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**")

# FACTUM OF THE APPLICANTS/MOVING PARTY
## (Re Leave under Rule 39.02 and Adjournment Motions, Returnable November 29, 2018)

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|---|---|
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| **TO:** | **Service List** |

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(the "**Applicants**")

# FACTUM OF THE APPLICANTS
**(Motion for Leave under Rules 39.02 and 39.03)**

## PART I - OVERVIEW

1. Domfoam Inc. (formerly 4037057 Canada Inc.) ("**Purchaser**") purchased the operating business of the Applicant, Domfoam International Inc. (now known as 4362063 Canada Limited) ("**Domfoam**"), in March 2012.

2. The Purchaser now moves for an order setting aside the Order of The Honourable Justice Wilton-Siegel dated May 29, 2018, wherein the Court authorized Deloitte Restructuring Inc. in its capacity as Court-appointed Monitor of the Applicants (the "**Monitor**") to make an interim distribution of $3,470,000 to the creditors of Domfoam, and directing Domfoam to pay the proceeds from the US Class Action (as defined below) in the amount of $3.6 million USD to the Purchaser.

3. The asset which the Purchaser is now trying to claim represents the most significant asset in the Domfoam estate. A Plan of Compromise and Arrangement ("**Plan**") was developed based upon the distribution of the proceeds from the US Class Action to the creditors of Domfoam. The

Plan was supported by the creditors and approved by the Court. If the Purchaser is successful on its motion, the result will be that Domfoam's creditors will receive virtually nothing.

4. In support of its motion, the Purchaser has put forward two affidavits from its counsel, Mr. Jacques Vincent, who acted as solicitor on the asset purchase transaction in 2011-2012. Mr. Vincent is not the Purchaser; he cannot provide evidence of the Purchaser's intentions with respect to the 2012 transaction. He can only testify as to what his understanding of those intentions was at the time. Following Mr. Vincent's cross-examination on November 20, 2018, it became evident that Mr. Vincent played a limited legal role on the purchase transaction. He was not involved in the due diligence regarding the assets that were being purchased, and could not provide evidence on what steps his client took (if any) to investigate or secure the asset it had allegedly purchased.

5. The Court is entitled to decide the important issues at stake on the Purchaser's motion on a full evidentiary record. Similarly, Domfoam is entitled to make full and fair answer and defence to the Purchaser's motion, particularly in light of the serious consequences the Purchaser seek to cause. Given the gaps in Mr. Vincent's testimony that go to the heart of this dispute, Domfoam moves for an order granting it leave to examine Mr. Terry Pomerantz and Mr. John Howard as representatives of the Purchaser, as witnesses to the pending motion. Given that the Purchaser's motion is returnable November 29, 2018, Domfoam also seeks an adjournment.

6. Granting leave will not prejudice the Purchaser, who has waited more than six years before bringing its motion. There is no urgency to this matter whatsoever, and the disputed funds are being held by the Monitor, an Officer of the Court. Any prejudice can be compensated with costs. Refusing leave will, however, cause significant prejudice to the creditors of Domfoam, who stand to be deprived of the estate's largest and only significant asset.

## PART II - FACTS

### US Urethane Antitrust Litigation

7. In 2004, a class action lawsuit was commenced alleging that certain companies unlawfully fixed the prices of polyether polyol products sold in the United States between January 1, 1999 and December 31, 2004. This class action was commenced in the United States District Court for the District of Kansas ("**US Court**") under the case name "In Re: Urethane Antitrust Litigation" ("**US Class Action**"). The defendants were Bayer AG, Bayer Corporation, Bayer MaterialScience LLC (collectively, "**Bayer**"), BASF SE, BASF Corporation (collectively, "**BASF**"), the Dow Chemical Company ("**Dow**"), Huntsman International LLC ("**Huntsman**") and Lyondell Chemical Company (collectively, the "**Defendants**"). As purchasers of polyether polyol products in the relevant time period, the Applicants, including Domfoam, were class members in the US Class Action.[1]

8. In 2008, the Applicants retained the services of Refund Recovery Services, LLC ("**RRS**") as agent to assist the Applicants with filing a claim in the US Class Action in order to participate in any recoveries from the Defendants. Mr. Howard was the former General Manager for the Applicants and executed the agreement on the Applicants' behalf. Immediately following the close of the transaction between Domfoam and the Purchaser, Mr. Howard became employed by the Purchaser.[2]

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[1] Affidavit of Tony Vallecoccia, sworn October 16, 2018 ("**Vallecoccia Affidavit**"), para. 9, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.
[2] Vallecoccia Affidavit, *supra*, paras. 11 and 23, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

9. The plaintiffs in the US Class Action reached negotiated settlements of the claims against Bayer, BASF, Huntsman and Lyondell, which were approved by the US Court at different times.[3]

10. A settlement was reached with BASF and Huntsman, which was approved by the US Court on December 12, 2011 and distributed to the Applicants in three tranches.[4]

11. Unlike the other Defendants, the action against Dow proceeded to a jury trial in 2013. In May 2013, a judgment was entered against Dow in favour of the plaintiff class in the amount of $1.2 billion. Dow appealed from the jury verdict and judgment. The United States Court of Appeals for the Tenth Circuit affirmed the trial court's decision in September 2014, and Dow appealed to the Supreme Court of the United States. Before the Supreme Court appeal could be decided, the parties reached a settlement in February 2016. Under the settlement, Dow agreed to pay $835 million to the benefit of the class action plaintiffs. This settlement was approved in December 2017, and distributions were made thereafter.[5]

**Sale of Domfoam**

12. In December 2011, the Purchaser and Domfoam entered into a first draft of the Asset Purchase Agreement ("**APA #1**"). The purchase price in APA #1 included a value for the US Class Action which the parties referred to as the "BASF Receivables" (as defined in APA #1).[6]

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[3] Vallecoccia Affidavit, *supra*, para, 12, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[4] Vallecoccia Affidavit, *supra*, para, 14, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[5] Vallecoccia Affidavit, *supra*, para, 16, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[6] Vallecoccia Affidavit, *supra*, para, 6, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

13. The "BASF Receivables" was expressly "withdrawn" from the second draft of the Asset Purchase Agreement, dated February 22, 2012 ("**APA #2**") and the purchase price was adjusted accordingly.[7]

14. The BASF Receivables continued to remain "withdrawn" in the final Asset Purchase Agreement, dated March 8, 2012 ("**Final APA**").[8]

15. One of the disputes between Domfoam and the Purchaser is the meaning of the "BASF Receivables." The Purchaser interprets the definition to apply only to funds payable to Domfoam from BASF, whereas Domfoam's position is that this definition applied and was meant to apply to all proceeds from the US Class Action.[9]

**Notice to Purchaser that Proceeds from US Class Action was an Estate Asset**

16. The Purchaser through its counsel, Mr. Vincent, was on the Service List between March 2012 and October 2015. During this time period, materials were filed in the *CCAA* proceedings that made numerous references to the anticipated proceeds to be received by the Applicants from the US Class Action and, in particular, the funds coming from the settlement with Dow. Domfoam's principal, Tony Vallecoccia, provided sworn evidence on multiple occasions that the proceeds from the US Class Action were an asset of the estate.

17. From the fall of 2015 to present, Mr. Robert Tanner, counsel for the former directors and officers of Domfoam, including Mr. Howard, was on the Service List and was provided with notice of developments in the proceeding.

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[7] Vallecoccia Affidavit, *supra*, para, 7, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.
[8] Vallecoccia Affidavit, *supra*, para, 8, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.
[9] Vallecoccia Affidavit, *supra*, para, 5, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

**Notice of the Plan**

18. Domfoam structured its Plan based on the proceeds it would receive from the US Class Action. The Plan set out a methodology for distributing the Dow funds to Domfoam's creditors. Notice of the Plan was provided to the Service List, including Mr. Howard, through his counsel, Mr. Tanner. Notice of the creditors' meeting to vote on the Plan was also published in national newspapers by the Monitor.[10]

19. The Plan was supported by the requisite double majority of creditors and approved by the Court.[11]

20. An initial distribution representing 85% of the total recovery from the Dow settlement was made to the Applicants in March 2018. On May 29, 2018, Justice Wilton-Siegel ordered an interim distribution to be made to the creditors of Domfoam in the amount of $3.47 million ("**Distribution Order**").[12]

21. The Purchaser brought its motion to set aside the Distribution Proceeds and lay claim to the US Class Action funds on the eve of the distribution to be made by the Monitor to Domfoam's proven creditors and more than six years after it allegedly purchased the asset.

**Evidence of Mr. Vincent**

22. Mr. Vincent was cross-examined on his two affidavits on November 20, 2018. It is evident from Mr. Vincent's cross-examination that he had very little knowledge about the APA transaction and the US Class Action.

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[10] Vallecoccia Affidavit, *supra*, paras. 25-26 and Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.
[11] Vallecoccia Affidavit, *supra*, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1O.
[12] Order of the Honourable Justice Wilton-Siegel, dated May 29, 2018, Motion Record of the Moving Party, Volume 2 of 2, dated September 14, 2018, Tab 3.

23. Excerpts from Mr. Vincent's affidavit are set out below:

> Q. Okay, and did you also come to learn or your client come to learn that this litigation related to the price-fixing of specifically, polyol, P-O-L-Y-O-L, in the United States?
>
> A. I don't remember if we knew the exact, if I remember, I know, exactly the name of the polyol particularly at the time.
>
> Q. Okay.
>
> A. But it is for that, yes.
>
> Q. And did you also come to learn that this litigation was based in the State of Kansas?
>
> A. I don't have any recollection if I knew it at the time.
>
> Q. Okay, and how about your client, would they have known that at the time?
>
> A. I don't know.
>
> Q. Did your client or you have knowledge of another defendant, called Huntsman International LLC?
>
> A. At the time?
>
> Q. Yes.
>
> A. No.
>
> Q. Okay, and are you confident in saying that your client wouldn't have known about it, either?
>
> A. I do think so, but I cannot confirm. I cannot put myself in his place.
>
> …
>
> Q. Yes, I understood that. And so the next question is to really clarify. Are you aware of whether your client made any additional due diligence on its own, that you didn't participate in, such that –
>
> A. I don't know. I don't know.
>
> Q. You don't know?
>
> A. I don't know.
>
> Q. Okay. Did you work on the transaction with them, though, in a business sense? Did you take active steps to do due diligence on the proposed assets, as well?
>
> A. We did some due diligence at the time, yes. I do remember that.
>
> Q. Okay.

A. It was, we were not doing the due diligence on the accounting side, on the tax side. It was done by external accounting.

Q. I see, but you and your client together did review the assets; you did some due diligence into the assets that were going to be purchased?

A. What do you mean by "review the assets"? I did not walk the shop, no.

Q. Well, review documents, financial statements, lists of inventory, for example, lists of outstanding receivables?

A. Actually, those things were not under my control. It was under my client's control.

Q. Okay, so your client really was the one who received the –

A. I was doing actually the legal side of the due diligence.

Q. Okay. Thanks, and that's my question, really, whether you were strictly doing the legal work or you were also acting in a bit of a business advisory role, as corporate counsel sometimes does, on the transaction.[13]

24. The issue of Mr. Vincent not providing the best evidence was raised at his cross-examination:

Q. So you write there: "At the end of May 2018, I was advised by Terry Pomerantz, President of Domfoam –" And that would be Domfoam Inc.: "—that he was informed by John Howard, an employee of Domfoam who heard through the industry's grapevine…" So you talk about the industry's grapevine. Is it your understanding that these American class actions were fairly big news in the foam industry? Is that fair to say?

A. I don't know. I'm not part of the industry. I don't know.

Q. So you're not aware if it was something that your client was aware of and that they were monitoring, for instance?

A. They were not monitoring it.

Q. Do you know exactly what it is that Mr. Howard told to Mr. Pomerantz, anything more specific than what you've written in paragraph 35 of your affidavit?

A. I was not there when Mr. Pomerantz was informed by Mr. Howard of the lawsuit…

[13] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Qs. 39-45, Qs. 47-54, pgs. 10-14.

Q. Fair to say Mr. Howard had knowledge has knowledge that there was still outstanding litigation in the United States involving urethane antitrust claims. Right?

…

Q. Let me ask you this question: Can you enquire with Mr. Pomerantz as to what steps he or Mr. Howard were taking to monitor what litigation was going on in the United States and what the status of the litigation was?

…

A. Actually, I answered as to Mr. Pomerantz.

Mr. Tayer: The witness just answered that.

A. I told you "no."

Q. Oh, you know? You can say with –

A. I can say –

Q. certainty that he was –

A. Yes, because we have discussions. I had discussion with my client about that. He was not monitoring anything in regard to those lawsuits in the States.

Q. Okay, so, to your knowledge, he didn't have any of his employees monitoring it, either?

A. I would be very surprised.

Q. Okay. If you don't know with certainty, can we ask Mr. Pomerantz what he understood Mr. Howard to be doing, if anything, to monitor American litigation?

Mr. Tayar: Okay, we'll ask the question. But, just do you understand, Mr. Arman, this isn't an examination for discovery. You're asking for a lot of undertakings. This is really a cross-examination on affidavit material. It's not really incumbent on the witness to go and do an enquiry like a discovery. I'm giving you quite a bit of latitude through the undertakings, but we should really try to hit on points where this witness can answer the questions as opposed to –

Mr. Arman: Right, **well, one of the issues that we're kind of encountering here is that the witness is the lawyer from the transaction and he chose to put the affidavit in his name**. We don't have to – (**emphasis added**)

Mr. Tayar: That's because the lawyer is the one who negotiated the purchase agreement with counsel, with Mr. Ullmann and Mr. Slattery, at the time, at Minden Gross. That's why he is the person to give the best evidence and is most knowledgeable in terms of

> the negotiations leading to the APA that was signed and approved by the court.
>
> Mr. Arman: I'm not saying he's not knowledgeable. **I'm just saying he doesn't have the understanding as to the intentions of the purchaser and what the purchaser did to investigate certain things**.[14] (**emphasis added**)

25. The gaps in Mr. Vincent's evidence are most appropriately filled by a representative of the Purchaser. The request for an adjournment in order to examine Mr. Pomerantz and Mr. Howard was made promptly, that same day, following the cross-examination of Mr. Vincent.

## PART III - ISSUES AND LAW

26. The two issues this Honourable Court must consider on this motion are:

a. Should the Court grant leave under Rule 39.02(2) for an examination of Mr. Howard and Mr. Pomerantz to take place following Mr. Vincent's cross-examination pursuant to Rule 39.03? Yes. Mr. Howard and Mr. Pomerantz may have relevant information on issues that are critical to this motion. The Purchaser will suffer no prejudice if leave is granted that cannot be compensated by costs.

b. Should the Court adjourn to motion to allow for the examination of Mr. Howard and Mr. Pomerantz? Yes. If the leave test is met, the Court should adjourn the Purchaser's motion in order to allow for the examinations to take place. The Purchaser will suffer no prejudice as a result of the adjournment.

[14] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Qs. 146-149, 150-154, pgs. 41-46.

**Leave Should be Granted**

27. Under Rule 39.02(2), a party who has cross-examined on an affidavit delivered by an adverse party cannot conduct an examination of a witness under Rule 39.03 without leave of the Court:

> "A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence on the form of an affidavit or a transcript of an examination conducted under rule 30.03."[15]

28. The four-part test under Rule 39.02(2) is as follows:

a. Is the evidence relevant?

b. Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

c. Would granting leave result in a non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

d. Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?[16]

29. The Court must take a flexible, contextual approach under Rule 39.02(2) having regard to the overriding principle in Rule 1.04 that the *Rules of Civil Procedure* are to be interpreted liberally to ensure a just and timely resolution of the dispute.

30. If a deponent has no actual knowledge of a relevant issue, the person with knowledge could be examined with leave if necessary under Rules 39.02 and 39.03.[17]

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[15] *Rules of Civil Procedure*, RRO 1990, Reg 194 ("**Rules**"), Rule 39.02(2).
[16] *Elgner v. Freedman Estate*, 2013 ONSC 2176, at para. 2 ("**Elgner**") referring to *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, 2009 CarswellOnt 6914 at para. 13, Brief of Authorities of the Applicants, Tab 1.
[17] Rules, *supra*, Rule 39.03. See also Elgner, *supra*, para. 4, Brief of Authorities of the Applicants, Tab 1.

31. The Court can also consider proportionality when determining a right to further examinations.[18]

**The Evidence is Relevant**

32. There are two main issues for the Court to determine on the Purchaser's motion to set aside the Distribution Order: (a) Did the Purchaser buy the proceeds from the US Class Action in 2012? (b) Is the Purchaser otherwise prevented or barred from making a claim against the proceeds from the US Class Action because it did not act fast enough?

33. The evidence that is necessary for the Court to make findings of fact on first issue includes: (a) What was the parties' understanding of "BASF Receivables"? and (b) How did the parties behave after the completion of the APA? The latter evidence sheds light of the parties' true intentions and understanding of what was purchased under the APA.

34. Mr. Vincent could not provide evidence on the due diligence that the Purchaser undertook in the context of the APA. Mr. Vincent was providing advice to the Purchase on the "legal side" of the transaction, whereas the Purchaser was conducting due diligence of the business and assets of Domfoam itself.[19]

35. Mr. Vincent can provide evidence on *his understanding* of his instructions from his client, but he was not able to provide any evidence on the Purchaser's understanding of the "BASF Receivables" and whether, in particular, it pertained to the receivables from BASF only or from the US Class Action as a whole. This evidence is critical as there is a disagreement between the parties on how the definition of "BASF Receivables" should be interpreted.

[18] Elgner, *supra*, para. 6, Brief of Authorities of the Applicants, Tab 1.
[19] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Qs. 49-54, pgs. 13-14.

36. Mr. Vincent claims to have been ignorant of the fact that there was only one piece of litigation giving rise to the proceeds the Purchaser is now attempting to claim, which involved Dow and the other defendants. He claims to have been of the understanding that there were two separate actions (one against BASF and one against Bayer).[20] Inherent in this is the suggestion that he did not know about the lawsuit against Dow. Domfoam has the opposite view with respect to the US Class Action – namely, that it was all one lawsuit against many defendants including BASF, Bayer, Dow and others, which was "withdrawn" from the APA.[21] Leave is required to examine a representative of the Purchaser as to what the Purchaser understood the "BASF Receivables" to refer to in the APA.

37. Mr. Pomerantz, as Mr. Vincent's instructing client, is better situated and can provide direct evidence on what the Purchaser thought it was buying, why the Purchaser decided not to buy the "BASF Receivables" and what information he received from Mr. Howard with respect to the proceeds from the US Class Action.

38. Furthermore, Mr. Vincent was not able to provide evidence on whether or not the Purchaser took any steps to recover the proceeds from the US Class Action the receivable it had allegedly purchased. This evidence goes to the issue of whether the Purchaser behaved as a genuine purchaser or whether it is simply acting opportunistically at the eleventh hour.

39. Evidence from Mr. Howard on his understanding of the APA and actions following its closing is important on this motion. Mr. Howard was a former officer of Domfoam who then was employed by the Purchaser. He executed the agreement to retain the services of an agent to recover the proceeds from the US Class Action. Mr. Howard's counsel was served with materials

[20] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Qs. 36-38, pgs. 9-10.
[21] Vallecoccia Affidavit, *supra*, para, 5, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

in the *CCAA* process after 2015 when Mr. Vincent was no longer on the Service List, including the Plan.[22] The extent of Mr. Howard's knowledge of the US Class is relevant to the two issues before the Court on the Purchaser's motion.

40. On the second issue of whether the Purchaser's motion is demonstrably out of time and/or otherwise barred, the Purchaser's evidence on discoverability is relevant and has not been provided. Evidence with respect to what the Purchaser knew and when it had knowledge of the US Class Action proceeds is missing. Mr. Vincent's evidence about how and when he came to learn about the Dow settlement, which is of critical importance, demonstrates that he does not have firsthand knowledge or the best evidence:

> "At the end of May 2018, I was advised by Terry Pomerantz ("Pomerantz"), President of Domfoam, that he was informed by John Howard, an employee of Domfoam who heard through the industry's grapevine that a) a lawsuit involving 4362063 as one of the claimants against Dow had been instituted some time prior to CCAA proceedings, and b) a judgment had been rendered against Dow in the United States which was subsequently settled out of Court, and c) that a payment was to be made by Dow to the class action claimants, which may include 4362063."[23]

41. Mr. Vincent's statement is triple hearsay, which is particularly problematic. "Special attention has been given to hearsay as being particularly fraught with untrustworthiness and unreliability because its evidential value rests of the credibility of an out-of-court asserter who is not subject to the oath, cross-examination or a charge of perjury."[24] Further, no particulars are given of the actual source of this triple hearsay, other than the "industry grapevine".

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[22] Vallecoccia Affidavit, *supra*, paras. 11, 23, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[23] Affidavit of Jacques Vincent, sworn September 13, 2018, para. 35, Motion Record of the Moving Party, Volume 1 of 2, dated September 14, 2018, Tab 2.

[24] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Fifth Edition, Sidney N Lederman, Alan W. Bryant, Michelle K. Fuerst (LexisNexis Canada Inc., 2018), at pg. 251, Brief of Authorities of the Applicants, Tab 2.

42. Moreover, the "best evidence rule" states that parties should endeavour to put forth the best evidence "that the nature of the case will allow" for consideration by the triers of fact.[25] Courts have been critical of lawyers providing evidence on behalf of their clients, particularly when the client is available to provide evidence, the affidavit contains hearsay, and there was no reason provided as to why the client did not provide direct evidence.[26] In light of the fact that Mr. Vincent's evidence violates the best evidence rule and the rule against hearsay, the Applicants should be granted leave to examine a representative of the Purchaser.

43. Since Mr. Vincent was no longer on the Service List after the fall of 2015, we do not know if the Purchaser received notice of the Plan. Mr. Howard's counsel would have received notice of the Plan. Additionally, the parent company or related company of the Purchaser filed a claim for unpaid rents in the *CCAA* process.[27] Mr. Pomerantz is presumably the principal and guiding mind of the parent and the Purchaser, and therefore likely had awareness of the claims process and the Plan. The Claims Solicitation Procedure was mailed to the Purchaser's parent company on June 20, 2012, so it stands to reason that Mr. Pomerantz or his employees had notice of it[28]. This is a critical question that needs to be asked of Mr. Pomerantz.

**Evidence Raised on Cross-Examination**

44. Mr. Vincent's lack of knowledge with respect to the Purchaser's understanding of the "BASF Receivables," what knowledge the Purchaser had of the US Class Action (if any), and what steps it took to recover the asset it allegedly purchased was raised on the cross-examination.[29] The Purchaser made a tactical decision to put forward evidence from its lawyer

[25] *R v. Shayesteh*, 1996 CarswellOnt 4226, para. 91, Brief of Authorities of the Applicants, Tab 3.
[26] See, for example, *Al Masri v. Baberakubona*, 2010 ONSC 562, paras. 15-17, 19 and 21, Brief of Authorities of the Applicants, Tab 4.
[27] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Q. 232, pg. 69.
[28] Affidavit of Service of Anna Zailer sworn June 26, 2012.
[29] Elgner, *supra*, paras. 15-17, Brief of Authorities of the Applicants, Tab 1.

and it must now live with the consequences of that choice, where the evidence is utterly insufficient to allow Domfoam to fairly respond to the motion.

45. Leave of the Court is therefore required in order to examine Mr. Howard and Mr. Pomerantz to address the unanswered questions that arose as a result of Mr. Vincent's cross-examination.

**No Prejudice to Purchaser - Significant Prejudice to Domfoam**

46. The Purchaser has waited more than six years before asserting a claim for the proceeds from the US Class Action. There is no urgency to this motion being heard now. The parties had previously agreed to adjourn the November 29th date if required to accommodate Mr. Tayar's trial schedule. The funds in dispute are being held by the Monitor, an Officer of the Court. There is no prejudice that the Purchaser can point to that could not be compensated for with costs.

47. Conversely, significant prejudice will result to Domfoam (or its creditors) if leave is not granted.

48. If the Applicants are forced to proceed without the opportunity to examine Mr. Pomerantz and Mr. Howard, they will suffer actual prejudice as they will be unable make full and fair answer and defence to the Purchaser's motion.

49. Mr. Pomerantz and Mr. Howard hold the knowledge and information that is critical to unlocking the truth about what the Purchaser thought it was buying (particularly in light of the removal of the BASF Receivables from the transaction). They also hold the critical knowledge regarding the Purchaser's likely notice of steps being taken in the *CCAA* proceeding, including the anticipated settlement proceeds from Dow, and why the Purchaser took no steps to bring a claim against Domfoam.

50. Although the Purchaser's motion has been cleverly brought as a set aside motion, it is tantamount to commencing a claim. In bringing the claim as a motion, the Purchaser has bypassed the ordinary discovery process (both documentary and oral) and insisted on an unduly accelerated schedule for the hearing of the motion.

51. Moreover, Domfoam formulated a Plan around the understanding that funds would flow to the estate from the US Class Action. The proceeds in dispute represent the estate's largest asset without which the creditors would receive virtually zero. The creditors voted in favour of the Plan and it was sanctioned by the Court.

52. The Purchaser is now attempting to deprive Domfoam's creditors of an asset which is worth almost $4 million on a paltry record that only includes cherry-picked evidence from the Purchaser's solicitor, who played a limited role in the APA and cannot directly speak to the Purchaser's intentions or actions. The Court should have the benefit of a full record in these circumstances, particularly when obtaining this information will not cause any non-compensable prejudice to the Purchaser.

**Evidence Could not be Included at the Outset**

53. It only became evident that evidence from Mr. Pomerantz and Mr. Howard is necessary following the cross-examination of the Purchaser's deponent, Mr. Vincent. In particular, Mr. Vincent's limited role in the APA was not known prior to his cross-examination. Had Mr. Vincent been involved in the due diligence phase of the transaction or otherwise monitored the US Class Action pre- and post-closing, additional evidence may not have been necessary.

**Adjournment Should be Granted**

54. If this Honourable Court grants leave, a brief adjournment of the Purchaser's motion is required in order to allow the examinations of Mr. Pomerantz and Mr. Howard to take place.

**PART IV – RELIEF REQUESTED**

55. The moving party respectfully requests that leave be granted under Rule 39.02 and Rule 39.03 to examine Mr. Pomerantz and Mr. Howard as witnesses the pending motion, and that the Purchaser's motion be adjourned to allow for these examinations in order to address the evidentiary gaps that exist following Mr. Vincent's cross-examination.

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

David Ullmann
**BLANEY MCMURTRY LLP**
Lawyers for the Applicants

## Schedule "A" – List of Authorities

1. *Al Masri v. Baberakubona*, 2010 ONSC 562
2. *Elgner v. Freedman Estate*, 2013 ONSC 2176
3. *R v. Shayesteh*, 1996 CarswellOnt 4226
4. Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Fifth Edition, Sidney N Lederman, Alan W. Bryant, Michelle K. Fuerst (LexisNexis Canada Inc., 2018)

## Schedule "B" – Statutes, Regulations and By-laws

***Rules of Civil Procedure*, RRO 1990, Reg 194**

**EVIDENCE BY CROSS-EXAMINATION ON AFFIDAVIT**

***On a Motion or Application***

**39**.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

***To be Exercised with Reasonable Diligence***

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

***Additional Provisions Applicable to Motions***

(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

**EVIDENCE BY EXAMINATION OF A WITNESS**

***Before the Hearing***

**39**.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

***To be Exercised with Reasonable Diligence***

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

***At the Hearing***

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

***Summons to Witness***

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

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**

# FACTUM OF THE APPLICANTS/MOVING PARTY
**(Re Leave under Rule 39.02 and Adjournment Motions, Returnable November 29, 2018)**


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