

**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, ROBERT WONG, DAVIS NEW YORK VENTURE FUND, INC. and DAVIS SELECTED ADVISERS, L.P.**

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 MOVING PLAINTIFF – INDEPENDENT DIRECTORS  
SETTLEMENT APPROVAL  
(Returnable March 29, 2016)**

March 21, 2016

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**TO: ATTACHED SERVICE LIST**

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## PART I - OVERVIEW

1. This motion is to approve a settlement between the class action plaintiffs and William Ardell, James Bowland, James Hyde and Garry West (the "**Independent Directors**"), defendants in the Ontario class action against Sino-Forest Corporation ("**Sino-Forest**") and others. It is the product of hard-fought and protracted litigation and negotiation which were conducted by counsel having extensive experience in securities class actions and who had the benefit of extensive investigations.

2. This settlement (the "**Independent Directors Settlement**") only seeks to release the claims of members of the certified class pursuant to the *Class Proceedings Act, 1992*. The Independent Directors Settlement does not require approval under the *Companies' Creditors Arrangement Act*.

3. The Independent Directors Settlement should be approved for the following reasons:

- (a) Sino-Forest's court-approved Plan of Compromise and Arrangement (the "**Plan**") limits recovery from the Independent Directors to the insurance proceeds.
- (b) The funds available under Sino-Forest's insurance policies are almost exhausted as they have been used to fund the defense of several defendants in this litigation and proceedings by the Ontario Securities Commission (the "**OSC**").
- (c) The class action litigation will soon enter the discovery stage, a time- and resource-intensive process which will likely completely exhaust all insurance proceeds.
- (d) The Independent Directors were "outside directors" at Sino-Forest, meaning that, unlike other director defendants in this action, they were also not part of Sino-Forest's management.

- (e) Although losses to class members caused by all of the defendants could run into the billions of dollars, there are numerous legal and practical impediments to recovery from the Independent Directors which weigh strongly in favour of the Independent Directors Settlement.
  - (f) There were no claims made by the OSC against the Independent Directors and there is no evidence of intentional wrongdoing, unlike other individual defendants named in this proceeding.
  - (g) The settlement assists in moving towards the final resolution of all claims related to Sino-Forest. Obtaining a contribution from and eliminating four defendants and one set of defence counsel makes the resolution of other claims incrementally easier.
4. In the circumstances, the Independent Directors Settlement ought to be approved.

## **PART II - THE FACTS**

### **A. Background of the Action**

5. Sino-Forest was a forestry company with shares that were traded publicly on secondary markets, alternative trading venues, and on the over-the-counter market in the United States. Sino-Forest also had various notes outstanding which were also traded on the secondary market.<sup>1</sup>

6. On June 2, 2011, Muddy Waters Research released a report alleging misconduct against Sino-Forest and alleging that it “massively exaggerates its assets”. The release of this report was immediately followed by a dramatic decline in Sino-Forest’s share and note prices.<sup>2</sup>

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1 Affidavit of Jonathan Ptak sworn March 18, 2016 (“Ptak Affidavit”), para. 6, Plaintiff’s Motion Record (Settlement Approval), Tab 2, p. 9.

2 Ptak Affidavit, para. 6, Plaintiff’s Motion Record (Settlement Approval), Tab 2, p. 9.

7. In June 2011, the Plaintiffs in this action commenced the above-captioned class proceeding against Sino-Forest and various other defendants, including the Independent Directors.<sup>3</sup>

8. William Ardell ("**Ardell**"), James Hyde ("**Hyde**"), James Bowland ("**Bowland**") and Garry West ("**West**") were Sino-Forest's independent directors:

- (a) Mr. Ardell was an independent director from January 2010.
- (b) Mr. West was an independent director from February 2011.
- (c) Mr. Bowland was an independent director from February 2011 until November 2011.
- (d) Mr. Hyde was an independent director from 2004.

9. Each of the Independent Directors resides in Ontario. While they sat on Sino-Forest's Board of Directors, unlike Allen T.Y. Chan and Kai Kit Poon, Messrs. Ardell, Hyde, Bowland and West were not also officers of Sino-Forest. This explains their status as "independent" directors.<sup>4</sup>

#### **B. Class Action Against Sino, the Independent Directors and Others**

10. On July 20, 2011, an action was commenced in Ontario under the *Class Proceedings Act, 1992* (the "**CPA**") against Sino-Forest, the Independent Directors, and other defendants on behalf of persons that had purchased Sino-Forest securities in the period from March 19, 2007 to June 2, 2011 (the "**Class**").<sup>5</sup>

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<sup>3</sup> Ptak Affidavit, para. 10, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 10.

<sup>4</sup> Ptak Affidavit, para. 5, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 8-9.

<sup>5</sup> Ptak Affidavit, para. 10, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 10.

11. The class action plaintiffs allege that Sino-Forest misstated its financial statements, overstated the value of its assets, and failed to provide material information about its business and operations from investors in its public filings. As a result, Sino-Forest's securities allegedly traded at artificially inflated prices for many years.<sup>6</sup>

12. Before commencing the class 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 ("**Dacheng**"). Class Counsel's investigation has also been aided by: (a) Hong-Kong based investigators specializing in financial fraud; (b) two separate Toronto-based firms that specialize in forensic accounting, generally accepted accounting principles and generally accepted auditing standards; (c) a lawyer qualified to practice in the Republic of Suriname where Sino-Forest purported to own timber; and (d) a financial economist who specializes in the treatment of damages in securities class actions.<sup>7</sup>

### **C. Steps Taken in the Actions**

#### **i. Motions for Certification and Leave in the Ontario Action**

13. In March and April 2012, the Plaintiffs brought: (a) a motion for certification of the Ontario Action as a class action under the CPA; and (b) a motion for leave to proceed with statutory claims under Part XXIII.1 of the OSA.<sup>8</sup>

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6 Ptak Affidavit, para. 6, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 9.

7 Ptak Affidavit, para. 14, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 11-12.

8 Ptak Affidavit, para. 14, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 11-12.

14. The Plaintiffs filed voluminous motion records in support of their motions, comprising evidence from their investigations and expert reports. The Plaintiffs also filed extensive facts on the motions for leave and certification.<sup>9</sup>

15. While the Independent Directors initially opposed certain aspects of the motion for certification, including the certification of certain common issues, and advanced a limitation period argument, the representative plaintiffs and the Independent Directors arrived at a negotiated resolution of the motion. The certification and leave motions were heard on January 15, 2015 and proceeded largely on an unopposed basis.<sup>10</sup> Justice Perell certified the action and granted leave pursuant to Part XXIII.1 of the *Securities Act* by Order dated January 15, 2015.

**ii. Sino-Forest's Plan of Compromise and Arrangement Limited Recovery From Independent Directors**

16. On March 30, 2012, Sino-Forest filed an application for protection from its creditors under the CCAA (the "**CCAA Proceedings**") and secured an interim stay of proceedings. Pursuant to an order dated May 8, 2012, the stay of proceedings was extended to all other defendants in the action, including the Independent Directors.<sup>11</sup>

17. The CCAA Proceedings presented a material risk to investors on whose behalf the class actions were being prosecuted. In particular, the CCAA Proceedings could have

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9 Ptak Affidavit, paras. 14-15, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 11-12.

10 Ptak Affidavit, para. 17, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 12.

11 Ptak Affidavit, para. 18, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 12.



resulted in an order approving a plan of arrangement that had the effect of imposing an unfavourable settlement on the Ontario Plaintiffs and the other securities claimants.<sup>12</sup>

18. In the course of the CCAA Proceedings, counsel to the Plaintiffs appeared numerous times to protect the interests of purchasers of Sino-Forest's securities. These attendances included motions, among other things: (a) to lift the CCAA stay partially or fully; (b) regarding the claims procedure and obtaining the right to file a representative claim; (c) to permit a motion to approve a litigation funding arrangement for the Ontario Action; (d) for a representation order; (e) to effect a settlement with one of the defendants to the Ontario Action, Pöyry (Beijing) Consulting Company Ltd. ("**Pöyry (Beijing)**"); (f) to secure access to non-public documents that were relevant to the claims advanced in the Ontario Action; and (g) to schedule a mediation in the CCAA Proceedings.<sup>13</sup>

19. On December 12, 2012, Sino-Forest's Plan of Compromise and Arrangement (the "**Plan**") was sanctioned by Order of this Court. The Plan limited recovery on any claims against the Independent Directors to the available insurance proceeds:

#### **2.4 Insurance**

(c) Notwithstanding anything herein [...] all Insured Claims shall be deemed to remain outstanding and are not released following the Plan Implementation Date, but recovery as against SFC and the Named Directors and Officers [Ardell, Bowland, Hyde and West] is limited only to proceeds of Insurance Policies that are available to pay such Insured Claims, either by way of judgment or settlement.<sup>14</sup>

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12 Ptak Affidavit, para. 19, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 13.

13 Exhibit "D" to the Ptak Affidavit, Plaintiff's Motion Record (Settlement Approval), Tab 2(D), pp. 199-202.

14 Ptak Affidavit, para. 26, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 14.

20. The Plan was supported by: (a) the Monitor; (b) SFC's largest creditors, the Ad Hoc Committee of Noteholders; (c) Ernst & Young LLP; (d) BDO Limited; and (e) the Underwriters.<sup>15</sup>

21. The Plan was approved by an overwhelming majority of Affected Creditors voting on the Plan in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.<sup>16</sup>

22. The Plan was implemented on January 21, 2013 pursuant to Court Order.<sup>17</sup>

### **iii. Settlement with Pöyry (Beijing) Crystallizes the Class**

23. The class action plaintiffs entered into a settlement with Pöyry (Beijing) in March 2012. On September 25, 2012, the Ontario Action was certified as a class proceeding as against Pöyry (Beijing) for settlement purposes and the settlement was approved between the class and Pöyry (Beijing).<sup>18</sup> The opt-out period ran in respect of all claims against all defendants. The opt-out deadline was January 15, 2013.<sup>19</sup> The class has now crystallized.

### **iv. Court-Ordered Mediation**

24. On July 25, 2012, this Court ordered the various constituencies in the CCAA proceedings to attend a mediation. On September 4 and 5, 2012, the class action plaintiffs attended an all-parties mediation, which included the Independent Directors. The mediation was conducted with the assistance of the Honourable Justice Newbould,

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<sup>15</sup> Ptak Affidavit, para. 23, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 14.

<sup>16</sup> Ptak Affidavit, para. 24, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 14.

<sup>17</sup> Ptak Affidavit, para. 25, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 14.

<sup>18</sup> Ptak Affidavit, para. 28, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 15.

<sup>19</sup> Ptak Affidavit, para. 28, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 15.

acting as mediator. Extensive mediation briefs were filed by all parties. The position of each of the parties was set out in the briefs and at the mediation, including the Independent Directors' positions. The mediation did not result in a settlement with any of the parties, including the Independent Directors.<sup>20</sup>

25. Following the mediation, settlement discussions continued with the defendants. However, those settlement discussions did not come close to bridging the significant difference between the positions of the parties.<sup>21</sup>

**v. Settlements with Ernst & Young, Horsley and the Dealers**

26. In November 2012, the Ontario Plaintiffs engaged in a further mediation with Ernst & Young, which resulted in a settlement with Ernst & Young.<sup>22</sup> Pursuant to a motion brought by the class action plaintiffs, the Ernst & Young Settlement was approved by this Court on March 20, 2013. The class action plaintiffs then brought a motion for approval of the method of distribution of the Ernst & Young Settlement funds to securities claimants and claims filing procedure. The motion was granted on December 27, 2013.<sup>23</sup> Similar orders were granted in respect of the settlements between the class action plaintiffs and David Horsley and the underwriters.<sup>24</sup>

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20 Ptak Affidavit, para. 29, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 15.

21 Ptak Affidavit, para. 34, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 17.

22 Ptak Affidavit, paras. 30-32, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 16.

23 Ptak Affidavit, para. 31, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 16.

24 Ptak Affidavit, paras. 32, 33, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 16-17.

**D. The OSC Proceedings**

27. On May 22, 2012, the OSC issued a Statement of Allegations against Sino-Forest and certain of its senior executives (the “**OSC Proceeding**”). While Sino-Forest's senior management were named as respondents in the OSC Proceeding, the Independent Directors were not named as respondents.<sup>25</sup>

**E. The Exhaustion of the Insurance Policies**

28. Class Counsel has been tracking the rate of consumption of Sino-Forest's insurance policies in the course of this litigation. By April 2015, approximately \$46 million had been paid out under the insurance policies.<sup>26</sup>

29. On October 2, 2015, Gary Luftspring, counsel to Travelers Guarantee Insurance Company (“**Travelers**”), Sino-Forest's third and final excess insurer and the last of four layers of insurance available to the insureds, advised the parties and the Court that the limits of liability under the Travelers policy would be exhausted no later than the end of October 2015. Mr. Luftspring advised in January 2016 that the policies have now been exhausted.<sup>27</sup>

30. Although an additional \$2 million “top-hat” policy responsive to claims made against the Independent Directors remained available, the next stage of the class action is the discovery stage which will increase the rate of insurance depletion. As a result, given the expected rate of depletion, there would shortly be no responsive insurance money

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25 Ptak Affidavit, para. 8, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 9.

26 Ptak Affidavit, para. 40(f), Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 19.

27 Ptak Affidavit, para. 40(h), Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 19.

remaining and any recovery as against the Independent Directors would no longer be possible.<sup>28</sup>

**F. The Independent Directors Settlement**

**i. Background and Terms of Settlement**

31. The negotiations leading to the Independent Directors Settlement were conducted on an adversarial, arm's-length basis.<sup>29</sup> Following Mr. Luftspring's letter advising that Travelers' insurance coverage would run out by the end of October 2015, Class Counsel re-engaged in settlement discussions and reached a settlement.<sup>30</sup> As set out in the agreement, the Minutes of Settlement represent the agreement amongst the parties reached on October 23, 2015. The key terms of the Independent Directors Settlement are as follows:

- (a) Travelers will pay the amount of \$250,000 on behalf of the Independent Directors for the benefit of the class;
- (b) the Independent Directors will be released from any actions, causes of action, claims and/or demands, known or unknown which have been made or which could have been made, based upon, arising out of, in relation to, in connection with or in any way related to Sino-Forest and its affiliates and subsidiaries;
- (c) the Independent Directors will provide any non-privileged documents or information relevant to the common issues certified against BDO Limited if they have any; and
- (d) the settlement shall become effective when the settlement order has been obtained and all rights of appeal have expired or the applicable court of final jurisdiction upholds the settlement order.<sup>31</sup>

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28 Ptak Affidavit, paras. 35-36, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 17.

29 Ptak Affidavit, para. 34, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 17.

30 Ptak Affidavit, para. 36, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 17.

31 Ptak Affidavit, para. 39, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 18.

**ii. Factors Supporting the Settlement**

32. Class Counsel have substantial experience in class actions, particularly securities class actions. In the view of Class Counsel, the Independent Directors Settlement is fair, reasonable and in the best interests of the Class.<sup>32</sup>

33. Class Counsel's view is informed by its extensive investigations, document review, and the input and opinions of experts, including:

- (a) the amounts remaining under responsive insurance policies and the rate at which the insurance policies have been consumed;
- (b) all of Sino-Forest's public disclosure documents and other publicly available information, and over one million documents obtained from Sino-Forest;
- (c) the available trading data for Sino-Forest's securities;
- (d) extensive non-public documentation uploaded by Sino-Forest into the data-room established in the CCAA Proceedings for purposes of the global mediation;
- (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 by the OSC against non-Director defendants and others;
- (h) the mediation briefs provided by the parties, including the Independent Directors, at the global mediation in September 2012; and
- (i) input from experienced US securities counsel, Kessler Topaz Meltzer & Check, LLP.<sup>33</sup>

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<sup>32</sup> Ptak Affidavit, para. 50, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 22.

<sup>33</sup> Ptak Affidavit, para. 51, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 22-23.

34. Class Counsel had at its disposal an abundance of information available from which to make an appropriate recommendation concerning the resolution of the claims against the Independent Directors.

**iii. Actual Damages Far Exceed Recoverable Damages**

35. The class action asserts against the Independent Directors are: (i) statutory liability in respect of primary market purchaser claims; (ii) statutory liability in respect of secondary market share and note purchaser claims pursuant to Part XXIII.1 of the OSA; and (iii) common law and equitable claims for negligent misrepresentation and negligence.

36. If successful, these claims could result in an award for significant damages against all defendants. However, the extent of damages which were caused, and which could be proven and collectible against any one defendant would be far lower. In particular, recovery as against the Independent Directors was limited by Sino-Forest's Plan to the insurance policies.<sup>34</sup>

37. Furthermore the action against the Independent Directors raises complex legal issues that are largely untested in Canadian courts. There has never been a trial of claims under Part XXIII.1 of the *Securities Act*. Its detailed provisions that create defences and place limits on damages are uncertain and will be contentious. There have also been few securities trials of negligent misrepresentation claims.

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<sup>34</sup> Ptak Affidavit, para. 55, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 24.

38. Finally, the Independent Directors had a more limited role in the oversight of Sino-Forest. Unlike other individual defendants named in this proceeding, they were not inside directors who also held management roles.<sup>35</sup>

#### **G. Objections to the Settlement**

39. To date, Class Counsel has received ten objections from individuals regarding the Independent Directors Settlement:

- (a) Six objectors did not provide any reason for their objection. These objectors did not write anything on their objector forms, calling into question whether those persons actually intended to object.
- (b) Three objectors objected to the quantum of the settlement. These individuals did not have access to the extensive investigations, document review, and the input and opinions of experts that led Class Counsel to reach this settlement. They also do not appear to be aware of or have not considered that recovery from the Independent Directors was limited to rapidly dwindling insurance proceeds. This fact is an absolutely essential factor under the circumstances.
- (c) One objector argues that Sino-Forest is innocent of any wrongdoing.<sup>36</sup>

40. As discussed above, Class Counsel considered these types of concerns in reaching the settlement with the Independent Directors.

### **PART III - ISSUES AND THE LAW**

41. For the reasons set out below, the Independent Directors Settlement is fair, reasonable, and in the best interests of the class, and ought to be approved.

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<sup>35</sup> Ptak Affidavit, para. 59, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 25.

<sup>36</sup> Exhibit "C" to the affidavit of Jonathan Ptak sworn March 18, 2016, Plaintiff's Motion Record (Settlement Approval), Tan 3(C), pp. 380-423.



**A. The Test for Settlement Approval**

42. The test for whether a class action settlement ought to be approved is whether "in all 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 arms-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; and
- (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 actions or simply rubber-stamp a proposed settlement.<sup>37</sup>

43. 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

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<sup>37</sup> *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (S.C.J.) at para. 7, Plaintiff's Book of Authorities, Tab 1.

interests of those affected [...] when compared to the alternative of the risks and costs of litigation."<sup>38</sup>

44. 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 recommendation 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.<sup>39</sup>

45. 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."<sup>40</sup>

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38 *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Civ.), Plaintiff's Book of Authorities, Tab 2.

39 *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 at para. 12, Plaintiff's Book of Authorities, Tab 3. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at paras. 71 and 73, Plaintiff's Book of Authorities, Tab 4.

40 *Metzler Investment GmbH v. Gildan Activewear Inc.*, 2011 ONSC 1146 (S.C.J.) at para. 31, Plaintiff's Book of Authorities, Tab 5.

46. Class Counsel recommends that the proposed settlement be approved as being fair, reasonable and in the best interests of the class.<sup>41</sup>

47. As set out below, the test under the CPA to approve a settlement and release is met.

**B. The Settlement is Fair and Reasonable and Should be Approved**

48. As outlined above, the Independent Directors Settlement provides for payment of \$250,000 in total in settlement of all claims against the Independent Directors in relation to Sino-Forest.

49. In all of the circumstances, the Independent Directors Settlement is a good settlement. The Independent Directors Settlement is fair and reasonable. It provides a benefit to the class and is consistent with both the purpose and spirit of the CPA, which encourage settlement after a reasonable investigation and hard look at the merits, costs and risks of continuing litigation.

50. In reaching the settlement, Class Counsel considered, among other things:

- (a) the Plan limits recovery from the Independent Directors to insurance proceeds;
- (b) the insurance proceeds are rapidly being depleted and only the "top-hat" policy remains;
- (c) the litigation is on the brink of entering the discovery phase which will be time and resource heavy and will likely exhaust the insurance proceeds shortly;
- (d) the extensive investigations done by class counsel and the OSC did not claim against the Independent Directors;

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<sup>41</sup> Ptak Affidavit, para. 50, Plaintiff's Motion Record (Settlement Approval), Tab 2, p. 22.

- (e) two of the Independent Directors, Messrs. Bowland and West, were only directors for four months; and
- (f) the common law claims for negligence and negligent misrepresentation presents procedural and substantive challenges, including, among others: (a) the potential for the claim not to be successful at trial; (b) the potential for significant individual issues following the common issues trial; and (c) proving individual reliance.<sup>42</sup>

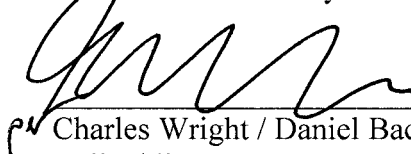
51. Finally, the settlement assists in moving towards the final resolution of all claims related to Sino-Forest. The class actions include multiple intertwined claims, and multiple potential draws on the relevant insurance policies. Obtaining a contribution from, and eliminating one defendant and one set of defence counsel makes the resolution of other claims incrementally easier.

#### **PART IV - ORDER REQUESTED**

52. The class action Plaintiffs request an order approving the Independent Directors Settlement.



Kirk Baert / Garth Myers



Charles Wright / Daniel Bach / Serge Kalloghlian

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<sup>42</sup> Ptak Affidavit, paras. 51-60, Plaintiff's Motion Record (Settlement Approval), Tab 2, pp. 22-26.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. no. 2527 (S.C.J.)
2. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Civ.)
3. *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (S.C.J.)
4. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
5. *Metzler Investment GmbH v. Gildan Activewear Inc.*, 2011 ONSC 1146 (S.C.J.)

**SCHEDULE “B”  
RELEVANT STATUTES**

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

**Discontinuance, abandonment and settlement**

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

**Settlement without court approval not binding**

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

**Effect of settlement**

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

**Notice: dismissal, discontinuance, abandonment or settlement**

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

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

Plaintiffs

Defendants

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto  
Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE MOVING PLAINTIFF**  
**- INDEPENDENT DIRECTORS**  
**SETTLEMENT APPROVAL**  
**(returnable March 29, 2016)**

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