

**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")

**FACTUM OF THE APPLICANTS  
(Motion to Accept Filing of the Plan  
and Authorize Creditors' Meeting)**

August 26, 2015

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**TO: THE ATTACHED SERVICE LIST**

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(Motion to Accept Filing of the Plan  
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**PART I — NATURE OF THE MOTION**

1. 4362063 Canada Ltd., formerly known as Domfoam International Inc. ("**Domfoam**") and the other applicants listed above (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 Restructuring Inc. ("**Deloitte**") was appointed in the Initial Order to act as the Monitor in this CCAA proceeding.
2. This factum is filed in support of Domfoam's motion to file its Plan of Compromise and Arrangement (the "**Plan**") and to obtain an order of this Court (the "**Meeting Order**") authorizing Domfoam to hold a meeting of its creditors.
3. If approved by the requisite majority of creditors at the proposed Creditors' Meeting and sanctioned by this Court, the Plan will provide for the resolution of the remaining contested

issues in Domfoam's claims process, complete the orderly wind down of the business of Domfoam and facilitate the distribution of future funds.

4. Domfoam submits that the proposed Meeting Order, in the form set out in the Applicants' Motion Record, should be granted.

## II — FACTS

5. On January 12, 2012, the Applicants sought and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-35, as amended (the CCAA) pursuant to the Initial Order.

Initial Order of the Honourable Justice Newbould, dated January 12, 2012, Applicants' Book of Authorities, Tab 1.

6. Deloitte was appointed as Monitor of the Applicants.

Initial Order of the Honourable Justice Newbould, dated January 12, 2012, Applicants' Book of Authorities, Tab 1.

7. In 2012, in these proceedings, Domfoam completed the sale of its business.

Fourteenth Report of the Monitor, dated August 26, 2016, para. 7.

8. The Applicants, including Domfoam, are each claimants in a U.S. class action proceeding that relates to price fixing for a product known as "Polyether Polyol" which has been ongoing since before the current CCAA proceedings began. Dow Chemical Company, the last principal defendant, has recently accepted a settlement under which it is to pay \$834,000,000 for distribution to the class members, including the Applicants (the "**Polyols Settlement**").

Affidavit of Tony Vallecoccia, sworn August 23, 2016 ("**Vallecoccia Affidavit**"), paras. 10-13, Applicants' Motion Record, Tab 2, pgs. 26-7.

9. The settlement and proposed method for the distribution of these funds was approved by the US Judge overseeing the case in July, 2016.

Vallecoccia Affidavit, para. 16, Applicants' Motion Record, Tab 2, pg. 27.

10. The recovery of the Applicants, before attorney fees, payable in respect of the Applicants' claim in the Polyol proceedings, is expected to be several million dollars.

Vallecoccia Affidavit, para. 17, Applicants' Motion Record, Tab 2, pg. 27.

11. Based upon previous filings and payments received to date in this case, and without any unanticipated circumstances, the gross payment to Domfoam could be as much as \$4,900,000.

Vallecoccia Affidavit, para. 18, Applicants' Motion Record, Tab 2, pg. 28.

12. Domfoam is also in possession of \$1,923,397.66 from the sale of its business which is available for distribution.

Fourteenth Report of the Monitor, dated August 26, 2016, para. 49.

13. The Applicants have run a Court ordered process to identify pre- and post-filing claims against the Applicants and/or their officers and directors (the "**Claims Process Order**").

Vallecoccia Affidavit, para. 21, Applicants' Motion Record, Tab 2, pg. 28.

Order (Claims Solicitation Procedure) of the Honourable Justice Brown, dated June 15, 2012, Applicants' Book of Authorities, Tab 2.

14. The Monitor has a comprehensive registry of claims, including contact information, so as to enable payments to be made to those Creditors.

Vallecoccia Affidavit, para. 22, Applicants' Motion Record, Tab 2, pg. 28.

15. There are certain minor late filed claims which the Monitor proposes be allowed. There is no objection to this from Domfoam. Similar late filing claims were previously allowed by this Court in the proceedings of the other Applicants.

Order (Extension of Stay Period, Admission of Late Claims and Interim Distributions) of the Honourable Justice Newbould, dated September 29, 2015, Applicants' Book of Authorities, Tab 3.

Fourteenth Report of the Monitor, dated August 26, 2016, paras. 20-30.

16. The sole remaining disputed claim involves a claim by Revenu Quebec and the Canada Revenue Agency. This claim is proceeding before both the Tax Court of Canada and the Quebec Superior Court. Discussions are ongoing with respect to settlement of this claim. The Plan addresses this issue.

Vallecoccia Affidavit, paras. 23-32, Applicants' Motion Record, Tab 2, pgs. 29-30.

17. The Monitor advises that Domfoam has claims against it in the amount of \$27,298,242.79. The anticipated dividend will be in the range of \$0.06, and the estimated total funds available for distribution is \$1,717,397.66, before including anything from the Polyols Settlement. If the anticipated Polyols Settlement amount is received, the dividend will increase substantially.

Fourteenth Report of the Monitor, dated August 26, 2016, para. 64.

### **Nature of the Plan**

18. Domfoam has developed the Plan to present to its creditors, the key features of which are as follows:

- a) the Plan only relates to Domfoam;

- b) it proposes a pro rata distribution of the funds already realised by the liquidation of Domfoam's business and from the Polyols Settlement to a single class of unsecured creditors;
- c) it utilizes the existing claims, as filed;
- d) it meets the statutory requirements in terms of those provisions of a Plan, which must be included in any plan;
- e) Domfoam's directors and officers will be released from any pre-filing claims against them (other than those which cannot be released pursuant to section 5.1(2) of the CCAA), including from any claims by Revenu Quebec and the Canada Revenue Agency;
- f) the proceeds from the Polyols Settlement will be distributed when they are received without further Court order; and
- g) Domfoam will discontinue its action to contest the Revenue Quebec claim in the Tax Court and resolve other remaining tax issues.

Vallecoccia Affidavit, para. 33, Applicants' Motion Record, Tab 2, pgs. 30-31.

19. There are no known creditors in priority to the unsecured creditors other than one minor claim by CRA which is under review.

Vallecoccia Affidavit, para. 34, Applicants' Motion Record, Tab 2, pg. 31.

Fourteenth Report of the Monitor, dated August 26, 2016, para. 16.

20. The Plan contains language declaring that the distributions under the Plan are distributions from the Applicant, and do not constitute distributions from the Monitor.

Vallecoccia Affidavit, paras. 41-42, Applicants' Motion Record, Tab 2, pg. 32.

21. A distribution under the Plan is the most efficient manner of distributing funds to the creditors, and maximizes return to the creditors. Key creditors were canvassed about the proposed Plan and no objection was received.

Vallecoccia Affidavit, para. 39, Applicants' Motion Record, Tab 2, pg. 32.

### **Meeting Order Required**

22. Domfoam intends to file the Plan to call the Meeting in respect of the Plan.

Vallecoccia Affidavit, para. 46, Applicants' Motion Record, Tab 2, pg. 33.

23. In advance of the Meeting, it is necessary to establish a procedure for the calling and conduct of the Meeting.

24. The Meeting Order provides that, for the purposes of considering and voting on the Plan, the Creditors will constitute a single class.

Notice of Motion, Schedule "A", Meeting Order, para. 18, Applicants' Motion Record, Tab 1A, pg. 11.

25. The proposed Meeting Order also provides for, *inter alia*:

- (a) comprehensive notification of the Meeting to the Creditors;
- (b) procedures for the conduct of the Meeting, including that a representative of the Monitor will preside as the Chair of the Meeting, and, subject to any further Order of this Court, will decide all matters relating to the conduct of the Meeting;
- (c) the voting procedure at the Meeting;
- (d) the manner of valuing Claims for voting and distribution purposes;

- (e) the process by which the Monitor will keep a separate record of votes cast by Creditors holding Unconfirmed Voting Claims;
- (f) the processes and requirements for assigning claims; and
- (g) the ability of Domfoam and the Monitor to make amendments to the Plan.

Notice of Motion, Schedule "A", Meeting Order, paras. 8-13, 22-25, 27-28, 29, Applicants' Motion Record, Tab 1A, pgs. 9-14.

26. The Monitor is supportive of this Motion. The Monitor recommends the calling of a creditors' meeting, and states that the proposed distribution under the Plan is the most cost-effective way of distributing proceeds, and will result in a greater recovery for the creditors than a bankruptcy.

Vallecoccia Affidavit, para. 58, Applicants' Motion Record, Tab 2, pg. 35.

Fourteenth Report of the Monitor, dated August 26, 2016, paras. 49, 50 and 55.

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

27. The sole issue on this motion is should this Honourable Court grant the requested Meeting Order? It is Domfoam's position that it should.

#### ***Authority to Call Meeting***

28. Section 4 of the CCAA, which expressly contemplates the calling of a meeting of the unsecured creditors of a company to consider and vote on a plan proposing a compromise of the claims of those creditors, provides the Court with authority to order that a meeting be held:

Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order



a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders or the company to be summoned in such manner as the court directs.

*Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 4.

29. The threshold to be satisfied in order to file a plan and call a meeting of creditors is low. As the Ontario Court of Appeal held in *Nova Metal Products*, the feasibility of a plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors. However, the Court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset.

*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (W.L. Can.) (C.A.) at para. 90, Applicants' Book of Authorities, Tab 4.

30. The Plan is a very straight forward plan which enables the distribution of the existing and future funds to the creditors. Key creditors have been notified about the Plan and do not object to the Plan or a meeting being called. The Plan was developed in consultation with the Monitor.

Vallecoccia Affidavit, paras. 33-38, 44, Applicants' Motion Record, Tab 2, pgs. 30-33.

31. In the recent *Target Canada* decision in which the filing of a Plan was rejected by the Court, Justice Morawetz also reaffirmed that plans of arrangement which seek to distribute liquidation proceeds would ordinarily be filed and sent to the creditors for consideration.

*Target Canada* developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. *Target Canada* liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, *Target Corporation* agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

*Target Canada Co. (Re)*, 2016 ONSC 316, at para. 76, Applicants' Book of Authorities, Tab 5.

### ***Release of Directors and Officers***

32. Section 5.1 of the CCAA expressly authorizes a company to include releases of directors and officers for pre-filing claims which arise from statutory obligations of the company in its Plan.

*Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 5.1.

33. Section 5.1 is similar in wording to s. 50(13) of the *Bankruptcy and Insolvency Act*. A plan under the CCAA may include in its terms provision for the compromise of claims against directors of the debtor company where the directors are legally liable in their capacity as directors for payment of such claims. The right to compromise such claims is limited by the provisions of s. 5.1(2), (3) and 11.03(1).

L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 2009), N§36, Applicants' Book of Authorities, Tab 6.

34. Under the Plan, Domfoam's directors and officers will be released from any pre-filing claims against them (other than those which cannot be released pursuant to section 5.1(2) of the CCAA), including from any claims by Revenu Quebec and the Canada Revenue Agency.

Vallecoccia Affidavit, Exhibit "B": Plan of Compromise and Arrangement, s. 9.1, Applicants' Motion Record, Tab 2B, pg. 58.

35. All possible claimants have had the opportunity to file claims against the officers and directors. Those that failed to do so have been barred and have had their claims deemed extinguished for in excess of 4 years at this point by the terms of the Claims Process Order in these proceedings.

Vallecoccia Affidavit, para. 21, Applicants' Motion Record, Tab 2, pg. 28.

Order (Claims Solicitation Procedure) of the Honourable Justice Brown, dated June 15, 2012, Applicants' Book of Authorities, Tab 2.

36. The only known claims which remain outstanding against the officers and directors are those filed by Revenu Quebec with respect to issues which remain before the Tax Court and the Quebec Superior Court. No actions have been commenced against any directors or officers in respect of those claims.

Vallecoccia Affidavit, paras. 23-32, Applicants' Motion Record, Tab 2, pgs. 29-30.

37. The resolution of the matter before the Tax Court is currently road blocked by the inability of the parties to reach a resolution on the question of the release of the officers and directors. It is also preventing the issuance of a clearance certificate from Revenu Quebec. In the absence of this resolution, the distribution of funds is suspended. The approval of the Plan (if approved by the Creditors and the Court) will remove this road block.

Vallecoccia Affidavit, paras. 24-26, Applicants' Motion Record, Tab 2, pg. 29.

38. The proposed release of the claims of Revenu Quebec against the officers and directors is necessary to accelerate the distribution of funds from the company without having to wait for the resolution of the outstanding matter in tax court. The Court has the authority to sanction a plan which contains these releases. In any event, that is a matter to be further considered at the eventual Sanction hearing and need not be finally determined at this time.

*Re Ball Machinery Sales Ltd.*, 2002 CarswellOnt 2742 (Ont. S.C.J.), para. 7, Applicants' Book of Authorities, Tab 7.

*Re BlueStar Battery Systems International Corp.*, 2000 CarswellOnt 4837 (Ont. S.C.J. [Commercial List]), paras. 14-17, Applicants' Book of Authorities, Tab 8.

### **Distribution of Funds by the Monitor as Agent**

39. The funds to be distributed in the Plan will be distributed by the Monitor on behalf of and as an agent of Domfoam. In this capacity, the Monitor will be a disbursing agent and therefore

not liable to any tax authority which might otherwise govern the release of funds by a court officer or receiver.

Vallecoccia Affidavit, Exhibit "B": Plan of Compromise and Arrangement, s. 5.6, Applicants' Motion Record, Tab 2B, pg. 55.

40. In the CCAA proceedings of AbitibiBowater Inc., the Court sanctioned a plan which contained essentially identical language to the language which the Plan requires be in the proposed Plan Sanction Order, which insulated the Monitor from personal liability for the statutes listed therein in that proceeding. It is respectfully submitted that any distribution by the Monitor under the Plan is to be done as agent for Domfoam and not in the Monitor's personal capacity:

*ORDERS and DECLARES* that any distributions under the CCAA Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants for the purposes of section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 14 of the Act Respecting the Ministère du Revenu (Québec), section 107 of the Corporations Tax Act (Ontario), section 22 of the Retail Sales Tax Act (Ontario), section 117 of the Taxation Act, 2007 (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a Disbursing Agent under the CCAA Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the CCAA Plan and this Order and any claims of this nature are hereby forever barred.

*AbitibiBowater Inc., Re*, 2010 OCCS 4450, pg. 17 Applicants' Book of Authorities, Tab 9.

## **Creditors in a Single Class**

41. If the Meeting Order is granted, all of the Creditors will vote in an unsecured creditors' class at the Creditors' Meeting. All of the Creditors under the Plan have unsecured claims against the Domfoam.

Notice of Motion, Schedule "A", Meeting Order, para. 18, Applicants' Motion Record, Tab 1A, pg. 11.

Vallecoccia Affidavit, para. 34, Applicants' Motion Record, Tab 2, pg. 31.

42. Section 22(1) of the CCAA provides that:

A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to a company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

*Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 22(1).

43. Presumptively, the fact that all of the Creditors under the Plan have unsecured claims against Domfoam favours the placement of such creditors in the Unsecured Creditors' Class. As Farley J. noted in *Stelco*:

...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

*Stelco Inc., Re*, 2005 CarswellOnt 6483, para. 13, aff'd 2005 CarswellOnt 6818 (C.A.), Book of Authorities, Applicants' Book of Authorities, Tab 10.

44. Domfoam therefore submits that this Court should approve the voting of Creditors in a single unsecured class.

**PART IV — NATURE OF THE ORDER SOUGHT**

45. The extension of the stay of proceedings is required in order to proceed with the Plan and to otherwise proceed with the remaining issues in the Applicants' proceeding. It is not opposed by any party.

46. For all of the reasons above, the Applicants submit that this Honourable Court should grant the requested Meeting Order and related relief requested by the Applicants.

August 26, 2016

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:**



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**David Ullmann**  
Lawyer for the Applicants

## SCHEDULE A

### LIST OF AUTHORITIES

#### Case Law

1. Initial Order of the Honourable Justice Newbould, dated January 12, 2012
2. Order (Claims Solicitation Procedure) of the Honourable Justice Brown, dated June 15, 2012
3. Order (Extension of Stay Period, Admission of Late Claims and Interim Distributions) of the Honourable Justice Newbould, dated September 29, 2015
4. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (W.L. Can.) (C.A.)
5. *Re Target Canada Co.*, 2016 ONSC 316
6. *Re Ball Machinery Sales Ltd.*, 2002 CarswellOnt 2742 (Ont. S.C.J.)
7. *Re BlueStar Battery Systems International Corp.*, 2000 CarswellOnt 4837 (Ont. S.C.J. [Commercial List])
8. *AbitibiBowater Inc., Re*, 2010 OCCS 4450
9. *Re Stelco Inc.*, 2005 CarswellOnt 6483, aff'd 2005 CarswellOnt 6818 (C.A.)

#### Secondary Source

10. L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 2009)

## SCHEDULE B

### *COMPANIES' CREDITORS ARRANGEMENT ACT*

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

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#### **Compromise with unsecured creditors**

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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#### **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.

1997, c. 12, s. 122.



## **Stays — directors**

- **11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

## **Company may establish classes**

**22. (1)** A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

## **Factors**

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

## **Related creditors**

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

## **Class - creditors having equity claims**

**22.1** Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

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  
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Proceeding commenced at TORONTO

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