Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC., and ELMCLIFFE INVESTMENTS INC.

Applicants

BOOK OF AUTHORITIES OF ZOLA FINANCE HOLDINGS LTD. AND IGOR GIMELSHTEIN (VARYING ALLOCATION AND DISTRIBUTION SCHEME)

Motion Returnable June 11, 2021

June 9, 2021

Siskinds LLP
680 Waterloo Street
P.O. Box 2520
London, ON N6A 3V8

Michael G. Robb (LSO#: 45787G)
Tel: 519-660-2121
Fax: 519-672-6065

Barristers & Solicitors
100 Lombard Street
Suite 302
Toronto, ON M5C 1M3

Alex Dimson (LSO#: 56129U)
Tel: 416-594-4394
Fax: 416-362-2610

Wright Henry LLP
200 Wellington St. West
Suite 602
Toronto, ON M5V 3C7

Michael Wright
Danielle Stampley
Tel: 416-306-8280
Fax: 416-306-8281

Lawyers for Zola Finance Holdings Ltd. and Igor Gimelshtein

TO: **ERNST & YOUNG INC.**
Ernst & Young Tower
100 Adelaide Street West
P.O. Box. 1
Toronto, ON M5H 0B3
Tel: 416-864-1234

Alex Morrison
alex.f.morrison@ca.ey.com

David Saldanha
david.saldanha@ca.ey.com

Karen Fung
karen.l.fung@ca.ey.com

Monitor

AND TO: **MCCARTHY, TÉTRAULT LLP**
Barristers and Solicitors
TD Bank Tower
66 Wellington Street West
Suite 5300
Toronto, ON M5K 1E6
Fax: 416-868-0673

James D. Gage, LSO# 34676I
Tel: 416-601-7539
jgage@mccarthy.ca

Paul R. Steep, LSO# 21869L
Tel: 416-601-7998
psteep@mccarthy.ca

Shane D'Souza, LSO# 58241G
Tel: 416-601-8196
sdsouza@mccarthy.ca

Trevor Courtis, LSO# 67715A
Tel: 416-601-7643
tcourtis@mccarthy.ca

Alexander Steele, LSO# 75719P
Tel: 416-601-8370
asteele@mccarthy.ca

Lawyers for the Applicants, CannTrust Inc., CTI Holdings (Osoyoos) Inc. and Elmcliffe Investments Inc. and the Applicant and Debtor, CannTrust Holdings Inc.

AND TO: **FTI CONSULTING CANADA INC.**
TD Waterhouse Tower
79 Wellington Street W
Toronto Dominion Centre
Suite 2010, PO Box 104
Toronto, ON M5K 1G8

Paul Bishop
Tel: 416-649-8100
paul.bishop@fticonsulting.com

Steven W. Bissell
Tel: 416-649-8054
steven.bissell@fticonsulting.com

Ellen Dong
Tel: 416-649-8091
ellen.dong@fticonsulting.com

Chief Restructuring Officer of the Applicants

AND TO: **AIRD & BERLIS LLP**
181 Bay Street, Suite 1800
P.O. Box 754
Toronto, ON M5J 2T9

Steven Graff, LSO# 31871V
Tel: 416-865-7726
sgraff@airdberlis.com

Jonathan Yantzi
Tel: 416-865-4733
jyantzi@airdberlis.com

Lawyers for the Monitor

AND TO: **THORNTON GROUT FINNIGAN LLP**
100 Wellington Street West, Suite 3200
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Robert I. Thornton
Tel: 416-304-0560
rthornton@tgf.ca

Leanne M. Williams
Tel: 416-304-0060
lwilliams@tgf.ca

Lawyers for Greenhill & Co. Canada Ltd.

AND TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Ontario Regional Office, Tax Law Section
120 Adelaide Street West, Suite 400
Toronto, ON MGH 1T1
Fax: 416-973-0810

Diane Winters, General Counsel
Tel: 647-256-7459
diane.winters@justice.gc.ca

Maria Vujnovic
Tel: 647-256-7455
Maria.Vujnovic@justice.gc.ca

Lawyers for the Minister of National Revenue

AND TO: **MINISTRY OF FINANCE (ONTARIO)**
Legal Services Branch
777 Bay Street, 11th Floor
Toronto, ON M5G 2C8
Tel: 416-327-8463

Kevin O'Hara
kevin.ohara@ontario.ca

AND TO: **ATTORNEY OF BRITISH COLUMBIA**
Legal Services Branch, Revenue & Taxation
400-1675 Douglas Street
Victoria, BC V8W 9J7
Tel: 250-356-8589

Aaron Welch
aaron.welch@gov.bc.ca

AND TO: **GOLDMAN, SPRING, KICHLER & SANDERS LLP**
40 Sheppard Avenue West
Toronto, ON M2N 6K9
Tel: 416-225-9400

Mitchell J. Sanders
msanders@goldmanspring.com

Lawyers for CannTrust Holdings Inc.

AND TO: **TORYS LLP**
79 Wellington Street West, Suite 3000
Toronto, ON M5K 1N2

David Bish
Tel: 416-865-7380
dbish@torys.com

John Fabello
Tel: 416-865-8228
jfabello@torys.com

Gillian Dingle
Tel: 416-865-8229
gdingle@torys.com

Craig Gilchrist
Tel: 416-865-7629
cgilchrist@torys.com

Lawyers for Merrill Lynch Canada Inc., Jefferies Securities Inc., Credit Suisse Securities (Canada) Inc., Canaccord Genuity Corp., Citigroup Global Markets Canada Inc., and RBC Dominion Securities Inc.

AND TO: **MILLER THOMSON LLP**
255 Queens Avenue, Suite 2010
Toronto, ON N6A 5R8

Tony Van Klink
Tel: 519-931-3509
tvanklink@millerthomson.com

Lawyers for Bank of Montreal

AND TO: **FOGLER RUBINOFF LLP**
77 King Street West, Suite 3000
Toronto, ON M5K 1G8

Vern W. DaRe
Tel: 416-941-8842
vdare@foglers.com

Lawyers for Balfour Energy Corp.

AND TO: **HENEIN HUTCHISON LLP**
235 King Street East, First Floor
Toronto, ON, M5A 1J9

Marie Henein
Tel: 416-368-5000
mhenein@hhllp.ca

Scott Hutchison
Tel: 416-368-5000
shutchison@hhllp.ca

Mark Strychar-Bodnar
Tel: 416-368-5000
mstrychar.bodnar@hhllp.ca

Lauren Mills Taylor
Tel: 416-368-5000
lmillstaylor@hhllp.ca

Lawyers for the Ad Hoc Committee of Shareholders

AND TO: **KALLOGHLIAN MYERS LLP**
250 University Avenue, Suite 200
Toronto, ON M5H 3E5

Serge Kalloghilian
Tel: 647-812-5615
serge@kalloghlianmyers.com

Alexander Freedman
Tel: 647-812-5615
aj@kalloghlianmyers.com

Lawyers for the Ad Hoc Committee of Shareholders

AND TO: **A DIMITRI LASCARIS LAW PROFESSIONAL CORPORATION**
G101-360 Rue Saint-Jacques
Montreal, QC H2Y 1P5

A Dimitri Lascaris
Tel: 514-941-5991
alexander.lascaris@gmail.com

Lawyers for the Ad Hoc Committee of Shareholders

AND TO: **STROSBERG SASSO SUTTS LLP**
1561 Ouellette Avenue
Windsor, ON N8X 1K5

Jay Strosberg
Tel: 519-561-6285
jay@strosbergco.com

David R. Wingfield
Tel: 519-561-6285
dwingfield@strosbergco.com

Justin Smith
Tel: 519-561-6285
jsmith@strosbergco.com

Lawyers for the Ad Hoc Committee of Shareholders

AND TO: **MORGANTI & CO., P.C.**
21 St Clair Avenue East
Toronto, ON M4T 1L9

Eli Karp
Tel: 647-344-1900
ekarp@morgantico.com

Sajjad Nematollahi
Tel: 647-344-1900
Email: snematollahi@morgantico.com

Hadi Davarinia
Tel: 647-344-1900
hdavarinia@morgantico.com

Lawyers for Renato A. Piscioneri

AND TO: **CRAWLEY MACKEWN BRUSH LLP**
179 John Street, Suite 800
Toronto, ON M5T 1X4

Alistair Crawley
Tel: 416-217-0806
acrawley@cmblaw.ca

Jonathan Preece
Tel: 416-217-0897
jpreece@cmblaw.ca

Lawyers for Peter Aceto

AND TO: **STOCKWOODS LLP**
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Paul Le Vay
Tel: 416-593-2493
paullv@stockwoods.ca

Gerald Chan
Tel: 416-593-1617
geraldc@stockwoods.ca

Carlo DiCarlo
Tel: 416-593-2485
carlodc@stockwoods.ca

Lawyers for Eric Paul

AND TO: **GOWLING WLG (CANADA) LLP**
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

Thomas Gertner
Tel: 416-369-4618
thomas.gertner@gowlingwlg.com

Lawyers for KIK Holdco Company Inc.

AND TO: **SULLIVAN MAHONEY LLP**
40 Queen Street, P.O. Box 1360
St. Catharines, ON L2R 5K8

Peter Mahoney
Tel: 905-688-8490
pmahoney@sullivanmahoney.com

Lawyers for Verhoef Electric Inc.

AND TO: **MERCHANT LAW GROUP LLP**
400-2710 17th Avenue S.E.
Calgary, AB T2A 0P6

Evatt Merchant
Tel: 403-225-7777
emerchant@merchantlaw.com

Chris Simoes
Tel: 403-225-7777
csimoes@merchantlaw.com

Lawyers for 1604070 Alberta Ltd. representative plaintiff in respect of 1604070 Albert Ltd. v. CannTrust Holdings Inc., et al.

AND TO: **MERCHANT LAW GROUP LLP**
200-10 Notre-Dame Street East
Montreal, QC H2Y 1B7

Erik Lowe
Tel: 514-248-7777
elowe@merchantlaw.com

Lawyers for Diran Avedian, representative plaintiff in respect of Diran Avedian v. CannTrust Holdings Inc., et al.

AND TO: **MERCHANT LAW GROUP LLP**
304-15127 100th Avenue
Surrey, BC V3R 0N9

Evatt Merchant
Tel: 604-951-0777
emerchant@merchantlaw.com

Steven Roxborough
Tel: 604-951-0777
sroxborough@merchantlaw.com

Lawyers for Jeff Dyck, representative plaintiff in respect of Jeff Dyck v. CannTrust Holdings Inc., et al.

AND TO: **BLAKES, CASSELS & GRAYDON LLP**
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Linc Rogers
Tel: 416-863-4168
linc.rogers@blakes.com

Caitlin McIntyre
Tel: 416-863-4174
caitlin.mcintyre@blakes.com

Lawyers for KPMG LLP

AND TO: **STIKEMAN ELLIOT LLP**
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Peter Howard
Tel: 416-869-5613
phoward@stikeman.com

Ashley Taylor
Tel: 416-869-5623
ataylor@stikeman.com

Brian Pukier
Tel: 416-869-5567
bpukier@stikeman.com

Lawyers for Forum Financial Corp

AND TO: **ROCHON GENOVA**
121 Richmond Street West, Suite 900
Toronto, ON M5H 2K1

Joel P. Rochon
Tel: 416-363-1867
jrochon@rochongenova.com

Peter R. Jervis
Tel: 416-363-1867
pjervis@rochongenova.com

Douglas Worndl
Tel: 416-363-1867
dworndl@rochongenova.com

Ronald Podolny
Tel: 416-363-1867
rpodolny@rochongenova.com

Lawyers for Stephen Rosen

AND TO: **WEISZ FELL KOUR LLP**
100 King Street West
Suite 5600
Toronto, ON M5X 1C9

Steven Weisz
Tel: 416-613-8281
sweisz@wfklaw.ca

Canadian Lawyers for US Securities Class Action Claimants

AND TO: **LABATON SUCHAROW LLP**
140 Broadway
New York, New York 10015

James Johnson
Tel: 202-907-0859
jjohnson@labaton.com

Michael H. Rogers
Tel: 212-907-0814
mrogers@labaton.com

American Lawyers for US Securities Class Action Claimants

AND TO: **CHAITONS LLP**
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
harvey@chaitons.com

Lawyers for Single Dose Solutions Inc

AND TO: **THORNTON, GROUT & FINNIGAN LLP**
100 Wellington Street West, Suite 3200
Toronto, ON M5K 1K7

Mitch Grossell
Tel: 416-315-2864
mgrossell@tgf.ca

Lawyers for Andrew Peppin

AND TO: **KIRKLAND ELLIS LLP**
300 North LaSalle
Chicago, IL 60654

John Hartmann
Tel: 312-862-2215
jhartmann@kirkland.com

Jonathan Lahn
Tel: 312-862-2151
jlahn@kirkland.com

American Lawyers for KPMG

AND TO: **TRISURA GUARANTEE INSURANCE COMPANY**
333 Bay Street, Suite 1610, Box 22
Toronto, ON M5H 2R2

AND TO: **ENTERPRISE FLEET MANAGEMENT CANADA, INC.**
77 Belfield Road, Suite 100
Toronto, ON M9W 1G6

AND TO: **ENTERPRISE FLEET MANAGEMENT CANADA, INC.**
5821 6 Street SE
Calgary, AB T2H 1M4

AND TO: **RIGO LIFT TRUCK LIMITED**
175 Courtland Avenue
Concord, ON L4K 4T2

AND TO: **IMPACK PACKAGING SYSTEMS INC.**
445 Milner Avenue, Unit 4
Scarborough, ON M1B 2K4

AND TO: **BRITCO BOXX LIMITED PARTNERSHIP**
21690 Smith Crescent
Langley, BC V2Y 0W6

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TAB 1

2013 ONSC 1078
Ontario Superior Court of Justice [Commercial List]

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.

2013 CarswellOnt 3361, 2013 ONSC 1078, 100 C.B.R. (5th) 30, 227 A.C.W.S. (3d) 930, 37 C.P.C. (7th) 135

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

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) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lunch 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

Morawetz J.

Heard: February 4, 2013
Judgment: March 20, 2013
Docket: CV-12-9667-00CL, CV-11-431153-00CP

Counsel: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, Jonathan Ptak, for Ad Hoc Committee of Purchasers including the Class Action Plaintiffs
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young LLP, John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.
Robert W. Staley for Sino-Forest Corporation
Won J. Kim, Michael C. Spencer, Megan B. McPhee for Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.
John Fabello Rebecca Wise, for Underwriters
Ken Dekker, Peter Greene for BDO Limited
Emily Cole, Joseph Marin for Allen Chan
James Doris for U.S. Class Action
Brandon Barnes for Kai Kit Poon
Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
Derrick Tay, Cliff Prophet for Monitor, FTI Consulting Canada Inc.
Simon Bieber for David Horsley
James Grout for Ontario Securities Commission
Miles D. O'Reilly, Q.C. for Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Securities

MOTION by representative plaintiffs for approval of settlement in class proceeding.

***Morawetz J.*:**

Introduction

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

Facts

Class Action Proceedings

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former

holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to optout was required to be exercised.

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

IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Sino-Forest Corp., Re*, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.)].

Ernst & Young Settlement

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);

(b) the issuance of the Settlement Trust Order;

(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;

(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and

(e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

Law and Analysis

Court's Jurisdiction to Grant Requested Approval

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]) [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), paras. 66-70 ("*Re Nortel*"); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), para. 43]

45 Further, as the Supreme Court of Canada explained in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *Nortel Networks Corp., Re*, *supra*; *Robertson*, *supra*; *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ont. S.C.J. [Commercial List]) ("*Muscle Tech*"); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]); *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List])].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or

the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...

71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then — as was the case in T&N — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

. . .

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

. . .

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;

(b) whether it provides substantial benefits to other stakeholders; and

(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting thirdparty releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.), para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.)]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. Gen. Div.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

> (a) class members are not releasing their claims to a greater extent than necessary;
>
> (b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
>
> (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
>
> (d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial*, *supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young

as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Nortel Networks Corp., Re*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp., Re*, *supra*, paras. 73 and 81; and *Muscletech*, *supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders.

The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and optout rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148 (Ont. S.C.J.), paras. 43-46; and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.).]

Miscellaneous

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

Disposition

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

Motion granted.

TAB 2

2013 ONSC 5490
Ontario Superior Court of Justice

Zaniewicz v. Zungui Haixi Corp.

2013 CarswellOnt 11949, 2013 ONSC 5490, 232 A.C.W.S. (3d) 319, 44 C.P.C. (7th) 178

Jerzy Robert Zaniewicz and Edward C. Clarke, Plaintiffs and Zungui Haixi Corporation, E &Y, Fengyi Cai, Jixu Cai, Yanda Cai, Michelle Gobin, Michael W. Manley, Patrick A. Ryan, Elliott Wahle, Margaret Cornish, CIBC World Markets Inc., Canaccord Genuity Corp. (f.k.a. Canaccord Financial Ltd)., Gmp Securities LP and Mackie Research Capital Corporation (f.k.a. Research Capital Corporation), Defendants

Perell J.

Heard: August 27, 2013
Judgment: August 27, 2013
Docket: 11-CV-436360-00CP

Counsel: Charles M. Wright, Douglas M. Worndl, for Plaintiffs
Deborah Berlach, for Defendant, Zungui Haizi Corporation
Margaret L. Waddell, for Defendant, Michelle Gobin
Michael A. Eizenga, for Defendant, Michael W. Manley
James S.F. Wilson, for Defendants, Patrick A. Ryan, Elliott Wahle, and Margaret Cornish
Linda L. Fuerst, for Defendant, Ernst &Young LLP
Kent Thomson, Derek Ricci, for Defendants, CIBC World Markets Inc., Canaccord Genuity Corp. (f.k.a. Canaccord Financial Ltd.) and Mackie Research Capital Corporation (f.k.a. Research Capital Corporation) and GMP Securities LP

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities

MOTION by investors for certification of action as class proceeding as against four underwriters for purposes of settlement, for approval of three settlements, and for ancillary relief; MOTION by class counsel for order approving class counsel fees.

***Perell J.*:**

A. Introduction and Overview

1 This is a securities class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The Plaintiffs Jerzy Robert Zaniewicz and Edward C. Clarke advance common law tort claims and also statutory claims with respect to the sale of the shares of Zungui Haizi Corporation in the primary and secondary markets.

2 The Plaintiffs bring this motion for: (a) certification for settlement purposes as against the Defendants CIBC World Markets Inc., Canaccord Genuity Corp., GMP Securities LP, and Mackie Research Capital Corporation (the "Underwriting Syndicate"); (b) approval of three settlements; (c) ancillary orders, including the appointment of an administrator; (d) approval of the notice program; and (e) approval of the plan of distribution (the "Plan of Allocation") for the settlement funds.

3 Class Counsel also bring a motion for approval of its counsel fees and disbursements. Class Counsel seeks $2,250,000.00, plus disbursements, interest on disbursements, and applicable taxes. The total request is for $2,807,037.56.

4 For the reasons that follow, I certify the action as against the Underwriting Syndicate for settlement purposes. I approve the three settlements and Class Counsel's request for counsel fees. I approve the requests for ancillary orders. However, I do not approve the proposed Plan of Allocation, and, rather, I have varied the plan and approved a modified Plan of Allocation.

5 As I will explain, in this case, the court has the jurisdiction to approve the settlement agreements and then establish a plan of distribution that is different than the plan of distribution proposed by the parties.

B. Factual Background to the Class Action

6 See *Zaniewicz v. Zungui Haixi Corp.*, 2013 ONSC 2959 (Ont. S.C.J.), which sets out most of the factual background and the procedural history. See also: *Zaniewicz v. Zungui Haixi Corp.*, *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 4842 (Ont. S.C.J.), *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 4904 (Ont. S.C.J.), and *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 6061 (Ont. S.C.J.).

7 In December 2009, Zungui made an initial public offering ("IPO"), and it raised approximately $40 million in Ontario's capital markets.

8 Zungui and its directors and officers had a statutory obligation under the Ontario *Securities Act* to provide Zungui's investors with timely and accurate disclosure regarding the business of Zungui, including disclosure in Zungui's interim and annual financial statements.

9 In its interim and annual financial statements, Zungui and the Defendants Yanda, Fengyi, and Zungui Cai (the "Cai Brothers") assured investors that Zungui's financial statements presented fairly, in all material respects, the financial position of Zungui in accordance with GAAP. They represented that the Zungui's offering documents contained full true and plain disclosure of all material facts relating to the offering of securities.

10 The Plaintiffs are residents of Ontario. Each purchased common shares of Zungui in the primary market. Mr. Clarke also purchased common shares of Zungui in the secondary market.

11 On August 22, 2011, Zungui issued a press release announcing that its auditor, Ernst & Young LLP ("E&Y"), had suspended its audit of Zungui's financial statements for the year ended June 30, 2011. With that announcement, Zungui's shares immediately lost 77% of their value. Subsequently, Zungui's shares became the subject of various temporary and permanent cease trade orders, and they are now worthless.

12 On September 22, 2011, Zungui's Chief Financial Officer and all independent members of the Board resigned, in part, because the special committee formed to investigate E&Y's concerns had been prevented from fulfilling its mandate.

13 On September 23, 2011, E&Y resigned as Zungui's auditor. E&Y withdrew its opinions that Zungui's financial statements were GAAP compliant.

14 On February 2, 2012, the Ontario Securities Commission ("OSC") ruled that Yanda, Fengyi, and Zungui Cai had engaged in conduct contrary to the public interest, and on August 28, 2012, the OSC ordered, among other things, that Yanda and Fengyi resign as directors or officers of Zungui and be permanently prohibited from acting as directors or officers of any issuer.

15 The OSC investigation revealed that when E&Y resigned, it advised that all of its audit opinions that formed part of the IPO Prospectus, as well as Zungui's June 2010 financial statements could no longer be relied upon.

16 On October 3, 2011, Mr. Zaniewicz, commenced the action by the issuance of a Notice of Action. On November 2, 2011, he filed his Statement of Claim. On February 7, 2012 and February 10, 2012, I made orders granting leave to amend the Statement of Claim to add Mr. Clarke as a plaintiff and to correct the description of two of the Underwriters incorrectly described in the style of cause.

17 On February 8, 2012, the Plaintiffs filed their Fresh as Amended Statement of Claim.

18 In the action, the Plaintiffs sue not only Zungui and the Cai Brothers, but others allegedly responsible for ensuring that Zungui's public disclosure to primary and secondary market investors was timely and accurate in accordance with securities law. The Plaintiffs allege various statutory claims under the Ontario *Securities Act* and also common law claims.

19 The Plaintiffs allege that Zungui's IPO Prospectus was misleading as it contained material misrepresentations. The Plaintiffs allege that the representations were materially false, and Zungui's financial statements contained in the prospectus, and other financial statements later prepared and disseminated in the secondary securities market, were neither accurate nor reliable in respect of reported revenues, net income, assets, and shareholders' equity. Moreover, the Plaintiffs allege that the financial statements did not fairly present, in all material respects, the financial condition, results of operations and cash flows of Zungui for the reporting periods presented.

20 Alan Mak, who is a chartered accountant, a member of the Institute of Chartered Accountants of Ontario, and a member of the Association of Certified Fraud Examiners opined that the audits conducted by Ernst & Young were not in accordance with GAAP and that Ernst & Young's unqualified audit opinions should not have been given for the 2006 through 2010 reporting periods. E&Y does not admit that it was negligent.

21 In the class action, the Class Definition is as follows:

> All persons or entities wherever they may reside or be domiciled, other than Excluded Persons and Opt-Out Parties, who acquired Eligible Shares.
>
> Eligible Shares means the Shares acquired by a Class Member or Opt-Out Party during the Class Period.
>
> Class Period means the period from and including August 11, 2009 to and including August 22, 2011.
>
> Excluded Persons means each Defendant, the past or present subsidiaries or affiliates, officers, directors, partners, legal representatives, consultants, agents, successors and assigns of Zungui and any member of each Defendant's families, their heirs, successors or assigns, and includes any Southern Zungui Acquirers who acted as a consultant or provided other professional services to Zungui or its subsidiaries in connection with the IPO.

22 The Class is comprised of three (3) types of acquirers of Zungui common shares: (1) primary market purchasers; (2) secondary market purchasers; and (3) share exchange acquirors (i.e. anyone who was a shareholder of Zungui's subsidiary, Southern Trends International Holding Company (BVI), who entered into an agreement with Zungui, before its IPO, to exchange their Southern Trends shares for Zungui common shares on a basis of 1:5,000.

23 Paul Mulholland, a US based certified forensic accountant, was retained by the Plaintiffs, to among other things, calculate the damages of class members. Mr. Mulholland's estimate of damages was $23.76 million comprised of: (a) $10.1 million in damage to primary market purchasers; $12.9 million in damage to secondary market Purchasers; and $0.7 million in damage to share exchange acquirors. (The original Statement of Claim sought damages of $30 million.)

24 The Defendants, of course, do not admit liability or the amount of the Class Member's alleged losses.

C. Certification for Settlement Purposes

25 I have already certified this action for settlement purposes as against Zungui, Michelle Gobin, Michael W. Manley, Patrick A. Ryan, Elliott Wahle, and Margaret Cornish (the "Zungui Defendants") and against Ernst & Young LLP and the Cai Brothers.

26 I am satisfied that that action should now be certified for settlement purposes as against the Underwriting Syndicate, and an Order should issue accordingly.

D. Settlement Approval

27 The Plaintiffs have concluded three settlements: (1) the Auditor Settlement; (2) the Zungui Settlement; and (3) Underwriter Settlement.

28 The Auditor Settlement is for $2 million. The Zungui Settlement is for $8 million, and the Underwriter Settlement is for $750,000.00.

29 The Zungui Defendants have agreed to contribute an additional $100,000.00 if the Plaintiffs: (a) settled their claims against the Underwriting Syndicate before the scheduled settlement approval hearings for the Auditor Settlement and the Zungui Settlement; and (b) obtained the Court's approval of a settlement with the Underwriting Syndicate. Thus, if all the settlements are approved, the settlement funds will total $10,850,000.00 plus interest before deductions for counsel fee and administrative expenses.

30 The settlement funds under the Auditor Settlement were received on May 17, 2013, and have been accruing interest since that date. The settlement funds under the Zungui Settlement were received on May 24, 2013, and have been accruing interest since February 22, 2013. The settlement funds under the Underwriter Settlement will be paid within fourteen days of execution of the Underwriter Agreement (i.e., by September 2, 2013).

31 The Settlement Amounts that have been received are currently invested at RBC in interest bearing accounts. Each settlement amount is held in a separate escrow account.

32 Class Counsel has been informed that, as of August 16, 2013, the escrow accounts contain: (1) Zungui Escrow Account, $7,984,781.20; and (2) Auditor Escrow Account, $1,995,373.52. These accounts reflect the payment of $48,931.32 for the publication of the First Notice (allocated, $39,145.07 from the Zungui Escrow Account and $9,786.25 from the Auditor Escrow Account) and the accrual of $ in interest on the Zungui Settlement Amount and $. 23,926.275,159.68 in interest on the Auditor Settlement Amount

33 Notice of the certification of the action as against the Zungui Defendants, Ernst & Young LLP, and the Cai Brothers has been given to the Class Members. There were no opt-outs. The notice also provided notice of the Auditor Settlement and the Zungui Settlement.

34 Notice of the proposed Underwriter Settlement has recently been given to the Class Members pursuant to a recent court order made at a case conference. Having already had a right to opt-out, class members do not have a right to opt-out with respect to the certification of the action as against the Underwriting Syndicate. When there are partial or progressive certifications of a class action, provided that there was adequate notice, the right to opt-out is a procedural right that may only be exercised once: *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.) at paras. 29-32; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (Ont. S.C.J.).

35 Under the settlements, the Plaintiffs and the Class will provide releases to all of the Defendants. The Cai Brothers will be released as part of the Zungui Settlement. The settlements, if approved, would complete the class action.

36 The key terms of the settlement agreements are as follows:

- The settlement will be administered by an Administrator;
- the Defendants will pay their respective settlement amounts for the benefit of the Class;
- the settlement funds will be distributed, after payment of any administration expenses and Class Counsel fees, disbursements, and taxes as awarded by the Court;
- the settlement funds will be distributed in accordance with a Plan of Allocation that is in a form satisfactory to the Defendants or as fixed by the Court;

• if the settlement is approved by the court, the Notices of the Settlement will provide Class Members with information concerning their right to participate by filing a Claim Form;

• the settlement funds will be distributed among all Class Members who timely submit valid Claim Forms to the Administrator;

• there are no rights of reversion;

• the Plan of Allocation provides for the possibility of a *cy près* distribution to the Small Investor Protection Association Canada in the event that less than $25,000.00 remains 180 days from the date on which the Administrator distributes the net settlement amount; and

• the Plaintiffs and the Class Members will release the Defendants and certain identified associated entities.

37 Under the Plan of Notice, the Short Form Notice of Settlement will be published: (a) in the English language, in the business/legal section of the national weekend editions of the *National Post* and the *Globe and Mail*; (b) in the French language, in the business section of *La Presse*; and (c) in the French and English languages across *Marketwire*, a major business newswire in Canada.

38 Under the Plan of Notice, the Long Form Notice of Settlement will be: (a) posted in both the French and English languages on *www.classaction.ca*; (b) posted in both the French and English languages on the Administrator's website; and (c) mailed or emailed, along with the Claim Form and the Opt-Out Form, directly to persons that have contacted Class Counsel and have provided their contact information.

39 Also in accordance with the Plan of Notice, the Long Form Notice of Settlement and the Claim Form will be sent by the Administrator: (a) directly to persons identified as Class Members by way of a computer-generated list provided by Zungui's litigation receiver to Class Counsel and the Administrator; and (b) to the brokerage firms in the Administrator's proprietary databases, requesting that these firms either send a copy of these materials to all individuals and entities identified as Class Members, or to send the names and addresses of all such individuals and entities to the Administrator, who will mail these materials to the individuals and entities so identified.

40 The estimated cost of implementing the Plan of Notice, excluding the First Notice that has already been published and paid for, will be approximately $140,000.00 (before tax). Of that amount, approximately $85,000.00 is attributable to the cost of effecting direct notice.

41 David Weir, the President of NPT RicePoint Class Action Services, the proposed Administrator, deposes that the broker outreach portion of the notice plan is likely to bring the settlement to the attention of the Class Members in a manner consistent with other notice programs in securities class actions.

42 Class Counsel believes that the Approval Notices, disseminated in accordance with the Plan of Notice, will come to the attention of a substantial portion of the Class.

43 Class Counsel recommends that the court approve the settlements. Class Counsel is of the view that the settlement terms and conditions are fair and reasonable, and represent a significant recovery for Class Members in a securities class action.

44 Based on the expert opinion of Paul Mulholland, CFA, Class Counsel believes that the combined settlement amounts represent close to 50% of the damages allegedly suffered by the Class Members as calculated by Mr. Muhlholland. I would calculate the class's gross recovery as 46% of the damages allegedly suffered and the class's net recovery after the payment of administrative expenses and legal fees, as claimed, as approximately 33%.

45 The Plaintiffs have instructed Class Counsel to seek approval of the settlements.

46 No objections to the quantum of the Settlements have been received to date. However, Class Counsel has received: (a) one objection to the release provisions in the Zungui Agreement insofar as they apply to the Cai Brothers; and (b) one written objection to the proposed Plan of Allocation, discussed below, concerning the proposed ineligibility for any payment to Class Members for shares purchased in the secondary market after the alleged corrective press release on August 22, 2011.

47 Section 29(2) of the *Class Proceedings Act*, *1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para 57; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (Ont. S.C.J.), at para. 43; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

48 In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (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 future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.), at para. 38; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

49 In my opinion - independent of the matter of the Plan of Allocation (the plan of distribution) - having regard to the various criteria set out above, the three settlement agreements taken together are fair, reasonable, and in the best interests of the Class Members.

50 Therefore, independent of the matter of the Plan of Allocation, which I will discuss next, I approve the three settlements.

E. Distribution Plan

1. The Court's Jurisdiction to Approve the Distribution Plan

51 In the case at bar, the court's authority to approve the plan of distribution, the Plan of Allocation, comes from the settlement agreements, where the plan of distribution is referred to as a Plan of Allocation.

52 The settlement agreements define the "Plan of Allocation" as follows:

> Plan of Allocation means the distribution plan distributing the proposed settlement in a form satisfactory to the Settling Defendants or as fixed by the Court.

53 As I interpret the settlement agreements, and as confirmed by the Plaintiffs during argument, I can approve the settlements independent of approving the Plan of Allocation, which is what I have done. In other words, I have approved the settlements, which are now binding on the parties and on the Class Members, and I shall determine or fix the Plan of Allocation.

54 For reasons that I will set out below, I do not approve of the Plan of Allocation proposed by the parties, but I shall vary it, and I shall approve a different plan of distribution.

55 Had the settlement agreements in the case at bar not left it to the court to ultimately determine what is an appropriate plan of distribution, I would not have approved the settlements, because I do not think the proposed Plan of Allocation is fair and reasonable and in the best interests of the class. I also would not have approved Class Counsel's fees because the settlements would not have been approved.

2. The Test for Approving a Distribution Plan

56 In the situation where there is a judgment in a certified class action, the court's authority to determine or approve a plan of distribution comes from s. 26 of the *Class Proceedings Act, 1992*, which states:

> **Judgment distribution**
>
> 26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.
>
> **Idem**
>
> (2) In giving directions under subsection (1), the court may order that,
>
> (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
>
> (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
>
> (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.
>
> **Idem**
>
> (3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.
>
> **Idem**
>
> (4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.
>
> **Idem**
>
> (5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.
>
> **Idem**
>
> (6) The court may make an order under subsection (4) even if the order would benefit,
>
> (a) persons who are not class members; or
>
> (b) persons who may otherwise receive monetary relief as a result of the class proceeding.
>
> **Supervisory role of the court**
>
> (7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.
>
> **Payment of awards**

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

57 It may be noted that under s. 26(1) of the *Class Proceedings Act, 1992*, the court may direct any means of distribution of amounts awarded that it considers appropriate. I am not aware of any caselaw actually applying s. 26(1), although numerous cases have suggested that the court has ample discretion and ample scope for creativity in employing s. 26.

58 In the case at bar, as noted above, the court's authority to approve the plan of distribution comes from the settlement agreements, where the plan of distribution is referred to as a Plan of Allocation, and, as noted above, as I interpret the settlement agreements, I can determine or fix the Plan of Allocation as I think appropriate.

59 In determining what is appropriate, I intend to apply the same test or standard that the court applies when deciding whether to approve a settlement. Thus, a plan of distribution will be appropriate if in all the circumstances, the plan of distribution is fair, reasonable, and in the best interests of the class.

3. The Proposed Plan of Allocation

60 For reasons that I will set out below, I do not approve of the Plan of Allocation proposed by the parties, but I shall vary it and approve a different plan of distribution.

61 Class Counsel, with Mr. Mulholland's assistance, developed the Plan of Allocation. This plan was structured to reflect Mr. Mulholland's opinion that Zungui suffered two share price falls that were statistically significant, net of external market factors. These events occurred on: (1) June 2, 2011, when Muddy Waters LLC issued a report about Sino-Forest Corporation in which a fraud was alleged; and (2) August 22, 2011, when Zungui issued the press release announcing the suspension of 2011 audit procedures by Ernst & Young LLP.

62 The Plaintiffs' damages theory is that the value of Zungui's common shares was at all times artificially inflated by misrepresentation and that the artificial inflation, equivalent to $1.52 per share, was removed from the share value by the close of TSX-V trading on August 22, 2011. The Plaintiff's theory is that the artificial inflation was removed: in part, on June 2, 2011, in an amount of $0.26; and in balance, on August 22, 2011, in an amount of $1.26.

63 The amount of each Class Member's compensation will depend upon: whether the Class Member is a Primary Market Purchaser and/or a Secondary Market Purchaser and/or Share Exchange Acquiror; the number and price of Zungui common shares purchased by the Class Member during the Class Period; whether and when the Class Member sold Zungui common shares purchased during the Class Period, and the price at which these common shares were sold; whether the Class Member continues to hold some or all of the Zungui common shares purchased during the Class Period; and the total number and value of all claims for compensation filed with the Administrator.

64 The Plan of Allocation provides that no compensation shall be paid for any shares disposed of before June 2, 2011, which is consistent with Mr. Mulholland's opinion that June 2, 2011 was the first time that Zungui's common shares were subject to a statistically significant event, net of external market factors.

65 The Plan of Allocation provides that no compensation shall be paid for any shares purchased after the time of the making of the alleged corrective disclosure on August 22, 2011. The main rationale for the disqualification of these shares is that they purchased when it was publicly known that audit issues existed. I note, however, that it was not until another month later that E&Y disavowed that Zungui's financial statements were GAAP compliant.

66 In any event, although a purchaser of Zungai shares on Aug 22, 2011 is a Class Member, under the proposed Plan of Allocation, he or she is not entitled to receive compensation.

67 These background circumstances bring me to the written objection to the Plan of Allocation delivered by Dr. Christopher Lane, which I set out below:

> My name is Dr. Christopher Lane (psychologist) and I would like to register an objection to the terms of the proposed "Plan of Allocation," particularly under the heading "Secondary Market Purchasers," and under "VII" which states: "No Nominal Entitlement shall be recognized for any Eligible Shares purchased after the time of the making of the alleged corrective disclosure on August 22, 2011." This statement appears to eliminate the right of anyone who purchased shares of ZUN on August 22, 2011 to receive any compensation whatsoever and to thereby lose 100% of their investment. I happen to be one of those individuals who purchased shares on that fateful August 22, 2011 day, as did my brother, Brian Lane. Indeed, I bought a total of 117,000 shares of ZUN that day at a "book value" (according to my bank statements) of $47,735.83 (average cost per share of 40.8 cents). As one might expect, I am very upset by the wording of the proposed "Plan of Allocation" and would like to offer a suggestion of a fairer settlement, as the one proposed is, in my mind, overly punitive and leaves investors in my position with a feeling of defeat and lack of justice.
>
> .... While it is true that the announcement indicated that Ernst & Young suspended procedures until Zungui "clarifies and substantiates its position with respect to issues pertaining to the current and prior year" this does not clearly foreshadow the events that followed, which turned out to be devastating to the investors who held the stock and represented a "worst case scenario" with the stock never trading again after August 22, 2011. Clearly this was bad news and sent the stock tumbling from approximately 1.50 down to trading around 40 cents per share for most of the day on August 22, 2011 and ending the day around 34 cents per share. Of course, in hindsight it is easy to suggest that one shouldn't have bought stock in ZUN that day, but at that time there were also many who felt the negative reaction was entirely overblow and that clarification of the issues could logically prevail and substantiate the position of the company. In short, there was no way of knowing that the worst possible outcome would come to pass, with investors unable to trade their shares ever again.
>
> I submit that eliminating shareholders who bought ZUN stock on August 22, 2011 from any form of compensation is overly harsh and punitive. It was clear that an important issue existed at that time but issues emerge with Venture Exchange listed stocks quite frequently but without these catastrophic consequences. And it is important to note that investors such as myself have suffered considerably due to this loss of capital. In my case, I lost all of my RRSP, almost all of my cash trading account holdings and a good part of my TFSA. With children entering university I am hard-pressed to pay my part of the costs as well as funding home and business expenses. Indeed, these losses have had a significant negative effect on my quality of life and that of my family and have led to me working long hours to pay for our needs, thereby creating significant hardship.
>
> Hence, I ask that the court consider changing the section dealing with ZUN purchasers of August 22, 2011 to include them in providing some compensation in the class action lawsuit. Of course, I believe that to be fair, the compensation for purchasers on August 22, 2011 should be much less than for those who purchased earlier at prices of $1.52 per share or higher. I would suggest that a discount of 80% of the amount often quoted in the "Plan of Allocation" ($1.52) would be appropriate, which would amount to payment of 30.4 cents per share for individuals who bought shares of ZUN on August

> 22, 2011. I ask that the court consider this proposal to be fair to all shareholders of ZUN without singling out any in a harsh or punitive manner. We all lost money in this investment and have suffered as a result and it's unfair to single out a subsection of individuals for exclusion of all compensation.

68 The Plan of Allocation contemplates that for some Class Member's eentitlements, a notional amount of damage based on the application of the calculations in the Plan of Allocation before distribution proration, will be discounted to reflect the risks facing the claimants. Class Counsel considered that the question of whether a discount to a Nominal Entitlement ought to apply for a particular type of acquisition should be determined by considering the particular strengths and weaknesses of the common law and statutory claims are common to all groups

69 With a view to ensuring that any discount was arrived at in a manner that was objective and fair, a formal mediation session was held on April 29, 2013. Joel Wiesenfeld was the mediator. Mr. Wiesenfeld practiced law as a broker/dealer litigation and securities regulatory counsel for 31 years.

70 At the mediation, the claimant groups were represented by Class Members holding Eligible Shares as follows: (a) the Plaintiffs, who bought substantially all of their shares in Zungui's IPO, represented Primary Market Purchasers; (b) Nick Angellotti CA, IFA and President and Managing Director of Williams & Partners Forensic Accountants Inc., the representative of a partnership that purchased Zungui's shares in the secondary market, represented Secondary Market Purchasers; and (c) Avi Grewal, President and Chief Executive Officer of Cinaport Capital Inc., a private investment firm which acts as advisor for the Cinaport China Opportunity Fund, a fund with investments in private and public PRC based companies, represented Share Exchange Acquirors.

71 The representatives were represented by counsel; namely: Charles Wright and Nicholas Baker of Siskinds LLP for the Plaintiffs; Kirk Baert of Koskie Minsky LLP for Mr. Angellotti; and John J. Longo of Aird & Berlis LLP for Mr. Grewal.

72 I pause here to note that nobody represented the interests of secondary market purchasers who, like Dr. Lane, purchased shares on August 22, 2011.

73 The negotiations were all conducted at arm's length and the position of each claimant group was advanced by their counsel. The full-day mediation session concluded with the Primary Market Purchasers and Secondary Market Purchasers reaching agreement that the proposed Plan of Allocation should provide for the Nominal Entitlements of primary market purchasers to be undiscounted and the Nominal Entitlements of secondary market purchasers should be discounted by 8%.

74 The representatives were unable to agree on a discount to be applied to the claims of Share Exchange Acquirors at the mediation, and so the Plaintiffs proposed (and posted on Class Counsel's website) a draft Plan of Allocation with a discount of 60% for Share Exchange Acquiror claims. Subsequently, Class Counsel agreed, to amend the Share Exchange Acquiror Discount to 40 %.

75 Class Counsel submits that an 8% discount for secondary market purchasers is fair and reflects that: (a) the secondary market purchasers were required to obtain leave under Part XXIII.1 of the Ontario *Securities Act* before asserting the right of action for misrepresentation in Zungui's secondary market disclosure documents, and such leave would be contested; (b) Part XXIII.1 provides defendants with a number of defences to liability for secondary market misrepresentation, and in this case, the secondary market purchasers could expect to face the "reasonable investigation" defence, an expert reliance defence, and a due diligence; and (c) the secondary market purchasers may not be able to recover the full estimated damages they have suffered, due to liability limits.

76 Class Counsel submits that no discount for primary market purchasers is fair because it reflects that: (a) these purchasers did not need to obtain leave of the Court to assert their claim; (b) damages are not limited for primary market purchasers in the same way as they are limited for secondary market purchasers; (c) if a prospectus is found to have contained a misrepresentation, then the issuer is strictly liable, (d) certain defendants, such as the issuer's directors and officers, are generally liable, unless they demonstrate on a balance of probabilities that they exercised reasonable diligence prior to issuance of the prospectus; and (e) liability is joint and several and damages can be recovered from any defendant with the means to pay.

77 Class Counsel initially considered that a 60% discount for Share Exchange Acquirors was fair. However, the Significant Shareholder Group through their counsel at Aird and Berlis LLP, and certain members of the Significant Shareholder Group indicated that they had higher expectations than a settlement with the Underwriting Syndicate at $750,000.00, in part, based on the fact that the Underwriting Syndicate had earned fees of approximately $2.75 million for underwriting the IPO.

78 However, the Significant Shareholder Group were prepared to support the proposed settlement with the Underwriting Syndicate if two (2) conditions were met: (1) Class Counsel would limit their request for Class Counsel Fees to an agreed amount; and (2) the discount applicable to Share Exchange Acquirors under the proposed Plan of Allocation would be amended from 60% to 40%.

79 Class Counsel estimates that the impact on the combined settlement fund of the amendment to the discount applicable to Share Exchange Acquirors under the proposed Plan of Allocation will be at most $262,200.00 and more likely the impact will be less, because the maximum impact assumes no proration, which is unlikely to be the case.

80 Class Counsel communicated with each Class Member who participated in the mediation relating to the Plan of Allocation, and they have instructed that the proposed amended discount applicable to Share Exchange Acquirors is acceptable.

81 The Plan of Allocation provides for the possibility of a *cy près* distribution to the Small Investor Protection Association Canada in the event that less than $25,000.00 remains in the Allocation Pool 180 days from the date on which the Administrator distributes the Net Settlement Amount to Authorized Claimants.

82 Notwithstanding the objection to the Plan of Distribution, Class Counsel is of the view that the Plan of Allocation was carefully considered and promotes the interests of the class as a whole, and that it is fair and reasonable and ought to be approved.

83 At the argument of the fairness hearing, Class Counsel argued that should the court consider it appropriate to have purchasers like Dr. Lane participants in the Plan of Allocation, their claims should be discounted by 98.5%.

4. Discussion and Analysis of the Proposed Plan of Allocation

84 I do not regard the Proposed Plan of Allocation as appropriate, fair, reasonable, or in the best interests of the class.

85 In my opinion, Dr. Lane's objection to the Plan of Allocation and his suggestion as to how the plan should be revised has considerable merit.

86 Although perhaps unlikely to occur, it seems inappropriate and unfair to me that the proposed Plan of Allocation provides for a *cy près* distribution to a small investor association and does not provide any compensation for an investor like Dr. Lane, who is a member of the class. More to the point, in my opinion, it is inappropriate and unfair to include August 22, 2011 purchasers as Class Members and then exclude them from the Plan of Allocation.

87 Notwithstanding that it was the Defendants who urged that these purchasers be included as Class Members as part of the bargaining for the settlements, once Class Counsel and the Representative Plaintiffs agreed to the joinder of these Class Members, it was unfair and inappropriate for Class Counsel and the Representative Plaintiffs to advocate a theory of the case that August 22, 2011 purchasers were not eligible for any compensation at all.

88 If Dr. Lane, his brother, and other August 22, 2011 purchasers had appreciated that the parties had included them in the class as a bargaining chip but had excluded them from the theory of the claim and would exclude them from the Plan of Allocation, these putative class members sensibly should have opted-out of the class action rather than add the unrequited value of their releases to the consideration or *quid quo pro* that the Defendants will be receiving for the settlement payments. As it stands, Dr. Lane and those similarly situated are bound by the settlement but receive nothing themselves for being a Class Member.

89 In my opinion, the appropriate Plan of Allocation is the one proposed by Dr. Lane.

90 Accordingly, I shall revise the Plan of Allocation in accord with Dr. Lane's suggestion, which I regard as fair and reasonable, and I approve the Plan of Allocation as revised.

F. Administation of the Settlement

91 Class Counsel proposes the appointment of NPT RicePoint Class Action Services as the Administrator. NPT has already served as the Notice Advisor in the Action. NPT has also been administering bilingual class action settlements for over 9 years. In Class Counsel's opinion, NPT has the experience and resources that make them capable of administering the Settlements.

92 NPT's administration proposal provides for a minimum administration fee of $35,000, and a maximum administration fee cap of $195,000.00, before taxes.

93 I approve the appointment of NPT RicePoint Class Action Services as the Administrator.

G. Fee Approval

94 Turning to the matter of Class Counsel's fee request of $2,807,037.56.

95 The Retainer Agreements with the Plaintiffs provide that Class Counsel may seek a fee of up to 30% of the recovery. Class Counsel are seeking a recovery of 20.75% (a 3.3 multiplier).

96 As at August 12, 2013, Class Counsel had docketed time of $648,386.00, excluding applicable taxes, disbursements of $226,670.44, exclusive of applicable taxes.

97 Class Counsel is not seeking to recover, and will not return to request payment of the time and disbursements required to complete the administration of the settlement, which is estimated to be at least $50,000.00.

98 Class Counsel has agreed to pay, from Class Counsel's fee award the accounts of Aird & Berlis LLP rendered to the Significant Shareholder Group in the amount of $105,796.50, taxes in the amount of $13,896.73 and disbursements in the amount of $1,101.36.

99 Class Counsel proposes to pay Wolf Popper LLP $105,689.00 (US$) in fees, and (US$) $1,466.73 in disbursements from the Class Counsel's fee award. Mr. Clarke, a representative plaintiff, initially contacted this U.S. law firm to investigate his potential claim. Ms. Patricia Avery, of Wolf Popper LLP, has been a member of the Class Counsel team prosecuting the Action, and Wolf Popper LLP undertook certain tasks that were within the competence of the firm, such as researching risk disclosure practices in North American securities offering documents for issuers with substantial operations in the People's Republic of China.

100 The disbursements included $40,465.42 in agent fees for investigations in the People's Republic of China, location of the Cai Brothers, translation of correspondence and pleadings, Hague Convention service on the Cai Brothers and the cost of paying for independent counsel to attend at the Plan of Allocation mediation.

101 The disbursements include $156,842.05 in expert fees and mediation fees for Mr. Mulholland, Mr. Mak, William H. Purcell, a U.S. investment banking expert, in relation to underwriting due diligence practices for companies with substantially all operations in the People's Republic of China, and Mr. Wisenfeld.

102 The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (Ont. S.C.J.), at para. 13; *Smith Estate v. National Money Mart Co.*, [2010] O.J. No. 873 (Ont. S.C.J.), at paras. 19-20; *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.), at para 25.

103 Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of

responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith Estate v. National Money Mart Co.*, *supra*, at paras. 19-20; *Fischer v. IG Investment Management Ltd.*, *supra*, at para 28.

104 Having regard to these various factors, I approve Class Counsel's request for approval of its legal fees.

H. Conclusion

105 Orders accordingly.

Order accordingly.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC. ET AL.

Court File No: CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
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Siskinds LLP
680 Waterloo Street
P.O. Box 2520
London, ON N6A 3V8
Michael G. Robb (LSO#: 45787G)
Tel: 519-660-2121
Fax: 519-672-6065

Barristers & Solicitors
100 Lombard Street
Suite 302
Toronto, ON M5C 1M3

Alex Dimson (LSO#: 56129U)
Tel: 416-594-4394
Fax: 416-362-2610

Wright Henry LLP
200 Wellington St. West
Suite 602
Toronto, ON M5V 3C7

Michael Wright
Danielle Stampley
Tel: 416-306-8280
Fax: 416-306-8281

Lawyers for the Plaintiff