

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 July 24, 2014)

Cohen Milstein Sellers & Toll PLLC
88 Pine Street
14th Floor
New York, NY 10005
United States
Richard A. Speirs
Tel: (212) 838-7797 / Fax: (212) 838-7745

Steven J. Toll
1100 New York Ave. NW
Suite 500 West
Washington, D.C. 20010
United States
Tel: (202) 408-4600 / Fax: (202) 408-4699

U.S. Class Counsel for Lead Plaintiffs in the
U.S. Class Action

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7
James Doris (LSUC#33236P)
Tel: (415) 367-6919 / Fax: (416) 863-0871

Local counsel for plaintiffs in the U.S. Class
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 Horsley Settlement, 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)\$ 84,000 for fees and (US) \$59,957.02 for disbursements¹. 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 July 24, 2014, this Court will consider a (CAD) \$4.2 million settlement of the class action claims (the “Horsley Settlement”) with David J. Horsley (“Horsley”) 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 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 Horsley 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 Horsley Settlement in the U.S. through the pending Chapter 15 proceeding of Sino-Forest. Bankruptcy counsel filed a Motion to Approve Manner of Service of Motion Seeking Recognition and Enforcement of the Order of the Ontario Superior Court Approving

¹ This amount represents the unpaid portion of U.S. Counsel’s expenses subsequent to approval of the E&Y Settlement. Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 55.

the Horsley Settlement on June 16, 2014. This was followed on June 27, 2014 with the filing of a motion for recognition of the order approving the Horsley Settlement, which was scheduled to be heard in a joint proceeding in the Chapter 15 proceeding in the U.S., via videoconference with the Ontario Superior Court on July 24, 2014.²

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 \$84,000) reflect a percentage of 20% of the notional Horsley 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 proceedings in this

² Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 29.

action, Cohen Milstein seeks approval of (CAD) \$84,000 in respect of legal fees. This sum comprises approximately 20% of the notional Horsley Settlement for U.S. plaintiffs and is consistent with both Canadian and U.S. case law, which has commonly found that fees approximating even more than 20% of the recovery obtained in similar cases is reasonable. Moreover, this fee is consistent with an appropriate cross-check multiplier (here, approximately 0.35 for fees incurred since the E&Y Settlement, and 1.5 for fees since inception of this case) under both 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 have approved in the past. As noted by Justice Strathy (as he then was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, fees in the range of 20% to 30% are very common in class proceedings and there have been a number of instances in recent years in which this court has approved fees that fall within that range.³ In this case, the requested fees are 20% of the notional value of the Horsley Settlement with respect to the U.S. Class Action.⁴

8. Second, U.S. Class Counsel took on significant risk for claims against Horsley because of the multiple legal impediments to establishing liability and recovering damages against Horsley based on the facts in this case and findings in the proceedings (the “OSC Proceedings”) of the Ontario Securities Commission (the “OSC”).

³ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs’ Authorities, Tab 1.

⁴ The Court previously approved a 20% fee award, with respect to the E&Y Settlement, by Order on December 27, 2013.

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) \$1,528,072.50 in docketed time to this action, including 2,964.75 lawyer hours and out-of-pocket disbursements (USD) \$267,860.21. Fourth, the settlement obtained, (CAD) \$4.2 million is a substantial result considering the OSC Proceedings.

PART II – THE FACTS

A. Background of These Proceedings and Settlement with Horsley

10. 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

11. 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

12. 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

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.

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

13. The Class Settlement Fund will be paid into a settlement trust within fifteen (15) days following the Effective Date. The Effective Date is that date by which an order from this Court has been issued, an order of recognition from the U.S. Bankruptcy Court has been issued, and all appeal rights in both the U.S. and Canada have expired or the related orders for the Horsley Settlement have been upheld by appellate courts. Except for legal fees incurred in any future criminal actions against Horsley in relation to Sino-Forest, Horsley will not seek reimbursement from any insurers for legal fees after the Effective Date. The Horsley Settlement also resolves claims advanced against Horsley by Sino's Litigation Trust. Horsley and his insurers will make a payment of (CAD) \$1.4 million, of which Horsley will pay (CAD) \$600,000.⁸ U.S. Class Counsel participated in achieving the Horsley Settlement, and support the Horsley Settlement for the reasons set forth in their affidavits (attached to the Affidavit of Richard A. Speirs) and in the Affidavits of Charles Wright, dated July 4, 2014, and supporting exhibits.⁹

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

⁷ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, paras. 3-4.

⁸ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, paras. 13-17.

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

¹⁰ Affidavit of Charles Wright (Settlement Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, para. 31.

15. 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. The E&Y Settlement received final approval in the U.S. District Court where the U.S. plaintiffs' claims are pending on November 26, 2013 and in the U.S. Bankruptcy Court on December 18, 2013. 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

16. In May 2014, months of arms-length negotiations resulted in a settlement agreement between the plaintiffs and Horsley. The Horsley Settlement provides for payment (CAD) \$4.2 million in full settlement of all claims that relate to Sino-Forest against Horsley (the "Class Settlement Fund"), subject to court approval.¹²

17. The Horsley Settlement also seeks to resolve the claims advanced against Horsley by Sino's Litigation Trust. The Horsley Settlement will resolve the Litigation Trust claims, and Horsley and his insurers will make a payment of (CAD) \$1.4 million, of which (CAD) \$600,000 will be paid personally by Horsley.¹³

B. Notional Allocation of the Settlement Amount

18. The approved settlement with Horsley provides for a total payment of (CAD) \$4.2 million. The plaintiffs and class counsel in the Ontario, Québec and New York actions

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: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, para. 17.

¹³ *Id.*

have agreed to a notional allocation of that settlement amount between the Canadian and U.S. claims for the purposes of determining class counsel fees. They agreed that the fees of Canadian Class Counsel will be determined on the basis that 90% of the gross settlement is allocated to the Canadian claims and 10% of the gross settlement is allocated to the U.S. claims (“U.S. Settlement Proceeds”). This notional allocation is based on the relative class sizes of the Canadian and U.S. class actions and the work performed by the law firms.¹⁴

19. Accordingly, Canadian Class Counsel request fees based on a recovery of \$3,780,000 (90% of \$4.2 million) and U.S. Class Counsel request fees based on a recovery of \$420,000 (10% of \$4.2 million).¹⁵

C. Fees Pursuant to the Retainer Agreements

20. 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 Horsley Settlement, and working with U.S. Bankruptcy Counsel to seek recognition of the Horsley Settlement in the U.S. Bankruptcy Court. Cohen Milstein undertook this case on a contingent fee basis and seeks approval of (CAD) \$84,000 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.¹⁶

¹⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 52.

¹⁵ *Id.*

¹⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 51.

21. 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 U.S. 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.¹⁷

22. 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.

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

23. 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 Horsley Settlement. As described in

¹⁷ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 53.

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 Horsley 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,¹⁸ 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. 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;

¹⁸ *Leapard v. Chan, et al*, Index No. 650258/2012.

- (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 E&Y Settlement on the U.S. Class Action;
- (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 E&Y Settlement;
- (l) reviewed and analyzed terms of E&Y Settlement 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 *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 E&Y Settlement 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 notice program related to E&Y's motion to recognize the settlement and the motion for approval of the Claims and Distribution Protocol and Request for Attorneys' Fees and Reimbursement of Expenses;
- (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) 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;

- (s) supported Canadian class counsel in extensive, protracted, and hard-fought negotiations with Horsley and the Litigation Trust to reach the Horsley Settlement;
- (t) worked with Canadian class counsel to help design and implement a notice program and monitored the progress of the notice program for U.S. class members;
- (u) worked with bankruptcy counsel to support recognition in the U.S. Bankruptcy Court of the Horsley Settlement so that final approval could be achieved; and
- (v) worked with Canadian class counsel to support the filing of the motion for settlement approval 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.¹⁹

(a) Preliminary investigation and filing of the U.S. Class Action

24. 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.²⁰

25. 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. This area of investigation was particularly significant due to the recent U.S. Supreme Court ruling in a securities class action lawsuit, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) ("*Morrison*") which limited U.S. investor claims to only securities traded in the United States. As part of this investigation as to the scope of the class, U.S. Plaintiffs also reviewed the claims and allegations in the Canadian Class Actions which

¹⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 9.

²⁰ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 10.

did not assert claims on behalf of investors who purchased in the U.S. markets, except for Canadian residents.²¹

26. In preparing the initial complaint, U.S. Class Counsel reviewed and analyzed (i) all Sino-Forest's public filings issued during the relevant period; (ii) all new articles, analyst reports, and other public statements regarding Sino-Forest's business and finances; (iii) all available reports and exhibits prepared by Sino-Forest's independent committee of the Board of Directors; (iv) documents relating to the investigations of the Ontario Securities Commission; and (v) relevant Canadian accounting and auditing standards.²²

27. Plaintiffs in the U.S. Class Action also reviewed and analyzed the relevant trading in Sino-Forest Securities, potential damage and causation issues, and investigated the jurisdictional basis for commencing the action.²³

28. As a result of these investigations, and in light of the *Morrison* decision, Plaintiffs drafted and filed a complaint in New York Supreme Court, based on various common law theories of liability including, among others, common law fraud, negligence and negligent misrepresentation. The initial complaint was removed to federal court in the Southern District of New York.²⁴

29. After removal to federal court, plaintiffs in the U.S. Class Action researched and briefed issues related to Defendants proposed motions to dismiss the original claims pled

²¹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 11.

²² Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 12.

²³ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 13.

²⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 14.

under New York State law. The U.S. Plaintiffs conducted further review and analysis of factual developments based on the ongoing investigations of Defendants and information disclosed in the *CCAA* proceedings.²⁵

30. 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.²⁶

31. 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.²⁷

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

32. 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

²⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 15.

²⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 17.

²⁷ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 17.

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.²⁸

33. Shortly thereafter, in order to protect the interests of U.S. Class Members, U.S. Class Counsel filed proofs of claim in Sino-Forrest's *CCAA* proceeding on behalf of Lead Plaintiffs and class members in the U.S. Class Action.²⁹

34. On July 25, 2012, the Court entered an order requiring certain parties to mediate the claims in Sino-Forest's *CCAA* proceeding. That mediation was held on September 4 and 5, 2012. Prior to the mediation, U.S. Class Counsel contacted the Monitor and other parties in an effort to participate in the mediation. However, the Monitor did not permit the U.S. Class Plaintiffs to participate at that time.³⁰

35. Subsequently, Canadian Class Counsel entered into separate negotiations and eventually mediation with E&Y. On November 28, 2012, they executed the Minutes of Settlement setting forth the terms of the settlement with E&Y. Several days later U.S. Class Counsel was advised of the settlement and the terms agreed to with E&Y, which included a proposal to resolve all investor claims through the *CCAA* proceeding.³¹

36. Over the next two months, U.S. Class Counsel engaged in extensive negotiations and discussions regarding the terms of the E&Y Settlement. U.S. Class Counsel retained U.S.

²⁸ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 18.

²⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 19.

³⁰ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at paras. 20.

³¹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at paras. 21 & 23.

bankruptcy counsel and Canadian counsel, Davies Ward Philips Vineberg LLP (the “Davies Firm”), to advise them of the procedural, substantive, and jurisdictional implications relating to the *CCAA* proceeding resulting from the E&Y Settlement.³²

37. 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. On March 20, 2013, this Court approved the E&Y Settlement.³³

(c) Recognition of the E&Y Settlement in U.S. Bankruptcy Court and Settlement Approval and Distribution

38. 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.³⁴

³² Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 23.

³³ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 24.

³⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 23.

39. On February 4, 2013, the Canadian Monitor filed a Memorandum of Law in Support of Chapter 15 Petition for Recognition of Foreign Proceeding and Related Relief to petition the U.S. Bankruptcy Court for recognition of the *CCAA* proceedings and E&Y Settlement. Bankruptcy counsel filed a Motion to Approve Manner of Service of Motion Seeking Recognition and Enforcement of the Order of the Ontario Superior Court Approving the Horsley Settlement on June 16, 2014. This was followed on June 27, 2014 with the filing of a motion for recognition of the order approving the Horsley Settlement, which was scheduled to be heard in a joint proceeding in the Chapter 15 proceeding in the U.S., via videoconference with the Ontario Superior Court on July 24, 2014.³⁵

(d) Coordination with the Ontario Class Action

40. 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.³⁶

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

41. On May 22, 2012, the Ontario Securities Commission (“OSC”) issued a Statement of Allegations against Sino-Forest and senior executives, including Horsley (the “OSC

³⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at paras. 25, 29.

³⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 26.

Proceeding”), but clearly distinguishing the conduct of Horsley from the rest of the senior executives. The allegations against Horsley are only those of negligence, not fraud as alleged against other defendants. The Horsley Settlement is conditioned upon the approval of the OSC.³⁷

42. In July 2013, the Litigation Trust issued a statement of claim against Horsley and other senior executives of Sino, and, like the OSC Proceeding, distinguished Horsley’s conduct. After a failed court-ordered mediation in September 2012, Class Counsel eventually picked up settlement discussions with counsel to Horsley and reached an agreement in principle in January 2014. However, it soon became apparent, due to a number of practical considerations, that any resolution of class claims against Horsley would also require resolution of the Litigation Trust claims. Thus, Class Counsel, Horsley’s counsel (and insurers) and counsel to the Litigation Trust continued to negotiate a resolution of all claims over the next several months. These efforts culminated in the Horsley Settlement in May 2014.³⁸

43. 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. Bankruptcy counsel filed a Motion to Approve Manner of Service of Motion Seeking Recognition and Enforcement of the Order of the Ontario Superior Court Approving the Horsley Settlement on June 16, 2014. This was followed on June 27, 2014

³⁷ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 27.

³⁸ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 28.

with the filing of a motion for recognition of the order approving the Horsley Settlement, which was scheduled to be heard in a joint proceeding in the Chapter 15 proceeding in the U.S., via videoconference with the Ontario Superior Court on July 24, 2014.³⁹

E. Context of Contingency Fee Retainers in Class Proceedings

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

45. 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.⁴⁰

46. 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

³⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 29.

⁴⁰ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, para. 12; Affidavit of Richard A. Speirs, U.S. Plaintiffs Motion Record, Tab 2, at paras. 49, 51.

and even motion scheduling is hotly-contested. As a result, costs are high and litigation proceeds slowly.⁴¹

47. 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;
- (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.⁴²

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

- (a) identifying class members;
- (b) advising and instructing class members with questions concerning the settlement agreement and claims process;
- (c) providing information to class members, including relevant documents;
- (d) assisting class members with claim forms, if necessary;

⁴¹ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, para. 13.

⁴² Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, para. 14.

- (e) providing documentation to the accountants and financial advisors of class members to assist with determinations of tax implications of settlement proceeds;
- (f) facilitating the claims process;
- (g) monitoring settlement implementation to ensure the processed are be followed;
- (h) liaising with the claims administrator; and
- (i) overall coordination of the settlement distribution.⁴³

49. All of the above factors are equally applicable to and are also required in U.S. class action litigation as part of the execution of a settlement and required claims administration process.

50. In addition to these continuing obligations identified above as part of the initial settlement approval process, courts in the Southern District of New York, where the U.S. Class Action remains pending, determine reasonableness of a settlement and award of attorneys' fees by reference to the factors set forth in *Goldberger v. Integrated Resources, Inc.*:⁴⁴

- (a) the time and labor expended by counsel;
- (b) the magnitude and complexities of the litigation;
- (c) the risk of the litigation ...;
- (d) the quality of representation;
- (e) the requested fee in relation to the settlement; and
- (f) public policy considerations.

⁴³ Affidavit of Charles Wright (Fee Approval), Plaintiffs' Motion Record re: Fee Approval Motion, Returnable July 24, 2014 at Tab 2, para. 15.

⁴⁴ *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388-89 (S.D.N.Y. 2013).

U.S. courts assess the various factors above, and, “[w]ith respect to process” for evaluating the fairness and reasonableness “a class action settlement enjoys a ‘presumption of correctness’ where it is the product of arm's-length negotiations conducted by experienced, capable counsel.”⁴⁵ Moreover, courts heavily weigh the risk of continued litigation because “[a]ll litigation carries a risk.”⁴⁶ “Indeed, ‘[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome’....” such as risks that “the Court might deny class certification.”⁴⁷ As explained below, the risks of litigation as well as the significance of the relief achieved weigh heavily in favor of approval of a settlement and award of fees requested under U.S. as well as Canadian precedent.

PART III – ISSUES AND THE LAW

51. 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.

A. Approach to Fee Approval in Class Proceedings

(1) Test for fee approval

52. The retainer agreement is the starting point for the approval of contingency fees. The court determines whether the fees and disbursements as provided for in the retainer agreement

⁴⁵ *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 575 (S.D.N.Y. 2008). In *Telik*, the court awarded a 25% fee to plaintiffs’ counsel based on the assessment factors.

⁴⁶ *In re Citigroup Inc. Sec. Litig.*, *supra*, 965 F. Supp. 2d at 382.

⁴⁷ *Id.*

are fair and reasonable, failing which the court has discretion to determine the amount owing to class counsel for fees and disbursements.⁴⁸

53. Courts assessing the fairness and reasonableness of fees focus on two main factors: the risk that class counsel undertook in conducting the litigation and the degree of success or result achieved.⁴⁹

54. Risk in this context is measured from the commencement of the action and as it continued, and includes all of the risks facing class counsel such as the liability risk, recovery risk and the risk that the action will not be certified as a class proceeding. As set out in paragraphs 45-51, above, there are unique risks arising from the class proceedings procedure.

(2) The importance of strong incentives for class counsel

55. Ontario courts have recognized that class proceedings depend on entrepreneurial lawyers willing to take on these cases and that class counsel compensation should reflect this. Compensation must be sufficiently rewarding to “provide a real economic incentive to lawyers to take on a class proceeding and do it well”.⁵⁰

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

⁴⁸ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.32(2) and (4); *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs’ Authorities, Tab 1. *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at paras. 59 and 63 (S.C.J.), Plaintiffs’ Authorities, Tab 10.

⁴⁹ *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.), Plaintiffs’ Authorities, Tab 11; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 12.

⁵⁰ *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, Plaintiffs’ Authorities, Tab 12; *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs’ Authorities, Tab 15; *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 at para. 53, Plaintiffs’ Authorities, Tab 16.

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

58. The incentive must be large enough when assessed in the context of counsel's class action practice as a whole. Class counsel's assessment of incentive does not hinge on each case, but the sum of successes and losses. "They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here."⁵¹

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

59. It is appropriate for the court to consider metrics such as the effective multiplier on counsel's docketed time as a check of the reasonableness of the fees claimed. However, Ontario class action judges have warned against an excessive focus on the multiplier: "courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times

⁵¹ *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602 at para. 26, Plaintiffs' Authorities, Tab 15.

the hourly rate.” The result achieved, not the time expended by counsel, should generally be the most important test of the value of counsel’s services.⁵²

60. Accordingly, by way of example, Justice Cullity (as he then was) approved fees equal to 20% of recovery in *Cassano v. Toronto-Dominion Bank* even though the effective multiplier was approximately 5.5.⁵³

61. The effective multiplier in this case for fees and disbursements requested by U.S. Class Counsel is approximately a total of 1.5 for all fees requested, including those for the E&Y Settlement and the Horsley Settlement, or 0.35 for the request herein of (CAD) \$84,000 as compared to attorneys’ fees incurred subsequent to the E&Y Settlement.⁵⁴ It is within the range that Ontario courts have found reasonable. That range is “slightly greater than one (at the low end) to four or higher in the most deserving cases”.⁵⁵

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

62. 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.

⁵² *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 22, Plaintiffs Authorities, Tab 18; *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiffs Authorities, Tab 1; *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at para. 60 (S.C.J.), Plaintiffs’ Authorities, Tab 10; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 25, Plaintiffs’ Authorities, Tab 15.

⁵³ *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 25, Plaintiffs’ Authorities, Tab 15; *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at para. 59-63 (S.C.J.), Plaintiffs’ Authorities, Tab 10.

⁵⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at paras. 43 & footnote 20.

⁵⁵ *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at para. 31, Plaintiffs Authorities, Tab 18.

(1) Fees as a percentage of recovery are within the appropriate range accepted by both Canadian and U.S. Courts

63. The requested fees are within the range of percentages that Ontario courts have approved in the past.

64. Justice Strathy (as he then was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, stated that fees in the range of 20% to 30% are “very common” in class proceedings and there have been a number of instances in recent years in which this court has approved fees that fall within that range:⁵⁶

<i>Abdulrahim v. Air France</i> , [2011] O.J. No. 326:	30%
<i>Ainslie v. Afexa Life Sciences Inc.</i> , [2010] O.J. No. 3302:	19.4%
<i>Robertson v. ProQuest LLC</i> , [2011] O.J. No. 2013:	24%
<i>Osmun v. Cadbury Adams Canada Inc.</i> , [2010] O.J. No. 2093:	25%
<i>Pichette v. Toronto Hydro</i> , [2010] O.J. No. 3185:	28.5%
<i>Robertson v. Thompson Canada Ltd.</i> , [2009] O.J. No. 2650:	36%
<i>Cassano v. Toronto- Dominion Bank</i> (2009), 98 O.R. (3d) 542:	20%
<i>Martin v. Barrett</i> , [2009] O.J. No. 2015:	29%

65. Justice Strathy explained that compensating counsel through a percentage of recovery is “generally considered to reflect a fair allocation of risk and reward as between lawyer and client.” It induces the lawyer to maximum the recovery for the client and is fair to the client because there is no pay without success.⁵⁷

66. Justice Cullity (as he then was) in *Cassano v. Toronto Dominion Bank* also endorsed a percentage approach in approving a retainer agreement that provided fees of 20%, which in that case resulted in fees of \$11 million out of a \$55 million settlement. His Honour adopted

⁵⁶ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

⁵⁷ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at paras. 63, Plaintiffs Authorities, Tab 1.

the reasoning of Justice Cumming in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* in emphasizing the value of a percentage approach to fees: “[u]sing a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards “one imaginative, brilliant hour” rather than “one thousand plodding hours.”⁵⁸

67. In U.S. class action securities cases, “courts traditionally award plaintiffs’ counsel fees in class actions based on either a reasonable percentage of the settlement fund” known as a percentage of the fund method, “or an assessment by the court of the market value of the work plaintiffs’ attorneys performed.”⁵⁹ Yet, “in complex securities fraud class actions, courts have long observed that the ‘the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases.’”⁶⁰ Courts typically use the lodestar analysis simply to “cross-check” the reasonableness of the requested percentage.⁶¹ This method entails totalling the hours worked by class counsel (the “lodestar”) and then dividing the dollar value of the percentage of the fund award by the dollar amount of lodestar charges to obtain a multiplier.

68. U.S. courts in the Southern District of New York, where the U.S. Class Action is pending, have frequently found reasonable and approved fees that are equivalent to more than 20% of the recovery obtained through settlement, and roughly a multiplier of 2 by the lodestar

⁵⁸ *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 at paras. 50-63 (S.C.J.), Plaintiffs’ Authorities, Tab 10.

⁵⁹ *In re Citigroup Inc. Sec. Litig.*, supra, 965 F. Supp. 2d at 387 (S.D.N.Y. 2013).

⁶⁰ *Id.* (citation omitted).

⁶¹ *Id.*

cross-check. As just a few examples, in the following cases courts have approved settlement fees such as:

- (a) 22.5% of recovery or a 2.09 lodestar multiplier in *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124 (2008);
- (b) 25% of recovery, or a lodestar multiplier of 1.6, in *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570 (S.D.N.Y. 2008);
- (c) 24% of the total recovery, or a lodestar multiplier of 1.985 in *In re Merrill Lynch & CO., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156 (S.D.N.Y. 2007);
- (d) a 19%-18% sliding scale fee of the total recovery, which was a 2.16 lodestar multiplier, in *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004); and
- (e) 33% of the total recovery, or a multiplier of 4.65 in *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002).

69. In this case, the requested fees are 20% of the notional value of the U.S. portion of the Horsley Settlement. This is within the range of fees that Ontario courts have approved as well as U.S. Courts and, as set out below, there were considerable risks in this litigation and significant success as against Horsley.

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

70. U.S. Class Counsel took on significant risk for claims against Horsley because of the multiple legal impediments to establishing liability and recovering damages against him under Canadian and U.S. law.

71. U.S. Class Counsel were always confident that they would establish liability against Sino-Forest and the senior insiders at Sino-Forest. However, obtaining relief against

remaining individual defendants posed additional hurdles, and in light of the associated risks, the Horsley Settlement is a significant success.⁶²

72. The defendants that are most culpable (Sino-Forest, Allen Chan, Kai Kit Poon and Horsley) are also the defendants that became insolvent (Sino-Forest), have limited personal means (Horsley) or are individuals living in the People's Republic of China (Messrs. Chan and Poon), where enforcement of a U.S. judgment is doubtful.⁶³

73. Plaintiffs have already obtained a favorable settlement from E&Y. Damages recoverable from E&Y after a trial might have been zero or less than the E&Y Settlement amount, because U.S. law provides to auditors many defenses from liability. Obtaining a judgment for damages against Horsley would have been just as challenging, given the OSC Proceedings. To obtain damages against Horsley, Plaintiffs would first have had to establish that Horsley acted with *scienter*, which can be shown by demonstrating defendant acted with knowing intent or recklessness – and both have much more stringent legal standards for proof than does negligence. The OSC Proceedings found only that Horsley acted with negligence, a finding that is not cognizable under the Exchange Act and would fail to incur any liability on Horsley's behalf. Moreover, where plaintiffs do not meet the heightened pleading standard requiring a showing of *scienter*, the U.S. Private Securities Litigation Reform Act ("PSLRA") mandates dismissal.⁶⁴

⁶² Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 32.

⁶³ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 33.

⁶⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 34.

74. Another risk in the U.S. Action is that the doctrine of joint and several liability applies under the Exchange Act “only if the trier of fact specifically determines” that the defendant “knowingly committed a violation of the securities laws.”⁶⁵ Given the challenges in this case in proving knowledge against Horsley, U.S. plaintiffs faced the risk that Horsley would eventually be found only proportionately liable and that his proportionate fault was much smaller than the amount achieved in the Horsley Settlement. A finding of proportionate liability, in turn, would pose additional limitations to recovery, as Horsley’s net worth could restrict the collectability of any judgment obtained against him. As an additional factor, the Horsley Settlement also precludes any challenges faced by enforcing a U.S. judgment overseas in a foreign jurisdiction.⁶⁶

75. Similar or greater challenges face U.S. Class Counsel in advancing the claims advanced against the other solvent defendants with the means to satisfy a large judgment thus reinforcing the high risk nature of this litigation.

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

76. 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 over (USD) \$1,528,072.50 in attorneys time and (USD) \$267,860.21 in out-of-pocket expenses.⁶⁷

⁶⁵ This is provided for under U.S. Code as amended by the PSLRA, under 15 U.S.C. § 78u-4(f)(2)(A); Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 35.

⁶⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 35.

⁶⁷ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 39.

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

78. 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.⁶⁸

79. 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 to advancing this case.⁶⁹

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

⁶⁸ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 41.

⁶⁹ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 42.

the documents. Canadian Counsel and U.S. Class Counsel expect that substantially more documents will be produced.⁷⁰

81. Third, to prove their claims, plaintiffs for the U.S. Class Action would be required to prove *scienter* (fraudulent intent) – a standard for which, as the United States Supreme Court has stated, they would face “[e]xacting pleading requirements....”⁷¹ As held in controlling law for the District where the U.S. Class Action is pending, allegations supporting *scienter* must satisfy the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA, which requires pleading facts with sufficient particularity to prove a state of mind behind knowing or reckless conduct.⁷² Where plaintiffs do not meet this standard in their complaint, the PSLRA mandates dismissal under 15 U.S.C. § 78u-4(b)(3)(A). These pleading standards create a distinctly high burden that plaintiffs must reach in order to survive a motion to dismiss – and all *without* the benefit of *any* discovery. Under U.S. securities laws, all discovery and other proceedings are stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary.⁷³

82. Fourth, even were *scienter* proven and dismissal avoided, knowing intent (and not just recklessness) would have been required to hold Horsley jointly and severally liable. A

⁷⁰ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 43.

⁷¹ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

⁷² *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001).

⁷³ Affidavit of Richard A. Speirs, U.S. Plaintiffs’ Motion Record, Tab 2, at para. 44.

finding of proportionate liability of Horsley as compared with all the other defendants could have restricted even what relief was available.⁷⁴

83. 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 24. 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.⁷⁵

84. 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 paragraphs 24. U.S. Class Counsel has also supported the Class Counsel in the Ontario Class Action by shouldering significant efforts in conducting document review.⁷⁶

85. Finally, the (CAD) \$4.2 million settlement achieved in this case, must be considered in the context of the realistic recovery from Horsley at trial. For good or bad, there are legal

⁷⁴ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 45.

⁷⁵ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 46.

⁷⁶ Affidavit of Richard A. Speirs, U.S. Plaintiffs' Motion Record, Tab 2, at para. 47.

impediments in U.S. law to establishing liability and recovering from individual defendants. Success at trial against Horsley 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.

86. A settlement of (CAD) \$4.2 million with Horsley 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 Horsley.

PART IV – ORDER REQUESTED


87. U.S. Class Counsel requests that this court make an order approving their fees of (CAD) \$84,000 and unreimbursed disbursements of (US) \$59,957.02.

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



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

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
2. *Cassano v. Toronto-Dominion Bank* (2009), O.R. (3d) 543 (S.C.J.)
3. *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)
4. *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962
5. *Helm v. Toronto Hydro-Electric Systems Ltd.*, 2012 ONSC 2602
6. *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292
7. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752

SCHEDULE "B" – RELEVANT STATUTES

Fees and disbursements

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

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

- (4) If an agreement is not approved by the court, the court may,
- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
 - (b) direct a reference under the rules of court to determine the amount owing; or
 - (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

Agreements for payment only in the event of success

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

Interpretation: success in a proceeding

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

Definitions

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

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

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

Agreements to increase fees by a multiplier

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

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members;
or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

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

Idem

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

(a) shall determine the amount of the solicitor’s base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

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

Idem

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

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

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

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

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

Plaintiffs

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE U.S. CLASS ACTION
PLAINTIFFS
(Approval of U.S. Counsel Fees,
returnable July 24, 2014)**

Cohen Milstein Sellers & Toll PLLC

88 Pine Street, 14th Floor

New York, NY 10005

United States

Richard A. Speirs

Tel: (21) 838-7797 / Fax: (212) 838-7745

1100 New York Ave. N.W.

Suite 500 W

Washington, D.C. 20006

Steven J. Toll

Tel.: (202) 408-4600

Fax: (202) 408-4699

U.S. Class Counsel for the Lead Plaintiffs in the U.S. Class
Action

Davies Ward Phillips & Vineberg LLP

155 Wellington Street West

Toronto, ON M5V 3J7

James Doris (LSUC #33236P)

Tel: (418) 367-6919 / Fax: (416) 863-0871

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