Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REPLY FACTUM OF THE APPELLANTS

**INVESCO CANADA LTD.,
NORTHWEST & ETHICAL INVESTMENTS L.P.,
COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.,
MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND
MONTRUSCO BOLTON INVESTMENTS INC.**

(Motion for Leave to Appeal from E&Y Settlement Approval Order
and Representation Dismissal Order)

May 27, 2013

KIM ORR BARRISTERS P.C.
19 Mercer Street, 4th Floor
Toronto, Ontario
M5V 1H2

Michael C. Spencer (LSUC #59637F)
Won J. Kim (LSUC #32918H)
Megan B. McPhee (LSUC #48351G)

Tel: (416) 596-1414
Fax: (416) 598-0601

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

TO: THE SERVICE LIST

TABLE OF CONTENTS

LAW AND ARGUMENT

1. The Appellants submit this Reply Factum in further support of their motion for leave to appeal from Justice Morawetz's E&Y Settlement Approval Order and Representation Dismissal Order.

2. The Respondents oppose leave to appeal by arguing generally that the issues raised are not of significance to the profession or to this practice area, assertedly because the issue of non-debtor third party *Companies' Creditors Arrangement Act* ("*CCAA*")[1] releases was "already settled" in *Re Metcalfe & Mansfield Alternative Investments II Corp.* ("*Metcalfe*"),[2] as applied by Justice Morawetz in his decisions below.

3. The Respondents' approach is superficial. This is unquestionably an important litigation -- the largest securities fraud case in at least a decade -- and the application of *Metcalfe* to shelter auditors and other third-party defendants under a debtor applicant's *CCAA* umbrella in such a situation has never received scrutiny by this Court. The class action defendants (other than Sino-Forest Corp.) are the only sources of recovery for defrauded Sino-Forest Corp. ("Sino-Forest") share purchasers. Those defendants are certainly solvent and do not themselves qualify for *CCAA* protection.

4. The Appellants have raised serious questions as to whether claims against solvent non-debtor defendants can and should be resolved in a *CCAA* proceeding that provides non-opt-out releases of those claims. Furthermore, the rationale utilized by Justice Morawetz -- that the E&Y

---

[1] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ["*CCAA*"].
[2] *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, [2008] O.J. No. 3164 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337 ["*Metcalfe*"], **Book of Authorities of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Tab 8.**

settlement is a "contribution" to Sino-Forest's reorganization plan[3] -- raises a fundamental question as to whether any settlement funds can be distributed to equity claimants (share purchaser class members) before noteholder claimants have been paid in full, consistent with section 6(8) of the *CCAA*.[4] The Respondents' position that these questions have "already been decided" is not a serious response.

5. The Respondents also seek to insulate Justice Morawetz's decisions by characterizing them as factual or discretionary determinations entitled to deference on appeal. However, the basic *Metcalfe* issue -- whether the settlement and release of E&Y were necessary to the success of Sino-Forest's Plan of Compromise and Reorganization ("Plan") and restructuring -- is not resolvable based on observable facts; at least it depends on applying facts about Sino-Forest's restructuring to the *Metcalfe* legal standard. Similarly, interpretation of section 6(8) of the *CCAA* in the present context raises purely legal questions.

6. We submit that Justice Morawetz was legally incorrect in adopting (at the Respondents' behest) an overly aggrandized view of the proper scope of Sino-Forest's *CCAA* proceeding. These are question of law, which attract no deference and are reviewable on a correctness standard.

7. The following sections address particular arguments raised by the Respondents.

---

[3] *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 at paras. 27, 60-64 (S.C.J.) ["Settlement Approval Reasons"], **Motion Record of the Appellants, Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order ["Appellants' Motion Record"], Tab 4, pp. 39, 46-47.**

[4] *CCAA*, section 6(8).

A. None of the Respondents have provided convincing reasons why the E&Y settlement belongs in Sino-Forest's *CCAA* proceeding

8. The Respondents have not truly addressed the specifics of the Appellants' argument that the *Metcalfe* requirements for extending *CCAA* treatment for the settlement and release of E&Y are not satisfied in the situation at hand.

9. All Respondents except E&Y maintain that *Metcalfe* only requires that a proposed third-party release be "reasonably related" to the debtor's reorganization. No fair reading of *Metcalfe* permits such a milquetoast conclusion. In *Metcalfe,* Justice Blair would not have needed to give the issue such careful and exhaustive attention if merely a "reasonable relationship" were required. Even Justice Morawetz applied the "necessary" standard when deciding, in the Sanction Order, that Sino-Forest's *subsidiaries* deserved *CCAA* releases under the *Metcalfe* standard ("the Plan cannot succeed without the releases of the Subsidiaries"[5]).[6] Notably, E&Y, in its opposing factum on the present motion, describes the *Metcalfe* standard as involving a finding that the release is "necessary" to the success of the debtor's reorganization plan.[7] This basic difference between E&Y's and the other parties' interpretation of *Metcalfe* alone demonstrates the significance of the issues on this proposed appeal.

10. A dispassionate review of Sino-Forest's restructuring yields the conclusion that the E&Y settlement and release were not necessary to the success of the restructuring on any level.

---

[5] *Sino-Forest Corporation (Re)*, 2012 ONSC 7050 at para. 74 (S.C.J.) ["Plan Sanction Reasons"], **Responding Motion Record of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Vol. I, Tab 5, p. 163.**

[6] Plan Sanction Reasons, *ibid.* at paras. 70-74 (S.C.J.), **Responding Motion Record of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Vol. I, Tab 5, pp. 162-163.**

[7] Responding Factum of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order) dated May 17, 2013 at paras. 34(g), 53, 54 ["E&Y Factum"].

11. E&Y's indemnification claim against Sino-Forest with respect to possible liability to share purchaser class members in the class action was held to be an equity claim subject to release under the Plan by this Court, regardless of any settlement.[8] E&Y's indemnification claim against Sino-Forest with respect to the Noteholder Class Action Claims were not considered by this Court. Both prior to, and following, the E&Y settlement, the Plan established a negotiated dollar cap which limited third party defendants' indemnification claims for Noteholder Class Action Claims. The capped indemnifications for Noteholder Class Action Claims were treated as Unresolved Claims.[9]

12. The affidavit of Mr. W. Judson Martin, Sino-Forest's vice chairman and CEO, sworn November 29, 2012, clearly demonstrates that the E&Y settlement and release were not necessary for the restructuring of Sino-Forest to succeed.

13. Mr. Martin's affidavit was sworn just before the E&Y settlement was announced. The affidavit did not consider the settlement, or the other subsequent provisions for third party defendant releases, at all. It contended at length that Sino-Forest's restructuring Plan, as then configured (without any provision for settlements or releases of auditors or underwriters), was fair and reasonable and would allow the company to continue as a going concern for the benefit of its stakeholders.[10] Notably, releases of the Sino-Forest subsidiaries and of Named Directors

---

[8] *Sino-Forest Corp.(Re)* (2012), 114 O.R. (3d) 304, 2012 ONCA 816 at paras. 2, 3, 59-61 (ONCA), **Book of Authorities of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Tab 21** ["Sino-Forest Equities Decision"].

[9] See Plan of Compromise and Reorganization December 3, 2012 version blacklined to November 28, 2012, article 1.1 ("Indemnified Noteholder Class Action Limit" and "Unresolved Claims Reserve"), 4.4(b), 7.2(e), attached as Appendix "C" to the Supplemental Report to the Thirteenth Report of the Monitor, **Appellants' Motion Record, Tab 18A, pp. 269, 280, 287-288, 319-320.**

[10] Affidavit of W. Judson Martin sworn November 29, 2012 at paras. 158, 164 ["Martin Affidavit"], **Responding Motion Record of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Vol. I, Tab 13, pp. 322-323.**

and Officers *were* identified as "necessary" for the reorganization,[11] but the other third party defendants were not mentioned, and the restructuring Plan confirmed that any class action share purchaser claim against them "is unaffected by this Plan".[12]

14. The position of Sino-Forest, and the other parties, changed dramatically after the E&Y settlement was announced. The view in Mr. Martin's affidavit that a successful restructuring was at hand, without any settlement of claims against the third-party defendants, was left behind. All parties rallied around the idea that the E&Y settlement, and the framework for settlements and releases of other third-party-defendant claims, should be rolled into the *CCAA* Plan. But the historical record is clear that those further steps were not "necessary".

15. In approving the E&Y settlement under the *Metcalfe* factors, Justice Morawetz viewed the $117 million E&Y settlement proceeds as "essential" to the restructuring because the payment "represents, at this point in time, the only real monetary consideration available to stakeholders."[13] That reasoning cannot withstand reasonable scrutiny. The restructuring Plan was about to be approved without any such payment, so the payment cannot fairly be termed "essential". The Plan already provided that Sino-Forest's creditors were to receive Newco interests and a portion of any Litigation Trust proceeds.[14] More generally, if settlement proceeds *per se* can be termed "essential" or "necessary", then the standard loses any meaning. This

---

[11] Martin Affidavit, *ibid.* at paras. 157, 163. **Responding Motion Record of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Vol. I, Tab 13, pp. 321, 323.**

[12] Plan of Compromise and Reorganization December 3, 2012 version blacklined to November 28, 2012, article 7.5, attached as Appendix "C" to the Supplemental Report to the Thirdteenth Report of the Monitor, **Appellants' Motion Record, Tab 18A, pp. 320-321.**

[13] Settlement Approval Reasons, *supra* note 3 at para. 71, **Appellants' Motion Record, Tab 4, p. 47-48.**

[14] Plan of Compromise and Reorganization December 3, 2012 version blacklined to November 28, 2012, article 4.1, attached as Appendix "C" to the Supplemental Report to the Thirdteenth Report of the Monitor, **Appellants' Motion Record,Tab 18A, p. 285.**

payment was not "necessary" for the restructuring to be successful -- the restructuring would have, and indeed has, proceeded regardless.

16. The only other factor identified by Justice Morawetz was that, absent the settlement, quantification of E&Y's indemnification claims against Sino-Forest "had the potential to significantly delay the CCAA proceedings."[15] That is tantamount to saying that the potential for delay in quantifying any unresolved claim makes settlement and release of the claim "essential" or "necessary" under *Metcalfe*. But again, this did not inhibit Mr. Martin from urging Plan approval as of November 29, 2012.[16] Unresolved claims are capped or reserved against as a matter of routine in devising *CCAA* plans. The idea that possible delay *required* a settlement with E&Y in order for the Sino-Forest Plan to succeed is simply not plausible, historically or logically.

17. As Justice Morawetz demonstrated when he properly applied the *Metcalfe* standard to the issue of releases of the Sino-Forest subsidiaries, there are situations in which non-debtor releases are "necessary," and good reasons can be articulated for that outcome. As Mr. Martin demonstrated in his affidavit urging approval of the Sino-Forest restructuring Plan prior to and devoid of any third-party-defendant releases, releases of E&Y and the other such defendants was not "necessary" for Sino-Forest's Plan to succeed. The E&Y settlement could and should have been left to the regular class action court for consideration.

---

[15] Settlement Approval Reasons, *supra* note 3 at para. 70, **Appellants' Motion Record, Tab 4, p. 47.**

[16] See Martin Affidavit, *supra* note 10, **Responding Motion Record of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Vol. I, Tab 13, pp. 179-324.**

B. The Appellants were not required to file individual claims in Sino-Forest's *CCAA* proceeding in order to preserve their right to opt out of a settlement with E&Y

18. Sino-Forest argues that the Appellants' "failure to file a proof of claim in SFC's *CCAA* proceeding forever bars them from bringing a claim against E&Y if they opt out of the E&Y Settlement."[17] In a similar vein, the Class Action Plaintiffs assert that their own fulsome participation in the Sino-Forest *CCAA* proceedings compares favorably to the Appellants' "inaction and lack of diligence".[18] E&Y contends that its settlement resulted from a process begun early in the *CCAA* proceedings that the Appellants did not join.[19] The common thread of these arguments is that the Appellants should not have opt-out rights because they did not participate in the *CCAA* claims procedure, mediation, and creditors' vote. Justice Morawetz made similar observations.[20] These are sometimes referred to as "lying in the weeds" arguments.

19. It is understandable that participants in a *CCAA* restructuring view everything through the prism of that proceeding, but that perspective is too expansive if it comes to include investors' claims against solvent non-debtor third-party defendants.

20. From the perspective of investors injured by the Sino-Forest debacle, the company's entry into *CCAA* proceedings simply confirmed the fact, already apparent at the time, that shareholders and share purchaser class members, as equity claimants, would not likely recover anything from the insolvent debtor whose available assets would go toward compensating non-equity creditors.

---

[17] Responding Factum of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order) dated May 17, 2013 at para. 5 ["Sino-Forest Factum"].
[18] Responding Factum of the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action dated May 17, 2013 at para. 37 ["Ontario Class Action Plaintiffs Factum"]
[19] E&Y Factum, *supra* note 7 at para. 14.
[20] Settlement Approval Reasons, *supra* note 3 at paras. 78-79, **Appellants' Motion Record, Tab 4, p. 48.**

Although the Class Action Plaintiffs filed a *CCAA* claim on behalf of class members, there was no prospect of recovery from the debtor applicant on behalf of share purchasers; the real action in the *CCAA* proceeding was to preserve assets for the creditors, in this case the Noteholders as of the Plan Distribution Date. The Class Action Plaintiffs also took necessary but routine steps to preserve documents; to lift the *CCAA* stay of proceedings as against a non-debtor third-party defendant (Pöyry) so a class action settlement of the claims against it could proceed to be approved by the class action court; and to participate in the mediation among all parties. No one ever indicated that absent class members, like the Appellants, needed to separately and duplicatively participate in the *CCAA* proceeding if they wished to preserve their right to effectively opt out of a settlement against a third-party defendant. Imposing such a requirement would be a logistical nightmare and in any event is not supported by the applicable orders, or by the relevant jurisprudence. [21]

21. The Claims Procedure Order requires persons "making a purported Claim" to file proofs of claim before the bar date.[22] "Claim" is defined as a right or claim "against the Applicant".[23] Failure to file a proof of claim bars the person "from making or enforcing *such Claim* against the Applicant" or "from making or enforcing *such Claim* as against any other Person who could

---

[21] *CIT Financial Ltd. v. Lambert*, 2005 BCSC 1779, [2005] B.C.J. No. 2765 at paras. 24-25 (B.C.S.C.), **Supplementary Book of Authorities of the Appellants, Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. ["Supplementary Authorities"], Tab 1**; *Nexient Learning Inc. (Re)* (2009), 62 C.B.R. (5th) 248, [2009] O.J. No. 5507 at para. 71 (S.C.J.), **Supplementary Authorities, Tab 2**.

[22] Claims Procedure Order, dated May 14, 2012 at paras. 8, 16, **Responding Motion Record of Ernst & Young LLP on Leave to Appeal the Sanction Order ["E&Y Sanction Order Motion Record"], Tab 6, pp. 185, 188**.

[23] Claims Procedure Order, dated May 14, 2012 at para. 2(q), **Responding Motion Record of Ernst & Young LLP on Leave to Appeal the Sanction Order ["E&Y Sanction Order Motion Record"], Tab 6, pp. 176-177**.

claim contribution or indemnity from the Applicant"[24] -- with the "Claim" still defined as being a claim "against the Applicant". The persons who could claim contribution or indemnity from the Applicant were not identified in the Claims Procedure Order. Specific separate provisions were also made for claims against Sino-Forest subsidiaries and D&O Claims.[25]

22. The Claims Procedure Order also explicitly authorized the Ontario Class Action Plaintiffs to file one proof of claim on behalf of the class, and class members were explicitly authorized to "rely on" that proof of claim "and are not required to file individual Proofs of Claim or D&O Proofs of Claim in respect of the Claims forming the subject matter of the Ontario Class Action."[26]

23. There was no indication that class members were required to file individual claims against E&Y or other third-party defendants, or otherwise participate individually under any circumstances.

24. The Appellants thus saw no reason to take any steps in the *CCAA* proceeding individually.

25. When the time came for creditor votes on Sino-Forest's reorganization Plan, only non-equity creditor interests were allowed to vote. Equity claimants did not have the right to attend

---

[24] Claims Procedure Order, dated May 14, 2012 at para. 17, **Responding Motion Record of Ernst & Young LLP on Leave to Appeal the Sanction Order ["E&Y Sanction Order Motion Record"], Tab 6, pp. 188-189** [emphasis added].

[25] Claims Procedure Order, dated May 14, 2012 at paras. 22, 23, **Responding Motion Record of Ernst & Young LLP on Leave to Appeal the Sanction Order ["E&Y Sanction Order Motion Record"], Tab 6, p. 190**.

[26] Claims Procedure Order, dated May 14, 2012 at para. 27, **Responding Motion Record of Ernst & Young LLP on Leave to Appeal the Sanction Order ["E&Y Sanction Order Motion Record"], Tab 6, p. 191**. A similar provision was made for the Quebec class action plaintiffs at para. 28 of the Claims Procedure Order.

the creditors' meeting or to vote on the restructuring Plan.[27]

26. It is thus particularly ridiculous and misleading for the Class Action Plaintiffs to complain that the Appellants "did not vote [on the Plan] because they failed to (or intentionally chose not to) appear in the CCAA proceedings."[28] The Class Action Plaintiffs themselves did not, and could not, vote on the Plan either. Justice Morawetz made the same mistake.[29]

27. Similarly, Sino-Forest's contention that the sheltering provision for the class proof of claim *becomes inoperative* if and when a class member opts out is contrary to the explicit language of the provision itself (class members -- which can only mean class members at the time claims were filed -- are "not required to file individual Proofs of Claim") and is not supported by any authority or even reference cited in its factum. [30]

28. From a broader perspective, none of the Plan notice provisions could extend the proper scope of the Sino-Forest *CCAA* proceeding beyond the Applicant, its subsidiaries, and the Named Directors and Officers, unless the *Metcalfe* criteria for extension of the plan to additional non-debtor third-party settlements and releases were satisfied. In addition, nothing in the procedures cited by the Respondents supports their position that the E&Y settlement and release were "necessary" to the success of the reorganization under *Metcalfe*.

---

[27] Plan of Compromise and Reorganization dated December 3, 2012, article 3.2(b), 4.5., attached as Schedule A to the Plan Sanction Order, **E&Y Sanction Order Motion Record, Tab 4, pp. 86, 91.**

[28] Ontario Class Action Plaintiffs Factum, *supra* note 18 at para. 35.

[29] Settlement Approval Reasons, *supra* note 3 at para. 79, **Appellants' Motion Record, Tab 4, p. 48** ("Further, even if the Objectors had filed a claim and voted…").

[30] Sino-Forest Factum, *supra* note 17 at paras. 5, 33. See also Claims Procedure Order, dated May 14, 2012 at para. 27, **Responding Motion Record of Ernst & Young LLP on Leave to Appeal the Sanction Order ["E&Y Sanction Order Motion Record"], Tab 6, p. 191**.

C. The E&Y settlement funds cannot be both a distribution to creditors under the *CCAA* and a distribution to class members under the *CPA*, since the two recipient groups are largely non-overlapping

29. As stated in the Appellants' initial factum submitted on this motion for leave to appeal, Justice Morawetz's main reason for approving the E&Y settlement was that the settlement proceeds would provide a tangible monetary contribution to Sino-Forest's restructuring Plan.[31] Justice Morawetz described the proposed distributees as Sino-Forest's "creditors"[32] and "relevant stakeholders",[33] and explicitly mentioned class action plaintiffs, including "shareholders," as recipients.[34]

30. The *CCAA* provides at section 6(8): "No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.".

31. Section 24 of the *Class Proceedings Act, 1992* ("*CPA*")[35] requires that payments in respect of a defendant's liability be made "to class members".[36]

32. In this case, non-equity claimants (Sino-Forest noteholders as of the Distribution Record Date) and class members (purchasers of Sino-Forest shares and notes during the class period) constitute two largely non-overlapping groups, making the tension between the two distribution regimes inescapable. Use of a Settlement Trust to handle the payments does not change the underlying reality of who the recipients will be.

---

[31] Settlement Approval Reasons, *supra* note 3 at paras. 60-64, Appellants' Motion Record, Tab 4, pp. 46-47.
[32] Settlement Approval Reasons, *ibid.*. at paras. 62, 67, Appellants' Motion Record, Tab 4, pp. 46-47.
[33] Settlement Approval Reasons, *ibid.*. at para. 66, Appellants' Motion Record, Tab 4, p. 47.
[34] Settlement Approval Reasons, *ibid.*. at para. 67, Appellants' Motion Record, Tab 4, p. 47.
[35] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ["*CPA*"].
[36] *CPA*, section 24.

33. Under Justice Morawetz's reasoning that the settlement is a distribution in a *CCAA* Plan ("compromise or arrangement"), either:

(a) Some or all of the $117 million will be distributed to "shareholders" (share purchaser class members), in which case equity claimants will receive a distribution even though non-equity creditors will not have been paid in full, in violation of section 6(8); or

(b) All of the $117 million will go to non-equity creditors (i.e. the Noteholders), preserving compliance with section 6(8), but violating the obvious principle, and at least some parties' apparent intention, that the proceeds of settling class action claims should belong to the class members, not some other group.

This conundrum confirms, from within the structure of the *CCAA* itself, that the E&Y settlement should be effectuated under the *CPA* and does not belong under the *CCAA*.

34. The Class Action Plaintiffs insist that the settlement payment will go to the plaintiffs in the litigation, presumably including share purchaser class members[37] -- but they do not explain how section 6(8) is not then violated.

35. Sino-Forest insists that the settlement payment "is not an asset of the debtor," so section 6(8) "has no application".[38] But section 6(8) does not use the term (or concept) "asset", and Sino-Forest's explanation does not address the problem.

36. Under Justice Morawetz's reasoning, the E&Y settlement must be part of or related to the

---

[37] Ontario Class Action Plaintiffs Factum, *supra* note 18 at para. 54.
[38] Sino-Forest Factum, *supra* note 17 at para. 46.

Sino-Forest compromise or arrangement that provides for a payment -- that is his whole justification for approving the settlement and release under the *CCAA*. If some or all of the payment goes to shareholders or share purchasers, it is a payment of an "equity claim" -- defined in *CCAA* section 2.1 as including "a claim for … a monetary loss resulting from the ownership, purchase or sale of an equity interest," which means shares in a company.[39] Under that definition, payments to share purchaser class members are prohibited unless non-equity creditors are first paid in full[40] -- which is not happening in the Sino-Forest Plan.

37. E&Y's theory is that, "[a]lthough the settlement funds are a contribution to the Plan," they are being paid "in respect of claims against Ernst & Young, not the debtor Applicant."[41] However, Justice Morawetz actually said the opposite: the class action plaintiffs "have claims to assert *against SFC* that are being directly satisfied, in part with the payment of $117 million by Ernst & Young."[42] Even if that were not so, section 6(8) speaks in terms of what a *CCAA* plan of "compromise or arrangement … provides" -- not in terms of in whose "respect" the payments are made.

38. The bottom line is that, if the E&Y settlement is brought under the *CCAA* to the extent necessary to meet the *Metcalfe* test, then it should be required to conform to section 6(8) as well.

39. In the Appellants' view, neither theory is correct. The E&Y settlement and release do not qualify for *CCAA* treatment under *Metcalfe,* so section 6(8) is not implicated; and the settlement

---

[39] *CCAA,* section 2.1 ("equity claim"). See also *Sino-Forest Corporation (Re)*, 2012 ONCA 816, [2012] O.J. No. 5500 at paras. 42-43 (ONCA), **Book of Authorities of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Tab 21.**

[40] *CCAA,* section 6(8).

[41] E&Y Factum, *supra* note 7 at para. 65.

[42] Settlement Approval Reasons, *supra* note 3 at para. 67, **Appellants' Motion Record, Tab 4, p. 47** (emphasis added).

should be effectuated through the *CPA,* not the *CCAA,* so that the Appellants' opt outs may be effectively exercised.

40. These issues deserve full appellate consideration, for which leave should be granted.

D. Approval of the E&Y settlement is not a moot issue on appeal

41. Sino-Forest contends briefly that the Appellants' appeal of the Settlement Approval Order "would be moot given that the Plan has already been substantially implemented and cannot be undone."[43] That submission is misplaced. If the *Metcalfe* test is not satisfied, as the Appellants contend, then the E&Y settlement cannot go forward in the *CCAA* Plan, and E&Y will have to decide whether to proceed under the *CPA,* which would entail litigating the Appellants' opt out claims. That eventuality will not affect Plan implementation, just as the implementation would have proceeded in due course even if Justice Morawetz had not approved the E&Y settlement.

E. Conclusion

42. The Appellants and the Respondents have presented two divergent views on the proper handling of investors' equity claims against auditors and other third-party defendants in situations where the company defendant is insolvent and seeks *CCAA* protection.

43. For the Respondents, along with Justice Morawetz, the *CCAA* proceedings provide a necessary forum for resolving all such claims. Under the framework adopted in this situation and the precedent set by the E&Y settlement and release, any third-party defendant will be able to settle with class counsel and obtain a *CCAA* release, performing an end-run around *CPA* opt out requirements. This includes solvent (and often deep-pocket) auditors and underwriters, and

[43] Sino-Forest Factum, *supra* note 17 at para. 27.

even directors and officers alleged to have participated in a fraud. The company's insolvency shifts the entire focus of investor recovery to the *CCAA* court. Any investors who dissent from class counsel's settlement strategy are locked in to the *CCAA's* super-majority creditor vote structure, and if they are equity investors they cannot even participate in that vote. The bedrock *CCAA* requirement in section 6(8) that non-equity creditors be paid in full before any plan provides compensation to shareholder or share purchaser claimants apparently is avoided -- or else settlement proceeds even from share purchasers' claims against class action defendants are funneled into making unsecured creditors like noteholders or bondholders whole before the share purchasers recover anything.

44. The Appellants' view of the permissible approach is quite different.

45. The *CCAA* proceeding is used to reorganize the applicant's assets, and investors' and others' claims may be released as against the insolvent applicant and related parties as permitted by statute[44] and as against entities that *need* to be "cleansed" in order for the reorganization to succeed, such as Sino-Forest's subsidiaries. With respect to investors' claims against solvent third-party defendants, the principle is that third party releases should be the exception and should not be requested or granted as a matter of course.[45] Existing litigation against auditors, underwriters, and other third parties, including class actions, will be used to properly adjudicate or settle those claims, with class counsel in control except that investors will maintain their

---

[44] *CCAA*, section 5.1. Section 5.1(1) allows a compromise or arrangement to include the compromise of claims against directors of the company in limited circumstances, section 5.1(2) provides that claims against directors related to contractual rights of one or more creditors, claims based on allegations of misrepresentations to creditors or claims of wrongful or oppressive conduct cannot be compromised.

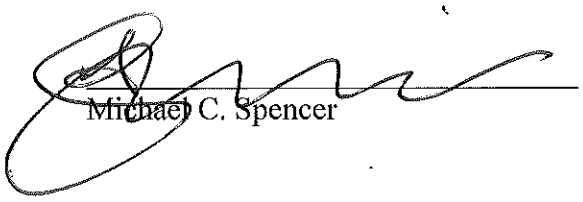
[45] *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, [2010] O.J. No. 3233 at para. 29 (S.C.J.), **Book of Authorities of Ernst & Young LLP (Motion for Leave to Appeal from Settlement Approval Order), Tab 20**.

fundamental right to opt out of a class action if they wish to proceed individually. Settlement proceeds would be allocated among the recovering plaintiffs and/or class members, without any possible diversion of those amounts to non-litigant creditors (like noteholders who may have purchased their notes at steep discounts in the aftermath of the fraud, long after the end of the class period).

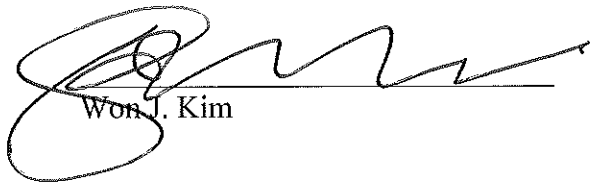
46. What happened here is that E&Y and class counsel decided to persuade the *CCAA* court to exercise its powers expansively and treat E&Y like Sino-Forest's subsidiaries were treated-- as an entity whose "cleansing" of liability through *CCAA* releases was "necessary" for the reorganization to succeed. Certainly E&Y found it convenient to try to fix its liability by using a *CCAA* release to destroy or neuter class members' opt-out rights, but that effort was unnecessarily overreaching, and also introduced allocation issues as between creditors and equity claimants that do not (or at least should not) exist with respect to these investor claims. Class counsel should not have countenanced that approach, in violation of class members' opt out rights.

47. The appropriate and simple outcome should be that the E&Y settlement (and any other third-party defendant settlements) should be handled in the class proceeding and without *CCAA* releases. Since Justice Perell has ruled that the class action opt-out period has ended, and the Appellants are the only opt-outs, the practical significance of this proper outcome is well defined, and E&Y can make its decision accordingly. But for this case and for the practice in general, the issue of whether non-opt-out *CCAA* releases in favour of third-party defendants are proper is significant, and should be decided by this Court on appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 27th DAY OF May, 2013

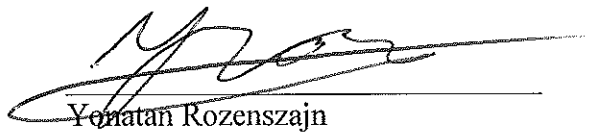


Michael C. Spencer

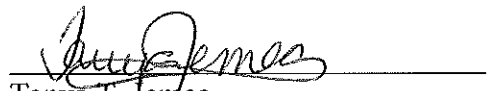


Won J. Kim

Megan B. McPhee



Yonatan Rozenszajn



Tanya T. Jemec

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

KIM ORR BARRISTERS P.C.
19 Mercer Street, 4th Floor
Toronto, ON M5V 1H2

TAB A

SCHEDULE A—AUTHORITIES

1.	*Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, [2010] O.J. No. 3233 (S.C.J.)
2.	*CIT Financial Ltd. v. Lambert*, 2005 BCSC 1779, [2005] B.C.J. No. 2765 (B.C.S.C.)
3.	*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, [2008] O.J. No. 3164 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 337
4.	*Nexient Learning Inc. (Re)* (2009), 62 C.B.R. (5th) 248, [2009] O.J. No. 5507 (S.C.J.)
5.	*Sino-Forest Corporation (Re)*, 2012 ONCA 816, [2012] O.J. No. 5500 (O.N.C.A.)

TAB B

SCHEDULE B—LEGISLATION

***Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36**

2(1)

...

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(*a*) a dividend or similar payment,

(*b*) a return of capital,

(*c*) a redemption or retraction obligation,

(*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);

"equity interest" means

(*a*) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(*b*) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

...

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

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

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

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

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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

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

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

TAB C

SCHEDULE C - EXCERPT FROM THE CLAIMS PROCEDURE ORDER DATED MAY 14, 2012

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 14th
	)	
JUSTICE MORAWETZ	)	DAY OF MAY, 2012

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

CLAIMS PROCEDURE ORDER

THIS MOTION, made by Sino-Forest Corporation (the "Applicant") for an order establishing a claims procedure for the identification and determination of certain claims was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Applicant's Notice of Motion, the affidavit of W. Judson Martin sworn on May 2, 2012, the Second Report of FTI Consulting Canada Inc. (the "Monitor") dated April 30, 2012 (the "Monitor's Second Report") and the Supplemental Report to the Monitor's Second Report dated May 12, 2012 (the "Supplemental Report"), and on hearing the submissions of counsel for the Applicant, the Applicant's directors, the Monitor, the *ad hoc* committee of Noteholders (the "Ad Hoc Noteholders"), and those other parties present, no one appearing for the other parties served with the Applicant's Motion Record, although duly served as appears from the affidavit of service, filed:

....

2.(q) "Claim" means:

(i) any right or claim of any Person that may be asserted or made in whole or in part against the Applicant, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a oust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, lmown or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or

anticipatory in nature, including any right or ability of any Person (including Directors and Officers) to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA had the Applicant become bankrupt on the Filing Date, or an Equity Claim (each a "Prefiling Claim", and collectively, the "Prefiling Claims");
(ii) a Restructuring Claim; and.
(iii) a Secured Claim;

provided, however, that "Claim" shall not include an Excluded Claim, a D&O Claim or a D&O Indemnity Claim;

...

8. THIS COURT ORDERS that a Person making a purported Claim, D&O Claim or D&O Indemnity Claim shall complete its Proof of Claim, D&O Proof of Claim or Indemnity Proof of Claim, as applicable, indicating the amount of the purported Claim, D&O Claim or D&O Indemnity Claim without including any interest and penalties that would otherwise accrue after the Filing Date.

...

16. THIS COURT ORDERS that (i) Proofs of Claim (but not in respect of any Restructuring Claims) and D&O Proofs of Claim shall be filed with the Monitor on or before the Claims Bar Date, and (ii) Proofs of Claim in respect of Restructuring Claims shall be filed with the Monitor on or before the Restructuring Claims Bar Date. For the avoidance of doubt, a Proof of Claim or D&O Proof of Claim, as applicable, must be filed in respect of every Claim or D&O Claim, regardless of whether or not a legal proceeding in respect of a Claim or D&O Claim was commenced prior to the Filing Date.

17. THIS COURT ORDERS that any Person that does not file a Proof of Claim as provided for herein such that the Proof of Claim is received by the Monitor on or before the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, (a) shall be and is hereby forever barred from making or enforcing such Claim against the Applicant and all such Claims shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such Claim as against any other Person who could claim contribution or indemnity from the Applicant; (c) shall not be entitled to vote such Claim at the Creditors' Meeting in respect of the Plan or to receive any distribution thereunder in respect of such Claim; and (d) shall not be entitled to any further notice in, and shall not be entitled to participate as a Claimant or creditor in, the CCAA Proceedings in respect of such Claim.

...

22. THIS COURT ORDERS that (i) each Person shall include any and all Claims it asserts against the Applicant in a single Proof of Claim, provided however that where a Person has taken assignment or transfer of a purported Claim after the Filing Date, that Person shall file a separate Proof of Claim for each such assigned or transferred purported Claim, and (ii) each Person that has or intends to assert a right or claim against one or more Subsidiaries which is based in whole or in part on facts, underlying transactions, causes of action or events relating to a purported Claim made against the Applicant shall so indicate on such Claimant's Proof of Claim.

23. THIS COURT ORDERS that each Person shall include any and all D&O Claims it asserts against one or more Directors or Officers in a single D&O Proof of Claim, provided however that where a Person has taken assignment or transfer of a purported D&O Claim after the Filing Date,

that Person shall file a separate D&O Proof of Claim for each such assigned or transferred purported D&O Claim.

...

27. THIS COURT ORDERS that the Ontario Plaintiffs are, collectively, authorized to file, on or before the Claims Bar Date, one Proof of Claim and, if applicable, one D&O Proof of Claim, in respect of the substance of the matters set out in the Ontario Class Action, notwithstanding that leave to make a secondary market liability claim has not be granted and that the National Class has not yet been certified, and that members of the National Class may rely on the one Proof of Claim and/or one D&O Proof of Claim filed by the counsel for the Ontario Plaintiffs and are not required to file individual Proofs of Claim or D&O Proofs of Claim in respect of the Claims forming the subject matter of the Ontario Class Action.

28. THIS COURT ORDERS that the Quebec Plaintiffs are, collectively, authorized to file, on or before the Claims Bar Date, one Proof of Claim and, if applicable, one D&O Proof of Claim, in respect of the substance of the matters set out in the Quebec Class Action, notwithstanding that leave to make a secondary market liability claim has not be granted and that the Quebec Class has not yet been certified, and that members of the Quebec Class may rely on the one Proof of Claim and/or one D&O Proof of Claim filed by the counsel for the Quebec Plaintiffs and are not required to file individual Proofs of Claim or D&O Proofs of Claim in respect of the Claims forming the subject matter of the Quebec Class Action.

Court of Appeal File No.: M42399
Commercial Court File No.: CV-12-9667-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED,

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.: M42399
Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al.

Plaintiffs

-and-

SINO-FOREST CORPORATION, et al.

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

REPLY FACTUM OF THE APPELLANTS

KIM ORR BARRISTERS P.C.
19 Mercer Street, 4th Floor
Toronto, Ontario M5V 1H2

Michael C. Spencer (LSUC #59637F)
Won J. Kim (LSUC #32918H)
Megan B. McPhee (LSUC #48351G)

Tel: (416) 596-1414
Fax: (416) 598-0601

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