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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE CLASS ACTION PLAINTIFFS
Settlement Approval – Ernst & Young LLP Settlement
(Motion Returnable February 4, 2013)

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

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PART I. OVERVIEW

1. This motion is to approve the largest auditor settlement in Canadian history, one that is more than twice as large as the second largest auditor settlement, and over ten times the fees that the auditor earned from Sino during the relevant period. It is the product of hard-fought and protracted negotiation, which was conducted by counsel having extensive experience in securities class actions and *CCAA* proceedings, and who had the benefit of extensive investigations. It is opposed by investors who collectively held a minute fraction of Sino's shares at June 2nd 2011, and who appear to have done nothing to advance their interests in this insolvency proceeding.

2. In June 2011, the Ontario Plaintiffs[1] commenced the above-captioned class proceeding (the "Ontario Action") against Sino-Forest Corporation ("Sino") and various other defendants, including Allen Chan. Chan is the company's co-founder and former CEO. Today, Chan and other former officers of Sino stand accused of fraud by Staff of the Ontario Securities Commission ("OSC").

3. In the same month as the Ontario Action was commenced, a parallel action was commenced in the Quebec Superior Court (the "Quebec Action" and, together with the Ontario Action, the "Canadian Actions") by an individual shareholder of Sino (together with the Ontario Plaintiffs, the "Canadian Plaintiffs").

4. In the Canadian Actions, the Canadian Plaintiffs allege in essence that Sino, Chan and others misstated Sino's financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors. They further allege that, as a result of Sino's misrepresentations, Sino's securities traded at artificially inflated prices for many years and that, when the truth was revealed, Sino's security holders were injured by the collapse in market value of their Sino holdings.

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1 The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong.

5. The Canadian Plaintiffs have reached an agreement to settle the claims they assert against the defendant, Ernst & Young LLP ("E&Y"), for $117 million (the "Settlement"). This agreement was made as of November 29, 2012.

6. The Settlement is subject to court approval in Ontario and recognition in Quebec and the United States. The litigation will continue against the remaining defendants other than Pöyry (Beijing) Consulting Company Limited ("Pöyry"). The claims against Pöyry were released in 2012 pursuant to a Court-approved settlement agreement.

7. The net settlement fund[2] is to be paid to persons who purchased Sino securities, other than the defendants and their affiliates. The manner in which the net settlement fund will be allocated among different groups of security holders will be the subject of a subsequent approval hearing, assuming that the Settlement is approved.

8. In light of, among other factors, the requirements that the Canadian Plaintiffs must satisfy in order to achieve complete success as against E&Y, the limited capacity of E&Y to satisfy a judgment for all of the damages sustained by Sino investors, the peculiar evidentiary challenges posed by this litigation, and the time value of money, the Settlement is fair and reasonable and ought to be approved.

9. The members of the Kim Orr Group (as defined below) do not argue that the Settlement consideration is inadequate, nor do they assert that they would or could achieve a superior result through opt-out litigation. They nonetheless complain that their opt-out 'rights,' which in this context they do not possess, were bargained away without their consent, and that they have insufficient information (despite the relative abundance of information) to assess the sufficiency of the Settlement. All the while, they fail to justify their complacency in regard to a *CCAA* proceeding in which Class Counsel[3] acted vigorously to protect the interests of all Class Members, including the members of the Kim Orr Group.

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2 The amount remaining after Class Counsel fees and disbursements, the litigation funder's fee, and notice and administration costs.

3 Siskinds LLP, Koskie Minsky LLP and Paliare Roland Rosenberg Rothstein LLP.

10. The Kim Orr Group held a mere 1.6% of Sino's shares at the time that the Muddy Waters report was issued. The Settlement is expressly supported by persons and entities who collectively held over 25% of such shares, and is tacitly supported by persons and entities who collectively held over 98% of such shares. In regard to this unprecedented Settlement, the scattered voices of dissent are scarcely audible over a vast chorus of support.

PART II. THE FACTS

(A) The Class Actions against Sino, E&Y and Others

11. The background of this litigation is well known to the Court. The Canadian Plaintiffs allege that Sino, Chan and others misstated Sino's financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business and operations from investors in its public filings.

Affidavit of Charles Wright, dated January 10, 2013 ("Wright Affidavit"), Plaintiffs' Motion Record ("Motion Record"), vol. 1, tab 2, para 30, p 38.

12. Beginning in August 2007, E&Y audited Sino's financial statements. As its auditor, E&Y signed offering documents and audit reports. The Canadian Plaintiffs allege that E&Y failed to conduct GAAS audits, falsely certified Sino's financial statements as GAAP-compliant and negligently performed its auditing work. E&Y resigned as Sino's auditors in April 2012. No new auditors have been appointed. Sino has cautioned that its historical financial statements ought not to be relied upon.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 29, p 38.

(B) Steps Taken in the Action

13. On June 9, 2011, Siskinds Desmeules, a Quebec City law firm affiliated with Siskinds, commenced the Quebec Action against Sino and other defendants in the Quebec Superior Court. Plaintiffs' counsel in the Ontario and Quebec Actions have worked together in a coordinated manner.

Wright Affidavit, Motion Record, vol. 1, tab 2, at para 32, p 39.

14. On January 27, 2012, the Washington, DC-based law firm of Cohen Milstein Sellers & Toll PLLC ("U.S. Plaintiffs' Counsel") commenced a proposed class action against Sino and other defendants in the New York Supreme Court. This action was later removed to the United States District Court for the Southern District of New York (the "U.S. Action"). The U.S. Action was filed on behalf of a resident of the United States who purchased Sino shares over the counter in the United States, and on behalf of an entity having offices in the British Virgin Islands that purchased Sino notes in an offering conducted in October 2010 (together, the "U.S. Plaintiffs"). The U.S. Action is putatively brought on behalf of the following class:

> i) all persons or entities who, from March 19, 2007 through August 26, 2011 (the "Class Period") purchased the common stock of Sino-Forest on the Over-the-Counter ("OTC") market and who were damaged thereby; and ii) all persons or entities who, during the Class Period, purchased debt securities issued by Sino-Forest other than in Canada and who were damaged thereby.

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 37 and 39, p 40 and 41.

15. On numerous occasions, Class Counsel have interacted with U.S. Plaintiffs' Counsel concerning developments in the Canadian Actions and the U.S. Action. Following recent, extensive discussions between Class Counsel and U.S. Plaintiffs' Counsel as to the basis of the Settlement, and U.S. Plaintiffs' Counsel's independent review of key documents and interviews of key actors, consultations with experts and a review of relevant issues, the U.S. Plaintiffs support the Settlement.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 40, p 41.

16. Before commencing the Ontario Action, Class Counsel conducted an investigation into the Muddy Waters allegations with the assistance of the Dacheng law firm, one of China's largest law firms. Class Counsel's investigation into the Muddy Waters allegations continued since that time, and has been aided not only by Dacheng, but also by: (1) Hong Kong-based investigators specializing in financial fraud; (2) two separate Toronto-based firms that specialize in forensic accounting, generally accepted accounting principles and generally accepted auditing standards; (3) a lawyer qualified to practice in the Republic of Suriname, where Sino purported to own, through an affiliate, certain

timber assets; and (4) a financial economist who specializes in the measurement of damages in securities class actions.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 31, pp 38-39.

17. Prior to entering into the Settlement, Class Counsel also had the benefit of the various reports issued by the special committee of Sino's Board (the "SC"), which was established to investigate the Muddy Waters allegations. The SC's investigation reportedly cost approximately $50 million. The SC's reports and the accompanying schedules revealed extensive, non-public information regarding Sino's business practices and the basis upon which Sino's financial results were compiled.

Transcripts of the Cross-Examination of Judson Martin on his affidavits sworn September 24, 2012 and October 3, 2012, Answers on Written Examination on Affidavits of Charles M. Wright, paras 94-96, pp 34-35.

18. Class Counsel relied on this mass of information in its negotiations with E&Y and in recommending the Settlement. Through December 14, 2012, Class Counsel have spent nearly $1 million on disbursements, largely in connection with factual investigation and expert assistance, and nearly $6 million in time.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 83, p 55.

The Carriage Motion in the Ontario Action

19. In mid-2011, two other class proceedings were commenced in Ontario relating to Sino. *Smith et al. v Sino Forest Corporation et al.*, commenced on June 8, 2011 (the "*Smith Action*") and *Northwest & Ethical Investments L.P. et al. v Sino-Forest Corporation et al.*, commenced on September 26, 2011 (the "*Northwest Action*"). Rochon Genova LLP acted for the plaintiffs in the *Smith Action*, and Kim Orr LLP ("Kim Orr") acted for the plaintiffs in the *Northwest Action*.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 33, p 39.

20. In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion").

21. On January 6, 2012, Justice Perell granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario Action, and stayed the *Smith Action* and the *Northwest Action*. Further, Justice Perell ranked Kim Orr last of the 3 groups competing for carriage. Justice Perell's decision was based in part upon the fact that the plaintiffs in the *Northwest Action*, unlike those in the *Smith Action*, had pled fraud against all 40 of the defendants in the *Northwest Action*, including forestry consultants, numerous underwriters and all of the outside directors of Sino.

> ***Smith v Sino Forest Corporation*, 2012 ONSC 24 at para 233, Brief of Authorities of the Plaintiffs ("Authorities"), tab 36.**
>
> **Wright Affidavit, Motion Record, vol. 1, tab 2, para 35, pp 39-40.**

22. At the time of the Carriage Motion, one of the three proposed representative plaintiffs in the *Northwest Action* was British Columbia Investment Management Corporation ("BC Investment"). The other two were Northwest & Ethical Investments LP ("NEI") and Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente").

> **Reasons of Justice Perell dated January 6, 2012 ("Carriage Reasons"), Exhibit "N" to the Supplemental Affidavit of Charles M. Wright, sworn January 23, 2013 ("Supp. Wright Affidavit"), Plaintiffs' Reply Motion Record ("Reply Motion Record"), para 132, p 164.**

23. In his reasons on the Carriage Motion, Justice Perell stated the following regarding BC Investment's holdings of Sino shares:

> BC Investment, through the funds it managed, owned 334,900 shares of Sino-Forest at the start of the Class Period, purchased 6.6 million shares during the Class Period, including 50,200 shares in the June 2009 offering and 54,800 shares in the December 2009 offering; sold 5 million shares during the Class Period; disposed of 371,628 shares after the end of the Class Period; and presently holds 1.5 million shares.
>
> **Carriage Reasons, Exhibit "N" to the Supp Wright Affidavit, Reply Motion Record, tab 1N, para 134, p 164.**

24. Of the 3 institutions who were represented by Kim Orr in the Carriage Motion, BC Investment held by far the largest number of Sino shares at the time that the initial Muddy Waters report was issued on June 2, 2011.

Supp. Wright Affidavit, Reply Motion Record, tab 1, para 6, pp 17-18.

25. BC Investment has not filed an opt-out form in the Ontario Action, nor has it filed a Notice of Objection in respect of the Settlement.

Objector Chart and Opt-Out Charts (Ontario and Quebec), Exhibits "O" and "P" to the Supp. Wright Affidavit, Reply Motion Record, tab 1O and 1N, pp 202-208.

26. At the time that the Carriage Motion was heard, the competing plaintiff groups were concerned that Sino's insolvency was imminent. As a result, counsel for the competing plaintiff groups made submissions at the hearing of the Carriage Motion in regard to their qualifications to represent the Class Members' interests in an eventual proceeding under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In particular, a lawyer for Kim Orr argued that its lawyers had sufficient experience in and knowledge of *CCAA* proceedings in order to represent the class adequately in such proceedings.

Supp. Wright Affidavit, Reply Motion Record, tab 1, para 10, p 18.

Class Counsel Prosecute the Action

27. In March 2012, the Ontario Plaintiffs brought (a) a motion for certification of the Ontario Action as a class action under the *Class Proceedings Act, 1992* (the "*CPA*"); and (b) a motion for leave to proceed with statutory claims under Part XXIII.1 of the Ontario *Securities Act* (the "*OSA*"). The Ontario Plaintiffs filed voluminous motion records in support of their motions, including extensive evidence from their investigations and the reports of their experts. The motion records included:

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

Wright Affidavit, Motion Record, vol. 1, tab 2, para 43, pp 41-42.

28. Due to concerns over limitation periods that may be applicable to the action, the Ontario Plaintiffs sought to expedite these motions. The defendants opposed an expedited motions process and instead executed tolling agreements with the Canadian Plaintiffs in order to remove limitation period concerns. Pursuant to the tolling agreements, the parties agreed that the running of time for the purpose of the proposed Part XXIII.1 claims of the Ontario Plaintiffs and members of the putative class was to be suspended as of March 6, 2012 and until the earlier of 12 months following the lifting of the *CCAA* stay or February 1, 2014.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 44, p 42.

29. The Ontario Plaintiffs brought a motion returnable March 22, 2012, to require the defendants to deliver a statement of defence and to set a timetable for the hearing of their leave and certification motions. Justice Perell ordered that each defendant who delivers an affidavit pursuant to s. 138.8(2) of the *OSA* must also deliver a statement of defence prior to the leave and certification motions. His Honour also ordered that the leave and certification motions be heard together from November 21 to 30, 2012.

***Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp*, 2012 ONSC 1924, paras 9 and 12, Authorities, tab 39.**

Class Counsel's Extensive Involvement in the *CCAA* Proceeding

30. On March 30, 2012, Sino filed an application for protection from its creditors under the *CCAA* (the "Insolvency Proceeding"), and thereby secured an interim stay of proceedings against the company. Pursuant to an order on May 8, 2012, the stay was extended to all other defendants in the action, including E&Y. The Canadian Plaintiffs agreed not to oppose this order on condition that (a) there was an order permitting a settlement approval hearing and certification hearing relating to a settlement with Pöyry; and (b) the defendants execute a second tolling agreement reflecting the delay caused by the Insolvency Proceeding. The stay of proceedings is currently extended through to February 1, 2013. Due to the stay, the certification and leave motions have yet to be heard.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 46, pp 42-43.

31. The Insolvency Proceeding presented a material risk to the Canadian Plaintiffs, the U.S. Plaintiffs and the investors on whose behalf they are prosecuting the Canadian and U.S. Actions (collectively, the "Class Members"). In particular, the Insolvency Proceeding could have resulted in an order approving a plan of arrangement which provided releases to some or all of the defendants while imposing an unfavourable settlement on the Class Members.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 47, p 43.

32. In the course of the Insolvency Proceeding, Class Counsel appeared numerous times to protect the interests of the Class Members. These attendances included motions (1) to lift the *CCAA* stay partially or fully; (2) regarding the claims procedure; (3) to permit a motion to approve a litigation funding arrangement for this action; (4) for a representation order; (5) to effect the Pöyry settlement; (6) to secure access to non-public documents that were relevant to the claims advanced in Canadian Actions; and (7) to schedule the mediation. Attendances before this Court and the Court of Appeal were required to consider the status of shareholder claims and the related indemnity provisions. These attendances were required to protect the Class Members' interests. In particular, claims against E&Y were not released via the *CCAA*. If such claims had been released, it is unlikely that the Settlement would have been achieved.

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 47-49 pp 43-44.

***Sino-Forest Corporation (Re)*, 2012 ONSC 4377 [Commercial List], Authorities, tab 34.**

***Sino-Forest Corporation (Re)*, 2012 ONCA 816, Authorities, tab 35.**

Pöyry Settlement, Certification and the Opt-Out Period

33. Shortly prior to the commencement of the Insolvency Proceeding, the Canadian Plaintiffs entered into a settlement agreement with Pöyry, a forestry valuator that provided services to Sino during the relevant period. As part of that settlement, Pöyry provided information to Class Counsel, including information about E&Y's audits. Class Counsel relied on

this information in the mediations and related negotiations, and in recommending the Settlement. Class Counsel also considered E&Y's critique of Pöyry's evidence.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 50, p 47.

Supplemental Answers on Written Examination on Affidavits of Charles M. Wright.

34. For purposes of the Pöyry settlement, the class was defined in essence as all persons and entities who acquired Sino's securities in Canada during the period March 19, 2007 to June 2, 2011, and all Canadian residents who acquired Sino securities outside of Canada during that same period (the "Pöyry Settlement Class").

Pöyry (Beijing) Consulting Company Limited Certification and Settlement Approval Order dated September 25, 2012 ("Pöyry Approval Order"), Exhibit "Y" to the Wright Affidavit, Motion Record, vol. 3, tab 2Y, para 4, p 700.

35. The notice of the hearing to approve the Pöyry settlement advised proposed members of the Pöyry Settlement Class that they may object to the proposed settlement. No member of the Pöyry Settlement Class filed an objection.

Wright Affidavit, Motion Record, vol. 2, para 50, p 47.

Pöyry (Beijing) Consulting Company Limited Settlement Agreement Notice, Exhibit "X" to the Wright Affidavit, Motion Record, tab 2X, p 693.

36. Ultimately, Justices Perell and Émond approved the settlement and certified the Pöyry Settlement Class for settlement purposes. They fixed January 15, 2013 as the date by which members of the Pöyry Settlement Class who wished to opt out of the Ontario or Quebec Actions would have to file an opt-out form with a claims administrator, and they approved the form by which the right to opt out was required to be exercised.

Pöyry Approval Order, Exhibit "Y" to the Wright Affidavit, Motion Record, vol. 3, tab 2Y, para 10, pp 700.

The Judgment of Justice Émond dated November 9, 2012 ("Quebec Pöyry Approval Judgment"), Exhibit "C" to the Affidavit of Christina Doria sworn January 18, 2013 ("Doria Affidavit"), Responding Motion Record of Pöyry (Beijing) Consulting Company Limited ("Pöyry Responding Motion Record"), tab 1C, p 69.

***The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2012 ONSC 5398, Authorities, tab 37.**

37. Notice of the certification and settlement was given in accordance with the certification orders of Justices Perell and Émond. The notice of certification states in part that:

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

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 50-53, pp 47-48.

Pöyry Approval Order, Exhibit "Y" to the Wright Affidavit, Motion Record, vol. 3, tab 2Y, para 2, p 699.

38. The orders of Justices Perell and Émond establishing the right to opt out made no provision for an opt out on a conditional basis, nor did the opt-out form which they approved offer members of the Pöyry Settlement Class the alternative of opting out on a conditional basis.

Pöyry Approval Order, Exhibit "Y" to the Wright Affidavit, Motion Record, vol. 3, tab 2Y.

Quebec Pöyry Approval Judgment, Exhibit "C" to the Doria Affidavit, Pöyry Responding Motion Record, tab 1C, p 69

The Kim Orr Group

39. On December 3, 2012, Class Counsel announced to the public that the Settlement had been reached. On that same day, following that announcement, Kim Orr emailed Class Counsel and congratulated them on the Settlement. At that time, Kim Orr also requested details of the Settlement, including whether its clients' "statutory right to opt out have [sic] been addressed."

Written Questions on Affidavit of Tanya Jemec, p 12.

40. In their response, Class Counsel requested clarification as to the identities of Kim Orr's clients. On December 5, 2012, Kim Orr advised by email that, at that point, it acted for the plaintiffs in the stayed class action, as well as Invesco Canada Limited ("Invesco") and Mackenzie Financial ("Mackenzie"). Kim Orr further advised that "we have also

been contacted by a number of other private and public funds and expect to have further retainers from approximately a dozen funds shortly."

Written Questions on Affidavit of Tanya Jemec, p 11.

41. However, on the next day (December 6, 2012), Kim Orr filed a notice of appearance in the Insolvency Proceeding on behalf of only three investors: Invesco, NEI and Bâtirente.

42. On January 15, 2013, the last day of the opt-out period established by orders of Justices Perell and Émond, six institutional investors represented by Kim Orr filed opt-out forms. Those institutional investors are NEI and Bâtirente, who were, as stated above, two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix Asset Management Inc. ("Matrix"), Montrusco Bolton Investments Inc. ("Montrusco") and Gestion Férique (collectively, the "Kim Orr Group"). Neither BC Investment nor Mackenzie filed an opt-out form.

43. On or before January 18, 2013, the deadline to object to the Settlement, all members of the Kim Orr Group filed an objection. However, neither BC Investment nor Mackenzie filed an objection.

44. Based on the opt-out forms filed by the Kim Orr Group, all of its members are encompassed within the Pöyry Settlement Class (assuming that they have not validly opted out). Those forms also indicate that Invesco, Matrix and NEI are based in Ontario, while Montrusco, Bâtirente and Gestion Férique are based in Quebec.

Opt out form of Inevsco, Exhibit "D" to the Affidavit of Eric Adelson, sworn January 18, 2013 ("Adelson Affidavit"), Responding Motion Record of the Objectors ("Objectors Responding Record"), tab 2D, pp 110-111.

Opt out form of Bâtirente, Exhibit "H" to the Affidavit of Daniel Simard sworn January 18, 2013 ("Simard Affidavit"), Objectors Responding Record, tab 3H, pp 236-237.

Opt out forms of NEI, Matrix Asset Management Inc, Gestion FERIQUE and Montrusco Bolton Investments Inc., Exhibits "E", "F", "G" and "H" to the Affidavit of Tanya T. Jemec, sworn January 18, 2013 ("Jemec Affidavit"), Objectors Responding Record, tab 4E, 4F, 4G and 4H, pp 254-261.

45. According to their opt-out forms the members of the Kim Orr Group collectively held 3,921,618 Sino shares on June 2, 2011, the day on which the initial Muddy Waters report

on Sino was released. This constitutes approximately 1.6% of the approximately 246 million shares which Sino had outstanding on June 30, 2011 and Sino's financial statements for the three and six months ended June 30, 2011. By contrast, Davis Selected Advisers and Paulson & Co., two of the numerous institutional investors who support the settlement, together controlled more than 25% of Sino's shares on June 2, 2011.

46. The Kim Orr Group appears to have become aware of and to have monitored developments in the Insolvency Proceeding long before the Settlement was announced on December 3, 2012. However, after the adjudication of the Carriage Motion and prior to the announcement of the Settlement, neither Kim Orr nor the Kim Orr Group ever sought any information from Class Counsel as to the Ontario Action or the Insolvency Proceeding, or took any steps in the Insolvency Proceeding to protect their interests.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 49, pp 44-47.

Answers to Written Questions arising from the Affidavit of Tanya Jemec, Answer 14, p 1.

47. After the Settlement was announced and prior to the January 15, 2013 deadline for opting out of the Ontario or Quebec Action, John Mountain, NEI's senior vice-president for legal affairs, publicly criticized the Settlement. For example, according to a *Globe and Mail* article of January 9, 2013, Mr. Mountain stated that, after the deduction of Class Counsel fees from the $117 million settlement, "[w]hat you are left with is about a penny on every dollar that every investor lost. So, yes, on one hand, it sounds like a huge amount of money, but on the other hand, it is a pittance."

***Globe and Mail Article*: "Burned Sino-Forest Investors Squabble Among Themselves", Exhibit "F" to the Supp. Wright Affidavit, Reply Motion Record, tab 1F, p 39.**

48. Despite his vocal opposition to the Settlement, Mr. Mountain has not sworn an affidavit in opposition to the motion for approval of the Settlement. Moreover, none of the three individuals whose affidavits the Kim Orr Group have filed in opposition to the Settlement asserts that the quantum of the Settlement is inadequate. Both Eric Adelson, the Senior Vice-President, Secretary and Head of Legal of Invesco, and Daniel Simard, the CEO of Bâtirente, object in their affidavits to the absence of opt-out rights in connection with the

Settlement, and assert that they do not have adequate information to evaluate the sufficiency of the E&Y settlement consideration. The third affiant of the Kim Orr Group, an associate of Kim Orr, does not comment at all on the sufficiency of the Settlement consideration. Further, neither Kim Orr nor any member of the Kim Orr Group has expressed the view that the members of the Kim Orr Group would or even could obtain superior compensation from E&Y by pursuing their claims against E&Y individually on an opt-out basis.

Adelson Affidavit, Simard Affidavit and Jemec Affidavit, Objectors Responding Record, tabs 2, 3 and 4, pp 7-18, 130-140, and 238-241.

49. Notably, Mr. Simard states that Bâtirente's and NEI's decision not to seek leave to appeal from the Carriage Motion decision of Justice Perell, which was rendered in January 2012, was based in part on their understanding that they would be given the opportunity to opt out at the appropriate time, if they deemed it appropriate to do so. It is thus evident that, prior to the commencement of the Insolvency Proceeding, Bâtirente and NEI gave serious consideration to the possibility of pursuing their own claims with counsel other than Class Counsel. Nonetheless, they elected to have their interests represented by Class Counsel in the Insolvency Proceeding.

Simard Affidavit, Objectors Responding Record, tab 3, para 10, p 134.

50. The members of the Kim Orr Group unilaterally added to their opt-out forms the following statements:

> This opt-out is submitted on condition that, and is intended to be effective only to the extent that, any defendant in this proceeding does not receive an order in this proceeding, which order becomes final, releasing any claim against such defendant, which includes a claim asserted on an opt-out basis by [fund]. Otherwise, this opt out right would be wholly illusory.

Opt out forms of NEI, Matrix Asset Management Inc, Gestion FERIQUE and Montrusco Bolton Investments Inc., Exhibits "E"-"H" to the Jemec Affidavit, Objectors Responding Record, tab 4E-H, pp 254-261.

Opt out form of Bâtirente, Exhibit "H" to the Simard Affidavit, Objectors Responding Record, tab 3H, pp 236-237.

Opt out form of Inevsco, Exhibit "D" to the Adelson Affidavit, Objectors Responding Record, tab 2D, pp 110-111.

51. Whatever the meaning of this language may be, no member of the Kim Orr Group moved for an order modifying the Court-approved opt-out form or establishing the right to opt out conditionally. Moreover, they failed to do so notwithstanding that the Settlement was announced approximately six weeks before the opt-out period expired.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 88, p 57.

The Allegations of OSC Staff

52. On May 22, 2012, Staff of the OSC issued a Statement of Allegations against various former senior officers of Sino, including Allen Chan, a defendant in the Canadian Actions. In their Statement of Allegations, Staff alleged expressly that the respondents committed fraud. Indeed, Staff's Statement of Allegations against Sino's former officers contains over 100 references to "fraud" and "fraudulent" conduct.

Statement of Allegations dated May 22, 2012 ("Statement of Allegations"), Exhibit "EE" to the Wright Affidavit, Motion Record, vol. 3, tab 2EE, p 786.

53. Notably, OSC Staff allege in the May 22, 2012 Statement of Allegations that "[d]uring the Material Time, Sino-Forest's auditors were not made aware of Sino-Forest's systematic practice of creating deceitful Purchase Contracts and Sales Contracts, including key attachments to these contracts."

Statement of Allegations, Motion Record, vol. 3, tab 2EE, p 790.

54. On December 3, 2012, OSC Staff filed a Statement of Allegations against E&Y. Staff has not alleged, however, that E&Y knew of a misrepresentation by Sino, that E&Y committed fraud, or even that E&Y acted recklessly. Rather, Staff alleged that E&Y "failed to conduct their audits in accordance with relevant industry standards," improperly relied on certain legal opinions, was insufficiently professionally skeptical, lacked sufficient audit evidence, and had insufficient Chinese-language resources to properly audit Sino. The only sections of the *OSA* which E&Y is alleged by OSC Staff to have violated are sections under which a respondent can incur liability for failing to have exercised reasonable diligence. In other words, those sections do not require OSC Staff to prove that E&Y acted fraudulently.

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 88 and 110-112, pp 57 and 63.

Statement of Allegations against E&Y, Motion Record, vol, 3, tab 2FF, p 826.

(C) The Settlement

(i) Background To and Terms of Settlement

55. In September 2012, the Canadian Plaintiffs and E&Y engaged in settlement discussions as part of a Court-ordered mediation with all defendants other than Pöyry. That mediation failed, as did further discussions among the parties in October 2012. Notwithstanding the failure of these negotiations, the Canadian Plaintiffs and E&Y continued thereafter to discuss a resolution of the claims against E&Y. These discussions culminated in a bilateral mediation held on November 28 and 29, 2012. Clifford Lax, Q.C., presided over that mediation. The Canadian Plaintiffs and E&Y reached an agreement in principle on November 29, 2012. The negotiations were "protracted and challenging" and nearly non-stop, at one point breaking at 4:00AM (for four hours).

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 55-60, 64, pp 48-49 and 50.

56. The key terms of the Settlement are as follows:

(a) E&Y will pay $117 million;

(b) all claims or possible claims against E&Y relating to Sino will be released; and

(c) the Settlement includes standard bar order provisions that preclude any right to contribution or indemnity against E&Y. If it is later determined that the non-settling defendants have such rights of contribution, indemnity or claim over against E&Y, then the Class Members would not be entitled to claim or recover from the non-settling defendants the proportion of any judgment that the Ontario court would have apportioned to E&Y.

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 7-10, pp 34-35.

Settlement Approval Order and Production Protocol Order, Exhibits B-1 & B-2 to the Wright Affidavit, Motion Record, vol. 1, tabs B-1 and B-2, pp 77-97.

57. The Settlement is subject to court approval in Ontario and recognition in Quebec and the United States.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 9, p 35.

(ii) Factors Supporting Settlement

58. This is by far the largest auditor settlement in Canadian history, and one of the largest worldwide. While total damages in this case may well exceed $4 billion, E&Y undoubtedly is responsible for only a portion of those damages. Were the litigation against E&Y to continue, E&Y would certainly argue that other defendants – particularly those of Sino's former senior officers who have been accused of fraud by OSC Staff – are considerably more responsible for the Class Members' losses than E&Y.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 98, 101, 107 121, pp 60, 62, and 65.

Affidavit of Frank C. Torchio sworn January 11, 2013 ("Torchio Affidavit"), Motion Record, vol. 5, paras 4-7, p 1107.

59. Class Counsel have substantial experience in class actions, particularly securities class actions. In the view of Class Counsel, the Settlement is fair, reasonable and in the best interests of the Class.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 90, p 57-58.

60. Class Counsel's view is informed by the available information, including:

(a) all of Sino's public disclosure documents and other publicly available information with respect to Sino, including the SC's reports and the schedules to those reports;

(b) the available trading data for Sino's securities;

(c) non-public documents uploaded by Sino into the data-room established in the Insolvency Proceeding for purposes of the global mediation;

(d) E&Y's responsive insurance policies;

(e) the input and opinions of accounting experts, insolvency law experts, and insurance coverage experts;

(f) the input and opinion of Frank C. Torchio, the President of Forensic Economics, Inc., who has consulted or given independent damage opinions in securities fraud lawsuits for over 20 years;

(g) the Statement of Allegations issued against Sino and certain officers and directors by the OSC, dated May 22, 2012;

(h) the mediation briefs provided by the parties at the global mediation in September, 2012 and by E&Y at the mediation in November, 2012; and

(i) the proffer from Pöyry and E&Y's response thereto;

(j) input from experienced U.S. securities counsel, Kessler Topaz Meltzer & Check, LLP, and discussions with U.S. Plaintiffs' Counsel.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 87, pp 56-57.

Supplemental Answers on Written Examination on Affidavits of Charles M. Wright.

61. Although the parties entered into the Settlement prior to formal discovery, Class Counsel acquired access to an abundance of relevant information, including extensive non-public documents, before entering into the Settlement, and Class Counsel carefully considered numerous factors that militated in favour of settlement at this stage of the litigation.

62. First, the Class Members' claims against E&Y are subject to substantial litigation risks. The common law claims depend on the existence of a duty of care (among other things). Given the Supreme Court's decision in *Hercules Managements*, it is unclear if such a duty of care exists in the circumstances of this case. Moreover, prior to the parties agreeing to settle the claims against E&Y, E&Y obtained an opinion from a respected, experienced Canadian auditor in respect of E&Y's audit of Sino's 2010 financial statements (the most recent of Sino's audited financial statements). In that expert's view, E&Y properly discharged its duties as an auditor and, in particular, conducted a GAAS-compliant audit in respect of those financial statements. There is thus uncertainty as to whether a Court would conclude that E&Y breached any duty it owed to the Class Members.

***Hercules Managements v Ernst & Young*, [1997] 2 SCR 165, Authorities, tab 13.**

Wright Affidavit, Motion Record, vol. 1, tab 2, para 105-106, p 61-62.

63. The Canadian Plaintiffs also assert secondary market claims under the *OSA* and the equivalent provisions of other provincial securities acts. Part XXIII.1 presents certain advantages over common law claims. In particular, Part XXIII.1 does not require the Class Members to prove reliance, nor does it require the Class Members to establish a duty of care. However, the *OSA* imposes a limit on the liability of auditors, and that limit constitutes a minute fraction of maximum potential damages in this case. That limit will apply to the statutory claims unless the Class Members prove that E&Y made "the misrepresentation . . . while knowing that it was a misrepresentation." Thus, E&Y's total exposure under Part XXIII.1 and its other provincial equivalents may well be less than $10 million.

***Securities Act*, ss 138.1 and 138.7.**

Wright Affidavit, Motion Record, vol. 1, tab 2, para 110, p 63.

64. As stated above, OSC Staff have not alleged that E&Y made statements it knew to be false. Staff's allegations, which are unproven, are consistent with negligence.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 112, p 63.

***OSA*, s 138.7(2).**

65. On behalf of those who purchased Sino shares in various public offerings, the Ontario Plaintiffs also assert prospectus misrepresentation claims under s. 130 of the *OSA* and the equivalent sections of other provincial securities acts. Section 130 essentially offers the advantages of Part XXIII.1, but imposes no monetary cap on damages. However, the Ontario Plaintiffs' damages expert estimates the damages of all prospectus share purchasers, wherever they may reside, to amount to only $78 million. E&Y's position is that such damages are substantially smaller.

Torchio Affidavit, Motion Record, vol. 5, tab 5, para 4 and 5, p 1107.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 93, 99-101, pp 58 and 60.

66. The Ontario Plaintiffs also advance claims on behalf of those who purchased Sino's notes in various non-public offerings conducted by way of various offering memoranda. According to the Ontario Plaintiffs' damages expert, the damages of those persons may be in excess of $700 million. The *OSA* does not provide, however, a private right of action against Sino's auditors for a misrepresentation in an offering memorandum. Thus, on behalf of persons who purchased Sino notes in an offering, the Ontario Plaintiffs advance only common law claims. These claims would need to overcome the hurdle posed by *Hercules Managements*, and are also subject to certification risk. Moreover, these claims may be subject to unique defences based on the terms of the trust indentures governing Sino's notes, and based on disclaimers in the related offering memoranda.

Torchio Affidavit, Motion Record, vol. 5, tab 5, para 6-7, p 1107.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 102, 113-117, pp 61 and 64-65.

67. Second, while the Ontario Plaintiffs have put forward the expert opinion of Mr. Torchio regarding damages, E&Y would challenge his evidence at trial. Moreover, that report estimates damages on the assumption that all claimants come forward following success at the common issues trial, but if the Ontario Plaintiffs were to succeed at trial, damages may well be paid on a claims made-basis. In general, substantially less than 100% of class members file valid claims in securities class action settlements. Accordingly, it is likely that substantially less than 100% of claimants would come forward were the Plaintiffs to succeed at the common issues trial.

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 93-94, p 58-59.

68. Third and finally, the total damages estimated by the Ontario Plaintiffs' expert would not reasonably be recoverable against an organization such as E&Y. If this action succeeded at trial, and if the (draconian) liability limit applicable to the statutory secondary market claims against E&Y was overcome, E&Y would almost certainly be unable to satisfy a multi-billion-dollar judgment. Even a judgment for an amount far lower than total maximum damages may be beyond the capacity of E&Y to pay, and the protracted prosecution of private and regulatory claims against E&Y in multiple jurisdictions would rapidly deplete E&Y's insurance.

Torchio Affidavit, Motion Record, vol. 5, tab 5, para 4-7, p 1107.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 118, p 65.

Objections to the Settlement

69. As indicated in the chart below, prior to the deadline for filing an objection to the Settlement, 11 entities (including the six members of the Kim Orr Group) and 75 individuals filed objections to the Settlement. Since that time, 28 of those individuals have withdrawn their objections, and all entities other than the members of the Kim Orr Group have withdrawn their objections. Thus, the only institutional investors who filed timely objections and who have not withdrawn their objections are the members of the Kim Orr Group. The persons and entities who filed timely objections and who have not withdrawn them collectively constitute approximately 0.16 % of the 34,177 beneficial shareholders which Sino had as of April 29, 2011. In addition, 37 individuals filed objections to the Settlement after the objection deadline. Since that time, 10 of those individuals have withdrawn their objections. When the net total of these objections are added to the individuals and entities who filed timely objections and have not withdrawn them, then the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 beneficial shareholders which Sino had as of April 29, 2011. Finally, of the 43 individuals and entities who withdrew their objections, 19 advised counsel that they misunderstood the objection forms and did not in fact intend to object to the proposed settlement.

	Entities	**Individuals**	**Total**
Objections Received by Deadline	11	75	86*
Objections Received by Deadline and Subsequently Withdrawn	5	28	33
Total timely and valid objections	**6**	**47**	**53**
Objections Received after Deadline	0	37	37*
Objections Received after Deadline and Subsequently Withdrawn	0	10	10
Total Objections Received after Deadline	**0**	**27**	**27**
TOTAL OBJECTIONS RECEIVED	11	112	123

TOTAL OBJECTIONS WITHDRAWN	5	38	43
TOTAL OBJECTIONS	**6**	**74**	**80**

*From the Monitor's most recent summary, sent January 28, 2013.

Supp. Wright Affidavit, Reply Motion Record, tab 1, para 20, p 20.

Answer on Written Examination of Charles M. Wright, Answer 7, p 5.

PART III. ISSUES AND THE LAW

(A) Settlement Approval

(i) E&Y's Role in the Sino Saga

70. The Settlement, if approved and recognized within the requisite jurisdictions, will release claims against E&Y. In assessing the merits of the Settlement, it is important to bear in mind that E&Y's role in the events from which the Canadian and U.S. Actions arise was important, but was also subject to certain limitations, including those stated below.

71. First, E&Y did not audit Sino's annual financial statements for certain years, including 2005 and 2006. Responsibility for the audit of Sino's 2005 and 2006 annual financial statements was assumed by the defendant BDO Limited ("BDO"), which remains a defendant in the Ontario Action (and will be added as one in the Quebec Action). Inasmuch as the Class Members' claims are based in substantial part on misrepresentations contained in the 2005 and 2006 financial statements and in the prospectuses which plainly incorporated them by reference, BDO will have to answer to the Class Members for its conduct.

72. Second, Sino's quarterly financial statements, which are also alleged to contain misrepresentations, were unaudited.

73. Third, many of the alleged misrepresentations were not contained in or derived from Sino's financial statements. Some appear, for example, in sections of Sino's prospectuses other than the audited financial statements that were included or incorporated by reference therein. Notably, certain of the director and underwriter defendants gave certifications as to the material accuracy and completeness of the entire

prospectuses, and so like BDO, they too will have to answer to the Class Members for their conduct.

(ii) Settlements in the CCAA Context

74. Pursuant to the *CCAA*, a settlement will be approved if it is "fair and reasonable and will be beneficial to the debtor and its stakeholders generally."

> ***Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 22-26, Authorities, tab 30.**
>
> ***Air Canada (Re)* (2004), 47 CBR (4th) 169 at para 9 (Ont Sup Ct), Authorities, tab 2.**

75. In the *CCAA* context, the parties must establish that "the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*." A settlement is "fair and reasonable" where "look[ing] at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and seeing if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights."

> ***Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 22-26, Authorities, tab 30.**
>
> ***Sammi Atlas Inc (Re)* (1998), 3 CBR (4th) 171 at para 4 (Ont Gen Div [Commercial List]), Authorities, tab 32.**

(iii) Settlements in the CPA Context

76. While this Settlement is made in the context of the *CCAA* and approval of the Settlement is sought thereunder, the test for whether a class action settlement ought to be approved is substantially similar and can provide guidance to this Court. In the class actions context, the test is "that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it." The class action cases establish additional principles relevant on a settlement approval motion:

(a) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(b) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(c) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonableness;

(d) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a range of reasonableness. All settlements are the product of a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection;

(e) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement; and

(f) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

Menegon v Philip Services Corp **(1999), 11 CBR (4th) 262 at para 24 (Ont Sup Ct), Authorities, tab 23.**

Nunes v Air Transat AT Inc **(2005), 20 CPC (6th) 93 at para 7 (Ont Sup Ct), Authorities, tab 25.**

77. The "range of reasonableness" test is flexible. It permits the court to apply an objective standard, allowing for variation between settlements, depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation. In fact, even a "less than perfect settlement may be in the best interests of those affected . . . when compared to the alternative of the risks and costs obligations." In this case, and only to the extent that the Court has reference to the *CPA* jurisprudence, the range of reasonableness must be evaluated through the lens of the *CCAA* process and "all its attendant risks and uncertainties."

Parsons v Canadian Red Cross Society **(1999), 40 CPC (4th) 151 at para 70 (Ont Sup Ct), Authorities, tab 29.**

Nunes v Air Transat AT Inc **(2005), 20 CPC (6th) 93 at para 7 (Ont Sup Ct), Authorities, tab 25.**

Robertson v ProQuest Information and Learning Company**, 2011 ONSC 1647 at para 25 and 33, Authorities, tab 30.**

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

(a) the likelihood of recovery or likelihood of success;

(b) the amount and nature of discovery, evidence, or investigation;

(c) the proposed settlement terms and conditions;

(d) the recommendations and experience of counsel;

(e) the risk, future expense and likely duration of litigation;

(f) the number of objectors and nature of objections;

(g) the presence of arm's-length bargaining and the absence of collusion; and/or

(h) information conveying to the courts the dynamics of, and the positions taken by the parties during, the negotiations.

Marcantonio v TVI Pacific Inc **(2009), 82 CPC (6th) 305 at para 12 (Ont Sup Ct), Authorities, tab 19.**

Parsons v Canadian Red Cross Society **(1999), 40 CPC (4th) 151 at paras 71 and 73 (Ont Sup Ct), Authorities, tab 29.**

79. A class actions judge can approve or reject the settlement, but cannot modify its terms. In deciding whether to reject a settlement, the Court should consider if whether doing so would put the settlement in "jeopardy of being unraveled." There is no obligation on parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result

would be contrary to the widely-held view that the resolution of complex litigation through settlement is to be encouraged by the courts and favored by public policy.

> ***Dabbs v Sun Life Assurance Company of Canada,*** **[1998] OJ No 1598 (Gen Div) at paras 10 and 14; DAbbs v Sun Life Assurance Company of Canada, 1998 CarswellOnt 2758 at paras 32-34 (Gen Div), Authorities, tabs 6 and 7.**
>
> ***Semple v Canada (Attorney General),*** **2006 MBQB 285 at para 26, Authorities, tab 33.**

80. Of particular importance in examining these factors is the likelihood of success if the litigation were to continue. This examination requires not only a consideration of the litigation risks proceeding to trial, but also the amount at stake, discounted for risk, and the judgment, if successful, likely to be recoverable from the defendants. This aspect of the approval test assumes even greater importance where, as in this case, significant defences are being advanced.

> ***Martin v Barrett,*** **[2008] OJ no 2105 at para 21 (Ont Sup Ct), Authorities, tab 20.**

(iv) The Settlement is Fair and Reasonable and Should be Approved under the CCAA

81. As outlined above, the Settlement is an exchange of $117 million for a *CCAA* release of all claims that could ever be made against E&Y in relation to Sino. In addition, E&Y is giving up its indemnity claims against Sino, and there is no ability to "opt out." If the Settlement is approved, the *CCAA* release will globally extinguish E&Y's liability in relation to Sino.

82. Class Counsel recommend that the Settlement be approved because it is fair and reasonable. This is the largest auditor settlement in Canada, by a large margin, and the 5th largest in the world in a securities class action.

> **Wright Affidavit, Motion Record, vol. 1, tab 2, paras 119-124, pp 65-66.**

83. Notably, this Settlement with one defendant is larger than the offer from all defendants to settle the entire action at the Court-ordered mediation, which was "not . . . significant."

> **Wright Affidavit, Motion Record, vol. 1, tab 2, para 58, p 49.**

84. The Settlement is superior to:

(a) the possible mediated outcome;

(b) the settlement available had a *CCAA* release not been available to E&Y; and

(c) the possibility that the *CCAA* would release all of the Class's claims, without compensation at all or in a substantially smaller amount.

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 47, 58 and 66, pp 43, 49 and 50-51.

85. The question in this motion is: are the "rights . . . compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights." The fact that "a minority of creditors is bound by the Plan which a majority have approved" is neither unusual nor relevant (provided the settlement is "fair and reasonable").

***Sammi Atlas Inc, Re* (1998), 3 CBR (4th) 171 at para 4 (Ont Gen Div [Commercial List]), Authorities, tab 32.**

86. No rights are being confiscated by this Settlement. The Kim Orr Group's purported right to opt out is not confiscated because it does not exist in this context. Even if such a right did exist, it is being compromised in exchange for a very substantial sum.

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

***ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 70, Authorities, tab 4.**

88. E&Y contributed to the restructuring by:

(a) releasing its claims against Sino. In particular, the Proofs of Claim filed by E&Y set out extensive claims that were asserted directly against Sino's subsidiaries. None of these claims were addressed in the Equity Claims Order and, by agreeing to release all these claims, E&Y has eliminated:

(i) dilution of the Noteholders' recovery if E&Y were ultimately to obtain judgments or settlements in respect of those claims;

(ii) the expense and management time otherwise to be incurred by Newco and the subsidiaries in litigating these claims; and

(iii) what might otherwise have been a significant extension of the timelines to complete Sino's restructuring;

(b) agreeing not to receive any distributions of any kind under the Plan, as have the other third party defendants. Without that agreement, the Unresolved Claims Reserve (as defined in the Plan) would have materially increased, with the potential for a corresponding dilution of consideration paid to the Affected Creditors;

(c) significantly increasing the recovery to a class of stakeholders that would not otherwise receive any amount under the Plan; and

(d) agreeing to not pursue its objections generally to the Plan and its sanction, and agreeing to not pursue all of its appeal rights in that regard.

Affidavit of Mike Dean sworn January 11, 2013 ("Dean Affidavit"), Motion Record of Ernst & Young LLP (E&Y Motion Record"), tab 1, para 42, pp 13-14.

89. The Plan Sanction Order included the framework that allows for this Settlement. Without those features, the Plan would have likely faced vigorous opposition from various stakeholders, as well as appeals. These delays would have been detrimental to the restructuring. In the Monitor's words, Sino could "not afford to remain in a *CCAA* process for much longer."

Wright Affidavit, Motion Record, vol. 1, tab 2, paras 68-71, p 51

Thirteenth Report of the Monitor, Exhibit "H" to the Dean Affidavit, tab 1H, para 110, p 581.

90. The Settlement is a fair compromise. Class Counsel considered that:

(a) the Class Members' claims against E&Y face risks, including:

(i) with regard to common law claims, the uncertainty created by the Supreme Court's decision in *Hercules Management*s;

(ii) E&Y has provided an expert report by a well-respected auditor that its audit of Sino's 2010 financial statements satisfied applicable professional standards;

(iii) with regard to the Part XXIII.1 claims, damages as against E&Y are capped at a minute fraction of the Class Members' total maximum damages (and possibly at less than $10 million) unless the Class Members can prove that E&Y knowingly misled them; and

(iv) E&Y will claim that it was, in turn, defrauded by Sino and certain of its officers;

(b) E&Y has relatively limited insurance available to respond to this claim;

(c) while claimed damages are high, E&Y is only responsible for a portion of them, and other defendants, particularly Sino, Chan, Poon and Horsely, may ultimately be determined to have considerably more responsibility than E&Y; and

(d) it is uncertain that a class encompassing all injured investors, regardless of residence, will be certified.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 99-118, pp 60-65.

***McKenna v Gammon Gold Inc*, 2010 ONSC 1591 at para 118, Authorities, tab 21.**

The Risks of Proceeding Against E&Y are Underscored by the History of Securities Litigation Against Auditors in the United States

91. The secondary market civil liability regime in the United States requires the plaintiff to prove that the defendants acted with '*scienter*,' which means fraudulent intent. American decisions therefore highlight the challenges plaintiffs confront in establishing that an auditor acted fraudulently, which is potentially what the Canadian and U.S. Plaintiffs would have to prove in order to overcome the statutory cap on the Class Members' Part XXIII.1 claims against E&Y and to prevail on the U.S. Plaintiffs' claims under U.S. federal and New York State law. The applicability of these cases would be contested by U.S. Plaintiffs' Counsel.

***Dura Pharmaceuticals, Inc v Broudo*, 544 US 336, at 341–342 (2005), Authorities, tab 9.**

***Securities Act*, s. 138.7(2).**

Affidavit of Adam Pritchard sworn January 9, 2013, Motion Record, vol. 4, tab 4, para 21-23 and 30-32 p 887 and 881.

92. In the *Longtop Financial Technologies Limited Securities Litigation*, an action involving a reverse takeover entity based in China, a Court sitting in the Southern District of New York dismissed claims against Deloitte Touche Tohmatsu CPA Ltd. ("DTTC") because the complaint "insufficiently alleges facts that would have put DTTC on notice that Longtop was engaged in fraud during the Class Period. At its core the Complaint alleges that, had DTTC performed a better audit, it would have uncovered Longtop's fraud. At most this describes negligence by DTTC . . . ." As the Statement of Allegations of OSC Staff suggests, while E&Y's negligence may be demonstrable, E&Y's knowledge of a misrepresentation will be considerably more difficult to prove.

***In re Longtop Fin Techs Ltd*, 2012 US Dist LEXIS 162878, at *24 (SDNY, November 14, 2012), Authorities, tab 15.**

93. As in this case, the problems at Longtop were uncovered, in part, by short sellers. However, "the argument . . . that DTTC must have acted recklessly because Longtop's fraud was uncovered by short-sellers . . . also fails. If an auditor were liable every time a short seller issued a report prior to a fraud being uncovered, then the scope of auditor liability would extend well beyond that contemplated by" Congress.

***In re Longtop Fin Techs Ltd*, 2012 US Dist LEXIS 162878, at *32 (SDNY, November 14, 2012), Authorities, tab 15.**

94. Similarly, in *Dobina v Weatherford Int'l Ltd*, the plaintiffs alleged that Ernst & Young LLP had disregarded "red flags" during its audits of a U.S.-domiciled oil services company. The plaintiffs claimed that Ernst & Young LLP's statements regarding Weatherford's GAAP compliance and internal controls, and the auditors' compliance with GAAS, were false. The claims were dismissed in part because where "statements by an auditor are couched as opinions," as is the case here, the plaintiff must plead with particularity and later prove that "the auditor did not actually hold the opinion it expressed or that it knew that it had no reasonable basis for holding it." Based on the

evidence available to Class Counsel and the nature of the allegations advanced by OSC Staff against Sino's former senior officers and E&Y, it is uncertain that this standard could be met.

> ***Dobina v Weatherford Int'l Ltd*, 2012 US Dist LEXIS 160663, at *55 (SDNY, November 7, 2012), Authorities, tab 8.**
>
> ***See also In re Tyco Int'l Ltd, Sec Litig,* 535 F Supp 2d 249 (DNH 2007), Authorities, tab 17.**

95. The difficulty of proving fraud was also underscored in Justice Perell's reasons in the Carriage Motion, wherein His Honour stated in part that:

> [311] Turning to the pleading of fraudulent misrepresentation, when it is far easier to prove a claim in negligent misrepresentation or negligence, the claim for fraudulent misrepresentation seems a needless provocation that will just fuel the defendants' fervour to defend and to not settle the class action. Fraud is a very serious allegation because of the moral and not just legal turpitude of it, and the allegation of fraud also imperils insurance coverage that might be the source of a recovery for class members.
>
> [312] Kim Orr has understated the difficulties the plaintiffs in *Northwest v. Sino-Forest* will confront in impugning the integrity of Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management.
>
> **Carriage Reasons, Exhibit "N" to the Supp Wright Affidavit, Reply Motion Record, tab 1N, para 311-312, p 195.**

96. The Ontario Plaintiffs are two individual investors (Messrs. Grant and Wong), two union pension funds (the Labourers' Pension Fund of Central and Eastern Canada and the International Union of Operating Engineers), and the Swedish national pension fund (Sjunde AP-Fonden). They all support the Settlement, as do the two largest holders of Sino common stock on June 2, 2011: Davis Selected Advisors LP and Paulson & Co. These entities collectively lost hundreds of millions of dollars in Sino's collapse. Class Counsel, U.S. Plaintiffs' Counsel and Kessler Topaz Meltzer & Check, LLP have a wealth of experience litigating securities class actions in Canada and the United States. Counsel at Paliare Roland not only have extensive class action experience, but are also leading *CCAA* practitioners. All support the Settlement.

Wright Affidavit, Motion Record, vol. 1, tab 2, para 72-82, pp 52-55.

(v) If This Were a Settlement Approval Motion under the CPA, the Test would also be Met

97. For the reasons outlined above, the Settlement is in the best interests of the Class Members, which is in essence the *CPA* standard. Additionally, in the *CPA* context and in the absence of evidence to the contrary, "the recommendation of experienced counsel is entitled to considerable weight given their ability to weigh the factors bearing on the reasonableness of the settlement." Though discovery has yet to occur, Class Counsel had the benefit of its own extensive investigation aided by experts from a variety of relevant disciplines and jurisdiction, the investigation of the SC and its advisers, an evidentiary proffer from Pöyry, Class Counsel's review of non-public relevant documents from the confidential data room, and the allegations of OSC Staff.

> ***Metzler Investment GmbH v Gildan Activewear Inc*, 2011 ONSC 1146 at para 31, Authorities, tab 24.**
>
> ***Robinson v Rochester Financial Ltd*, 2012 ONSC 911 at para 20 (Cautioning against the Court "substituting [its] view of the prospects of success for the views of class counsel, who have lived with this action since its outset and who are familiar with the risks and benefits of continuing with the action"), Authorities, tab 31.**
>
> **Wright Affidavit, Motion Record, vol. 1, tab 2, para 87, p 56-57.**

98. A major policy objective of Ontario's class proceedings regime is of general and specific deterrence or "behaviour modification." A settlement of this unprecedented magnitude may well send a powerful signal to Canada's auditing profession that serious consequencs await those who fail to conduct proper audits of the accounts of public companies. The OSC proceeding against E&Y provides additonal assurance that behaviour modification will be achieved in this case.

(vi) The Settlement Fairly Compromises the U.S. Action

99. The Settlement will release Claims made against E&Y in the U.S. Action. That action asserts two types of claims against E&Y: claims pursuant to the *Securities Exchange Act of 1934* (the "*Exchange Act*") and New York State common law claims for aiding and abetting fraud. As is clear from the cases cited above, the U.S. Action's *Exchange Act* claims as against E&Y face significant hurdles.

Pritchard Affidavit, Motion Record, vol. 4, tab 4, para 3, 11, 12, 14, 32 and 34, pp 870, 873, 881 and 882.

100. Even if the state law fraud claims survive a motion to dismiss, they may prove difficult to certify, as such claims will require that the U.S. Plaintiffs prove reliance, and the U.S. certification regime, unlike that of Ontario, requires that the common issues predominate over the individual issues.

> ***In re Pfizer Inc Sec Litig*, 584 F Supp 2d 621, at 643 (SDNY 2008) ("[F]ederal courts repeatedly have refused to apply the fraud on the market theory to state common law cases."); *but see In re Coordinated Title Ins Cases*, 2004 WL 690380, at *5 (N.Y. Sup. 2004) ("While no case states a bright line rule that reliance is presumed in fraud cases involving omissions of material fact, the Appellate Division said that, 'once it has been determined that the representations alleged are material and actionable, thus warranting certification, the issue of reliance may be presumed, subject to such proof as is required on the trial.'")*; *Ackerman v Price Waterhouse*, 252 AD 2d 179, at 198 (NY App Div 1st Dep't 1998) (finding a presumption of reliance on material omissions where defendant was an accountancy firm and plaintiffs were a class of clients), Authorities, tabs 16, 14, and 1.**
>
> **Pritchard Affidavit, Motion Record, vol. 4, tab 4, para 34, 39 and 47, p 882, 884-888.**

The Kim Orr Group's Opposition to the Settlement is Ill-Advised

101. Although the Kim Orr Group has provided no evidence, or even expressed a view, that it would or even could achieve a superior result through the prosecution of individual claims, it has elected to challenge a fundamental term of the Settlement in order to preserve its members' ability to pursue their own claims against E&Y. If the Kim Orr Group's opposition to the Settlement succeeds, it will have deprived the Class Members of a very substanial sum of compensation obtained within a reasonable time-frame, and will expose the Class Members' claims against E&Y to all of the vagaries of protracted litigation whose success will be largely dependent on evidence and witnesses situated in the Peoples' Republic of China.

102. The Kim Orr Group does not claim, nor could it do so credibly, that the quantum of the Settlement consideration is insufficient. Rather, it claims that it is "unable to assess the adequacy and fairness of the proposed settlement." It thus appears that the litigation which the Kim Orr Group seeks to pursue against E&Y would constitute in essence an

information-gathering exercise. However, due in large part to the extensive investigation and the resulting Part XXIII.1 leave motion record of the Ontario Plaintiffs, the allegations of the OSC Staff, and the investigation and reports of the SC into the Muddy Waters allegations, the Class Members likely have considerably more information as to the merits of their claims than absent class members generally have when approval of a class action settlement is sought. In any event, the Settlement should not become a hostage to the Kim Orr Group's attempts to gather information through the prosecution of individual claims.

Adelson Affidavit, Objectors Responding Record, tab 2, para 23 p 15.

103. The Kim Orr Group also complains that the Settlement was entered into before the Canadian Plaintiffs acquired the non-public documents to which discovery would normally have afforded them access (such as E&Y's working papers). However, pre-discovery settlements of Ontario class proceedings are common. Indeed, promptly after winning a carriage motion in the *Timminco* securities class action, the plaintiff (represented by Kim Orr) "energetically" engaged in protracted settlement discussions with the main defendants, and did so prior to the filing of the plaintiff's Part XXIII.1 leave or certification motions. (The issuer defendant in *Timminco* subsequently commenced a proceeding under the *CCAA*, and the proposed class proceeding was stayed without a settlement having been concluded, and without the plaintiff's leave or certification motions having been adjudicated.) Similarly, in *McLaren v LG Electronics Canada Inc*, a plaintiff (again represented by Kim Orr) concluded a settlement of a class proceeding with the sole defendant before the certification motion had been adjudicated, and therefore before discovery had commenced. Despite the fact that the settlement did not provide for any monetary consideration, and although 17 of approximately 10,000 class members objected to the settlement, Justice Perell approved it.

Adelson Affidavit, Objectors Responding Record, tab 2, paras 23 (a) and (d), p 15.

***Globe and Mail* Article: "Burned Sino-Forest Investors Squabble Among Themselves" dated January 9, 2013, Exhibit "F" to the Supp. Wright Affidavit, Reply Motion Record, tab 1F, p 37.**

***Sharma v Timminco Limited*, 2011 ONSC 8024, paras 18-29, Authorities, tab 40.**

***McLaren v LG Electronics Canada Inc*, 2010 ONSC 4710, paras 1 and 14-21, Authorities, tab 22.**

104. The Kim Orr Group's principal complaint is that their rights to opt out are being improperly extinguished. This complaint is meritless, for at least three reasons.

105. First, the law does not permit a dissenting stakeholder to opt out of a restructuring. If that were possible, no creditor would take part in any *CCAA* compromise where they were to get less than the debt owed to them. There is no right to opt out of any *CCAA* process. It is clear that "the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved – subject only to the court determining that the Plan is fair and reasonable." If a creditor of any sort could "opt out" of the insolvency and demand additional compensation, the *CCAA* would serve no purpose.

***Sammi Atlas Inc, Re* (1998), 3 CBR (4th) 171 at para 4, Authorities, tab 32.**

106. The Kim Orr Group misapprehends the *CCAA*. Mr. Simard states that "it was and is our understanding that opt out rights cannot be abrogated under these circumstances," but this belief (the source of which he does not provide) is baseless. Neither Mr. Simard nor any other member of the Kim Orr Group cites any authority for the proposition that there is such a right under the *CCAA*.

Simard Affidavit, Objectors Responding Record, tab 3, para 20, p 137.

***See also* Adelson Affidavit, Objectors Responding Record, tab 2, para 6, p 10.**

107. Sino is *insolvent*: all of the stakeholders, including the Kim Orr Group, will get less than they are owed: "Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors." The *CCAA* addresses this reality through a voting system. As the Court of Appeal ruled, "Parliament[] . . . permit[ed] a wide range of proposals to be negotiated and put forward . . . and to bind all creditors . . . where the proposal can gain the support of the requisite 'double majority' of votes and obtain the sanction of the court on the basis that it is fair and reasonable." If the members of the Kim Orr Group wanted to vote on the *CCAA* Plan, they ought to have filed a claim and taken steps in a timely way to assert their right to vote in the Insolvency Proceeding, as did the Canadian Plaintiffs. They did not do so.

***ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 68, Authorities, tab 4.**

108. Even if it had a vote, the Kim Orr Group's stake is so small that it could not have altered the outcome: they controlled approximately 1.6% of Sino's outstanding shares at the time of the release of the initial Muddy Waters report. However, the Settlement is expressly supported by parties who then held more than 25% of Sino's outstanding shares, and is tacitly supported by the vast majority of the remaining persons and entities who were then shareholders.

109. Second, the Kim Orr Group demands a right to conditionally opt out of a settlement, but that right does not exist under the *CPA* in these circumstances, let alone in the *CCAA* context. By virtue of the Certification Order, Class Members had the ability to opt out of the class action. The Kim Orr Group instead amended the opt-out form, purporting to create a conditional opt out. Under the *CPA*, the right to opt out is "in the manner and within the time specified in the certification order." There is no provision for another or conditional opt out in the *CPA* and Ontario's single opt-out regime causes "no prejudice . . . to putative class members."

***CPA*, s 9.**

***Osmun v Cadbury Adams Canada Inc*, [2009] OJ no 5566 at paras 43-46 (Ont Sup Ct), Authorities, tab 27.**

***Eidoo v Infineon Technologies AG*, 2012 ONSC 7299, Authorities, tab 10.**

110. Third and finally, if the Kim Orr Group wanted a voice in the *CCAA* process, they ought to have sought one rather than lie in the weeds while the Court-appointed representatives of the Class Members expended prodigious resources to protect their interests. Notably, the Kim Orr Group "had been monitoring the *CCAA* Proceedings throughout, but had seen no need to participate . . . ." Evidently, they did not do so because they "did not anticipate that the apparently routine activity in the *CCAA* proceedings would affect Invesco's rights as against E&Y and other defendants in the Class Action." The Kim Orr Group's complacency is striking: the *CCAA* claims process requires that "all legitimate creditors come forward on a timely basis."

Dean Affidavit, E&Y Motion Record, tab 1, para 49, p 17.

Adelson Affidavit, Objectors Responding Record, tab 2, para 6, p 10.

Simard Affidavit, Objectors Responding Record, tab 3, para 22, p 138.

***Blue Range Resources Corp. (Re)*, 2000 ABCA 285 at para 10, Authorities, tab 5.**

111. This Court's Mediation Order facilitated the process that led to the Settlement. Therein, this Court ordered that the parties eligible to participate in the mediation were the Canadian Plaintiffs and the defendants and insurers (termed the "Mediation Parties"). That order provided that the Mediation Parties participate in the Mediation in person and with representatives present "with full authority to settle the Subject Claims." Despite evidently being aware of this, Bâtirente "did not see any reason to participate in or object to" the mediation.

Simard Affidavit, Objectors Responding Record, tab 3, para 18, p 136.

Dean Affidavit, E&Y Motion Record, tab 1, paras 22-23, p 8.

Mediation Order dated July 25, 2012 ("Mediation Order"), Exhibit "E" to the Dean Affidavit, E&Y Motion Record, tab 1E, s 4-5, pp 516-517.

112. The Canadian Plaintiffs' authority to settle and resolve the claims was critical to the Canadian Plaintiffs' and E&Y's support of the mediation. The other parties required certainty that the counterparties with whom they were negotiating had the ability to complete a settlement, if one could be reached.

113. The Kim Orr Group did not seek to appear at the mediation. Moreover, in advance of the mediation, a confidential data room was established by Court order. The Kim Orr Group did not seek access to the documents in the data room.

114. Indeed, the Kim Orr Group simply did *nothing* – until a very large settlement was announced.

115. The Kim Orr Group also did not appear (or take a position) at the motions for the:

(a) *Third Party Stay Order dated May 8, 2012*, which provided that Sino was authorized to enter into agreements with the plaintiffs and defendants in the

Canadian Actions providing for, among other things, the tolling of certain limitation periods; or

(b) *Claims Procedure Order dated May 14, 2012*, which established a claims bar date and a procedure for the determination and/or resolution of claims against Sino and others. At paragraph 17, the Claims Procedure Order provided that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Kim Orr Group against E&Y for which E&Y could claim indemnity from Sino. The Claims Procedure Order provided that the Ontario Plaintiffs (as defined therein) are authorized to file one Proof of Claim in respect of the substance of the matters set out in the Ontario Action, and that the Quebec Plaintiffs are similarly authorized to file one Proof of Claim in respect of the substance of the matters set out in the Quebec Action. The Kim Orr Group did not object to or oppose the Claims Procedure Order, either when it was sought or at any time thereafter. The Kim Orr Group did not file an independent Proof of Claim. Accordingly, the Canadian Plaintiffs were authorized to (and did) file a Proof of Claim in a representative capacity in respect of the claims of the Kim Orr Group.

Third Party Stay Order, dated May 8, 2012 ("Third Party Stay Order"), E&Y Motion Record, Exhibit "B" to the Dean Affidavit, tab 1B, pp 55-59.

Claims Procedure Order dated May 14, 2012 at paras 27-28, Authorities, tab 38.

116. This last omission is fatal to the Kim Orr Group's (barred) claims. This Court established the claims process to "allow the Applicants, their directors and officers, the Monitor, the court and all other stakeholders to identify the universe of potential claims." The Kim Orr Group did not identify themselves and did not file a claim, despite "monitoring the *CCAA* Proceedings throughout."

***Fraser Papers Inc (Re)*, 2012 ONSC 4882 at para 48, Authorities, tab 12.**

***Komarnicki v Hurricane Hydrocarbons Ltd.*, 2007 ABCA 361 at para 14 ("To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the *CCAA* proceedings seek to resolve matters and obtain finality without undue delay. A drop dead date is one means of**

bringing disputed claims to an end and allowing a company to move forward"), Authorities, tab 18.

Dean Affidavit, E&Y Motion Record, tab 1, para 49, p 17.

(B) Proposed Bar Order

117. As part of the Settlement, the parties seek an order barring any claims for contribution or indemnity against E&Y. The proposed bar order provides, as is standard, that if the court ultimately determines that there is a right of contribution and indemnity between the co-defendants, the class shall restrict its joint and several claims against the non-settling defendants to those damages arising from the conduct of the non-settling defendants.

Settlement Approval Order, Schedule "A" to the Notice of Motion, Motion Record, vol. 1, tab 1A, para 12, p 18.

118. The form of the bar order is fair and properly balances the competing interests of Class Members, E&Y and the non-settling defendants:

(a) Class Members are not releasing their claims to a greater extent than necessary;

(b) E&Y is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceeding;

(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if E&Y remained as a defendant in the action (i.e., the Canadian Plaintiffs have agreed not to look to the non-settling defendants for any loss attributable to E&Y and/or its related entities); and

(d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between co-defendants.

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

***Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 at para 51 (Ont Sup Ct), Authorities, tab 26.**

***Eidoo v Infineon Technologies AG*, 2012 ONSC 3801, Authorities, tab 11.**

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

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

> ***Amoco Canada Petroleum Co v Propak System Ltd*, 2001 ABCA 110 at para 25, Authorities, tab 3.**
>
> ***Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 58 (non-settling defendants not prejudiced by bar order), Authorities, tab 28.**

PART IV. ORDER REQUESTED

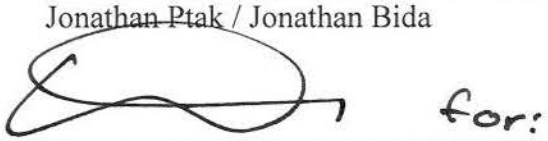
121. In light of all of the above, the Canadian Plaintiffs, with the support of the U.S. Plaintiffs, respectfully request an order approving this Settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 30, 2013

A. Dimitri Lascaris / Daniel Bach

Jonathan Ptak / Jonathan Bida



Ken Rosenberg / Massimo Starnino

Class Counsel

SCHEDULE "A"
LIST OF AUTHORITIES

Ackerman v Price Waterhouse, 252 AD 2d 179, (NY App Div 2st Dep't 1998)

Air Canada (Re) (2004), 47 CBR (4th) 169 (Ont Sup Ct)

Amco Canada Petroleum Co v Propak System Ltd, 2001 ABCA 110

ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp, 2008 ONCA 587

Blue Range Resources Corp (Re), 2000 ABCA 285

Dabbs v Sun Life Assurance Co of Canada, 1998 CarswellOnt 2758 (Ont Gen Div)

Dabbs v Sun Life Assurance Company of Canada, [1998] OJ no 1598 (Ont Gen Div)

Dobina v Weatherford Int'l Ltd, 2012 US Dist LEXIS 160663 (DNH 2007)

Dura Pharmaceuticals Inc v Broudo, 544 US 336, (2005)

Eidoo v Infineon Technologies AG, 2012 ONSC 7299

Eidoo v Infineon Technologies AG, 2012 ONSC 3801

Fraser Papers Inc (Re), 2012 ONSC 4882

Hercules Managements v Ernst & Young, [1997] 2 SCR 165

In re Coordinated Title Ins Cases, 2004 WL 690380 (NY Sup 2004)

In re Longtop Fin Techs Ltd, 2010 US Dist LEXIS 162878 (SDNY, November 14, 2012

In re Pfizer Inc, Sec Litig, 584 F Supp 2d 621 (SDNY 2008)

In re Tyco Int'l Ltd, Sec Litig, 535 F Supp 2d 249 (DNH 2007)

Komarnicki v Hurricane Hydrocarbons Ltd, 2007 ABCA 361

Marcantonio v TVI Pacific Inc (2009), 82 CPC (6th) 305 (Ont Sup Ct)

Martin v Barrett, [2008] OJ no 2105 (Ont Sup Ct)

McKenna v Gammon Gold Inc, 2010 ONSC 1591

McLaren v LG Electronics Canada Inc, 2010 ONSC 4710

Menegon v Philip Services Corp (1999), 11 CBR (4th) 262 (Ont Sup Ct)

Metzler Investment GMBH v Gildan Activewear Inc, 2011 ONSC 1146

Nunes v Air Transat AT Inc (2005), 20 CPC (6th) 93 (Ont Sup Ct)

Ontario New Home Warranty Program v Chevron Chemical Co (1999), 46 OR (3d) 130 (Ont Sup Ct)

Osmun v Cadbury Adams Canada Inc, [2009] OJ No 5566 (Ont Sup Ct)

Osmun v Cadbury Adams Canada Inc, 2010 ONSC 2643

Parsons v Canadian Red Cross Society (1999), 40 CPC (4th) 151 (Ont Sup Ct)

Robertson v ProQuest Information and Learning Company, 2011 ONSC 1647

Robinson v Rochester Financial Ltd, 2012 ONSC 911

Sammi Atlas Inc (Re) (1998), 3 CBR (4th) 171 (Ont Gen Div [Commercial List])

Semple v Canada (Attorney General), 2006 MBQB 285

Sino-Forest Corporation (Re), 2012 ONSC 4377 [Commercial List]

Sino-Forest Corporation (Re), 2012 ONCA 816

Smith v Sino Forest Corporation, 2012 ONSC 24

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation, 2012 ONSC 5398

Claims Procedure Order, dated May 14, 2012 of Justice Morawetz

Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp, 2012 ONSC 1924

Sharma v Timminco Limited, 2011 ONSC 8024

SCHEDULE "B"
RELEVANT STATUTES

1. *Class Proceedings Act, 1992*, SO, 1992, c 6, s 9

Opting out

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. 1992, c. 6, s. 9.

2. *Ontario Securities Act*, RSO 1990, C S5, ss 138.1, 138.7

PART XXIII.1
CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

Interpretation and Application

Definitions

138.1 In this Part,

"compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded; ("rémunération")

"core document" means,

(a) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements and an interim financial report of the responsible issuer, where used in relation to,

(i) a director of a responsible issuer who is not also an officer of the responsible issuer,

(ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or

(iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

(b) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, an interim financial report and a material change report required by subsection 75 (2) or the regulations of the responsible issuer, where used in relation to,

(i) a responsible issuer or an officer of the responsible issuer,

(ii) an investment fund manager, where the responsible issuer is an investment fund, or

(iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or

(c) such other documents as may be prescribed by regulation for the purposes of this definition; (“document essentiel”)

“document” means any written communication, including a communication prepared and transmitted only in electronic form,

(a) that is required to be filed with the Commission, or

(b) that is not required to be filed with the Commission and,

(i) that is filed with the Commission,

(ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any exchange or quotation and trade reporting system under its by-laws, rules or regulations, or

(iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer; (“document”)

“expert” means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization; (“expert”)

“failure to make timely disclosure” means a failure to disclose a material change in the manner and at the time required under this Act or the regulations; (“non-respect des obligations d’information occasionnelle”)

“influential person” means, in respect of a responsible issuer,

(a) a control person,

(b) a promoter,

(c) an insider who is not a director or officer of the responsible issuer, or

(d) an investment fund manager, if the responsible issuer is an investment fund; (“personne influente”)

“issuer’s security” means a security of a responsible issuer and includes a security,

(a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and

(b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; (“valeur mobilière d’un émetteur”)

“liability limit” means,

(a) in the case of a responsible issuer, the greater of,

(i) 5 per cent of its market capitalization (as such term is defined in the regulations), and

(ii) $1 million,

(b) in the case of a director or officer of a responsible issuer, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates,

(c) in the case of an influential person who is not an individual, the greater of,

(i) 5 per cent of its market capitalization (as defined in the regulations), and

(ii) $1 million,

(d) in the case of an influential person who is an individual, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,

(e) in the case of a director or officer of an influential person, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the director's or officer's compensation from the influential person and its affiliates,

(f) in the case of an expert, the greater of,

(i) $1 million, and

(ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and

(g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the person's compensation from the responsible issuer and its affiliates; ("limite de responsabilité")

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and financial performance of a responsible issuer as required under Ontario securities law; ("rapport de gestion")

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; ("déclaration orale publique")

"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or an exchange or to otherwise make available to the public; ("publication", "publier")

"responsible issuer" means,

(a) a reporting issuer, or

(b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded; ("émetteur responsable")

"trading day" means a day during which the principal market (as defined in the regulations) for the security is open for trading. ("jour de Bourse") 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s.

10; 2006, c. 33, Sched. Z.5, s. 14; 2007, c. 7, Sched. 38, s. 11; 2010, c. 1, Sched. 26, s. 6; 2010, c. 26, Sched. 18, s. 38.

Application

138.2 This Part does not apply to,

(a) the purchase of a security offered by a prospectus during the period of distribution;

(b) the acquisition of an issuer's security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;

(c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or

(d) such other transactions or class of transactions as may be prescribed by regulation. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 11.

…

Limits on damages

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

(a) the aggregate damages assessed against the person or company in the action; and

(b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 16.

Same

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure. 2002, c. 22, s. 185

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

Superior Court File No.: CV-10-414302
Commercial Court File No.: CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE AD HOC COMMITTEE OF THE PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE CLASS ACTION PLAINTIFFS (SETTLEMENT APPROVAL)

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