n) retained U.S. bankruptcy counsel, Lowenstein Sandler LLP, to advise plaintiffs in the U.S. Class Action regarding consequences of *CCAA* proceedings in Canada as well as the proceedings in the U.S. Bankruptcy Court for the Southern District of New York for recognition of the settlements approved in the *CCAA* proceeding under U.S. Chapter 15, Title 11 of the U.S. Code;
- (o) negotiated agreement with class counsel in the Ontario Class Action regarding participation of U.S. investors in the various settlements and coordination of prosecution of Canadian and U.S. class actions;
- (p) participated in the drafting and review of notices sent to U.S. class members, and the development of the various notice programs related to the motions to recognize the various settlement and the motion for approval of the Claims and Distribution Protocol and Request for Attorneys' Fees and Reimbursement of Expenses;

²² The "various settlements" now include the E&Y Settlement, the Horsley Settlement and the Dealer Settlement.

- (q) worked jointly with Canadian Class Counsel in the Ontario Action in reviewing and analyzing over 1.2 million Chinese and English documents produced by Sino-Forest in that action;
- (r) worked with bankruptcy counsel to support recognition in the U.S. Bankruptcy Court of the various settlements so that final approval could be achieved;
- (s) responded directly by email, mail and telephone to various individual class member inquiries related to the E&Y Settlement and directed class members to the proper sources for current information about the Sino-Forest class actions and submission of their individual claim forms;
- (t) developed claims distribution protocol, payment allocations, claims process, and notice to class members, in conjunction with Canadian counsel, with respect to the allocation of the E&Y settlement proceeds to U.S. and Canadian class members;
- (u) worked with Canadian class counsel in extensive, protracted, and hard-fought negotiations with Horsley and the Litigation Trust to reach the Horsley Settlement;
- (v) worked with Canadian class counsel to help design and implement a notice program advising class members of the Horsley Settlement, and developed a notice program for U.S. class members with respect to the hearing on recognition of the settlement by the U.S. Bankruptcy Court;
- (w) worked with Canadian class counsel in hard-fought negotiations with Underwriters to reach the Dealer Settlement;
- (x) worked with Canadian class counsel to help design and implement a notice program advising class members of the Dealer Settlement, and developed a notice program for U.S. class members with respect to the hearing on recognition of the settlement by the U.S. Bankruptcy Court;
- (y) worked with bankruptcy counsel to support recognition in the U.S. Bankruptcy Court of the Dealer Settlement so that final approval could be achieved; and
- (z) worked with Canadian class counsel to support the filing of the motion for settlement approval of the Dealer Settlement as well as appearances by counsel on behalf of U.S. class members at the scheduled Canadian approval hearing and U.S. Bankruptcy Court approval hearing.²³

²³ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11.

(a) Background of the U.S. Class Action

29. Shortly after the publication of the fraud allegations against Sino-Forest in the Muddy Waters report Cohen Milstein spoke with various investors in Sino-Forest securities and commenced an investigation into the allegations published in the Muddy Waters report.²⁴

30. On June 1, 2011, the day prior to the publication of the Muddy Waters report, Sino-Forest's common shares closed at \$18.21. After the Muddy Waters report became public, Sino-Forest shares fell to \$14.46 on the TSX (a decline of 20.6%), at which point trading was halted. When trading resumed the next day, Sino-Forest's shares fell to a close of \$5.23 (a decline of 71.3% from June 1).²⁵

31. Sino-Forest's notes also fell in value following the Muddy Waters report. On May 9, 2012 an auction was held to settle the credit derivative trades for Sino-Forest credit default swaps ("CDS"). CDS are essentially an insurance contract for debt instruments, and the price set in that auction represents the market's view of the value of the notes as of May 9, 2012. The CDS auction price was 29% of the notes' face values.²⁶

32. On August 26, 2011, the Ontario Securities Commission (the "OSC") issued a temporary cease-trade order in respect of Sino's securities, and staff of the Ontario Securities Commission commenced proceedings against Sino-Forest and certain of its officers and directors and Ernst & Young. Staff of the OSC did not commence proceedings against any of the Underwriters. The OSC enforcement proceedings against Ernst & Young were settled

²⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 12.

²⁵ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 12.

²⁶ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 13.

pursuant to a no-contest settlement whereby Ernst & Young neither admitted nor denied the OSC's allegations. Pursuant to the OSC settlement, Ernst & Young agreed to pay \$8 million in respect of allegations relating to both Sino-Forest and another issuer, Zungui Haixi.²⁷

33. On January 10, 2012, Sino-Forest issued a press release stating, among other things, that its historical financial statements and related auditors reports should not be relied upon.²⁸

34. On March 30, 2012, Sino-Forest filed for protection from its creditors under the CCAA and obtained a stay of proceedings against it, its subsidiaries and directors and officers, including the Ontario Action.²⁹

35. On May 9, 2012, Sino-Forest's shares were delisted from the TSX. Ernst & Young resigned as Sino-Forest's auditors effective April 4, 2012. No new auditors were appointed.³⁰

36. In response to many of the above events, U.S. Class Counsel conducted an extensive investigation, which, in part, involved an analysis of the various securities involved and the implications of cross-border trading of Sino-Forest securities. Following additional extensive research and investigation, Plaintiffs prepared a comprehensive 101 page Amended Complaint which included expanded allegations against E&Y, as well as other defendants under the U.S. securities laws.³¹

²⁷ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 14.

²⁸ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 15.

²⁹ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 16.

³⁰ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 17.

³¹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11(f).

37. U.S. Plaintiffs prepared and issued the requisite PSLRA notice to class members advising them of the litigation. Following briefing on the motion to appoint lead plaintiff and lead counsel the Court entered an order on January 4, 2013 appointing lead plaintiff and appointing Cohen Milstein lead counsel in the U.S. Class Action.³²

38. On March 30, 2012, Sino-Forest obtained an initial order under the *CCAA*, including a stay of proceedings with respect to Sino-Forest and certain of its subsidiaries. Immediately thereafter, U.S. Class Counsel commenced monitoring the *CCAA* proceedings, reviewed all motions and related papers, and reviewed the voluminous record in Sino-Forest's *CCAA* case as it developed, including all the Monitor's Reports and exhibits. On May 8, 2012, following negotiations between Canadian Class Counsel and other stakeholders in the *CCAA* proceeding, the stay of proceedings was extended to the other defendants in this action. The parties entered a tolling agreement reflecting the delay caused by the insolvency proceeding and there was an order permitting a settlement approval hearing and certification hearing relating to a settlement with the defendant Pöyry (Beijing). Given these developments, Plaintiffs in the U.S. Class Action agreed to a stay of their case against Sino-Forest.³³

39. Shortly thereafter, in order to protect the interests of U.S. Class Members, U.S. Class Counsel filed proofs of claim in Sino-Forest's *CCAA* proceeding on behalf of Lead Plaintiffs and class members in the U.S. Class Action.³⁴

³² Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11(g).

³³ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 15.

³⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 16.

(b) Class Actions Against the Underwriters Relating to Sino-Forest

40. On July 20, 2011, the Ontario Action was commenced under the *Class Proceedings Act, 1992* (the “CPA”) against Sino-Forest, the Underwriters, and other defendants on behalf of persons that had purchased Sino-Forest securities in the period from March 19, 2007 to June 2, 2011 (the “Class Period”). The plaintiffs allege that Sino-Forest misstated its financial statements, overstated the value of its assets, and concealed material information about its business and operations from investors in its public filings. With respect to the Underwriters, the plaintiffs allege in summary, that the Underwriters failed to conduct a reasonable investigation into Sino-Forest in connection with any of the offerings of Sino-Forest’s securities. As a result, Sino-Forest’s securities allegedly traded at artificially inflated prices for many years.³⁵

41. In Ontario, there were also two other proposed class proceedings commenced relating to Sino-Forest: *Smith et al. v. Sino-Forest Corporation et al.*, commenced on June 8, 2011, and *Northwest & Ethical Investments L.P. et al. v. Sino-Forest Corporation et. al.*, commenced on September 26, 2011. *Smith et al. v. Sino-Forest Corporation et al.* did not make any claims against Credit Suisse Securities (USA) LLC or Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC), the two primary Note Underwriters.³⁶

³⁵ Affidavit of Charles Wright (Settlement Approval), Plaintiffs’ Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 18.

³⁶ Affidavit of Charles Wright (Settlement Approval), Plaintiffs’ Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 21.

42. In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed. By order dated January 6, 2012, the Honourable Justice Perell granted carriage to the Ontario Plaintiffs.³⁷

43. In February 2015, the Class Plaintiffs filed the Second Fresh as Amended Statement of Claim. The Second Fresh as Amended Statement of Claim was served on the Underwriters in May 2013, and the Ontario Plaintiffs subsequently brought a motion for leave to file the amended pleading. The Second Fresh as Amended Statement of Claim included amendments containing additional claims and allegations against the Note Underwriters, including breaches of US federal law and New York State common law, and allegations that the purported private Note Offerings were public offerings. In addition, Davis New York Venture Fund, Inc. and Davis Selected Advisers L.P. were added as proposed representative plaintiffs. These two proposed representative plaintiffs were added in order to bolster the claim against the Note Underwriters because they purchased Sino-Forest notes in the primary market.³⁸

(c) Ontario Plaintiffs' Motion for Class Certification and Leave

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

³⁷ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 22.

³⁸ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 23.

records in support of their motions, comprising evidence from their investigations and expert reports.³⁹

45. A settlement agreement in principle was reached between the Ontario Plaintiffs and the Underwriters shortly before the hearing of the motions for certification and leave. The certification and leave motions were heard on January 15, 2015. Certification was adjourned as against the Underwriters. Leave and certification were granted by Justice Perell as against the remaining defendants.⁴⁰

(d) Sino-Forest's insolvency, CCAA proceeding, and E&Y Settlement Approval and Distribution

46. In November 2012, Canadian counsel for the plaintiffs in this action participated in mediation with E&Y and negotiated the E&Y Settlement and the framework for implementing the settlement through the CCAA proceeding. Lead plaintiffs in the U.S. Class Action subsequently agreed to and supported the E&Y Settlement. On December 10, 2012, the Plan of Reorganization was approved by this Court which included a mechanism for approving the E&Y Settlement.⁴¹

³⁹ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 24.

⁴⁰ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 25.

⁴¹ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 33.

47. The framework of the Ernst & Young Settlement is contained at Article 11.1 of the Plan and was the template for a similar framework for Named Third Party Defendants contained at Article 11.2 of the Plan (discussed more fully the Affidavit of Charles Wright).⁴²

48. Pursuant to a motion brought by the Ontario Plaintiffs, the E&Y Settlement was approved by this Court on March 20, 2013. The Ontario Plaintiffs then brought a motion for approval of the method of distribution of the E&Y Settlement funds to Securities Claimants and claims filing procedure. The motion was granted on December 27, 2013. In connection with both of these hearings, extensive notice was given to Securities Claimants of the proceedings. To date, over 47,000 claims have been filed in connection with the E&Y Settlement.⁴³

(e) Coordination with the Ontario Class Action

49. Beginning in mid-2013, U.S. Class Counsel began assisting Canadian Class Counsel in the prosecution of the Ontario Class Action by participating in the ongoing document review in that action. In particular, as part of an ongoing review of over a million documents produced by Sino-Forest, U.S. Class Counsel provided attorneys to assist in the review and analysis of those documents for the Canadian Class Action. U.S. Class Counsel expects that future litigation efforts among the Class Actions will continue to be coordinated in an effort to reduce duplication and costs to class members.⁴⁴

⁴² Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 34.

⁴³ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, paras. 35 and 36.

⁴⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 37.

(f) Horsley Settlement and Recognition of the Horsley Settlement in U.S. Bankruptcy Court

50. In July 2014, the Ontario Superior Court approved a settlement between David Horsley, Sino-Forest's former CEO, the Ontario Plaintiffs, and the Litigation Trust (the "Horsley Settlement"). The Horsley Settlement also utilized the framework contained in Article 11.2 of the Plan. The Horsley Settlement provided for payment of \$4.2 million in respect of the claims advanced in the Class Actions.⁴⁵

51. U.S. Class Counsel participated in proceedings before the U.S. Bankruptcy Court with their local U.S. Bankruptcy counsel, Lowenstein Sandler, to develop an appropriate notice program for recognition of the Horsley Settlement in the U.S. through the pending Chapter 15 proceeding of Sino-Forest and assisted in obtaining recognition of the Horsley Settlement in the Chapter 15 proceeding.⁴⁶

(g) Dealer Settlement and Recognition of the Dealer Settlement in U.S. Bankruptcy Court

52. Article 11.2 of the Plan provides the Ontario Plaintiffs with the ability to complete further settlements within the context of the CCAA proceedings, subject to further court approval. The Dealer Settlement contemplates that the settlement will be effected through Article 11.2 of the Plan. Pursuant to the Plan, the Underwriters are a Named Third Party Defendant under the Plan. In order to effect a Named Third Party Defendant Settlement through Article 11.2 of the Plan, the settlement must be approved by the court and the court

⁴⁵ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 37.

⁴⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11(n).

must issue a Named Third Party Defendant Settlement Order. The proposed draft Settlement Order, appended as Schedule "A" to the Minutes of Settlement, is such an order.⁴⁷

53. U.S. Class Counsel participated in proceedings before the U.S. Bankruptcy Court with their local U.S. Bankruptcy counsel to develop an appropriate notice program for recognition of the Dealer Settlement in the U.S. through the pending Chapter 15 proceeding of Sino-Forest. The U.S. Bankruptcy Court approved the Notice Program on March 12, 2015.⁴⁸

54. The negotiations leading to the Dealer Settlement were conducted on an adversarial, arm's-length basis. Following the failed court-ordered mediation in September 2012, Class Counsel continued settlement discussions with counsel to the Underwriters. U.S. Class Counsel assisted in preparation of the mediation statements, analysis of claims and damages, and consulted with Class Counsel as to the terms of the settlement. The parties appeared before Justice Stephen Goudge on August 26, 2014 and November 10, 2014. After extensive negotiation, an agreement in principle to settle the action was reached on November 10, 2014. The key terms of the Dealer Settlement are described more fully in Affidavit of Charles Wright.⁴⁹

E. Context of Contingency Fee Retainers in Class Proceedings

55. Fee awards under Canadian case law are consistent with standards under U.S. precedent. The general 20% fee awarded by U.S. courts is based on assessment criteria

⁴⁷ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 38.

⁴⁸ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11(p).

⁴⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 20.

similar to those considered by Canadian courts. For the Court's convenience, both concepts are discussed below, first those in Canada and then similar standards in the U.S.

56. Class proceedings involve a significant commitment of time and financial resources. These actions are typically taken on a contingency fee basis. It is common to dedicate thousands of lawyer hours and hundreds of thousands of dollars in disbursements to a particular case. Investigation and expert expenses are usually significant.⁵⁰

57. Moreover, class proceedings are highly adversarial and are often protracted. The concept that class proceedings often settle soon after the motion for certification is not correct. Cases are increasingly continuing beyond certification, through productions, examination for discovery and trial. The defendants tend to be well-resourced. The defendants bring motions for almost any dispute and appeal almost all decisions. A scorched-earth approach is common and even motion scheduling is hotly-contested. As a result, costs are high and litigation proceeds slowly.⁵¹

PART III – ISSUES AND THE LAW

58. The fees and disbursements that U.S. Class Counsel have requested are consistent with the retainer agreements with the plaintiffs in the U.S. Class Action and are fair and reasonable in light of the significant risks that U.S. Class Counsel undertook in these proceedings and the success achieved.

⁵⁰ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, para. 11; Affidavit of Richard A. Speirs, U.S. Plaintiffs Motion Record, Tab 2, at para. 37.

⁵¹ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, para. 12.

A. Risks and Limitations to the Success of Claims Against the Underwriters

59. It has always been Class Counsel's view that the primary market claims against the Underwriters had merit. However, a number of factors in this case presented a significant risk to the ultimate success and recovery from the Underwriters. These risks weighed strongly in favor of settlement with the Underwriters. It is Class Counsel's view that the Dealer Settlement is an excellent settlement and is fair and reasonable and in the best interests of securities claimants. Class Counsel's assessment of the Dealer Settlement and our recommendation of it rest primarily on the following factors, in addition to the general risks of proceeding with complex litigation.

(1) Risks to the breadth of claims generally

60. As explained more fully in Affidavit of Charles Wright (Settlement Approval), only primary market purchasers have valid claims against the Underwriters; purchasers of securities on the primary market must hold their securities to the end of the class period; and certain primary market claims may not be covered in any class action. Moreover, pursuant to the Pöyry (Beijing), Ernst & Young and Horsley settlements, the remaining defendants in the Class Proceedings may not be liable for any of the proportionate liability of Pöyry (Beijing), Ernst & Young and Horsley, as may be found by a court at trial. It is possible that a significant proportion of the (CAD) \$121.2 million total recovered from Ernst & Young and Horsley would be attributable to primary market claims, thereby reducing the amount that could be collected from the Underwriters at trial. In addition, some purchasers were noteholders during Sino-Forest's CCAA restructuring; and, as such, may have received some value for their notes. Finally, the maximum liability of all note claims (both secondary and

primary) is capped at (CAD) \$150 million under the Plan. Therefore, the potential recovery in respect of primary market claims may be even further reduced.⁵²

61. It is likely that the Underwriters would have asserted that they met the standard of care for the Note Offerings. The Underwriters would likely have claimed that they had experience dealing with forestry issuers and Chinese issuers, and that they completed comprehensive due diligence for each prospectus offering. The Underwriters would likely have claimed that they hired and relied upon legal counsel for each offering, and relied upon forestry expertise and valuation reports prepared on behalf of Sino-Forest as well as the financial statements audited by Ernst & Young and BDO Limited. In addition, the Underwriters would likely have argued that they had no due diligence obligation at all, given that they made explicit statements in the offering memoranda that they made no representations concerning the quality of Sino-Forest's securities. These due diligence and other defences added additional risk, particularly with respect to the Note claims where the Underwriters made explicit statements that the Underwriters made no representations concerning the quality of Sino-Forest's securities.⁵³

(b) Additional risks in the Ontario Action

62. As explained more fully in Affidavit of Charles Wright (Settlement Approval), there are various possible defenses that Underwriters may successfully assert under Canadian law. First, the Ontario Action's claim for unjust enrichment could potentially be defeated by Underwriters' assertion that such fees were paid by Sino-Forest and not by primary market purchasers. Moreover, the Ontario *Securities Act* does not contain any statutory claims

⁵² Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 66.

⁵³ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, para. 72.

against underwriters on behalf of primary market note purchasers. Thus, only Canadian common law claims can be asserted on behalf of noteholders against the Note Underwriters, and there were several potential barriers to certification of these claims. In addition, there are several reasons that an alternative damages model may have been adopted by the court even were the Ontario Plaintiffs successful in their claims. Finally, the Ontario Action also asserts claims against the Note Underwriters pursuant to the common law of New York State and US Federal law. Both of these claims would have faced significant challenges by the Underwriters.⁵⁴

63. Although the U.S. Action is being litigated separately, any substantive failure of claims in the Ontario Action could have proven persuasive with regard to the merits of claims in the U.S. Action.

(c) Additional risks in the U.S. Action

64. In addition to the strategic defense, described above, that the Underwriters were likely to advance based on due diligence, the Securities Act in the United States codifies this defense in the U.S. Code. First, to obtain damages against the Underwriters, Plaintiffs would have had to overcome the Underwriters' claim that no claim existed under U.S. law, and if any claim were pled properly, that they diligently reviewed all material related to the Sino-Forest securities and otherwise did nothing wrong. U.S. law provides a "due diligence" defense, among many others, that underwriters may invoke to avoid liability – even where a court finds that defendants have made an actionable misrepresentation under the securities laws otherwise entitling plaintiffs to recovery. Under this defense, if underwriters can

⁵⁴ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Settlement Approval, Returnable May 11, 2015 at Tab 2, paras. 63, 67, 69.

demonstrate that they conducted a reasonable investigation and were not made aware of any problems, a jury may find the Underwriters not liable.⁵⁵

B. U.S. Class Counsel's Fees and Disbursements are Fair and Reasonable

(1) Experience of U.S. Class Counsel

65. Cohen Milstein has developed extensive expertise from its experience as counsel for investors in some of the most significant securities fraud cases over the past 30 years, and has recovered over one billion dollars in assets for investors during that time. The Firm recovered assets for investors who were harmed as a result of the scandals in the 1980s involving Ivan Boesky, Michael Milken and, Drexel Burnham Lambert, as well as resulting from the savings and loan scandals involving Charles Keating of Lincoln/ACC and David Paul of Centrust. In the 1990s Cohen Milstein fought for investors who were victimized by securities frauds perpetrated both by public corporations and their outside advisors, including auditors and investment bankers. In more recent cases, Cohen Milstein has achieved substantial recovery for investors. In *New Jersey Carpenters Vacation Fund, et al., v. The Royal Bank of Scotland Group, plc, et al.*, Cohen Milstein obtained a court-approved \$275 million settlement in 2014 on behalf of investors who had purchased certain mortgage-backed securities. Likewise, in *New Jersey Carpenters Vacation Fund, et al., v. Residential Capital, LLC, et al.*, another mortgage-backed-securities case, Cohen Milstein obtained a \$325 million settlement that is currently pending final approval before the court in the Southern District of New York. In other recent cases, such as *In re Lucent Technologies Securities* and *ERISA* Litigation, Cohen Milstein represented one of the lead plaintiffs and recovered over \$600 million for the class in cash and securities. Cohen Milstein was also co-lead counsel in *In re Parmalat Securities*

⁵⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 27.

Litigation, Europe's version of the Enron scandal, where billions of dollars turned up missing and numerous corporate executives have been indicted and are imprisoned. Currently, Cohen Milstein serves as co-lead counsel in securities class-action cases against BP PLC over its oil-drilling safety that stem from BP's disastrous Deepwater Horizon explosion and oil spill in the Gulf of Mexico in April 2010.

66. Richard Speirs, in addition with his experience at his former firm, has served as lead or co-lead counsel in numerous securities fraud class actions throughout the United States. Mr. Speirs has over twenty-five years of experience representing investors in cases involving complex financial, accounting and auditing issues. He has also represented investors who were victims of fraudulent Ponzi schemes and the sale of unregistered securities. Mr. Speirs also has substantial experience in stockholder litigation involving corporate takeovers and in derivative actions. Mr. Speirs successfully litigated numerous national securities class actions as lead counsel, achieving significant recoveries for investors. Mr. Speirs was also lead or co-lead attorney in several cases where the court issued a seminal decision involving the following subjects: (i) the improper grouping of unaffiliated investors in a lead plaintiff motion; (ii) recommendation of default sanction against auditing firm for discovery misconduct involving electronic audit workpapers; and (iii) the liability under Section 10(b) of a non-issuer for disclosures made by the issuer. Among the successful cases litigated by Mr. Speirs are: *In re BP Prudhoe Bay Royalty Trust Securities Litigation*, (W.D. Wa.) (\$43.5 million recovery); *In re First BanCorp Securities Litigation*, (D.P.R.) (\$74.5 million recovery); *In re Telxon Corp. Securities Litigation*, (N.D. Ohio) (\$40 million recovery); and *Hayman v. PricewaterhouseCoopers, LLP*, (N.D. Ohio) (\$27.9 million recovery).

(2) Risks and costs associated with protracted litigation

67. The requested fees and disbursements are consistent with the retainer agreement entered, comply with U.S. and Canadian law, and are otherwise fair and reasonable based on the risks undertaken by U.S. Counsel and the success achieved.

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

69. Moreover, class proceedings are highly adversarial and are often protracted. The concept that class proceedings often settle soon after the motion for certification is not correct. Cases are increasingly continuing beyond certification, through productions, examination for discovery and trial. The defendants tend to be well-resourced. The defendants bring motions for almost any dispute and appeal almost all decisions. A scorched-earth approach is common and even motion scheduling is hotly-contested. As a result, costs are high and litigation proceeds slowly.⁵⁶

70. In addition, there are unique risks arising from the class proceedings procedure, including

- (a) the risk that the action will not be certified as a class proceeding;
- (b) the risk that a large number of class members opt out;
- (c) the risk that the defendant successfully moves to decertify a class proceeding;
- (d) the risk that an award of aggregate damages on a class-wide basis is denied and individual issues trials are ordered;

⁵⁶ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, para. 12.

- (e) the risk that individual issues trials are ordered but are not economically feasible;
- (f) the risk that the court does not approve a settlement agreement after lengthy, time-consuming and expensive negotiations; and
- (g) the risk that the court does not approve class counsel fees, or approves them only at a reduced rate.⁵⁷

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

- (h) identifying class members;
- (i) advising and instructing class members with questions concerning the settlement agreement and claims process;
- (j) providing information to class members, including relevant documents;
- (k) assisting class members with claim forms, if necessary;
- (l) providing documentation to the accountants and financial advisors of class members to assist with determinations of tax implications of settlement proceeds;
- (m) facilitating the claims process;
- (n) monitoring settlement implementation to ensure the processed are be followed;
- (o) liaising with the claims administrator; and
- (p) overall coordination of the settlement distribution.⁵⁸

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

72. U.S. Class Counsel took on the major risk that there would be little or no recovery from the defendants with the means to satisfy judgment, while at the same time having to commit an incredible amount of time, money and resources to the prosecution of this action.

U.S. Class Counsel has already expended 3,098.25 hours of attorney and legal support staff

⁵⁷ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, para. 13.

⁵⁸ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval, Returnable May 11, 2015 at Tab 2, para. 14.

time and out-of-pocket disbursements exceeding (USD) \$300,000, which includes over (USD) \$112,032.50 in attorneys' fees subsequent to the approval of the most recent Dealer Settlement.⁵⁹

73. There are at least four reasons this action has been and will continue to be difficult and costly to pursue.

74. First, this is a highly complex action and Sino-Forest is in organizational disarray. This case relates to a multi-billion alleged fraud over the course of more than 4 years and took place in 9 countries. Compounding this complexity is the fact that Sino-Forest has filed for insolvency and its records are in disarray and incomplete.⁶⁰

75. The difficulty in mining Sino-Forest's records and prosecuting this action is best demonstrated by the challenges faced by Sino-Forest's "independent committee" of its directors (the "IC"). After the allegations of fraud in June 2011, Sino-Forest's directors formed the IC to investigate the allegations. They produced three reports and expended *in excess of \$50 million* attempting to determine the validity of the allegations. They were unable to complete their mandate given the poor records and lack of cooperation faced in China. Plaintiffs face and will continue to face similar challenges, if not greater ones, to advancing this case.⁶¹

76. Even with proper discovery, proving the facts in this case will be unusually difficult. Most of the key witnesses are likely in China. Their voluntary cooperation is doubtful and the

⁵⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 30.

⁶⁰ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 32.

⁶¹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 33.

enforcement of letters rogatory by the courts of the People's Republic of China seems equally unlikely. Further, the documentary evidence in the Canadian Class Action already exceeds 1 million documents, and continues to grow. To date, Sino-Forest has produced 1.2 million documents to Canadian Class Counsel. Approximately 30% of the documents are in Chinese and Siskinds LLP has hired translators to assist in going through the documents. Canadian Counsel and U.S. Class Counsel expect that substantially more documents will be produced and anticipate continued protracted proceedings.⁶²

77. Finally, this case will require extensive and expensive expert evidence. In advancing this action, U.S. Class Counsel has already retained experts on insolvency issues and damages, as noted above in paragraph 28. The prosecution of the case against defendants with respect to Sino-Forest's financial statements would further require retention of a costly Canadian forensic accounting and auditing expert and experts on due diligence and underwriting of securities.⁶³

78. U.S. Class Counsel undertook these challenges at the commencement of this action, knowing this action would be very expensive and resource intensive, all with the real possibility of little or no recovery after trial, and many defendants who might be out of reach or unable to satisfy a large judgment. This risk increased significantly with Sino-Forest's insolvency filing which eliminated a potential source of recovery. Moreover, U.S. Class Counsel has pursued the U.S. Class Action on a contingency fee basis, which requires upfront payment of all costs, including significant fees to our consulting expert for damages and two sets of consulting counsel, as noted above in paragraph 28. U.S. Class Counsel has also

⁶² Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 34.

⁶³ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 36.

supported the Class Counsel in the Ontario Class Action by shouldering significant efforts in conducting document review and managing the proceedings in the U.S. with respect to the Chapter 15 process for recognition of the various settlements and class notice.⁶⁴

79. Finally, the (CAD) \$32.5 million settlement achieved in this case, must be considered in the context of the realistic recovery from Underwriters at trial. For good or bad, there are significant legal impediments in U.S. law to establishing liability and recovering from individual defendants. Assuming the case progressed beyond the pleading stage, success at trial against the Underwriters may have resulted in a damage award that was less than the settlement amount. Assessing the value of the settlement achieved should account for this reality and the fact that the Plan establishes a cap of (CAD) \$150 million in damages, on all claims against the underwriters.

80. A settlement of (CAD) \$32.5 million with the Underwriters was a significant success. The achievement of this success is particularly significant in light of the substantial risks assumed by U.S. Class Counsel in pursuit of the U.S. Class Action, as well as Canadian Counsel. For these reasons, and as set out above, the requested fees reflect four key factors: (a) the contingent nature of the fee retainer agreement for this action; (b) the significant risks undertaken by counsel that existed from the outset of this action; (c) the significant undertaking of time, money and resources required to prosecute this action, with a risk of little or no compensation for counsel; and (d) the success achieved for claims against the Underwriters.

⁶⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 37.


81. Finally, U.S. Class Counsel also took on significant risk in the disbursements incurred to-date which are composed of costs that remain unreimbursed and that were necessarily incurred to further the U.S. Action and obtain resolution of class members' claims through achieving settlements, including the Dealer Settlement, as well as recognition of those settlements in the U.S. Bankruptcy Court. These costs are printing and copying costs, court fees, incidental travel costs for court appearances, and other disbursements. In approving U.S. Class Counsel's request for reimbursement of disbursements to-date in support of the E&Y and Horsley Settlements, this Court approved the reimbursement of \$223,036.22 in disbursements, leaving a total of \$89,477.11 in remaining disbursements that have not been reimbursed.⁶⁵

PART IV – ORDER REQUESTED

82. U.S. Class Counsel requests that this court make an order approving their fees of (CAD) \$194,620 and disbursements of (US) \$89,477.11.


⁶⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 47.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____th day of ____, 2015.



Richard A. Speirs
Cohen Milstein Sellers & Toll PLLC

Lawyers for the plaintiffs in the U.S. Class
Action



James Doris (LSUC #33236P)
Davies Ward Phillips & Vineberg LLP

Local counsel for Plaintiffs in the U.S. Class
Action

Tab A

SCHEDULE "A" – LIST OF AUTHORITIES

Tab B

SCHEDULE "B" – RELEVANT STATUTES

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.
C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPRISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

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

Plaintiffs

Defendants

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE U.S. CLASS ACTION
PLAINTIFFS
(Approval of U.S. Counsel Fees,
returnable May 11, 2015)**

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