CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2015 ONSC 439

COURT FILE NO.: CV-11-431153CP

DATE: 20150120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

– and –

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

Jonathan Ptak, Garth Myers, A. Dimitri Lascaris, and *Kirk M. Baert,* for the Plaintiffs

Jonathan G. Bell and *Amanda McLachlan* for the Defendants, Sino-Forest Corporation, Simon Murray, Edmund Mak, W. Judson Martin, and Peter Wang

Emily Cole and *John Chapman* for the Defendant Allen T.Y. Chan

Brandon Barnes for the Defendant Kai Kit Poon

Larry Lowenstein and *Geoffrey Grove* for the Defendants William E. Ardell, James P. Bowland, James M.E. Hyde and Garry J. West

John Fabello and *Rebecca Wise* for the Defendants 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. and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC)

Kenneth A. Dekker and *David Vaillancourt* for BDO Limited

HEARD: January 12, 2015

PERELL, J.

REASONS FOR DECISION

1. Introduction

[1] This proposed securities class action was originally scheduled for a 10-day hearing.

[2] Save for one contested issue that affects two motions, the parties have agreed to settle, to adjourn, or not to oppose, the five multifaceted-motions that were to comprise the 10-day hearing; namely: (1) a motion for leave to deliver a Second Fresh as Amended Statement of Claim to plead an additional cause of action based on United States law; (2) a motion for an Order certifying this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6; (3) a motion for leave under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (and, if necessary, the equivalent provisions of the securities legislation of the other provinces and territories of Canada) to assert a secondary market misrepresentation action; (4) a motion for an Order striking the affidavits of Michael Chepiga, Edward Greene, and Rose Lombardi filed by the Defendant underwriters to resist the certification motion; and (5) a motion brought by the Defendant Allen T.Y. Chan to strike the affidavit of Stephen Chandler delivered for the Plaintiffs.

[3] The motion to amend the Statement of Claim is not opposed and is granted - subject to the rights of the Defendants, 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) (the "Underwriters") to oppose the amendments.

[4] Subject to the one contested issue, which I foreshadow to say I shall decide in the Plaintiffs' favour, the motion for leave under Part XXIII.1 of the Ontario *Securities Act* is unopposed or on consent. For the reasons set out below, the motion is granted. (Once again, the Underwriters are not to be affected by this Order.)

[5] Subject to the one contested issue, which, as already mentioned, I shall decide in the Plaintiffs' favour, the motion for certification is unopposed or on consent. For the reasons set out below, the motion is granted. (Once again, the Underwriters are not affected by this Order.)

[6] The motion to strike the Chepiga, Greene, and Lombardi affidavits is adjourned.

[7] The motion to strike Mr. Chandler's affidavit is withdrawn.

2. The Parties and the Claims

[8] This proposed securities class action arises out of the cataclysmic collapse and subsequent bankruptcy of Sino-Forest Corporation ("Sino-Forest"). Investors lost billions of dollars. The action is brought on behalf of purchasers of Sino-Forest's securities (notes and shares) from March 19, 2007 to June 2, 2011 ("the proposed Class Period").

[9] During the proposed Class Period, Sino-Forest raised $2.7 billion pursuant to seven public offerings of securities; visualize:

- ***Note Offerings***
    - (1) the July 2008 Note Offering pursuant to an Offering Memorandum dated July 17, 2008
    - (2) the June 2009 Note Offering to exchange Sino-Forests Guaranteed Senior Notes for new notes pursuant to an Exchange Offer Memorandum dated June 24, 2009
    - (3) the December 2009 Note Offering pursuant to a Final Offering Memorandum dated December 10, 2009
    - (4) the October 2010 Note Offering pursuant to a Final Offering Memorandum dated October 14, 2010
- ***Share Offerings***
    - (5) the June 2007 Share Offering pursuant to a Short Form Prospectus, dated June 5, 2007
    - (6) the June 2009 Share Offering pursuant to a Final Short Form Prospectus, dated June 1, 2009
    - (7) the December 2009 Share Offering pursuant to a Final Short Form Prospectus, dated December 10, 2009.

[10] The Plaintiffs allege that Sino-Forest made misrepresentations in its public disclosure in the following documents:

- 2006 – 2010 Annual Consolidated Financial Statements
- 2006 – 2010 Annual Information Forms ("AIFs")
- 2006 – 2010 Annual Management's Discussion and Analysis ("MD&A")
- Management Information Circulars: Management Information Circular dated April 27, 2007, April 28, 2008, April 28, 2009, May 4, 2010, and May 2, 2011
- Quarterly Financial Statements: Q1 2006, Q1, Q2, Q3 2007, Q1, Q2, Q3 2008, Q1, Q2, Q3, 2009, Q1, Q2, Q3 2010 Quarterly Financial Statements (collectively, the "Quarterly Financial Statements");
- Quarterly MD&A: Q1, Q2, Q3 2007, Q1, Q2, Q3 2008, Q1, Q2, Q3, 2009, Q1, Q2, Q3 2010 MD&A
- Prospectuses dated June 2007, June 2009, and December 2009
- Offering Memoranda dated July 2008, June 2009, December 2009, and October 2010.

[11] The Plaintiffs are the Trustees of the Labourers' Pension Fund of Central and Eastern Canada (the "Labourers Fund"), the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario (the "OE Fund"), Sjunde Ap-Fonden ("AP7"), David Grant, and Robert Wong.

[12] The Labourers Fund is a multi-employer pension plan. It currently has approximately $2 billion in assets, over 39,000 members and over 13,000 pensioners and beneficiaries and approximately 2,000 participating employers. The Labourers Fund purchased Sino-Forest's common shares over the Toronto Stock Exchange ("TSX") during the Class Period and continued to hold 128,700 shares at the end of the Class Period.

[13] The OE Fund is a multi-employer pension plan. It has approximately $1.5 billion in assets, over 9,000 members and pensioners and beneficiaries. The OE Fund purchased Sino-Forest's common shares over the TSX during the Class Period and continued to hold 324,100 shares at the end of the Class Period.

[14] AP7 is the Swedish National Pension Fund. As of June 30, 2011, it had approximately $15.3 billion in assets under management. Funds managed by AP7 purchased Sino-Forest's common shares over the TSX during the Class Period and continued to hold 139,398 common shares at the end of the Class Period.

[15] Mr. Grant resides in Calgary, Alberta. He purchased 100 of Sino-Forest's 6.25% Guaranteed Senior Notes that were offered by the October 2010 Offering Memorandum and in the distribution to which that Offering Memorandum related. Mr. Grant continued to hold 100 Notes at the end of the Class Period.

[16] Mr. Wong resides in Kincardine, Ontario. During the Class Period, he purchased Sino-Forest's common shares over the TSX and continued to hold some or all of such shares at the end of the Class Period. In addition, Mr. Wong purchased 30,000 Sino-Forest common shares offered by the December 2009 Prospectus and in the distribution to which that Prospectus related, and he continued to own 518,700 shares at the end of the Class Period, including the shares he purchased on the primary market.

[17] The Plaintiffs seek leave to add Davis Selected Advisers, L.P. ("DSALP") and Davis New York Venture Fund, Inc. ("DNYVF") as representative plaintiffs. DSALP is an asset management firm, and DNYVF is a fund managed by DSALP. DSALP purchased Sino-Forest's common shares over the TSX during the Class Period and allocated these shares to funds managed by DSALP, including DNYVF, who continued to hold those common shares at the end of the Class Period.

[18] DSALP purchased Sino-Forest's Notes pursuant to the July 2008 Offering Memorandum and in the distribution to which that Offering Memorandum related, and allocated these Notes to funds, including DNYVF, who continued to hold those Notes at the end of the Class Period. DSALP purchased Sino-Forest's common shares pursuant to the December 2009 Prospectus and in the distribution to which that Prospectus related, and allocated these common shares to funds managed by DSALP, including DNYVF, who continued to hold those common shares at the end of the Class Period.

[19] Sino-Forest operated forest plantations in the People's Republic of China ("PRC" or "China"). Sino-Forest was incorporated in 1994 under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, and continued under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 in 2002. It was a "reporting issuer" in all provinces of Canada. Sino-Forest had shares outstanding that were listed for trading on various exchanges including the TSX. Sino-Forest also had various debt instruments, derivatives and other securities that are traded in the secondary market in Canada and elsewhere.

[20] Since the commencement of this action, the Plaintiffs have settled their claims against Pöyry (Beijing) Consulting Company Limited, a forestry consulting firm, Ernst & Young LLP, Sino-Forest's auditors after 2007, and David Horsley, Sino-Forest's CFO.

[21] Pending court approval, there is also a settlement recently reached with the Underwriters. Pending the approval of the settlement, the parties have consented to an adjournment of the certification and leave motions and also the Plaintiffs' motion to strike out affidavits about foreign law filed by the Underwriters.

[22] The remaining Defendants are: BDO Limited, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, and Garry J. West.

[23] Mr. Chan and Mr. Poon were co-founders of Sino-Forest. Mr. Chan was Sino-Forest's Chairman, CEO, and a Director until his resignation in August 2011. Mr. Poon was Sino-Forest's President and a Director.

[24] As Sino-Forest's CEO, Mr. Chan signed and certified Sino-Forest's disclosure documents during the Class Period. He signed and certified Sino-Forest's annual and quarterly MD&As and Financial Statements as well as the AIFs. He signed and certified the June 2007, June 2009, and December 2009 Prospectuses as constituting full, true, and plain disclosure of all material facts relating to the securities offered.

[25] Messrs. Wang, Martin, Mak, Murray, Hyde, Ardell, Bowland, and West were Sino-Forest's Directors during the Class Period. Mr. Poon was a Director until May 2009. Mr. Ardell became a Director in January 2010. Mr. Bowland and Mr. West became Directors in February 2011. Mr. Hyde was the chairman of Sino-Forest's Audit Committee, and Messrs. Bowland, West, and Martin were members of the Audit Committee. Messrs. Martin and Hyde signed and certified the June 2007, June 2009, and December 2009 Prospectuses. Mr. Hyde, along with Mr. Chan, signed each of the 2007 – 2010 Annual Consolidated Financial Statements on behalf of all of the members of Sino-Forest's Board of Directors.

[26] BDO Limited ("BDO"), formally known as BDO McCabe Lo Limited, was Sino-Forest's auditor from March 21, 2005 to August 12, 2007. It audited Sino-Forest's annual consolidated financial statements for 2005 and 2006.

[27] On August 12, 2007, Ernst & Young LLP ("E&Y") replaced BDO as auditor.

3. The Catastrophic Collapse of Sino-Forest and the Claims against the Parties

[28] After its establishment in 1994, Sino-Forest appeared to experience extraordinary growth. It reported profits from the first quarter of 2000 through to the fourth quarter of 2010. As at year-end 2010, Sino-Forest reported approximately $5.7 billion in assets and annual revenue of approximately $2 billion. Immediately before its collapse in 2011, Sino-Forest enjoyed a market capitalization of approximately $4.5 billion.

[29] However, on June 2, 2011, Muddy Waters LLC, a short seller, issued a research report alleging that Sino-Forest had: (a) falsely claimed to have acquired trees; (b) reported sales that had not been made or had been made in a manner that did not permit Sino-Forest to include those sales as revenue under Canadian Generally Accepted Accounting Principles ("GAAP"); and (c) failed to disclose numerous related-party transactions.

[30] The Plaintiffs allege that Sino-Forest's purportedly strong financial performance and its ever growing assets and revenues were based on fraudulent transactions indicating plantation assets that did not exist or to which Sino-Forest did not have valid proof of ownership for public disclosure or financial reporting purposes. The Plaintiffs allege that Sino-Forest's financial statements violated GAAP.

[31] The Plaintiffs also allege that in its public disclosure documents Sino-Forest: (a) misrepresented the extent of its assets, which were exceptionally overstated; (b) failed to disclose numerous and extensive related party transactions with and among its Authorized Intermediaries ("AIs") and suppliers; (c) failed to disclose that it had title to only 8% of its purported standing timber holdings; (d) massively overstated its cash flow from operating activities; and (e) failed to disclose the risks that its subsidiaries were engaging in unlicensed business activities in China (i.e., Sino-Forest never received any proceeds for its sale of timber through AIs) and Sino-Forest engaged in unlawful and potentially criminal payments to staff at Chinese forestry bureaus.

[32] The Plaintiffs allege that the senior officers and directors of Sino-Forest breached their duties to ensure that the public statements of Sino-Forest were not false or misleading.

[33] The Plaintiffs allege that BDO made two misrepresentations in the 2005 and 2006 Audit Reports: (1) that BDO audited Sino-Forest's financial statements in accordance with Generally Accepted Auditing Standards ("GAAS"), and (2) that Sino-Forest's financial statements presented fairly, in all material respects, Sino-Forest's financial position and the results of its operations and its cash flows.

[34] BDO consented in writing to the inclusion of its 2005 and 2006 Audit Reports in: (a) the June 2007 Prospectus; (b) the December 2009 Prospectuses; (c) the July 2008 Offering Memorandum; (d) the June 2009 Offering Memorandum; and (e) the December 2009 Offering Memorandum. On each occasion, in consideration of new fees, BDO entered into a new engagement agreement with Sino-Forest that required BDO, among other things, to review Sino-Forest's interim financial statements, to review subsequent events up to the date of the filing of the Offering Memorandum, to communicate with Sino-Forest's legal counsel and management, and to participate in due diligence meetings with the Underwriters.

[35] The Plaintiffs allege that BDO breached a duty of care to Class Members to perform proper audits of Sino-Forest.

[36] The Plaintiffs allege that Class Members relied on the Defendants to their detriment in purchasing Sino-Forest's securities. In particular, the Plaintiffs allege that Class Members relied that: (a) Sino-Forest's financial statements were GAAP-compliant; and (b) BDO had conducted audits in compliance with GAAS. The Plaintiffs submit that the market, including the Class Members, would not have relied on Sino-Forest's financial reporting had BDO disclosed that Sino-Forest's financial statements were in fact unreliable.

4. The Aftermath of the Muddy Waters Research Report

[37] The market immediately and brutally responded to the news of the Muddy Waters Research Report. Sino-Forest's shares dropped from $18.21 on June 1 to $5.23 on June 2, a decline of 71.3%.

[38] BDO submits that the Muddy Waters Report was manipulative (self-interested), libelous, and contained false and unproven allegations about the mismanagement of the finances of Sino-

Forest and about its financial position. BDO denies that its audit was deficient in any way. Other Defendants deny the truth of the allegations made by the Muddy Waters Report.

[39] In any event, the Muddy Waters Report was taken seriously by Sino-Forest and by the marketplace. The Report had serious consequences. The Board of Sino-Forest struck an Independent Committee to investigate the allegations made by Muddy Waters. The initial members of the Committee were Messrs. Hyde, Ardell, and Bowland. On August 26, 2011, the Ontario Securities Commission (the "OSC") issued a cease-trade order in respect of Sino-Forest securities. The shares stopped trading.

[40] On November 13, 2011, the Independent Committee released an interim report, revealing that: (a) there was a risk that certain of Sino-Forest's operations were in violation of Chinese law; (b) Sino-Forest lacked proof of title to the majority of its holdings of standing timber; (c) there was no verification that income tax and value added tax ("VAT") have been paid; (d) Sino-Forest's "transaction volumes with a number of AIs and Suppliers did not match the revenue reported by such Suppliers in their SAIC filing"; and (e) none of the British Virgin Island timber purchase contracts had as attachments either: (i) plantation rights certificates or (ii) villager resolutions, both of which are standard attachments to a timber purchase contract.

[41] On January 31, 2012, the Independent Committee released its final report which indicated that the Committee had been unable to find evidence to refute Muddy Waters' allegations.

[42] On March 30, 2012, Sino-Forest filed for insolvency protection pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA").

[43] In May 2012, Sino-Forest's common shares were delisted from the TSX and the OSC issued a Statement of Allegations against Sino-Forest and certain of its officers, alleging that they had engaged in deceitful and dishonest courses of conduct that resulted in the overstatement of Sino-Forest's assets and revenues.

[44] On January 21, 2013, Sino-Forest's insolvency concluded with the implementation of Sino-Forest's Plan of Compromise and Reorganization. The shareholders received nothing. The noteholders experienced significant losses.

5. The Class Proceedings

[45] This proposed class action was commenced on June 20, 2011.

(a) *The Negligent Misrepresentation Claim*

[46] The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, Ardell, Martin, Bowland and West for negligent misrepresentation.

[47] The elements of a claim of negligent misrepresentation are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos*, [1993] 1 S.C.R. 87.

[48] The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest, the Individual Defendants, and BDO had a special relationship with members of the Class by virtue of their purported accounting, financial and managerial acumen and qualifications, and by virtue of having assumed the role of gatekeepers. These Defendants knew at all material times that the Impugned Documents were prepared for the purpose of attracting investment and inducing Class Members to purchase Sino-Forest securities.

(b) Sino-Forest, the Individual Defendants, and BDO owed a duty of care to Class Members who purchased securities in the Share and Note Offerings and on the secondary market to exercise care and diligence to ensure that the Impugned Documents, including Prospectuses and Offering Memoranda and the documents incorporated therein, fairly and accurately disclosed Sino-Forest's financial condition and performance in accordance with GAAP;

(c) Sino-Forest and the Individual Defendants represented that the Impugned Documents, including the Prospectuses and Offering Memoranda and the documents incorporated therein, fairly and accurately disclosed Sino-Forest's financial condition and performance in accordance with GAAP which was untrue, inaccurate or misleading;

(d) BDO made the GAAP Representation in the 2005 and 2006 Audit Reports, which were incorporated into the June 2007, December 2009 Prospectuses, the July 2008, June 2009, and December 2009 Offering Memoranda, and Sino-Forest's Annual Financial Statements for 2005 and 2006;

(e) Sino-Forest, the Individual Defendants, and BDO acted negligently in making the GAAP Representation;

(f) The Labourers Fund, the OE Fund, AP7, Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary and secondary markets during the Class Period reasonably relied, directly or indirectly, on the GAAP Representation; and

(g) The Labourers Fund, the OE Fund, AP7, Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary or secondary markets during the Class Period suffered damages as a result of relying on the GAAP Representation.

(b) ***The Negligence Claim in the Primary Market***

[49] The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, and Martin for negligence in the primary market.

[50] The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

[51] The theory of the claim is that Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, and Martin had a duty to prevent the securities from being sold before the misrepresentations in the offering documents were corrected.

[52] The claim for negligence against BDO is limited to those Class Members who purchased Sino-Forest's shares and notes in the primary market pursuant to the June 2007 and December 2009 Prospectuses and the July 2008, June 2009 and December 2009 Offering Memoranda.

[53] The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO owed a duty of care to Class Members who purchased Sino-Forest securities in the primary market during the Class Period to ensure that the Prospectuses and Offering Memoranda made full, true, and plain

> disclosure of all material facts relating to the securities offered thereby. In the circumstances plead, it was reasonably foreseeable that Class Members would be damaged by the alleged misrepresentations, and there are no policy considerations that negate the prima facie duty.
>
> (b) Sino-Forest Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO breached the standard of care by failing to prevent the Note and Share Offerings from occurring prior to the correction of the misrepresentations in the offering documents or in the documents incorporated therein, and by failing to maintain or ensure that Sino-Forest had appropriate internal controls in place to ensure that its disclosure documents adequately and fairly presented its business and affairs on a timely basis.
>
> (c) Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO's breach directly caused damages to Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary market during the Class Period when Sino-Forest's misrepresentations were revealed and the price of Sino-Forest's securities fell.
>
> (d) The causal link between Sino-Forest's alleged negligence and the damage to the Class Members arises from the fact that had Sino-Forest Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO complied with the standard of care, the securities regulators would not have issued a receipt for any of the Prospectuses, and the Share and Note Offerings would not have occurred, or would have occurred at prices that reflected the true value of Sino-Forest's securities

(c) ***Unjust Enrichment in the Primary Market and the Secondary Market***

[54] The Plaintiffs sue Sino-Forest for unjust enrichment in the primary market.

[55] The Plaintiffs sue Messrs. Chan, Poon, Mak, Murray, and Martin for unjust enrichment in the secondary market.

[56] The elements of a claim of unjust enrichment claim are: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and, (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

[57] The Second Fresh as Amended Statement of Claim pleads:

> (a) Sino-Forest was enriched by the difference between the amount for which the securities offered in the primary market were actually sold, and the amount for which such securities would have been sold had the offerings not included Sino-Forest's misrepresentation.
>
> (b) Chan, Martin, Poon, Mak and Murray sold shares during the Class Period at prices that were inflated as a result of their wrongful acts and omissions during the Class Period, and were enriched thereby.
>
> (c) primary and secondary market purchasers of the securities sold by Sino-Forest, Chan, Martin, Poon, Mak and Murray were correspondingly deprived.
>
> (d) no juristic reason existed for the enrichment

(d) ***Negligent Misrepresentation under New York State Common Law***

[58] The Plaintiffs sue Sino-Forest and BDO for negligent misrepresentation under New York State law.

[59] To state a claim for negligent misrepresentation under the common law of the State of New York, a plaintiff must allege: (1) a special relationship that creates a duty to exercise

reasonable care toward the plaintiff; (2) the transmittal of false information; and (3) justifiable, detrimental reliance on the false information.

[60] The claim against BDO is limited to those Class Members who purchased Sino-Forest's notes in the primary market pursuant to the July 2008, June 2009, and December 2009 Offering Memoranda.

[61] The Second Fresh as Amended Statement of Claim pleads:

> (a) Sino-Forest and BDO were in a special relationship with Grant, DSALP, and other Class Members who purchased notes in the primary market in the Class Period;
>
> (b) the Offering Memoranda contained misstatements; and
>
> (c) DSALP, Grant and Class Members who purchased notes in the primary market during the Class Period justifiably relied upon Sino-Forest's representation, and suffered losses.

(e) *Section 12(a)(2) of the United States Securities Act of 1933*

[62] The Plaintiffs sue Sino-Forest and BDO for breach of s. 12(a)(2) of the United States *Securities Act of 1933*.

[63] The claim against BDO is limited to those Class Members who purchased Sino-Forest's notes in the primary market pursuant to the July 2008, June 2009, and December 2009 Note Offerings.

[64] To state a claim under s. 12(a)(2) of the *United States Securities Act of 1933*, a plaintiff must allege that the defendant: (1) sold or offered the sale of a security; (2) by the use of any means of communication in interstate commerce; (3) through a prospectus or oral communication that contained a material misstatement or omission; and (4) the plaintiff is entitled to rescission or damages.

[65] The Second Fresh as Amended Statement of Claim pleads:

> (a) Sino-Forest sold notes pursuant to the Note Offerings;
>
> (b) the Notes were sold pursuant to the Offering Memoranda;
>
> (c) the Offering Memoranda contained misstatements made by Sino-Forest and BDO; and
>
> (d) Grant, DSALP, and Class Members who purchased notes in the primary market are entitled to damages.

(f) *Section 130 of Ontario Securities Act (Primary Market Claim)*

[66] The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Wang, Mak, Murray, Hyde, and Martin for breach of s. 130 of Ontario's *Securities Act* and, if necessary, equivalent provincial legislation.

[67] Section 130 of the Ontario *Securities Act* provides purchasers of a security offered by prospectus during the period of distribution or during distribution to the public a remedy for a misrepresentation in the prospectus. The remedy is available against the issuer of the security as well as directors of the issuer and others who have signed the prospectus or have allowed their reports or statements to be used in the prospectus.

[68] The claim against BDO is limited to those Class Members who purchased shares in the primary market pursuant to the December 2009 Share Offering.

[69] The Second Fresh as Amended Statement of Claim pleads:

> (a) The June 2009 and December 2009 Prospectuses and the documents incorporated therein contained the GAAP Representation and other misrepresentations, and that Wong, DSALP, and other Class Members purchased shares during the period of distribution or during distribution to the public of these Offerings.
>
> (b) There were misrepresentations in BDO's 2005 and 2006 Audit Reports, that BDO consented to the inclusion of the 2005 and 2006 Audit Reports in the December 2009 Prospectus.
>
> (c) Chan, Wang, Mak, Murray, and Hyde were Directors of Sino-Forest when the June 2009 and December 2009 Prospectuses were filed.

(g) *Section 130.1 of Ontario Securities Act (Primary Market Claim)*

[70] The Plaintiffs sue Sino-Forest for breach of s. 130.1 of Ontario *Securities Act* and, if necessary, the equivalent securities legislation in other provinces.

[71] The elements of a claim for statutory liability for misrepresentation in prospectus are: (a) the issuer's offering memorandum contains a misrepresentation; and (b) the purchaser purchased a security offered by the offering memorandum during the period of distribution.

[72] The Second Fresh as Amended Statement of Claim pleads that Sino-Forest's July 2008, June 2009, December 2009, and October 2010 Offering Memoranda and the documents incorporated therein by reference contained the representation and other misrepresentations, and that Mr. Grant, DSALP, and other Class Members purchased notes during the period of distribution.

(h) *Section 138.5 of the Ontario Securities Act (Secondary Market Claim)*

[73] Section 138.5 of the Ontario *Securities Act* provides purchasers of a security with a right of action for misrepresentations in ongoing public disclosure. If leave to make the claim is granted, subject to statutory defences, an issuer, such as Sino-Forest, and each Director of the issuer at the time the document was released, is liable under s.138.5 if there was a written misrepresentation. If leave to make the claim is granted, subject to statutory defences, an auditor such as BDO is liable under s. 138.5 where a misrepresentation was contained in the auditor's report, and the audit report is included, summarized or quoted in a document released by a responsible issuer, and the auditor consented to the use of its report.

[74] The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, Ardell, Martin, Bowland and West for breach of s. 138.5 of the Ontario *Securities Act*.

[75] In the Second Fresh as Amended Statement of Claim, the Plaintiffs plead in some considerable detail that there were misrepresentations in all of the impugned disclosure documents.

[76] These claims require leave under the Ontario *Securities Act*.

(i) *Conspiracy (Secondary Market Claim)*

[77] The Plaintiffs sue Sino-Forest and Messrs. Chan and Poon for conspiracy in the secondary market.

[78] The elements of a claim of conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants either (a) use some means (lawful or unlawful) for the predominant purpose of injuring the plaintiff; or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and (4) the plaintiff suffers damages as a result of the defendants' conduct: *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[79] The Plaintiffs allege that Sino-Forest and Messrs. Chan, and Poon conspired to inflate the price of Sino-Forest's securities by making misrepresentations, and to profit from such misrepresentations by issuing themselves stock options in respect of which the strike price was impermissibly low.

[80] The Second Fresh as Amended Statement of Claim pleads:

> (a) Sino-Forest, Chan, and Poon reached an agreement;
>
> (b) the common predominant intention of the agreement was to inflate the price of Sino-Forest shares;
>
> (c) Sino-Forest, Chan, and Poon committed acts that were either unlawful (under the *Securities Act* and other statutes) and likely to cause injury to the class members, or had the predominant purpose of causing injury to the class members; and
>
> (d) Sino-Forest, Chan, and Poon thereby cause damage to be suffered by the Class Members.

6. Certification

[81] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[82] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[83] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[84] As I will discuss later in these Reasons for Decision there is a dispute about the certification of the claims of Class Members who are the former owners of Sino-Forest notes ("Former Noteholders"). For the immediate purposes of discussing the certification criteria, I will ignore this dispute about the claims of Former Noteholders who assigned their notes to others. I will return to the dispute with a more fulsome discussion below. I foreshadow to say that my conclusion is that this dispute does not alter my decision to certify the action as a class proceeding or to grant leave under the Ontario *Securities Act*.

7. Cause of Action Criterion

[85] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada, supra*, is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[86] Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[87] On consent or because the cause of action criterion was unopposed, I conclude that the Plaintiffs have satisfied the cause of action criterion as follows:

> (a) the claims and rights of action asserted on behalf of the Class against Sino-Forest are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory liability for misrepresentation in offering memoranda, breach of section 12(a)(2) of the *United States Securities Act of 1933*, negligent misrepresentation under New York State law, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the Ontario *Securities Act* ("OSA"), unjust enrichment, and conspiracy;
>
> (b) the claims and rights of action asserted on behalf of the Class against BDO are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, negligent misrepresentation under New York State law, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;
>
> (c) the claims and rights of action asserted on behalf of the Class against Allen T.Y. Chan are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, unjust enrichment, and conspiracy;
>
> (d) the claims and rights of action asserted on behalf of the Class against Kit Kai Poon are negligence, negligent misrepresentation, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, unjust enrichment, and conspiracy;
>
> (e) the claims and rights of action asserted on behalf of the Class against Peter Wang and James M. E. Hyde are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;
>
> (f) the claims and rights of action asserted on behalf of the Class against William E. Ardell, Gary J. West, and James P. Bowland are negligent misrepresentation, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

(g) the claims and rights of action asserted on behalf of the Class against Simon Murray and Edmund Mak are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, and unjust enrichment;

(h) the claims and rights of action asserted on behalf of the Class against W. Judson Martin are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, and unjust enrichment.

8. Leave under Part XXIII.1 of the *Securities Act*

[88] Leave under Part XXIII.1 of the *Securities Act* must be granted if the Court is satisfied that: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. See: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 at para 90; leave to appeal granted [2014] SCCA no 137; *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 6061; *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25; *Silver v Imax Corp.*, [2009] O.J. No. 5573 (S.C.J.).

[89] On consent or because leave was not opposed, I conclude that leave should be granted to the Plaintiffs.

9. Identifiable Class Criterion

[90] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[91] Subject to a concession made as a result of an observation made during the oral argument of the leave and certification motion with respect to the Plaintiffs' claim on behalf of noteholders, the Class is defined as:

> (i) all persons and entities, wherever they may reside, who acquired Sino-Forest Corporation's Securities during the Class Period on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest Corporation's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino-Forest Corporation's Securities outside of Canada, except: those persons resident or domiciled in the Province of Quebec at the time they acquired Sino-Forest Corporation's Securities, and who are not precluded from participating in a class action by virtue of Article 999 of the *Quebec Code of Civil Procedure,* RSQ, c C-25, and except the Excluded Persons; and
>
> (ii) all persons and entities, wherever they may reside, who acquired Sino-Forest Corporation's Securities during the Class Period by distribution in Canada in an Offering, or are resident of Canada or were resident of Canada at the time of acquisition and acquired Sino-Forest Corporation's Securities by offering outside of Canada, except the Excluded Persons.

[92] During the oral argument, it was observed that a person who purchased a note during the Class Period and who sold the note during the Class Period was not affected by the alleged wrongdoings of Sino-Forest because they would not have suffered any consequent damages. The

Plaintiffs conceded that subject to drafting appropriate language, the class definition should be amended accordingly.

[93] Subject to this amendment with respect to noteholder claimants being made, on consent or because the identifiable class criterion was unopposed, I conclude that the Plaintiffs have satisfied the identifiable class criterion.

10. Common Issues Criterion

[94] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each Class Member's claim and its resolution must be necessary to the resolution of each Class Member's claim: *Hollick v. Toronto (City), supra* at para. 18. An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each Class Member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6.

[95] On consent or because the common issues criterion was not opposed, I conclude that the Plaintiffs have satisfied this criterion with respect to the following common issues:

Were There Misrepresentations?

(1) Did the financial statements of Sino-Forest Corporation comply with Canadian GAAP?

(2) Did the Defendants make misrepresentations, including a failure to make timely disclosure, and if so, who made these representations, when, where and how?

Negligent Misrepresentation

(3) Did the Defendants owe a duty of care to the Class Members purchasing Sino-Forest? If so, what is the content of such duty, which Defendants owed such a duty and when?

(4) If the answer to (1) is no, did the Defendants negligently make misrepresentations that Sino-Forest's financial statements complied with GAAP (the "GAAP Misrepresentation")?

(5) If the answer to (4) is yes, did the Defendants make the GAAP Misrepresentation intending that the Class Members rely upon it and acquire Sino-Forest securities?

Statutory Liability -Secondary Market under the Securities Legislation

(6) If the answer to (2) is yes, do the misrepresentations give rise to liability under section 138.3 of the *Securities Act*, R.S.O. 1990, c. S.5, or the equivalent securities legislation in other provinces? If so, for which Defendants, for which misrepresentations for each Defendant and for what time period?

(7) If the answer to (6) is yes,

i. Did each of the Individual Defendants who were not Directors at the time of the misrepresentations authorize, permit or acquiesce in the release of each of the documents containing such misrepresentations?

ii. Did each of Sino-Forest, Chan, Poon, or BDO know of each of the misrepresentations at the time they were made? If not, were these Defendants wilfully blind to each of the misrepresentations at the time that they were made and does wilful blindness constitute knowledge for the purposes of subsection 138.7(2) of the *Securities Act* or the Equivalent securities legislation in other provinces?

(8) What are the damages payable by each Defendant found liable under section 138.3 of the *Securities Act* or the equivalent securities legislation in other provinces?

Statutory Liability -Primary Market under the Securities Legislation

(9) If the answer to (2) regarding Sino-Forest's June 2009 or December 2009 prospectuses is yes, do the misrepresentations give rise to liability in favour of the Class Members who purchased shares in such prospectus offerings, pursuant to section 130 of the *Securities Act* or the equivalent securities legislation in other provinces? If so, for which defendants?

(10) What are the damages payable by each Defendant found liable under section 130 of the *Securities Act* or the equivalent securities legislation in other provinces?

(11) If the answer to (2) regarding Sino-Forest's July 2008, June 2009, December 2009 and October 2010 offering memoranda is yes, is Sino-Forest liable to Class Members who purchased notes in such offerings, pursuant to section 130.1 of the *Securities Act* or the equivalent securities legislation in other provinces?

(12) If the answer to (11) is yes, what are the damages payable by Sino-Forest?

Negligence for Primary Market Offerings

(13) Did Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, or BDO owe a duty of care to the Class Members purchasing Sino-Forest securities in an offering? If so, which Defendants owed such a duty, for which offerings and what is the content of such duty?

(14) If the answer to (13) is yes, did the Defendants owing such a duty breach that duty of care in connection with the offerings? If so, which Defendants breached their duty and how?

Unjust Enrichment: Chan, Poon, Martin and Murray: Secondary Market

(15) Are there are any members of the class who can be identified as having bought shares of Sino-Forest Corporation from any of Poon, Chan, Martin or Murray?

(16) In connection with amounts paid by those class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin or Murray, were these defendants enriched by the price paid for those shares?

(17) Was there a corresponding deprivation by those class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin or Murray, as at the time that they disposed of or were deprived of their shares of Sino-Forest?

(18) Did each of Chan, Poon, Martin and Murray have continuous disclosure obligations and if so during what period(s) of time?

(19) If the answer to (18) is yes, did Chan, Poon, Martin and Murray fail to meet their continuous disclosure obligations or fail to ensure that Sino-Forest met its continuous disclosure obligations under the securities legislation and regulation in Ontario and other provinces? If so, did such a failure deprive such defendants of a juristic reason for their resulting enrichment?

(20) If the answer to (19) is yes, are the class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin and Murray entitled to repayment as restitution of the amounts paid for such shares, to the extent that each was deprived of their shares or, as applicable, to the difference between such amounts paid by each of them and the lesser amounts received by each of them at the time that they disposed of their shares?

Unjust Enrichment: Sino-Forest: Primary Market

(21) In connection with amounts paid by the class members who purchased Sino-Forest securities in the Share or Note Offerings during the Class Period, was Sino-Forest enriched by the amounts it received in connection with its offerings, and was there a corresponding deprivation by the Class Members who purchased Sino-Forest securities in the Share or Note Offerings during the Class Period?

(22) Did Sino-Forest fail to meet its disclosure obligations under the securities legislation and regulation in Ontario and other provinces in connection with its offerings? If so, did such a failure deprive such defendants of a juristic reason for their resulting enrichment?

(23) If the answer to (22) is yes, are the class members who purchased Sino-Forest securities in the share and note offerings during the class period entitled to repayment as restitution of the amounts paid for such securities that Sino-Forest received or, alternatively, the difference between such amounts paid and the amount Sino-Forest would have been received had there not been a failure by Sino-Forest to meet its disclosure obligations?

Conspiracy

(24) Did Sino-Forest, Chan, and Poon, or some of them, conspire one with the other, or with persons unknown, for the purpose of inflating the price of Sino-Forest securities? If so, who conspired with whom, when, where, why and for what purpose?

Breach of Section 12(a)(2) of the United States Securities Act of 1933

(25) Did Sino-Forest sell or offer for sale a security by the use of any means of communication in interstate commerce through a prospectus?

(26) If the answer to (25) is yes, did the prospectus contain a material misstatement or omission?

Negligent Misrepresentation under New York State Common Law

(27) Was there a special relationship between the Defendants and the Class that creates a duty to exercise reasonable care towards the Class?

(28) If the answer to (27) is yes, was the duty to exercise reasonable care breached and was false information transmitted?

(29) If the answer to (28) is yes, was the false information transmitted with the intention that the

Class Members rely upon it and acquire Sino-Forest securities?

Inflation in Securities

(30) Did the price of Sino-Forest's securities incorporate and reflect any of the alleged misrepresentations made during the Class Period, and if so, what effect did any such misrepresentations have on the prices of Sino-Forest's securities during the Class Period?

Vicarious Liability

(31) Is Sino-Forest vicariously liable or otherwise responsible for the acts of the individual defendants and their other officers, directors and employees?

(32) Is BOO vicariously liable or otherwise responsible for the acts of their respective officers, directors, partners and employees?

Punitive Damages

(33) Should any of Sino-Forest, Chan, and Poon pay punitive damages? If so, which Defendant, in what amount and to whom?

Costs of Administration and Distribution

(34) Should the defendants pay the cost of administering and distributing recovery to the Class?

11. Preferable Procedure Criterion

[96] On consent or because the preferable procedure criterion was not opposed, I conclude that the Plaintiffs have satisfied the preferable procedure criterion.

12. Representative Plaintiff Criterion

[97] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[98] On consent or because the representative plaintiff criterion was unopposed, I conclude that the Plaintiffs have satisfied this criterion.

13. Miscellaneous Orders

[99] I order that the form, manner and cost of notice and the time and manner of opting out shall be determined by further order of this Court.

14. The Dispute about the Claims of Current and Former Noteholders

[100] The discussion can now turn to the one disputed issue that affects both the certification motion and also the leave motion. This is the dispute between Sino-Forest and the Plaintiffs about the claims of Former Noteholders. For reasons that will soon become apparent, I shall be circumspect in resolving this dispute, which I shall resolve as a matter of civil procedure rather than as a matter of substantive law.

[101] To be frank, while I disagree with the Plaintiffs' argument that as a matter of jurisdiction the Court cannot resolve this dispute at this juncture, and while I agree with Sino-Forest's argument based on *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 15 that some substantive matters, such as standing and who are the parties to a claim, can be resolved at the certification motion, I think it would be prudent and preferable for the Court to decide the dispute about the Former Noteholders' claims – only after the certification motion.

[102] If Sino-Forest's argument is substantively correct, about which I express no opinion, given that mega-millions approaching billions of dollars of claims might be taken out of the class action, it is preferable that Sino-Forest, which has not yet delivered a statement of defence, first, be put to the pain of pleading a defence to the class action and, second, it should be required to either pose a substantive question for the common issues trial or bring a summary judgment motion for a dismissal of the Former Noteholders' Claims.

[103] In my opinion, in the circumstances of the case at bar, the preferable approach to resolving the situation of the Former Noteholders is to postpone until after the certification motion a question that is, in truth, a determination of a matter of necessary, proper, or improper parties. I have four reasons for postponing a substantive decision.

[104] First, it appears to me that up to and including the oral argument of the certification and leave motions, the Plaintiffs have never understood the substantive law point being advanced by Sino-Forest, and, thus, Sino-Forest's argument and the Plaintiffs' counterargument are like legal battleships unknowingly passing each other on a foggy night. The opposing parties characterize or classify the legal problem differently, and, thus, they never come to terms about each other's arguments.

[105] Second, given that, as will be seen, Sino-Forest's argument is not comprehensive of all of the Former Noteholders' claims, there is little to recommend deciding the substantive legal point now.

[106] Third, were the point to be decided now, there would be the inevitable appeal, which would delay the advancement of the certified Class Action, which has numerous other claims against Sino-Forest. The dispute between the parties can conveniently be decided later.

[107] Fourth, even if Sino-Forest's argument about the Former Noteholders is substantively correct, then, nevertheless, in all the circumstances, Sino-Forest is not prejudiced by having to be patient and waiting its vindication after the certification motion.

[108] A circumspect synthesis of the factual and legal context for the disputed issue about the Former Noteholders' claims is that the Noteholder Class Members advance seven tort or statutory causes of action against Sino-Forest; namely: (1) negligent misrepresentation; (2) negligence; (3) unjust enrichment; (4) negligent misrepresentation under New York State common law; (5) breach of s. 12(a)(2) of the *United States Securities Act of 1933;* (6) breach of s. 130.1 of the Ontario *Securities Act;* and (7) breach of 138.5 of the Ontario *Securities Act*.

[109] The Sino-Forest notes are expressly governed by New York law, and under New York law, with an exception for federal enactments (such as s. 12(a)(2) of the *United States Securities Act of 1933*), unless expressly reserved in writing, a transfer of any bond vests in the transferee (viz., not a Class Member) all claims or demands of the transferor (viz., the Class Member Former Noteholder) for damages against the obligor (viz., Sino-Forest).

[110] From this legal and factual background, Sino-Forest argues that save for their claims under s. 12(a)(2) of the *United States Securities Act of 1933*, the Class Members that are Former Noteholders have assigned their claims, and the transferees (Former Noteholders) should not be included in the class and further, leave should not be granted under the Ontario *Securities Act,* because there is a no possibility, let alone a reasonable possibility, that the action will be resolved at trial in favour of the Former Noteholders who have legally assigned their claims and causes of action.

[111] To be somewhat more precise about the factual and legal background and using the July 2008 Note to illustrate Sino-Forest's argument, pursuant to s. 12.08(a) of the July 2008 Note, the note is governed by New York State law. Section 12.08(a) states:

> Each of the Notes, the Subsidiary Guarantees and the Indentures shall be governed by and construed in accordance with, the laws of the State of New York without giving effect to

> applicable principles of conflicts of law to the extent that the application of the law of another jurisdiction would be required thereby.

Pursuant to sections 2.06, 2.12, 2.13, and the transfer certificate of the July 2008 Note, the transfer and sale of the notes from original holders to subsequent noteholders is also governed by New York law.

[112] The provisions of the June 2009 Note, the December 2009 Note, and the October 2010 Note are similar and state that those notes are also governed by New York State law.

[113] Without having delivered a Statement of Defence, Sino-Forest delivered an affidavit from Gregory P. Joseph, as an expert on New York law.

[114] In his report dated October 7, 2013, Mr. Joseph explained that under New York law, all claims and causes of action, other than the claims under s. 12(a)(2) of the *Federal Securities Act of 1933*, whether asserted under New York State law or Canadian law, by former noteholders who transferred or sold their notes before the end of the class period are automatically assigned by operation of New York General Obligations Law ("GOL") § 13-107 to the subsequent purchaser of the notes. Therefore, Mr. Joseph opined that under New York law, the former noteholders are not entitled to pursue an assigned cause of action against Sino-Forest, other than the claims advanced under s. 12(a)(2) of the *Federal Securities Act of 1933*.

[115] GOL § 13-107, states:

> 1. Unless expressly reserved in writing, a transfer of any bond shall vest in the transferee all claims or demands of the transferrer, whether or not such claims or demands are known to exist, (a) for damages or rescission against the obligor on such bond, (b) for damages against the trustee or depository under any indenture under which such bond was issued or outstanding, and (c) for damages against any guarantor of the obligation of such obligor, trustee or depository.
>
> 2. As used in this section, "bond" shall mean and include any and all shares and interests in an issue of bonds, notes, debentures or other evidences of indebtedness of individuals, partnerships, associations or corporations, whether or not secured.
>
> 3. As used in this section, "indenture" means any mortgage, deed of trust, trust or other indenture, or similar instrument or agreement (including any supplement or amendment to any of the foregoing), under which bonds as herein defined are issued or outstanding whether or not any property, real or personal, is, or is to be, pledged, mortgaged, assigned or conveyed thereunder.

[116] In *Bluebird Partners, L.P. v. First Fid. Bank*, 97 N.Y. 2d 456 at pp. 460-462 (2002), the New York Court stated that the wording of GOL § 13-107 makes it clear that the buyer of a bond receives exactly the same claims or demands as the seller held before the transfer. See also: *Ellington Credit Fund LTD. v. Select Portfolio Servicing Inc.*, 837 F. Supp. 2d 162 at pp. 181-82 (S.D.N.Y. 2011); *LNC Invs. Inc. v. First Fid. Bank, N.A.*, 173 F.3d 454, 462 (2d Cir. 1999).

[117] Sino-Forest thus seeks an Order denying certification of all claims advanced by Former Noteholders against them other than the claim advanced pursuant to the *Federal Securities Act of 1933*, on behalf of the Former Noteholders.

[118] In a counterargument, which in my opinion is not responsive to Sino-Forest's argument, the Plaintiffs submit that there is no standing or proper-parties issue and that Sino-Forest is improperly and prematurely attempting to have the substantive defence of what law governs the tort claims of some of the noteholders determined on a certification motion when that issue must

be determined on a full evidentiary record after pleadings or upon a motion for summary judgment or at the common issues trial.

[119] As noted above, I disagree with the Plaintiffs' argument that the Court cannot decide the merits of Sino-Forest's argument at this juncture, but, in my opinion, while the Court could decide the substantive issue, it is procedurally preferable that the decision come later.

[120] As a matter of substance, the Plaintiffs submit that the tort claims of Former Noteholders are not governed by a choice of law clause because under Canadian law contractual choice of law clauses do not govern the substantive law applicable to claims in tort claims are governed by the *lex loci delicti*, the substantive law of where the tort occurred.

[121] As a matter of substance, although the Plaintiffs' position is that the matters discussed by Mr. Joseph ought not properly to be determined at this juncture of the proceedings, out of an abundance of caution, they retained Adam C. Prichard as their expert in New York State law. Mr. Prichard's opinion was similar to Mr. Joseph's, but Mr. Prichard explained that GOL § 13-107 does not preclude claims against others and was limited in its application to Sino-Forest.

[122] However, more to the substantive point, the Plaintiffs submit that for the present purposes of the certification and leave motions, the opinions of Messrs. Joseph and Prichard beg the critical question of whether or not the Ontario Court should apply New York law to the Former Noteholders' tort claims.

[123] Mr. Joseph, who was cross-examined, conceded that he was not retained as an expert on conflict of laws issues and that he was not opining on conflict of laws issues. Further, he conceded that he is not qualified to opine on conflict of laws issues under the law of Ontario; and that he cannot opine on whether under Canadian law, there has been any assignment of rights under the notes. Mr. Joseph did not provide an opinion as to whether or not this Court would apply New York or Ontario law to the tort claims of Class Members.

[124] Once again, I shall express no opinion about the merits of the Plaintiffs' argument. I simply note again my opinion that the Plaintiffs' argument is not substantively responsive to Sino-Forest's actual argument, which is not about what jurisdiction's law governs tort claims but is about the law about the assignment of causes of action, be those causes of action in contract, in debt, in tort, in restitution, or in statute. Sino-Forest is, in truth, quite content to have the *lex loci delicti* govern the tort claims of the Former Noteholders; Sino-Forest's point is that with an exception for s. 12(a)(2) of the *United States Securities Act of* 1933), the tort claims are vested in persons who are not Class Members.

[125] In any event, for the reasons discussed above, it is prudent and preferable and procedurally fair to decide the substantive merits of the competing arguments about all the Former Noteholders' claims after Sino-Forest has pleaded its defence.

15. Conclusion

[126] Orders accordingly.

[127] I order that that the costs of these motions shall be determined by further Order of this Court.

Perell J.

Perell, J.

Released: January 20, 2015

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2015 ONSC 439
COURT FILE NO.: CV-11-431153CP
DATE: 20150120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

– and –

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 20, 2015