Court File No. CV-12-9545-00CL

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 3113736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

(the "**Applicants**")

APPLICANTS' FACTUM

(Plan Sanction Hearing, returnable January 24, 2017)

January 20, 2017

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PART I — NATURE OF THE MOTION

1. 4362063 Canada Ltd., formerly known as Domfoam International Inc. ("**Domfoam**"), 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc. ("**Valle Foam**"), and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated January 12, 2012, as amended (the "**Initial Order**"). Deloitte & Touche, now known as Deloitte Restructuring Inc., was appointed to act as the Monitor in this CCAA proceeding ("**Monitor**").

2. The Initial Order granted a stay of proceedings until February 10, 2012 (the "**Stay Period**"). The Stay Period was later extended from time to time by Court order, most recently on August 30, 2016 until and including January 30, 2017.

3. This factum is filed in support of Domfoam's motion for this Court's sanction of its Plan or Compromise and Arrangement, dated August 23, 2016 (the "**Plan**"), and to obtain an order of this Court extending the Stay Period for all of the Applicants until June 30, 2017 to allow for the implementation of the Plan and the collection of certain proceeds owed to the Applicants for the benefit of all stakeholders.

4. The Plan will complete the controlled and orderly wind down of Domfoam in a timely manner without costly litigation or delay. It achieves a global resolution of the CCAA proceedings with respect to Domfoam, and requires that Domfoam resolve certain tax disputes prior to its implementation. If sanctioned by this Court and implemented, the Plan will maximize distributions to Creditors and avoid the expenses related to distributions made within a bankruptcy. The Plan has the support of the Monitor.

5. At the creditors' meeting held on October 19, 2016 (the "**Creditors' Meeting**"), 92% of Creditors in number and 99% of Creditors in value voted in favour of the Resolution to approve the Plan. This approval level far exceeds the "double majority" of creditor votes required by the CCAA, and is a strong indicator that the creditors, in their business judgment, believe the Plan fairly addresses their interests.

6. Domfoam submits that the Plan meets the test for sanction by this Honourable Court. Domfoam has complied with the CCAA; nothing has been done that is not authorized under the CCAA; and the Plan represents a fair and reasonable outcome for Domfoam's stakeholders.

7. Based on the Monitor's Fifteenth Report, dated January 17, 2017 (the "**Fifteenth Report**") (and subject to the caveats and qualifications set out in the Fifteenth Report), the Plan is projected to result in recoveries for Proven Creditors in the range of $0.06 (not including funds

collected from future proceeds such as the Polyols Settlement, as defined below). This recovery compares more favourably to the significantly lower recovery that Domfoam's creditors would receive in a bankruptcy scenario.

8. Based on these considerations, the submissions below, and the Monitor's recommendation, Domfoam submits that the Plan should be sanctioned by this Court as fair and reasonable.

II — FACTS

The Meeting Order

9. On September 6, 2016, the Honourable Mr. Justice Penny approved the Applicants' order seeking acceptance of the Plan for filing with the Court and authorizing Domfoam to seek approval of the Plan at the Creditors' Meeting (the "**Meeting Order**").[1]

10. The Monitor disseminated the Creditors' Information Package, the Meeting Order and the its Fourteenth Report to all Creditors and interested parties, pursuant to the Meeting Order. The Monitor also posted the relevant materials on its website, and published the Notice of Meeting in the *Globe and Mail* (National Edition).[2]

11. The Meeting Order authorized Domfoam to amend, modify and/or supplement the Plan in accordance with the terms of Section 11.1 of the Plan.[3]

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[1] Affidavit of Tony Vallecoccia, sworn January 13, 2017 ("**Sanction Affidavit**"), at para. 9, Applicants' Motion Record, Tab 2, pg. 9.
[2] Sanction Affidavit, *supra*, paras. 11-12, Applicants' Motion Record, Tab 2, pgs. 9-10. See also Fifteenth Report of the Monitor, dated January 17, 2017 ("**Fifteenth Report**"), paras. 50-52.
[3] Sanction Affidavit, *supra*, para. 13, Applicants' Motion Record, Tab 2, pg. 10.

12. On October 18, 2016, the Plan was amended to clarify that the Crown's Competition Act Claim (as defined in the Plan) could not be compromised under the Plan, but that the Crown was entitled to participate in any distribution under the Plan. This change was made at the request of counsel for the Crown, who recognized that a bankruptcy of Domfoam would not produce a better result for the Crown or the Creditors, and advised that it would abstain from voting on the Plan if the amendments were made to the Plan as requested.[4]

13. A version of the Plan that included the changes requested by the Crown was circulated to the largest trade creditor, the Crown and counsel for the class action creditors (the largest creditors) in blackline prior to the Creditors' Meeting.[5]

The Creditors' Meeting

14. The Creditors' Meeting was held on October 19, 2016 at the offices of Blaney McMurtry LLP, counsel for the Applicants. The Creditors' Meeting was properly convened in accordance with the Meeting Order.[6]

15. A minor change was made to the definition of Competition Act Claim to remove reference to the Plea Agreement and to clarify that the fines owed to the Crown by Domfoam and Valle Foam under the *Competition Act* are pursuant to court order. This change was made at

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[4] Sanction Affidavit, *supra*, paras. 15-17 and Exhibit "D", Applicants' Motion Record, Tab 2, pgs. 10-11, and Tab TD, pgs. 59-77. See also Fifteenth Report, *supra*, paras. 53-54.
[5] Sanction Affidavit, *supra*, para. 18, Applicants' Motion Record, Tab 2, pg. 11.
[6] Sanction Affidavit, *supra*, paras. 10, 19-20, Applicants' Motion Record, Tab 2, pgs. 9, 11-12. See also Fifteenth Report, *supra*, para. 57.

the request of the Crown, and was tabled at the Creditors' Meeting. The Monitor confirmed that there were no changes that would alter the substance of the Plan to the Creditors.[7]

16. The Resolution approving the Plan was supported by 92% of Creditors in number and 99% of Creditors in value. Neither the Crown, nor Revenu Quebec, attended the Creditors' Meeting or voted against the Plan.[8]

Revenu Quebec Action

17. Domfoam commenced an action in the Tax Court of Canada to contest the position taken by Revenu Quebec regarding the amount of its claim in the CCAA proceeding, and, particularly, the liability of Domfoam for the repayment of certain tax amounts relating to the hiring by Domfoam of temporary workers prior to the CCAA ("**Revenu Quebec Action**"). There is also a similar action pending before the Superior Court of Quebec. [9]

18. Settling the Revenu Quebec Action is one of the preconditions to Plan implementation.[10]

19. The Applicants, with the approval of the Monitor and the directors and officers, have settled the Revenu Quebec Action. The settlement will result in Domfoam withdrawing its claim against Revenu Quebec in both the Tax Court and the Superior Court of Quebec.[11]

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[7] Sanction Affidavit, *supra*, paras. 21-22, Applicants' Motion Record, Tab 2, pg. 12. Fifteenth Report, *supra*, para. 58.
[8] Sanction Affidavit, *supra*, paras. 23-25, Applicants' Motion Record, Tab 2, pgs. 12-13. Fifteenth Report, *supra*, paras. 58-59.
[9] Sanction Affidavit, *supra*, paras. 27, 31, Applicants' Motion Record, Tab 2, pg. 13-14. For an outline of the dispute see Fifteenth Report, *supra*, paras. 31-35.
[10] Sanction Affidavit, *supra*, para. 28, Applicants' Motion Record, Tab 2, pg. 13.
[11] Sanction Affidavit, *supra*, paras. 29, 31 and Exhibit "E", Applicants' Motion Record, Tab 2, pg. 13-14, and Tab 2E, pgs. 79-85.

20. The settlement of the Revenu Quebec Action is contingent on the Plan obtaining approval of this Court, which will release Domfoam's Directors and Officers from those claims that Revenu Quebec or the Canada Revenue Agency may otherwise pursue against them.[12]

Conditions Precedent to Plan Implementation

21. The implementation of the Plan is conditional upon the fulfillment of the following conditions outlined in Article 7.1 of the Plan, and described below.

22. First, the Plan must be approved by the Creditors pursuant to the CCAA requirements. As mentioned above, the Plan was approved by 92% of Creditors in number and 99% of Creditors in value, thereby receiving substantially more than the required "double majority" under the CCAA.[13]

23. Second, the Plan must be approved by this Court pursuant to the Sanction Order.[14]

24. Third, the appeal periods with respect to the Sanction Order have expired without an appeal, or an appeal and/or leave to appeal application has been dismissed such that the sanctioning of the Plan is finally affirmed and recognized by the appellate court.[15]

25. Fourth, Domfoam and its Directors and Officers will discontinue, settle, or withdraw the Revenu Quebec Action on terms satisfactory to the Monitor and the Court upon the Plan Implementation Date. As mentioned above, the Revenu Quebec Action has been settled by the

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[12] Sanction Affidavit, *supra*, paras. 30, 33, Applicants' Motion Record, Tab 2, pg. 14. Fifteenth Report, *supra*, paras. 25, 37.
[13] Sanction Affidavit, *supra*, para. 35, Applicants' Motion Record, Tab 2, pg. 14. Fifteenth Report, *supra*, para. 63(a).
[14] Sanction Affidavit, *supra*, para. 36, Applicants' Motion Record, Tab 2, pg. 14. Fifteenth Report, *supra*, para. 63(b).
[15] Sanction Affidavit, *supra*, para. 37, Applicants' Motion Record, Tab 2, pg. 15. Fifteenth Report, *supra*, para. 63(c).

parties, in consultation with the Monitor, and Domfoam intends to withdraw its claims in the Tax Court of Canada and the Superior Court of Quebec if the Plan is sanctioned. Additionally, the Monitor has issued a final disallowance to Revenu Quebec with respect to its claim on January 9, 2017.[16]

26. Finally, Domfoam and the Directors and Officers will have settled or withdrawn from contesting the position of the Monitor with respect to the HST Pre and Post Filing Dispute. As a result of the releases under the Plan, Domfoam and the Directors and Officers are no longer contesting the Monitor's position on the HST Pre and Post Filing Dispute.[17]

27. The sanctioning of the Plan need not wait for the preconditions to be complete. The Plan provides that, when the conditions set out above are satisfied, the Monitor will file a certificate with the court stating that the prerequisites for Plan implementation are complete, and that the Plan Implementation Date has occurred.[18]

Effect of the Plan

28. If the Plan is sanctioned by this Court, it will:

(a) allow for the efficient *pro-rata* distribution of the funds already realized by Domfoam from its liquidation, and also future funds collected from a class action settlement in the United States ("**Polyols Settlement**"), without further order of the Court, as and when those funds are received;

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[16] Sanction Affidavit, *supra*, paras. 33, 38, Applicants' Motion Record, Tab 2, pg. 14-15. See also Fifteenth Report, *supra*, paras. 38-40 and Exhibit "E". Fifteenth Report, *supra*, para. 63(d).
[17] Sanction Affidavit, *supra*, para. 39, Applicants' Motion Record, Tab 2, pg. 15. Fifteenth Report, *supra*, para. 63(e).
[18] Sanction Affidavit, *supra*, para. 40, Applicants' Motion Record, Tab 2, pg. 15. Fifteenth Report, *supra*, para. 64.

(b) avoid the expenses related to distributions made within a bankruptcy, thereby maximizing distributions to Domfoam's Proven Creditors[19];

(c) complete the orderly wind down of Domfoam in a timely manner without costly delay or litigation;

(d) release Domfoam's Directors and Officers from any pre-filing claims against them;

(e) require Domfoam to discontinue the Revenu Quebec Action and resolve the HST Pre and Post Filing Dispute;

(f) resolve the treatment of the Competition Act Claim without requiring a bankruptcy of Domfoam.[20]

29. Additionally, the Monitor in its Fifteenth Report states that the Plan is projected to result in recoveries for Proven Creditors of approximately $0.06 (not including the funds from the Polyols Settlement, as defined below), and supports the sanction of the Plan as fair and reasonable.

The Stay Period

30. The Initial Order granted a stay of proceedings until February 10, 2012. The Stay Period has been subsequently extended from time to time by orders of the Court, most recently by the

[19] See Fifteenth Report, *supra*, para. 47.
[20] Sanction Affidavit, *supra*, para. 42, Applicants' Motion Record, Tab 2, pgs. 16-17.

Order of the Honourable Mr. Justice Newbould, dated August 30, 2016, which extended the Stay Period to January 30, 2017.[21]

31. The Applicants are seeking to extend the Stay Period to and including June 30, 2017.

32. No cash flow is required as the Applicants have limited expenses and no employees. The Applicants have sufficient cash on hand to meet their obligations on a go-forward basis for the period of the proposed stay.[22]

33. There is no opposition to the stay extension, and the Monitor supports the Stay Period being extended to June 30, 2017.[23]

PART III - ISSUES AND THE LAW

34. The issues on this motion are: (a) should this Honourable Court approve the Plan as fair and reasonable? and (b) should the Stay Period be extended to and including June 30, 2017? It is Domfoam's position that the Plan should be sanctioned, and the Stay Period extended as requested.

Test for Sanctioning a Plan

35. Section 6(1) of the CCAA provides that the Court has the discretion to sanction a plan of compromise and arrangement if it has achieved the requisite "double majority" vote. The effect of the Court's approval is to bind the company and its creditors.[24]

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[21] Sanction Affidavit, *supra*, para. 46-47, Applicants' Motion Record, Tab 2, pg. 17. Fifteenth Report, *supra*, para. 6.
[22] Sanction Affidavit, *supra*, para. 49, Applicants' Motion Record, Tab 2, pg. 18.
[23] Fifteenth Report, *supra*, para. 78.
[24] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("**CCAA**"), ss. 6(1).

36. The criteria that a debtor company must satisfy in seeking the Court's approval for a plan of compromise and arrangement under the CCAA are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.[25]

Compliance with all Statutory Requirements

37. The first and second requirements relate to the procedural requirements under the CCAA and compliance with prior orders of the Court granted in the CCAA proceedings.

38. Under the first branch of the test for sanctioning a CCAA plan, courts typically consider factors such as whether: (a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant or affiliated debtor companies have total claims in excess of $5 million; (c) the notice of meeting was sent in accordance with the orders of the court; (d) the creditors were properly classified; (e) the creditors' meeting was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.[26]

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[25] *Re Canadian Airlines Corp.*, 2000 ABQB 442 ("***Canadian Airlines***"), para. 60, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 13, 2001 2001 CarswellAlta 888, Applicants' Book of Authorities, Tab 1.

[26] *Canadian Airlines, supra*, para. 62, Applicants' Book of Authorities, Tab 1. See also *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 ("***Canwest***"), para. 15, Applicants' Book of Authorities, Tab 2.

39. In this case, Domfoam submits that it has satisfied all of these requirements. In particular:

(a) in granting the Initial Order, this Honourable Court determined that the Applicants, including Domfoam, were companies to which the CCAA applied, which, by extension, requires that Domfoam comes within the definition of "debtor company" under section 2 of the CCAA, and has total claims against it or its affiliated companies in excess of $5 million[27];

(b) Creditors were classified for the purpose of considering and voting on the Plan as one single class. They voted on the Plan as a single class. This Honourable Court approved the classification of Creditors in granting the Meeting Order, which classification was not opposed at the time of the Meeting Order, nor was the Meeting Order appealed[28];

(c) in accordance with the Meeting Order, the Monitor provided copies of the Creditors Information Package, the Meeting Order and the Monitor's Fourteenth Report to all Creditors and interested parties, posted this information on its website, and published the Notice of Meeting in the *Globe and Mail* (National Edition)[29];

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[27] Initial Order of the Honourable Mr. Justice Newbould, dated January 12, 2012, para. 2, Applicants' Book of Authorities, Tab 3.
[28] Meeting Order of the Honourable Mr. Justice Penny, dated September 6, 2016, para. 17, Applicants' Book of Authorities, Tab 4.
[29] Sanction Affidavit, *supra*, paras. 11-12, Applicants' Motion Record, Tab 2, pgs. 9-10.

(d) the Creditors' Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order[30]; and

(e) 92% in number representing 99% in value of the Creditors that were present and voting in person or by proxy at the Creditors' Meeting voted in favour of the Plan.[31] This degree of approval of the Plan far exceeds the statutory "double majority" required by ss. 6(1) of the CCAA.

40. Subsections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan of compromise and arrangement unless it contains specified provisions concerning certain crown claims, employee claims and pension claims.[32]

41. All of the requirements under ss. 6(3), 6(5) and 6(6) of the CCAA are satisfied in this case:

(a) Section 5.2 of the Plan provides that, within six months after the date of the herein order and the expiry of all appeal periods related thereto, all amounts owed to the Crown pursuant to ss. 6(3) of the CCAA shall be paid in full[33];

(b) To the best of Domfoam's knowledge, there are no amounts owing to Domfoam's employees that would be captured by ss. 6(5) of the CCAA. Nevertheless, Section 5.1 of the Plan confirms that employees will receive all amounts owed to them

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[30] Sanction Affidavit, *supra*, paras. 10, 19-20, Applicants' Motion Record, Tab 2, pgs. 9, 11-12.
[31] Sanction Affidavit, *supra*, paras. 23-25, Applicants' Motion Record, Tab 2, pgs. 12-13.
[32] CCAA, *supra*, ss. 6(3), 6(5) and 6(6).
[33] Sanction Affidavit, Exhibit "A", s. 5.2, Applicants' Motion Record, Tab 2A, pg. 29.

under ss. 6(5) of the CCAA immediately after the Plan is approved by the Court, and all appeal periods relating to the Sanction Order have expired[34];

(c) Subsection 6(6) of the CCAA does not apply because Domfoam does not participate in a prescribed pension plan.

42. In addition, the Plan does not compromise, release or otherwise affect any rights or claims that fall within ss. 6(3), 6(5) or 6(6) of the CCAA.[35]

43. The claims of Proven Creditors will not be paid in full under the Plan. In compliance with ss. 6(8) of the CCAA[36], the Plan does not provide for any recovery for equity holders.[37]

44. Subsection 19(2) of the CCAA provides that a plan of compromise and arrangement may not deal with, *inter alia*, any fine or penalty imposed by a court, unless the plan specifically provides for its compromise and the creditor in relation to that debt has voted in favour of the plan.[38]

45. In accordance with ss. 19(2), the Plan does not seek to compromise or release the Competition Act Claim, although the Crown may participate in a distribution with respect to the Competition Act Claim under the Plan.[39] The Crown advised that it did not wish to see its claim compromised, but that it would abstain from voting on the Plan if the Plan was amended to

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[34] Sanction Affidavit, Exhibit "A", s. 5.1, Applicants' Motion Record, Tab 2A, pgs. 28-29.
[35] Sanction Affidavit, Exhibit "A", s. 3.3, Applicants' Motion Record, Tab 2A, pg. 27.
[36] Subsection 6(8) of the CCAA provides that "No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid."
[37] Sanction Affidavit, Exhibit "A", s. 3.4, Applicants' Motion Record, Tab 2A, pgs. 27-28. See also Fifteenth Report, *supra*, para. 60(d).
[38] CCAA, *supra*, ss. 19(2).
[39] Sanction Affidavit, Exhibit "A", s. 4.1, Applicants' Motion Record, Tab 2A, pg. 28.

highlight that its Competition Act Claim was not compromised.[40] The treatment of the Competition Act Claim was, therefore, required under ss. 19(2) of the CCAA, and avoids a bankruptcy of Domfoam.

46. The Monitor is of the view that the Plan complies with the requirements of the CCAA, including the requirements under section 6 of the CCAA.[41]

47. Accordingly, Domfoam submits that the statutory prerequisites to approval of the Plan have been satisfied, and there has been strict compliance with all statutory requirements.

No Unauthorized Steps Taken by Domfoam

48. In addressing the second component of the sanction test, the court relies on the parties and the Monitor in making a determination as to whether anything has been done, or is purported to have been done, that is not authorized by the CCAA.[42]

49. Domfoam submits that no unauthorized steps have been taken in this CCAA proceeding. This Honourable Court has been kept apprised of all of the key issues facing Domfoam (and the other Applicants) throughout the restructuring. In particular, the Applicants have filed several affidavits and the Monitor has issued fifteen reports throughout the pendency of the CCAA, which have all been filed publicly on the Monitor's website.[43]

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[40] Sanction Affidavit, para. 15, Applicants' Motion Record, Tab 2, pg. 10.
[41] Fifteenth Report, *supra*, para. 60(c).
[42] *Canadian Airlines*, *supra*, para. 64, citing *Olympia & York Developments Ltd. v. Royal York Trust Co.*, 1993 CarswellOnt 182 (Gen. Div.) ("***Olympia & York***"), Applicants' Book of Authorities, Tab 1. See also, *Canwest*, *supra*, para. 17, Applicants' Book of Authorities, Tab 2.
[43] Fifteenth Report, *supra*, para. 10.

50. While the Plan provides releases in favour of Domfoam and its Directors and Officers, it does not purport to release these parties in a manner that is contrary to s. 5.1(2) of the CCAA.[44]

51. Domfoam has acted in good faith and with due diligence in complying with all Court Orders, including the Initial Order and the Meeting Order, and ensuring that no unauthorized steps have been taken under the CCAA.[45] The Court, therefore, has the jurisdiction to approve the Plan.

The Plan is Fair and Reasonable

52. Domfoam submits that this Honourable Court should exercise its discretion to sanction the Plan as fair and reasonable.

53. Courts have repeatedly emphasized that when considering whether a plan of compromise and arrangement is fair and reasonable, the court will consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts will also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.[46] What is fair and reasonable will depend on the circumstances of each case, within the context of the CCAA.[47]

54. It has also been noted that a successful vote on a plan by sophisticated parties "speaks volumes as to fairness and reasonableness."[48] Where creditors have signaled their support of a

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[44] Sanction Affidavit, Exhibit "A", s. 9.1, Applicants' Motion Record, Tab 2A, pgs. 33-34.
[45] Sanction Affidavit, para. 45, Applicants' Motion Record, pg. 17.
[46] *Canadian Airlines, supra*, para. 3, Applicants' Book of Authorities, Tab 1. See also, *Canwest*, para. 19, Applicants' Book of Authorities, Tab 2.
[47] *Canadian Airlines*, *supra*, para. 94, Applicants' Book of Authorities, Tab 1.
[48] *Sammi Atlas Inc., Re,* 1998 CarswellOnt 1145 ("***Sammi Atlas***"),para. 5, Applicants' Book of Authorities, Tab 5.

plan by means of the vote, the court will be very reluctant to second guess the business decisions made by the debtor company's stakeholders.[49]

55. In considering whether a plan is fair and reasonable, courts have examined the following factors:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.[50]

56. Examining the applicable factors, it is respectfully submitted that the Plan is fair and reasonable and should be sanctioned by the Court:

(a) As noted above, the Creditors voted on the Plan as a single class on the basis of commonality of interest in that all Creditors held unsecured claims against

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[49] *Sammi Atlas, supra*, paras. 4-5, Applicants' Book of Authorities, Tab 5. See also *Canadian Airlines, supra*, para. 97, quoting *Olympia & York,* Applicants' Book of Authorities, Tab 1.
[50] *Canwest, supra*, para. 21, Applicants' Book of Authorities, Tab 2. See also *Re Sino-Forest Corp.*, 2012 ONSC 7050 ("***Sino-Forest***"), at para. 61, Applicants' Book of Authorities, Tab 6.

Domfoam.[51] The Plan received substantially more than the "double majority" required by the CCAA.[52] Justice Paperny held in *Canadian Airlines* that, "Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan."[53] The high degree of support for the Plan in this case (i.e.: 92% in number and 99% in value) is a strong indicator that the Plan is fair and reasonable with respect to the stakeholders' interests.

(b) The Monitor has expressed the view that the expected recovery under the Plan is $0.06, and that this represents a better outcome than under a potential bankruptcy.[54] The Plan avoids the costs and expenses associated with a bankruptcy, which includes the Superintendent's levy payable with respect to a distribution, thereby maximizing the dividend payable to Proven Creditors.[55] The Plan also resolves the treatment of the Competition Act Claim without requiring the bankruptcy of Domfoam.[56]

(c) There are no alternatives other than the Plan or a bankruptcy of the estate. As mentioned above, a bankruptcy would result in a diminished recovery to the Proven Creditors. The Monitor is of the view that the Plan will be a more cost effective method of distributing future proceeds, as compared to a bankruptcy,

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[51] Sanction Affidavit, Exhibit "A", s. 3.1, Applicants' Motion Record, Tab 2A, pg. 27.
[52] Sanction Affidavit, *supra*, paras. 23-25, Applicants' Motion Record, Tab 2, pgs. 12-13.
[53] *Canadian Airlines*, *supra*, para. 97, Applicants' Book of Authorities, Tab 1.
[54] Fifteenth Report, *supra*, para. 60(a).
[55] Sanction Affidavit, *supra*, para. 42(b), Applicants' Motion Record, Tab 2, pg. 16. Fifteenth Report, *supra*, para. 47.
[56] Sanction Affidavit, *supra*, para. 42(g), Applicants' Motion Record, Tab 2, pg. 17.

since only minimal incremental costs will be associated with such distribution.[57] Additionally, the Plan provides for distribution of the liquidation proceeds and the future proceeds (as and when those monies arrive) without the need for further court orders.[58] It is submitted that the Plan represents the best outcome for Creditors in light of all relevant circumstances.

(d) The rights of Domfoam's creditors are not oppressed under the Plan. Domfoam has not acted in any manner that unfairly disregards or prejudices the interests of its stakeholders.[59] The Plan provides for distributions to be made on a *pro rata, pari passu* basis to all Proven Creditors, and treats all Proven Creditors equally.[60]

(e) Given that the Proven Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recoveries under the Plan.

(f) The Plan resolves the Proven Claims against Domfoam in a manner that is efficient and timely, without further delays or costs. The Plan also requires that the Revenu Quebec Action and the HST Pre and Post Filing Dispute be resolved prior to the Plan Implementation Date.[61] Given that the Plan addresses and settles all Proven Claims, as well as certain disputes between Domfoam and Revenu Quebec and the Canada Revenue Agency, it is in the public interest to approve the Plan to allow all Creditors to benefit from the results of this process.

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[57] Fifteenth Report, *supra*, paras. 48, 60(a).
[58] Sanction Affidavit, *supra*, para. 42(a), Applicants' Motion Record, Tab 2, pg. 16.
[59] Sanction Affidavit, *supra*, para. 45, Applicants' Motion Record, Tab 2, pg. 17.
[60] Sanction Affidavit, *supra*, Exhibit "A", ss. 5.4-5.6, Applicants' Motion Record, Tab 2A, pgs. 29-30. Fifteenth Report, *supra*, para. 60(b).
[61] Sanction Affidavit, *supra*, para. 42(c) and (e), Applicants' Motion Record, Tab 2, pg. 16.

Releases under the Plan are Fair and Reasonable

57. Article 9.1 provides for full and final releases in favour of Domfoam, its Directors and Officers, current and former employees, advisors, legal counsel and agents (collectively, the "**Domfoam Released Parties**").[62] The Domfoam Released Parties are released and discharged from all Claims, except with respect to those matters not permitted under ss. 5.1(2) of the CCAA.

58. It is well-accepted that courts have jurisdiction to sanction plans containing releases in favour of the debtor company and other parties.[63] Releases for directors are expressly permitted under the CCAA.[64]

59. The releases in favour of the Domfoam Released Parties allow for the resolution of the Revenu Quebec Action and the HST Pre and Post Filing Dispute, which are prerequisite conditions to the implementation of the Plan. As a result of the releases, Domfoam was in a position to settle the Revenu Quebec Action, and withdraw its contestation of the Monitor's position regarding the HST Pre and Post Filing Dispute.[65] The releases, therefore, are essential to the success of the Plan for the benefit of Domfoam and its stakeholders.

60. Full disclosure of the nature and extent of the releases was made to the Creditors in the Plan, which was circulated to Creditors well in advance of the Creditors' Meeting.[66] No party has objected to the scope of the releases contained in the Plan.

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[62] Sanction Affidavit, *supra*, Exhibit "A", s. 9.1, Applicants' Motion Record, Tab 2A, pg. 33.
[63] *MuscleTech Research and Development (Re)* 2007, 30 C.B.R. (5th) 59, at paras. 23 and 26, Applicants' Book of Authorities, Tab 7.
[64] CCAA, *supra*, ss. 5(1).
[65] Sanction Affidavit, *supra*, paras. 33, 38-39, Applicants' Motion Record, Tab 2, pgs. 14-15.
[66] Sanction Affidavit, *supra*, paras. 11-12, Applicants' Motion Record, Tab 2, pgs. 9-10.

61. The Monitor is of the view that the Plan as a whole is fair and reasonable, including the releases.[67] Accordingly, Domfoam submits that this Honourable Court should sanction the Plan as it represents an equitable balancing of the Creditors' interests.

Stay Extension Should be Granted

62. The current Stay Period ends on January 30, 2017. The Applicants are seeking an extension of the Stay Period with respect to each of them up to and including June 30, 2017.[68]

63. In this case, the Applicants have acted, and continue to act, in good faith and with due diligence in pursuing the orderly wind down of Domfoam, and collecting outstanding amounts owed to them for distribution to the Creditors.[69] In particular, the Applicants and their stakeholders would benefit from an extension of the Stay Period to and including June 30, 2017 to allow the Applicants to: (a) take all steps and actions necessary to implement the Plan; (b) collect the Polyols Settlement; (c) resolve certain inter-company accounting issues relating to A-Z Foam; and (d) continue pursuing collection efforts with respect to receivables owed to Valle Foam.[70]

64. The Applicants are not aware of any parties objecting to the extension of the Stay Period. Additionally, the Monitor supports the request to extend the Stay Period to and including June 30, 2017.[71]

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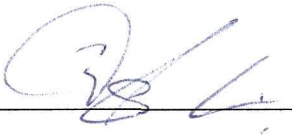
[67] Fifteenth Report, *supra*, para. 61.
[68] Sanction Affidavit, *supra*, paras. 46-48, Applicants' Motion Record, Tab 2, pgs. 17-18.
[69] Sanction Affidavit, *supra*, para. 50, Applicants' Motion Record, Tab 2, pg. 18.
[70] Sanction Affidavit, *supra*, paras. 52-66, Applicants' Motion Record, Tab 2, pgs. 18-21.
[71] Fifteenth Report, *supra*, paras. 77-78.

PART IV — NATURE OF THE ORDER SOUGHT

65. For all of the reasons outlined above, the Applicants submit that this Honourable Court should approve the Plan as fair and reasonable, and grant an extension of the Stay Period to the date requested above.

January 20, 2017

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:



David Ullmann
Lawyer for the Applicants

SCHEDULE A

LIST OF AUTHORITIES

Case Law

1. *Re Canadian Airlines Corp.,* 2000 ABQB 442

2. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209

3. Initial Order of the Honourable Mr. Justice Newbould, dated January 12, 2012

4. Meeting Order of the Honourable Mr. Justice Penny, dated September 6, 2016

5. *Sammi Atlas Inc., Re,* 1998 CarswellOnt 1145

6. *Re Sino-Forest Corp.*, 2012 ONSC 7050

7. *MuscleTech Research and Development (Re),* 2007, 30 C.B.R. (5^{th}) 59

SCHEDULE B

STATUTES

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

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Definitions

2 **(1)** In this Act, …

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

Application

3 **(1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Claims against directors — compromise

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

Exception

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

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

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

Powers of court

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

Resignation or removal of directors

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

Compromises to be sanctioned by court

6 **(1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a ***provincial pension plan*** as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly

incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within

the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

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

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

Stays, etc. — initial application

11.02 **(1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Claims that may be dealt with by a compromise or arrangement

19 **(1)** Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

Court File No. CV-12-9545-00CL

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 3113736 Canada LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at **TORONTO**

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(Plan Sanction Hearing,
returnable January 24, 2017)

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