

**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.

BRIEF OF ORDERS AND ENDORSEMENTS

August 27, 2021

FRED TAYAR & ASSOCIATES
Professional Corporation
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Lawyers for Domfoam Inc.

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LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

I N D E X

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1	Endorsement of Justice Wilton-Siegel	May 29, 2018
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3	Endorsement of Justice Hainey	August 27, 2018
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TAB 1

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.

May 29/18 Court File No. CV-12-9545-00CL

May 29/18

A. Teodorescu for the applicants

G. Mofkoff for the Monitor

All parties ~~been~~ on the notice but have been served and no objections received. Order to file in the form attached. W. Khan J.

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at TORONTO

MOTION RECORD OF THE APPLICANTS
(Re: Stay Extension, Returnable May 29, 2018)

BLANEY McMURTRY LLP

Barristers and Solicitors
Suite 1500 - 2 Queen Street East
Toronto, ON M5C 3G5

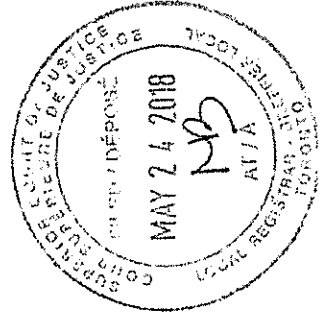
David T. Ullmann LSUC #423571

Tel: (416) 596-4289
Fax: (416) 594-2437

Alexandra Teodorescu LSUC #638899D

Tel: (416) 596-4279
Fax: (416) 593-5437

Lawyers for the Applicants

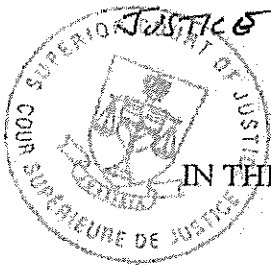


TAB 2

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.)

TUESDAY, THE 29TH DAY



JUSTICE H. J. WILTON - 5/26/18)

OF MAY, 2018

Handwritten initials

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")

ORDER

THIS MOTION made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "CCAA") for an order, *inter alia*, extending the stay of proceedings in respect of the Applicants to and including November 30, 2018 was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Tony Vallecoccia sworn May 22, 2018 and the exhibits thereto (the "**Vallecoccia Affidavit**") and the Eighteenth Report of Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) (the "**Eighteenth Report**") in its capacity as the Court-appointed monitor (the "**Monitor**") of the Applicants, and on hearing the submissions of counsel for the Applicants, the Monitor and all other counsel listed on the counsel slip, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service of Ariyana Botejue sworn May 23, 2018, filed;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Eighteenth Report is hereby abridged and validated and this Motion is properly returnable today without further service or notice thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meaning set out in the Eighteenth Report or the Order of the Court dated June 15, 2012 (the “**Claims Solicitation Procedure Order**”).

STAY EXTENSION

3. **THIS COURT ORDERS** that the Stay Period granted under the Initial Order of Justice Newbould dated January 12, 2012 (the “**Initial Order**”) and as subsequently extended by, *inter alia*, the Order of the Honourable Mr. Justice Myers, dated November 24, 2017, is hereby extended from May 31, 2018 to and including November 30, 2018.

INTERIM DISTRIBUTIONS

4. **THIS COURT ORDERS** that the Monitor is hereby authorized to make an interim Distribution of the Valle Foam Proceeds in the amount of \$5,600,000 to the Valle Foam Creditors holding Proven Claims on a *pro rata pari parssu* basis.
5. **THIS COURT ORDERS** that the Monitor is hereby authorized to make an interim Distribution of the Domfoam Proceeds in the amount of \$3,470,000 to the Domfoam

Creditors holding Proven Claims on a *pro rata pari parssu* basis.

6. **THIS COURT ORDERS** that the Monitor is hereby authorized to make an interim Distribution of the A-Z Foam Proceeds in the amount of \$708,000 to the A-Z Foam Creditors holding Proven Claims on a *pro rata pari parssu* basis.

MONITOR'S REPORT, ACTIONS AND FEES

7. **THIS COURT ORDERS** that the Eighteenth Report and the actions, decisions and conduct of the Monitor as set out in the Eighteenth Report are hereby authorized and approved.
8. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Eighteenth Report, the Affidavit of Paul Casey sworn on May 24, 2018 and the Affidavit of Grant B. Moffat sworn on May 23, 2018, and the exhibits attached thereto, are hereby authorized and approved.
9. **THIS COURT HEREBY** requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.
10. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty

and are hereby authorized and empowered to apply to any Court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

W. J. J. J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 29 2018

PER / PAR:

nl

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.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

COMMERCIAL LIST

Proceeding commenced at TORONTO

ORDER

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Lawyers for the Applicants

TAB 3

9:30 A.M.
COUNSEL SLIP

H1

COURT FILE NO CV-12-9545-00CL DATE AUG 27, 2018

3113736 CANADA LTD. et al. ^{NO ON LIST} 3B
A-Z SPONGE & FOAM PRODUCTS LTD)

TITLE OF
PROCEEDING

COUNSEL FOR:

PHONE & FAX NOS

PLAINTIFF(S)

APPLICANT(S) *moving party*

FRED TAYAR tel (416) 363-1800

PETITIONER(S)

fax (416) 363-3356

COUNSEL FOR:

PHONE & FAX NOS

DEFENDANT(S)

RESPONDENT(S)

Alexandra Teodorescu for
3113736 Canada Ltd., 4362063
Canada Ltd. and A-Z Sponge +
Foam Products Ltd.

(T.) 416-596-4279

(F.) 416-594-2506

ateodorescu@blaney.com

August 27/18

The parties shall
comply with the attached
schedule. Counsel shall
schedule a hearing before
Walters-Siegel J. with
the commercial list

Office for a date when
he is sitting in
November or December

Hayes J

Schedule

Moving Party's record - September 14th

Responding Party's record - October 5th

Reply materials - October 15th

Examinations to be completed by November 9th

Harry J

August 27, 2018

TAB 4

COUNSEL SLIP

Court File # CV-12-000091845-0001

Date Oct 30/18

On List 1

Title of Proceeding

Valle Foam Industries et al v. 631400 Ontario Limited et al

Plaintiff(s)
Applicant(s)
Petitioner(s)
moving party

FRED TAYAR

Phone # 416 363 1800

Fax # 416 363 3356

Defendant(s)
Respondent(s)

Alexandra Teodorasou
for the CCAA Applicants

Phone # 416-596-4279

Fax # 416-594-2566

GRANT WAIVER for
Deloitte as auditor

416 304-0298
304 1313

October 31/18

Motion scheduled for November 29/18 (1hr.)
Parties to ~~advise~~ ^{confirm with} the Commercial list on November
21/18 that this matter will proceed on this date.
C. Non-hul J.

TAB 5

COUNSEL SLIP

Court File No CV-12-9545-DOCL

Date: Nov 26/18

No. On List add-on

Title of Proceeding

Valle Foam - Dorisbeam

Counsel for:

Plaintiff(s)

Applicant(s)

Petitioner(s)

moving party
Perchuk

FRED TAYAR Phone No. 416 363 1800

Fax No. (416) 363 3356

Counsel for:

Defendant(s)

Respondent(s)

Phone No. _____

Fax No. _____

GRANT MOFFAT for
Debitte as Monitor

416 - 304 - 0599

301 - 1313

David Ullmann, Alexandra Teodoroscu (1) 416 - 596 - 4279
for the Applicants (F) 416 - 594 - 2506
(4362063 Canada Ltd et al)

November 26/18

The debtor will bring a motion for an examination under Rules 39.02 and 39.03 at the hearing scheduled for November 29/18.

W. Han - M.V.

TAB 6

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.) THURSDAY, THE 29TH DAY
JUSTICE WILTON-SIEGEL) OF NOVEMBER, 2018

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")

ORDER

THIS MOTION made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "CCAA") for an order, *inter alia*, extending the stay of proceedings in respect of the Applicants to and including April 30, 2019 was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Tony Vallecoccia sworn November 16, 2018 and the exhibits thereto (the "Vallecoccia Affidavit") and the Nineteenth Report of Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) (the "Nineteenth Report") in its capacity as the Court-appointed monitor (the "Monitor") of the Applicants, and on hearing the submissions of counsel for the Applicants, the Monitor and all other counsel listed on the counsel slip, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service of Ariyana Botejue sworn November 21, 2018, filed;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Nineteenth Report is hereby abridged and validated and this Motion is properly returnable today without further service or notice thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meaning set out in the Nineteenth Report.

STAY EXTENSION

3. **THIS COURT ORDERS** that the Stay Period granted under the Initial Order of Justice Newbould dated January 12, 2012 (the "**Initial Order**") and as subsequently extended by, *inter alia*, the Order of the Honourable Mr. Justice Wilton-Siegel, dated May 29, 2018, is hereby extended from November 30, 2018 to and including April 30, 2019.

MONITOR'S REPORT, ACTIONS AND FEES

~~4. **THIS COURT ORDERS** that the Nineteenth Report and actions, decisions and conduct of the Monitor as set out in the Nineteenth Report are hereby authorized and approved.~~

5. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Nineteenth Report, the Affidavit of Catherine Hristow, sworn November 22, 2018, and the exhibits attached thereto, and the Affidavit of Grant Moffat, sworn November 23, 2018, and the exhibits attached thereto, are hereby authorized and approved.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

DEC 05 2018

PER / PAR:

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

COMMERCIAL LIST

Proceeding commenced at TORONTO

ORDER

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Lawyers for the Applicants

TAB 7

CITATION: 3113736 Canada Ltd. (Re), 2019 ONSC 1050
COURT FILE NO.: CV-12-9545-00CL
DATE: 20190213

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1984, 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.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Ullmann, Varoujan Arman and Alexandra Teodorescu*, for the Applicant, Domfoam International Inc.

Fred Tayar, for the Respondent, Domfoam Inc.

Grant Moffat, for the Monitor, Deloitte Restructuring Inc.

HEARD: November 29, 2018

ENDORSEMENT

[1] On this motion, Domfoam International Inc. (now 4362063 Canada Limited) (“Domfoam” or the “applicant”), an applicant in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1984, c. C-36 (the “*CCAA*”), seeks leave of the Court under Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to conduct examinations of two individuals who are respectively the president and an employee of Domfoam Inc. (the “Purchaser”).

Factual Background

The Lawsuit

[2] Domfoam was a class member of an anti-trust class action that had been commenced in the United States District Court for the District of Kansas (the “U.S. Court”) in 2004 (the “Lawsuit”). The defendants in the Lawsuit were Bayer AG, Bayer Corporation and Bayer MaterialScience LLC (collectively, “Bayer”), BASF SE and BASF Corporation (collectively, “BASF”), the Dow Chemical Company (“Dow”), Huntsman International LLC (“Huntsman”) and Lyondell Chemical Company (“Lyondell”) (collectively, the “Defendants”).

[3] In 2008, Domfoam retained Refund Recovery Services, LLC (“RRS”) to assist it in filing its claim in the Lawsuit. John Howard (“Howard”) was the general manager of Domfoam at the

time. Howard signed the agreement with RRS and was therefore aware of Domfoam's claim in the Lawsuit.

[4] The plaintiffs in the Lawsuit negotiated settlements with Bayer, BASF, Huntsman and Lyondell which were approved by the U.S. Court at different times. In particular, a settlement was reached with BASF and Huntsman that was approved by the U.S. Court on December 12, 2011. The amount payable in respect of the settlement with BASF was distributed to Domfoam in three tranches.

These CCAA Proceedings

[5] As a result of declining sales, fines imposed by the Competition Bureau of Canada and class action lawsuits against the applicants in Canada and the United States, Domfoam, Valle Foam Industries (1995) Inc. (now 3113736 Canada Ltd.) and A-Z Sponge & Foam Products Ltd. sought protection under the CCAA on January 12, 2012.

The Transaction

[6] Pursuant to an agreement of purchase and sale dated March 8, 2012 between Domfoam and 4037057 Canada Inc. ("4037057") (the "APA"), 4037057 agreed to purchase the operating business of Domfoam (the "Transaction"). The APA was subsequently assigned to the Purchaser who completed the Transaction on March 26, 2012 after court approval of the Transaction was received on March 16, 2012.

[7] The APA provided in Section 2.1 that Domfoam would sell the "Purchased Assets" to the Purchaser. "Purchased Assets" was defined to mean "the right, title and interest of [Domfoam] in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets." Schedule 1.1(hh) provided that the "Purchased Assets" were "[a]ll assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated", including without limitation a list of assets that included "Purchased Receivables". "Purchased Receivables" was defined in section 2.9 of the APA to be "all of the Vendor's accounts receivable", the total amount of which was stated to be \$5,996,692. It is not disputed that the term "Excluded Assets" does not include any settlement proceeds from any party to the Lawsuit.

[8] The Purchaser says that the plain meaning of "Purchased Assets" includes any monies to be received in respect of the Lawsuit. It denies that there was any agreement to exclude any such monies, relying in part on the "entire agreement" provision of the APA. Domfoam says that there was an agreement to exclude any proceeds from the Lawsuit from the "Purchased Assets". It relies in part on the evolution of the treatment of an asset category of Domfoam referred to as the "BASF Receivables" in the Transaction documentation.

[9] In both an earlier draft of the APA, in December 2011, and in the APA, "BASF Receivables" is defined to have the meaning of the term set out in Section 2.9. Section 2.9 is a provision that allocates the purchase price of the "Purchased Assets" among a number of asset categories.

[10] The earlier draft of the APA did not contain a definition of "BASF Receivables" in Section 2.9. However, the following was set out in that provision under the heading "BASF Receivables":

As of December 16, 2011, the Purchaser has been informed that the Vendor was entitled to payments from BASF in lieu of a settlement out of court by BASF of class actions in the amount of approximately six hundred forty two thousand dollars (\$642,000).

The portion of the Purchase Price attributed to the BASF Receivables is three hundred eighty six thousand and two hundred dollars (\$385,200) calculated at a discount rate of 60%.

The purchase price of the BASF Receivables is conditional upon production by the Vendor of all the supporting documents related to said BASF Receivables and the completion of its assignment from the Vendor to the Purchaser as of the Closing Date.

If the Vendor does not want to sell the BASF Receivables because it would be used by the Vendor in the negotiation of the settlement out of court of the Canadian class actions instituted against the Vendor, the Purchaser would then agree to withdraw its offer to purchase said BASF Receivables and the Purchase Price would be reduced by the amount attributed to the BASF Receivables.

[11] The APA also did not contain a definition of "BASF Receivables" in Section 2.9. In that provision, however, the narrative set out above was deleted and the word "Withdrawn" was placed under the heading "BASF Receivables". It is understood that this means that the BASF Receivables, although originally to be included in the Transaction, were removed from the Transaction and were not sold by Domfoam.

[12] Domfoam submits that, in the initial draft and the APA, "BASF Receivables" referred to all monies to be received in respect of the Lawsuit, not merely to the proceeds of the settlement with BASF. Alternatively, Domfoam says that, regardless of the meaning of "BASF Receivables", the treatment of the "BASF Receivables" in the Transaction reflects an intention of the parties to exclude any monies to be received in respect of the Lawsuit from the "Purchased Assets".

The Dow Settlement

[13] The Lawsuit in respect of Dow proceeded to a jury trial in 2013. In May 2013, a judgment was entered against Dow in the amount of \$1.3 billion. Appeals of the judgment were ultimately settled in February 2016. Under the settlement, Dow agreed to pay U.S. \$835 million to the benefit of the plaintiffs in the Lawsuit. The settlement was approved in December 2017.

[14] An initial distribution representing 85% of the total recovery from the Dow settlement was made to the class members, including Domfoam, in March 2018.

[15] Domfoam has structured a plan of compromise and arrangement (the "Plan") based on the proceeds to be received by Domfoam from the Dow settlement (the "Dow Proceeds"). The Plan was approved by the requisite majorities at a creditors' meeting held in October 2016 and received court approval on January 24, 2017.

[16] On May 29, 2018, the Court ordered an interim distribution to the creditors of Domfoam in the amount of U.S. \$3.47 million (the "Distribution Order").

The Purchaser's Motion

[17] By notice of motion dated September 24, 2018, the Purchaser moved to set aside the Distribution Order on the ground that it is entitled to the Dow Proceeds based on the terms of the APA (the "Purchaser's Motion"). The Purchaser also says that the Distribution Motion was brought without notice to the Purchaser and that Domfoam failed to make proper disclosure to the Court regarding the Purchaser's entitlement to the Dow Proceeds when it provided an affidavit to the court stating that Domfoam's claim in the Lawsuit "was specifically excluded from the [Domfoam assets] purchased by the Purchaser".

[18] Jacques Vincent ("Vincent") was the Purchaser's lawyer in the Transaction in 2012. He negotiated the Transaction documentation with counsel for Domfoam. The motion materials for the Purchaser's Motion contained an affidavit of Vincent sworn September 13, 2018 (the "First Vincent Affidavit"). The relevant portion of the First Vincent Affidavit for present purposes are paragraphs 32-35, which read as follows:

The Urethane Antitrust lawsuit against BASF was the only lawsuit from the Urethane Antitrust lawsuits that has been discussed prior to the execution of the APA #1 and, as mentioned above, was specifically "withdrawn" from the APA #2 and the Final APA.

The Dow Action was never discussed.

The Dow Action was not, and has never been, an "Excluded Asset", it being understood that the drafting of the APA was purposely broad to reach and encompass all disclosed and undisclosed assets of any nature.

At the end of May 2018, I was advised by Terry Pomerantz ("Pomerantz"), President of [the Purchaser], that he was informed by John Howard, an employee of [the Purchaser] who heard through the industry's grapevine that a) a lawsuit involving [Domfoam] as one of the claimants against Dow had been instituted some time prior to the CCAA proceedings, 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 [Domfoam].

This Motion

[19] Following the cross-examination of Vincent in November 2018, Domfoam brought this motion under Rule 39.02(2) of the *Rules of Civil Procedure* seeking leave of the Court to

conduct examinations of Pomerantz and Howard under r. 39.03 as witnesses in respect of the Purchaser's Motion.

Applicable Law

[20] The applicable provision of the *Rules of Civil Procedure* is r. 39.02(2), which reads as follows:

(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.

[21] It is not disputed that r. 39.02(2) sets up a four-part test:

- (1) Is the evidence from the party sought to be examined relevant?
- (2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- (3) Would granting leave result in a non-compensable prejudice that could not be addressed by imposing costs, terms or an adjournment?; and
- (4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.), at para. 13 [*First Capital*].

[22] Further, a flexible, contextual approach is to be taken in assessing the criteria relevant to r. 39.02(2), having regard to the overriding principle outlined in r. 1.04 of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute: see *First Capital*, at para. 14. In this regard, a court should also consider proportionality in determining whether to grant leave for further examinations: see *Elgner v. The Estate of Harvey Freedman*, 2013 ONSC 2176, at para. 6.

The Background to this Motion

[23] The principal issue between the parties is whether the Dow Proceeds were conveyed to the Purchaser in the Transaction. In this context, the Purchaser's understanding at the time of the Transaction of the potential for future settlement proceeds in the Lawsuit, and the Purchaser's understanding of the treatment of the proceeds in respect of the settlement with BASF at that time, could well be relevant.

[24] In addition, Domfoam says that the timing of the Purchaser's first knowledge of the Lawsuit and, in particular, of the Dow Proceeds, subsequent to the completion of the Transaction, is relevant to various defences it asserts against the Purchaser's claim to the Dow Proceeds. In this regard, it makes two principal arguments.

[25] First, Domfoam suggests that the Purchaser lost any entitlement to the Dow Proceeds that it might otherwise have had under the APA by failing to assert its claim within the two year period provided under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B or otherwise. Second, Domfoam suggests that the Purchaser's failure to assert its entitlement after learning of the claim against Dow and/or the settlement with Dow is evidence of the Purchaser's understanding that Domfoam did not convey the Dow Proceeds under the APA. For the purposes of each argument, the date on which the Purchaser first learned of the claim against Dow in the Lawsuit, including the settlement with Dow and the Dow Proceeds, is material.

[26] Further, Domfoam disputes the Purchaser's claim that it had no prior notice of Domfoam's motion regarding the Distribution Order. In this context, the Purchaser's knowledge of, and any acquiescence to, the Plan is relevant. It is not disputed that Vincent was dropped from the service list in these *CCAA* proceedings after the fall of 2015. However, Howard was separately represented in these *CCAA* proceedings by counsel who continued on the service list after that date. Domfoam says that, therefore, Howard's knowledge of the Plan is relevant to this issue, at least to the extent he communicated that knowledge to Terry Pomerantz, the president and shareholder of the Purchaser ("Pomerantz").

[27] Vincent was cross-examined on the First Vincent Affidavit and a second affidavit on November 20, 2018. In the course of the cross-examination, Domfoam learned for the first time that Vincent received his instructions regarding the Transaction from Terry Pomerantz and another party.

[28] The cross-examination of Vincent also revealed that Vincent had little knowledge of when, and to what extent, the Purchaser learned of the Lawsuit, whether before or after the Transaction, or learned of the Dow Proceeds and the Plan subsequent to the completion of the Transaction. The party whose knowledge is relevant is Pomerantz. Further, Domfoam says that the nature and timing of any communication by Howard to Pomerantz of the existence of the Lawsuit, as well as of the Dow settlement beyond what was set out in the Vincent Affidavit, could also be relevant to the issues described above.

[29] As a result of Vincent's lack of direct knowledge, his cross-examination resulted in eleven undertakings of the Purchaser to obtain the answers from Pomerantz and Howard to various questions which addressed these issues. The Purchaser provided the answers to these questions. Accordingly, the result of the cross-examination was that, on a large number of the issues, the Purchaser's position was, in effect, put forward by answers to written interrogatories rather than was the subject of actual cross-examination. Domfoam now seeks to cross-examine Pomerantz and Howard directly rather than to rely entirely on these answers.

The Positions of the Parties on This Motion

[30] The Purchaser says that Vincent was the appropriate representative of the Purchaser because Vincent “negotiated” the Transaction on its behalf. I will address this assertion below. The Purchaser also says that it should have been evident to Domfoam from the First Vincent Affidavit that Vincent would be unable to answer a number of questions that Domfoam intended to put to him, in particular relating to the extent of the Purchaser’s knowledge after completion of the Transaction. The Purchaser says that Domfoam should therefore have raised any concerns regarding the need to examine Pomerantz and Howard before the cross-examination of Vincent. It suggests that it is too late to do so now after having received the answers to the undertakings. The Purchaser suggests that the real reason for this motion is that Domfoam does not like the answers to the undertakings that it received and seeks to have “another kick at the can” through this motion.

[31] In response, Domfoam makes two principal arguments regarding the need to examine Pomerantz. First, it says that the facts pertaining to Vincent’s role in the negotiation of the Transaction, and the fact that Pomerantz was the controlling mind and will of the Purchaser, only became clear in the cross-examination. Second, it says, in effect, that it should not be penalized for having gone forward with the cross-examination of Vincent regardless of any apparent deficiencies in his knowledge of relevant events. Further, it says that it would have raised a number of additional questions for answers by way of undertakings but felt constrained by the position of the Purchaser’s counsel as to the number of questions that were appropriate in the circumstances.

[32] Domfoam also says Howard is the person best able to testify as to when the Purchaser first had knowledge of the claim against Dow in the Lawsuit, as well as the judgment against Dow, the settlement with Dow, and the availability of the Dow Proceeds. Further, Domfoam says Howard’s evidence regarding the Purchaser’s knowledge of the Plan is relevant because, given that Vincent was no longer on the service list after the fall of 2015, Howard would have been the Purchaser’s source of such knowledge.

Analysis and Conclusions

[33] The issue for the Court on this motion is whether Domfoam can satisfy the four-part test for leave under r. 39.02(2) given that it has already received written answers to most of the matters upon which it seeks to examine Pomerantz and Howard. I will address each of the four parts of the test for granting leave separately, dealing in turn with the request to examine Pomerantz and Howard.

Relevance

[34] The first requirement of the test is demonstration that the evidence from the party sought to be examined is relevant.

[35] I conclude that the evidence of Pomerantz is relevant to the issue of the Purchaser’s claim to the Dow Proceeds and to the defences asserted by Domfoam for the following reason.

[36] As discussed above, the Purchaser's knowledge of the Lawsuit, and the BASF Receivables, is relevant contextual background to the treatment of the BASF Receivables in the Transaction which, in turn, could have implications for the interpretation of that term and, more generally, for the intention of the parties regarding any future proceeds from the Lawsuit. For this purpose, the relevant knowledge is that of the controlling mind and will of the Purchaser at the time. The cross-examination revealed that this was Pomerantz. Vincent may have "negotiated" the Transaction documentation and conducted certain legal due diligence. However, he did so on behalf of, and on the instructions of, his client which came from Pomerantz. Put simply, Vincent "negotiated" the Transaction documentation but Pomerantz "negotiated" the business transaction. While any knowledge of Vincent is imputed to Pomerantz, it remains possible that Pomerantz had knowledge that he did not communicate to Vincent. There is, therefore, no certainty that Vincent had a complete understanding of the Purchaser's knowledge of the relevant matters at the time of the Transaction.

[37] With respect to Howard, the application of the test is somewhat more complicated. Before addressing this requirement of the test, it is necessary to clarify Howard's role and the nature of his evidence, as these observations inform the conclusions below regarding the request to examine him.

[38] Howard was an employee of Domfoam at the time of the Transaction. Any knowledge of the Lawsuit that he may have had at that time is attributable to Domfoam rather than to the Purchaser. More importantly, it is not suggested that, after Howard became an employee of the Purchaser, Howard held a position in the Purchaser such that any knowledge on his part was attributable to the Purchaser. Accordingly, any knowledge on his part of the Lawsuit, the Dow Proceeds, or the Plan is of relevance only to the extent that he communicated that knowledge to Pomerantz.

[39] Turning to the first requirement of the test, given that the matters on which Domfoam seeks to examine Howard pertain to his communications to Pomerantz of knowledge of matters that are relevant to the extent Pomerantz was aware of them, I think it necessarily follows that such evidence would be relevant to the issues described above. Put another way, to the extent that Pomerantz's knowledge of these matters is relevant, Howard's communication to him of such matters would also satisfy the test of relevance. To be clear, however, in reaching this conclusion I have proceeded on a narrow view of relevance. Considerations of the necessity for such evidence will be addressed later.

[40] I therefore conclude that Domfoam has satisfied the first part of the test for leave in respect of Pomerantz and Howard.

Response to a Matter Raised on the Cross-Examination

[41] The second requirement of the test requires demonstration that the evidence sought responds to a matter raised on the cross-examination.

[42] The Purchaser submits that the evidence sought from Pomerantz and Howard does not respond to a matter raised on the cross-examination of Vincent for the first time. It suggests that the evidence sought from Pomerantz and Howard was set out in the Vincent Affidavit or,

alternatively, that any limitation on Vincent's ability to give such evidence should have been clear from the First Vincent Affidavit. This argument engages the Purchaser's submission that it is too late to seek leave of the Court to examine Pomerantz and Howard.

[43] In my view, the evidence that Domfoam seeks from Pomerantz is directly responsive to a matter raised on the cross-examination. The Purchaser put forward Vincent as the party who "negotiated" the Transaction. On cross-examination, it became clear that it was Pomerantz who "negotiated" the Transaction in the more fundamental sense described above. I do not think that Domfoam can, or should, be prejudiced for failing to recognize this difference, given that the Vincent Affidavit was silent on Pomerantz's involvement. The Purchaser has, in effect, acknowledged that the relevant knowledge rested with the person who negotiated the Transaction. It cannot now object to an examination of Pomerantz after it was revealed on Vincent's cross-examination that Pomerantz was the actual negotiator of the business transaction.

[44] With respect to Howard, however, the issues pertaining to him were directly raised in the Vincent Affidavit in paragraph 35. That paragraph sets out the specific matters that were the subject of the communications between Howard and Pomerantz but without any specific timeframe for such communications. Domfoam therefore had ample notice that Howard was the source of the Purchaser's information regarding the Lawsuit, the Dow settlement, and the Dow Proceeds. If Domfoam intended to address any matters pertaining to Howard's knowledge, and the timing and substance of any communications with Pomerantz regarding such knowledge, it should have acted prior to cross-examining Vincent.

[45] I therefore conclude that Domfoam has satisfied the second part of the test for leave in respect of Pomerantz but not in respect of Howard.

Would Granting Leave Result in Non-Compensable Prejudice?

[46] The third requirement of the test requires consideration of whether granting leave would result in a prejudice that could not be addressed by imposing costs, terms or an adjournment.

[47] In this case, I am satisfied that granting leave would not result in non-compensable prejudice to the Purchaser. The only effect of granting leave would be to delay the hearing of the Purchaser's Motion for a relatively short period of time with some potential attendant cost in the form of a delayed receipt of the Dow Proceeds if it were to succeed on that Motion.

The Existence of a Reasonable or Adequate Explanation

[48] The fourth part of the test requires consideration of whether the applicant has provided a reasonable or adequate explanation for why the evidence was not included at the outset. In this case, this requires consideration of whether Domfoam has provided a reasonable or adequate explanation for its decision not to examine Pomerantz or Howard on the matters of relevance to its position on the Purchaser's Motion until after the cross-examination of Vincent.

[49] For the reasons set out above, I am of the view that Domfoam has provided a reasonable explanation for not seeking to examine Pomerantz under r. 39.03 prior to cross-examining Vincent. In short, Pomerantz's involvement as the controlling mind and will of the Purchaser

and, in that capacity, as the party who negotiated the Transaction, did not become apparent until the cross-examination of Vincent.

[50] However, I am not persuaded that Domfoam has provided an adequate explanation for its failure to examine Howard prior to the cross-examination of Vincent. The extent of his communications with Pomerantz were set out in the First Vincent Affidavit and were known to Domfoam prior to the cross-examination of Vincent. Insofar as Howard's knowledge of the Plan is relevant, it was known that Vincent had been dropped from the service list after the fall of 2015 and that Howard's counsel remained on the list. The First Vincent Affidavit was entirely silent on this matter. Moreover, there was nothing new that arose out of the cross-examination of Vincent with regard to these matters. Accordingly, if Domfoam had wished to address these matters, it should have done so before cross-examining Vincent.

[51] Accordingly, I find that Domfoam has satisfied the fourth part of the test for leave in respect of Pomerantz but not in respect of Howard.

Remaining Considerations

[52] As noted above, in reaching its decision herein, the Court should also have regard to the context in which Domfoam's Motion is brought as well as any considerations of proportionality.

[53] The principal issue of context, namely the identity of the controlling mind and will of the Purchaser in the negotiation of the Transaction, has been set out above and need not be repeated here.

[54] More generally, Domfoam urges the Court to have regard to the fact that these proceedings take place in the larger context of the *CCAA* proceedings of the applicant. The Monitor has joined Domfoam in urging appropriate attention to this consideration. In effect, each says that, because the viability of the Plan effectively turns on a ruling favourable to Domfoam in the Purchaser's Motion and that an unfavourable ruling will have adverse financial consequences to the large number of creditors of Domfoam, the Court should permit an exhaustive review of all matters of potential relevance to Domfoam's position on that Motion. While I am sympathetic to the position of the creditors, particularly given the timing of the Purchaser's Motion relative to the creditors' approval of the Plan, I am not persuaded that these considerations have any relevance for the present motion. In particular, any issue of timing is more properly considered, if relevant, on the determination of the Purchaser's Motion.

[55] More significantly, however, I am of the view that proportionality weighs strongly in favour of denying leave to examine Howard for the following reasons. As mentioned, the issue in respect of the matters raised by Domfoam on the Purchaser's Motion is the state of Pomerantz's knowledge. The questions of significance that Domfoam wishes to put to Howard are the mirror image of the questions that it wishes to put to Pomerantz. The only purpose in asking the same questions of Howard and Pomerantz would be to seek to establish a lack of correspondence between the answers of the two parties. There is, however, no evidence in the record that would warrant such a concern regarding Pomerantz's evidence.

Conclusion

[56] Based on the foregoing, Domfoam's motion for leave under r. 39.02(2) to examine Pomerantz is granted but its motion for leave to examine Howard is denied.

W. Howard - d.m.j.

Wilton-Siegel J.

Date: February 13, 2019

TAB 8

COUNSEL SLIP

COURT FILE NO CN-12-0009548-0001

DATE Apr 24, 2019

NO ON LIST 6

TITLE OF
PROCEEDING

Valle Foam Industries (1985) Inc. v. 631400 Ontario Limited

COUNSEL FOR:

PLAINTIFF(S)

APPLICANT(S)

PETITIONER(S)

A. Teodorescu for
the Applicants

PHONE & FAX NOS.

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ateodorescu@blaney.com

COUNSEL FOR:

DEFENDANT(S)

RESPONDENT(S)

PHONE & FAX NOS

as being a WHITE
FOR DEFENDANT

P: 416 365 1800 x 500

F: 416 365 3586

e: colby@firedtaylor.com

GRANT MOTTAT

for Beloitte as Monitor

416-304-0599

-304 1313

April 24, 2019.

All parties have been duly served and none has raised any concerns with respect to the draft order which includes an extension of the stay to October 31, 2019. The stay is appropriate as there remains a business with respect to a payment to be made in a claim action proceeding and who is entitled to receive it. The 19th Report was not approved by Justice Shilton Siegel owing to a factual error.

Exhibit J

TAB 9

Court File Number: CV-12-9545-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re 3113735 Canada Ltd.; 4362063 Canada Ltd. and
Plaintiff(s)

A-Z Sponge & Foam Products Ltd.
AND
Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Facsimile No:

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows): _____

The parties should schedule a 9:30 am conference with Mr. Justice Hainey to schedule the hearing of the motion and to address any other matters between them, including matters pertaining to the proposed motion of the Debtor Corporation.

July 24, 2019
Date

[Signature]
Judge's Signature

Additional Pages _____

TAB 10

COUNSEL SLIP

COURT FILE NO CV-12-00009545-00CL DATE Sept. 11, 2019.

NO ON LIST 2.

Valle Foam Industries (1985) Inc. et al

TITLE OF
PROCEEDING

vs.
631400 Ontario Limited et al.

COUNSEL FOR:

PLAINTIFF(S)	D. Ullmann	for	432063 Canada Ltd.	PHONE & FAX NOS	416-596-2882 (H)
APPLICANT(S)	V. Arman	for	" (old Domfoam)		416-593-2960 (F)
PETITIONER(S)			"		

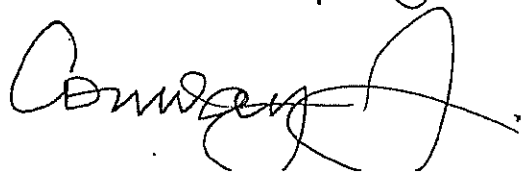
FRED TAYAR

COUNSEL FOR:

DEFENDANT(S)	new purchaser Domfoam Inc - minority	td (416)	PHONE & FAX NOS	363-1800
RESPONDENT(S)			fax (416) 363-3356	
	GRANT MORRIS	for	Deloitte as	416-304-0599
			Monitor	304-1313

Sept 11/19

I have decided to schedule a CC to determine whether Mr Jayar's motion to obtain the \$4 million should best proceed as a motion or some form of trial procedure. There appears to be no issue that Justice W-S's order re distribution of these funds be set aside & the entitlement to those funds be adjudicated. CC set for Oct 7/19 - 1 HR before me - confirmed. Mr Jayar may file his factum for the CC. Mr Ullmann may file his n of motion to connect and up to 5 pages in submissions.



TAB 11

COUNSEL SLIP

COURT FILE

NO.: CV-12-00009545-00CL

DATE: Monday October 7 2019

NO. ON LIST (4)

TITLE OF
PROCEEDING

Valle Foam Industries 1985 Inc et al v 631400 Ontario Limited et al

COUNSEL FOR:

- PLAINTIFF(S)
- APPLICANT(S)
- PETITIONER(S)

David Ullmann

Varoujan Arman

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EMAIL dullmann@blaney.com

COUNSEL FOR:

- DEFENDANT(S)
- RESPONDENT(S)

FRED TAYLOR

CONROY CONTINUUM

PER PURCHASER DORTOAM INC.

PHONE 416 363 1800 x 200

FAX 416 363 3356

EMAIL fred@fredtaylor.com

JUDICIAL NOTES:

GRANT MOTION for

Dismissal of Action

416-304-0599

304 1213

gmoffat@jgf.ca

October 7/19

The following procedure has been worked out w counsel today:

① The parties will be exchanging affs of docs within 45 days, relating only to the issues of surrounding circumstances (what the parties knew about the class action litigation at the time - not re what their subjective intentions were via prior drafts - all as per Sattva) and re the "estoppel issue" re Dortoam's claim to a \$4 million. Sherrill

② The parties will proceed to mediation thereafter.

③ If the matter does not resolve at mediation, they shall return to a 1 HR CC before me (to be scheduled through the CL office) per →

directions on how this matter with some motion will proceed and what evidence (written + VV) will be put before the court.

Conway J.

TAB 12

ENDORSEMENT

COURT FILE NO.: CV-12-9545-00CL

DATE: April 28, 2020

**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.**

Due to the COVID-19 crisis, I held a hearing on the above matter today by teleconference call. This hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020 and the Update dated April 2, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference facilities were arranged by Blaney McMurtry LLP to facilitate the hearing, as per the foregoing COVID-19 practice directions. Materials were sent to me by email prior to the hearing.

This email constitutes my endorsement of today's date and is to be placed in the court file. The following participants were on the teleconference call with me, all of whom are copied on this email:

COUNSEL FOR APPLICANTS:

David T. Ullmann and Varoujan Arman
Blaney McMurtry LLP
Tel: 416-596-4289
Fax: 416-594-2437
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Email: Varman@blaney.com

COUNSEL FOR THE MONITOR:

Grant B. Moffat
Thornton Grout Finnigan LLP
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COUNSEL FOR TONY VALLECOCCIA:

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Tanner & Guiney
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COUNSEL FOR DOMFOAM INC.:

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Email: fred@fredtayar.com
Email: colby@fredtayar.com

CATHERINE HRISTOW, MONITOR

Deloitte Restructuring Inc.
Tel/Direct 416-775-8831 |
Fax 416-601-6690
Email: christow@deloitte.ca

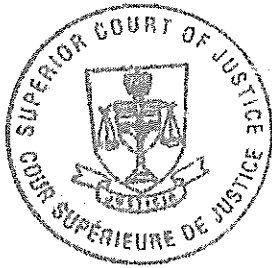
The Applicants' motion is for a further stay under the CCAA to October 30, 2020 from its current expiry date of April 30, 2020. I am satisfied that the further stay is brought forward in good faith and that it is just and convenient and in the interests of the Applicants and their stakeholders to grant it. The stay is sought in order to ensure the orderly collection and distribution of the companies' remaining assets and settlement funds from the various class actions. It is unopposed and is supported by the Monitor. I also approve the Monitor's Twenty-Second Report (except as provided in paragraph 4 of the signed order) and fees and disbursements of the Monitor and its counsel.

The Monitor had brought a motion seeking to appoint a Chief Restructuring Officer for the Applicants. It has agreed to adjourn the motion the request of counsel for the "Domfoam Purchaser". That motion is adjourned on consent to a date to be set by me at a 9:30 attendance. Counsel may email me (and copy the Commercial List office at the above address) when they are ready for the 9:30.

Order to go as signed by me and attached to this email. The Order is effective from today's date and is not required to be entered.

Conway J.
Superior Court of Justice (Toronto)

TAB 13



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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE) TUESDAY, THE 28TH DAY
JUSTICE CONWAY) OF APRIL, 2020

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")

ORDER

THIS MOTION made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "CCAA") for an order, *inter alia*, extending the stay of proceedings in respect of the Applicants to and including October 30, 2020, was heard this day by teleconference due to the COVID-19 crisis.

ON READING the Twenty-Second Report of Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) (the "Twenty-Second Report") in its capacity as the Court-appointed monitor (the "Monitor") of the Applicants, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for Tony Vallecoccia, and counsel for Domfoam Inc., no one appearing for any other person on the service list, although properly served as appears from the Affidavits of Service of Ariyana Botejue sworn April 16 and April 23, 2020, filed;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Twenty-Second Report is hereby abridged and validated and this Motion is properly returnable today without further service or notice thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meaning set out in the Twenty-Second Report.

STAY EXTENSION

3. **THIS COURT ORDERS** that the Stay Period granted under the Initial Order of Justice Newbould dated January 12, 2012 (the “**Initial Order**”) and as subsequently extended by, *inter alia*, the Order of the Honourable Justice Pattillo, dated October 23, 2019, is hereby extended from April 30, 2020 to and including October 30, 2020.

MONITOR’S REPORT, ACTIONS AND FEES

4. **THIS COURT ORDERS** that the Twenty-Second Report and the actions, decisions and conduct of the Monitor as set out in the Twenty-Second Report are hereby authorized and approved, however, the approval of the Twenty-Second Report of the Monitor does not adjudicate on the relief sought by the Monitor through its separate motion to appoint a Chief Restructuring Officer for the Applicants, and the Monitor’s motion in that regard is hereby adjourned to a 9:30 appointment to be scheduled by counsel.

5. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Twenty-Second Report, the Affidavit of Catherine A. Hristow, sworn

April 16, 2020, and the Affidavit of Grant Moffat, sworn April 16, 2020, are hereby authorized and approved.

SUPERIOR COURT OF JUSTICE
ENTERED
MAY 06 2020
COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

Conway J.

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD., 4362063 CANADA LTD.,
and A-Z SPONGE & FOAM PRODUCTS LTD.

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

ORDER

BLANEY McMURTRY LLP
Barristers and Solicitors
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Lawyers for the Applicants

TAB 14

Joshua Tayar

From: Conway, Madam Justice Barbara (SCJ) <Barbara.Conway@scj-csj.ca>
Sent: Monday, June 8, 2020 12:50 PM
To: David Ullmann ; Varoujan Arman; 'gmoftat@tgf.ca'; Fred Tayar, Colby Linthwaite; Linc Rogers
Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Subject: RE: In the Matter of a Plan of Compromise or Arrangement of 3113736 Canada Ltd., et al. (CV-12-9545-00CL)
Attachments: Signed CRO appointment order.pdf
Importance: High

This matter returned to a 9:30 before me today by Zoom videoconference call. The parties in attendance (copied on this email) were:

COUNSEL FOR APPLICANTS:

David T. Ullmann and Varoujan Arman
Blaney McMurtry LLP
Tel: 416-596-4289
Fax: 416-594-2437
Email: DUllmann@blaney.com
Email: Varman@blaney.com

COUNSEL FOR THE MONITOR:

Grant B. Moffat
Thornton Grout Finnigan LLP
Tel: 416-304-0599
Fax: 416-304-1313
Email: gmoftat@tgf.ca

COUNSEL FOR DOMFOAM INC.:

Fred Tayar and Colby Linthwaite
Fred Tayar & Associates Inc.
Tel: 416-363-1800
Fax: 416-363-3365
Email: fred@fredtayar.com
Email: colby@fredtayar.com

Mr. Rogers, the proposed CRO, was also on the call.
This is my endorsement of today's date and is to be placed in the court file.

The only party that had objected to the appointment of the CRO at the April 28 attendance was the Domfoam Purchaser. It is no longer opposing that appointment. I see no need to schedule another motion date now that the relief is unopposed and I have signed the order today appointing Mr. Rogers as CRO. I am satisfied that the appointment of an independent third party is necessary and desirable to provide instructions for the Applicants so that the remaining substantive issues in the proceeding can be addressed and resolved.

There is a mediation scheduled for June 24th. If the matter does not resolve, Mr. Tayar and Mr. Linthwaite wish to bring a motion for security for costs. Counsel have agreed on the date of **August 18, 2020 before me (one hour)** for the motion.

The signed appointment order is attached to this endorsement. It is effective from today's date and is enforceable without the need for entry and filing.



Superior Court of Justice (Toronto)

From: Conway, Madam Justice Barbara (SCJ)
Sent: April 28, 2020 11:47 AM
To: David Ullmann <dullmann@blaney.com>; Varoujan Arman <VArman@blaney.com>; 'gmoftat@tgf.ca' <gmoftat@tgf.ca>; rgtanner@tannerguiney.com; 'fred@fredtayar.com' <fred@fredtayar.com>; 'Colby Linthwaite' <colby@fredtayar.com>; christow@deloitte.ca
Cc: toronto.commercialist@jus.gov.on.ca
Subject: In the Matter of a Plan of Compromise or Arrangement of 3113736 Canada Ltd., et al. (CV-12-9545-00CL)
Importance: High

Due to the COVID-19 crisis, I held a hearing on the above matter today by teleconference call. This hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020 and the Update dated April 2, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference facilities were arranged by Blaney McMurtry LLP to facilitate the hearing, as per the foregoing COVID-19 practice directions. Materials were sent to me by email prior to the hearing.

This email constitutes my endorsement of today's date and is to be placed in the court file. The following participants were on the teleconference call with me, all of whom are copied on this email:

COUNSEL FOR APPLICANTS:

David T. Ullmann and Varoujan Arman
Blaney McMurtry LLP
Tel: 416-596-4289
Fax: 416-594-2437
Email: DUllmann@blaney.com
Email: Varman@blaney.com

COUNSEL FOR THE MONITOR:

Grant B. Moffat
Thornton Grout Finnigan LLP
Tel: 416-304-0599
Fax: 416-304-1313
Email: gmoftat@tgf.ca

COUNSEL FOR TONY VALLECOCCIA:

Robert G. Tanner
Tanner & Guiney
Tel: 416-862-7745
Fax: 416-862-7874
Email: rgtanner@tannerguiney.com

COUNSEL FOR DOMFOAM INC.:

Fred Tayar and Colby Linthwaite
Fred Tayar & Associates Inc.
Tel: 416-363-1800
Fax: 416-363-3365
Email: fred@fredtayar.com
Email: colby@fredtayar.com

CATHERINE HRISTOW, MONITOR

Deloitte Restructuring Inc.
Tel/Direct 416-775-8831 |
Fax 416-601-6690
Email: christow@deloitte.ca

The Applicants' motion is for a further stay under the CCAA to October 30, 2020 from its current expiry date of April 30, 2020. I am satisfied that the further stay is brought forward in good faith and that it is just and convenient and in the interests of the Applicants and their stakeholders to grant it. The stay is sought in order to ensure the orderly collection and distribution of the companies' remaining assets and settlement funds from the various class actions. It is unopposed and is supported by the Monitor. I also approve the Monitor's Twenty-Second Report (except as provided in paragraph 4 of the signed order) and fees and disbursements of the Monitor and its counsel.

The Monitor had brought a motion seeking to appoint a Chief Restructuring Officer for the Applicants. It has agreed to adjourn the motion the request of counsel for the "Domfoam Purchaser". That motion is adjourned on consent to a date to be set by me at a 9:30 attendance. Counsel may email me (and copy the Commercial List office at the above address) when they are ready for the 9:30.

Order to go as signed by me and attached to this email. The Order is effective from today's date and is not required to be entered.

Conway J.
Superior Court of Justice (Toronto)

TAB 15

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE) MONDAY, THE 8TH
)
JUSTICE CONWAY) DAY OF JUNE, 2020

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”)

**ORDER
(CRO Appointment)**

THIS MOTION made by Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) in its capacity as the Court-appointed Monitor (in such capacity, the “**Monitor**”) of 3113736 Canada Ltd., 4362063 Canada Ltd., and A-Z Sponge & Foam Products Ltd. (collectively, the “**Applicants**”), for an order appointing Linc Rogers, a partner with the law firm of Blake, Cassels & Graydon LLP (“**Blakes**”) in Toronto, as Chief Restructuring Officer (in such capacity, the “**CRO**”) of the Applicants, was heard on this day by a Judge of the Ontario Superior Court of Justice (Commercial List) through videoconference due to the COVID-19 crisis.

ON READING the Twenty-Second Report of the Monitor (the “**Twenty-Second Report**”), and on hearing submissions of counsel to the Monitor, the Applicants and Domfoam Inc., no one else appearing, although properly served as appears from the affidavit of service of Bobbie-Jo Brinkman sworn June 8, 2020,

DEFINITIONS

1. **THIS COURT ORDERS** that any capitalized terms used herein and not otherwise defined shall have the meanings given to them in the Twenty-Second Report.

SERVICE

2. **THIS COURT ORDERS** that (a) the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof, and (b) authorizes and validates service of the Notice of Motion and the Motion Record via electronic means.

APPOINTMENT OF CHIEF RESTRUCTURING OFFICER

3. **THIS COURT ORDERS** that Mr. Linc Rogers is hereby appointed as CRO, an officer of this Court, over and in respect of the Applicants and shall have the powers and duties specified in this Order.

CRO'S DUTIES

4. **THIS COURT ORDERS** that, subject to the terms of this Order, the CRO is hereby empowered, authorized and directed to:

- (a) in consultation with the Monitor, take any and all steps required in order to resolve:
 - (i) the entitlement of the Domfoam Purchaser's claim to the Dow Settlement Funds and the Domfoam Canadian Polyols Funds; and
 - (ii) the entitlement of the A-Z Purchaser to A-Z Foam's share of the Residual Dow Settlement Funds and the A-Z Canadian Polyols Funds; and

- (b) perform such other duties as required by this Order or by this Court from time to time and such other duties as the CRO and the Monitor may from time to time agree

(collectively, the “**CRO Duties**”).

CRO’S POWERS

5. **THIS COURT ORDERS** that, subject to the terms of this Order, the CRO, in the discharge and fulfilment of the CRO’s Duties, is hereby empowered and authorized to:

- (a) take any and all steps for and in the name of, and on behalf of, the Applicants in connection with the proceedings herein and to instruct counsel to the Applicants in connection with any such steps;
- (b) represent the Applicants in any negotiations with any other party, including creditors, customers, litigants and stakeholders of the Applicants;
- (c) communicate with and provide information to the Monitor and other stakeholders regarding the affairs of the Applicants;
- (d) report to the Court at such times and intervals as the CRO may deem appropriate with respect to any matters that may be relevant to the proceedings herein;
- (e) have full and complete access to the Property, as defined in the Initial Order of this Court dated January 12, 2012 (the “**Initial Order**”);
- (f) engage, give instructions to and pay counsel, consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on

whatever basis the CRO may agree, in consultation with the Monitor, to assist with the exercise of the CRO's powers and obligations;

- (g) take all such steps and actions, enter into and execute all such agreements and documents in the name of and on half of the Applicants, and incur such expenses and obligations necessary or incidental to the exercise of the foregoing powers;

provided that:

- (i) each of the foregoing actions, agreements, expenses and obligations shall be construed to be those of the Applicants and not of Blakes, the CRO, nor any of his partners, employees (and/or employees of Blakes), representatives or agents; and,
- (ii) the Applicants (directly or through its counsel) shall
 - (1) advise the CRO of all material steps taken by the Applicants in these proceedings; and
 - (2) cooperate fully with and provide the CRO with the assistance necessary to enable the CRO to exercise its powers and discharge the CRO Duties.

LIMITATION OF LIABILITY

6. **THIS COURT ORDERS** that the CRO shall not be in Possession of the Property (as such terms are defined in the Initial Order) and shall not, by fulfilling its obligations hereunder be deemed to have taken or maintained Possession of the Property or any part thereof. Without limiting the foregoing, the CRO shall not take possession or be deemed to take possession of any Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other

contamination including, without limitation, the Environmental Legislation (as defined in the Initial Order), provided however that nothing herein shall exempt the CRO from any duty to report or make disclosure imposed by applicable Environmental Legislation. The CRO shall not, as a result of this Order or anything done in pursuance of the CRO's Duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless he is actually in possession.

7. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the CRO as an officer of this Court, neither the CRO nor any other CRO Indemnified Party (as defined below) shall be deemed to be a director or trustee of any of the Applicants and the CRO shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on his part.

INDEMNITY AND INDEMNIFIED PARTIES

8. **THIS COURT ORDERS** that the Applicants shall indemnify and hold harmless the CRO and any of his partners, employees (and/or employees of Blakes), agents or representatives who may assist the CRO with the exercise of his powers and obligations under this Order (collectively, with the CRO, the "**CRO Indemnified Parties**") with respect to any liability or obligation that the CRO Indemnified Parties may incur as a result of the appointment of the CRO or the fulfilling of the CRO's Duties, including any claims or liabilities subject to indemnification pursuant to this Order, except to the extent the obligation or liability was incurred as a result of the CRO Indemnified Parties' gross negligence or wilful misconduct. The CRO Indemnified Parties shall be treated as unaffected parties, and the foregoing indemnity shall

be treated as unaffected and may not be compromised, for the purpose of this proceeding or any bankruptcy proceeding with respect to one or more of the Applicants.

9. **THIS COURT ORDERS** that no action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of the CRO Indemnified Parties, and all rights and remedies of any person against or in respect of the CRO Indemnified Parties are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on notice to the Applicants, the Monitor and the CRO. Notice of any such motion seeking leave of this Court shall be served upon the Applicants, the Monitor and the CRO at least seven (7) days' prior to the return date of any such motion for leave.

10. **THIS COURT ORDERS** that the Applicants' indemnity in favour of the CRO Indemnified Parties shall survive any termination, replacement or discharge of the CRO.

11. **THIS COURT ORDERS** that the appointment of the CRO and the granting of powers and responsibilities of the CRO hereunder will not constitute the sale or disposition of any of the Property.

PROFESSIONAL FEES AND PASSING OF ACCOUNTS

12. **THIS COURT ORDERS** that the Monitor on behalf of the Applicants is hereby authorized to pay to the CRO a retainer in the amount of \$25,000 to be held by the CRO as security for payment of his respective fees and disbursements, outstanding from time to time

13. **THIS COURT ORDERS** that the CRO Indemnified Parties shall submit their accounts to the Monitor for payment by the Applicants, provided however each CRO Indemnified Party

shall not be required to submit a separate account and the CRO may submit consolidated accounts showing the professional fees and disbursements of the CRO Indemnified Parties (the “CRO Accounts”). The CRO and the other CRO Indemnified Parties shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings, or such alternate rates as may be agreed to by the Monitor. The Applicants are authorized and directed to pay the CRO Accounts on a bi-weekly basis or such other timeframe as the Monitor and the CRO mutually agree.

14. **THIS COURT ORDERS** that the CRO shall pass the CRO Accounts from time to time and for this purpose the CRO Accounts are hereby referred to a Judge of the Ontario Superior Court of Justice (Commercial List).

15. **THIS COURT ORDERS** that the CRO Indemnified Parties shall be entitled to the benefit of the Administration Charge (as defined in the Initial Order) as security for their professional fees and disbursements incurred in respect of these proceedings.

GENERAL

16. **THIS COURT ORDERS** that the CRO shall consult with the Monitor regarding all material issues relating to these proceedings.

17. **THIS COURT ORDERS** that the CRO may resign or the appointment of the CRO may be terminated by further order of this Court at any time.

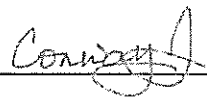
18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the CRO in carrying out the terms of this Order. All courts,

tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CRO as may be necessary or desirable to give effect to this Order or to assist the CRO and his agents in carrying out the terms of this Order.

19. **THIS COURT ORDERS** that the CRO is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the CRO is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

20. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order at least seven (7) days' notice to the CRO and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

21. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.

A handwritten signature in cursive script, appearing to read "Conway J.", is written above a horizontal line.

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.

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

ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

ORDER
(JUNE 8, 2020)

Thornton Grout Finnigan LLP
Barristers & Solicitors
Suite 3200, TD West Tower
100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Grant B. Moffat (LSUC# 32380L)
Tel: 416-304-0599
Fax: 416-304-1313
Email: gmoffat@tqf.ca

Lawyers for the Monitor

TAB 16

Court File Number: CV-12-9545-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

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.

Case Management Yes No by Judge: Koehnen J.

Counsel	Telephone No:	Email/Facsimile No:
Colby Linthwaite, Fred Tayar – counsel for the purchaser, Domfoam Inc.		
David Ullman, Varoujan Arman – counsel for the Applicants		
Grant Moffat – counsel for the Monitor, Deloitte Restructuring		
Linc Rogers – Chief Restructuring Officer of the vendor		

Jacqueline Dais-Visca – Department of Justice Canada Reidar Mogerman - B.C. Class Plaintiffs		
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- Order Direction for Registrar **(No formal order need be taken out)**
 Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**
 Adjourned to: _____
 Time Table approved (as follows): _____

Date Heard: October 7, 2020

1. This motion involves a series of 5 requests for relief by various parties.

Costs of the motion before Wilton-Siegel J.

2. In 2012 Domfoam Inc. purchased the assets, rights and undertakings of the debtor 4362063 Canada Ltd. (the "Debtor"), during the course of the Debtor's CCAA proceeding.
3. There was some discussion during the negotiations leading the sale about the extent to which the purchaser would be entitled to any proceeds of a class action in which the Debtor was a plaintiff.
4. In March 2018, the Debtor received a cheque in the amount of U.S. \$3,741,639.62 representing one instalment of the proceeds from the class action. The debtor then obtained an order without notice from Wilton-Siegel J. on May 29, 2018 allowing the proceeds of the class action settlement to be distributed to creditors.

5. The materials filed on the motion before Justice Wilton-Siegel indicated that there was at least an issue about the extent to which the proceeds of the class action settlement were excluded from the Debtor's sale to Domfoam. Despite this issue, the Debtor did not give Domfoam notice of the motion.
6. Shortly after the order was granted, Domfoam learned of the settlement and demanded payment of the settlement proceeds to itself on the basis that the class action was included in the assets rights and undertakings that Domfoam had purchased in the CCAA proceedings.
7. Domfoam brought a motion to set aside the order of Wilton-Siegel J. After one year of litigating the set-aside motion, the Debtor consented to it.
8. On today's motion, Domfoam seeks costs of the set-aside motion in the amount of \$54,888.73
9. The Debtor resists arguing that it consented to the set aside order and that the request for costs demonstrates that "no good deed goes unpunished." In addition, the Debtor argues that much of the work on the set-aside motion is work that would be necessary to argue the underlying issue of whether proceeds of the class action were included in what Domfoam purchased.
10. I cannot agree that either of those arguments should relieve the Debtor of the cost obligation arising out of the set-aside motion.
11. First, with respect to the no good deed goes unpunished argument, the better deed on the part of the Debtor would have been to have consented to the set-aside order immediately rather than forcing Domfoam through one year of litigation before

consenting. Still better would have been to have given Domfoam notice of the motion before Wilton-Siegel J.

12. In support of its motion before Wilton-Siegel J., the Debtor relied on the Seventh Report of the Monitor which stated at paragraph 34:

Mr. Vallecoccia's affidavit sworn July 11, 2013 provides that the Domfoam [i.e. the Vendor's] US Urethane Claim was specifically excluded from the Domfoam assets purchased by 4037057 Canada Inc...Accordingly, the net proceeds of the Domfoam US Urethane Claim...should be available for distribution to the creditors of Domfoam..

13. On cross-examination, Mr. Vallecoccia admitted that he did not know about the lawsuit or about what was excluded from the Domfoam purchase.

14. The agreement under which Domfoam purchased the assets at one point spoke of "BASF receivables" being retained for the Debtor. The BASF receivables was a defined term that spoke about the sum of approximately \$642,000 that was about to be paid to the Debtor and was in fact paid before closing. The sum of U.S. \$3,741,639.62 came not from BASF but from Dow chemicals.

15. After litigating the set-aside motion for one year, the Debtor advised on September 11, 2019 that it would consent to it.

16. That history does not fall into the category of no good deed going unpunished.

17. Courts have made it clear that even where a party consents to an order, the litigation costs incurred in getting the opposing party to the point of consent are costs for which

a consenting party is liable: *Markle v. Toronto (City)*, (2004) C.C.P.B. 69 (Ont. Sup. Ct.) at paragraph 4.

18. Nor does the Debtor's submission that the work on the set-aside motion would need to be done in the proceeding to adjudicate the underlying issue, relieve it of costs. In *Ledore Investments Ltd. v. Murray*, (2002), 58 O.R. (3d) 627 (Ont. Sup. Ct.), Justice Stinson addressed a similar argument when dealing with costs of an abandoned motion for summary judgment. The moving party argued that the work the respondent did would have to be done in any event for trial as a result of which it should not be awarded costs. Stinson J. rejected the argument at para 19.

19. I appreciate that Stinson J. was dealing with the issue in the context of summary judgment where a specific rule provides for cost consequences on unsuccessful motions. That should have no bearing on the issue here. As a practical matter, the work Domfoam did on the set-aside motion may have some overlap with what is required on the adjudication of the underlying issue but that should not prevent Domfoam from being awarded costs. There will be a considerable time lag between the work done on the set-aside motion and the adjudication the final issues. Whatever work was done in 2018-2019 will have to be substantially re-done for the final adjudication. Moreover, the set-aside motion was not even completed, making duplication even more necessary.

20. In my view Domfoam is entitled to costs of the set-aside motion which I fix at \$54,888.73.

Domfoam's Evidentiary Motions

21. Domfoam seeks orders striking the affidavit of Mr. Vallecoccia and prohibiting the Debtor from introducing any further evidence on adjudication of the underlying issue. It bases those motions on the allegation that the Debtor has not complied with the direction of Conway J. that compelled the parties to produce affidavits of documents by a particular date. Domfoam submits that the Debtor did not comply with that direction because it delivered only an unsworn affidavit of documents.

22. I dismiss Domfoam's motion in this regard.

23. The Debtor offered to deliver a sworn affidavit from Mr. Lincoln Rogers the Chief Restructuring Officer of the Debtor. Domfoam rejected that request.

24. It strikes me that if Domfoam was not satisfied with the Debtor's compliance with the direction of Conway J., a more proportionate first step would be to re-attend before her or another judge of the Commercial List for further directions or relief. It is somewhat draconian to strike a party's evidence and preclude them from introducing any further evidence in the circumstances here.

Security for Costs

25. Domfoam seeks security for costs in the amount of \$213,132.90. The Debtor objects noting that Domfoam is a plaintiff and that security for costs is not generally available plaintiffs.

26. In my view the issue is a bit of a red herring.

27. The Debtor's monitor has already agreed to set aside an amount equal to the security requested from the estate of Vallefoam, a company related to the Debtor which is also under CCAA protection and shares the same monitor as the Debtor does.

28. The creditors of the Debtor and Vallefoam are largely similar. Two creditors of Vallefoam who make up 86% of the claims against Vallefoam were present at the motion and did not object to the Monitor's proposal. Given the overlapping creditors in Domfoam and Vallefoam, the work done to adjudicate the underlying issue will benefit the creditors of Vallefoam, at least insofar as they are also creditors of Domfoam.

29. I therefore order the Monitor of the Debtor to set aside \$215,000 from the estate of Vallefoam to stand as security for costs Domfoam in this proceeding.

Canadian Settlement Funds

30. Since the set-aside motion was brought, Domfoam has received \$1,300,000 in settlement of a Canadian class action in which the Debtor was a plaintiff. That class action arises out of issues similar to the ones raised in the American class action. The debtor asserts that the settlement funds Domfoam received do not belong to Domfoam but belong to the Debtor because that action was not transferred as part of the purchase of the assets, interest and undertaking of the Debtor in the CCAA proceeding.

31. The Debtor asks that those funds be transferred to the Monitor for safekeeping until the underlying issues are disposed of.

32. It strikes me that if there is an issue with respect to the entitlement to the settlement funds, both sides should be treated similarly.

33. I therefore order Domfoam to pay the funds it has received the Canadian class action to Mr. Tayar's and Mr. Linthwaite's firm which is directed to hold those funds in trust until the underlying issue entitlement to the funds has been disposed of. Mr. Tayar and Mr. Linthwaite are directed to advise the Debtor and the Monitor when he has received those funds.

Next Steps

34. The overriding issue remains. To whom do settlement funds from the class actions belong: The Debtor or Domfoam. All parties require a resolution to that issue on an expedited basis.

35. There is disagreement about the appropriate manner in which to resolve that issue.

36. Domfoam submits it can be determined on a paper record. The Debtor submits it requires a trial or the trial of an issue. The debtor also submits that Conway J. has already implicitly determined that the matter requires at least the trial of an issue because she ordered that affidavits of documents be produced.

37. I read Justice Conway's endorsement differently. The affidavit of documents that she directed was a limited one. It did not relate to all matters relevant to the proceeding but was limited to the surrounding circumstances; that is to say what the parties knew about the class action at the time and not what the parties' subjective intentions were.

38. She then ordered the parties to attend a mediation. If the mediation did not resolve the matter, she ordered the parties to return for a one hour case conference before

her “for directions on how this motion will proceed and what evidence (written and viva voce) will be put before the court.”

39. That does not strike me as indicating that Justice Conway had decided that this matter should proceed to a trial or the trial of an issue. She clearly left the issue open to decide a later stage.

40. The parties are clearly at a stage where they need a case conference to move the matter forward. I have conferred with Justice Conway to determine whether it would be more efficient for me or her to conduct that case conference and to deal with the matter going forward. I have concluded that it is more appropriate for the case conference to be held before me. Although Justice Conway recalls the high level issues, her total involvement with the matter is now less than my involvement as a result of having reviewed materials for the motion before me and listened to 3 hours of argument.

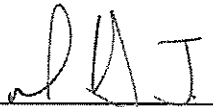
41. The parties are to confer amongst themselves to agree on a time at which they would be available for one hour case conference with me. The case conference will have to occur at 8:30 a.m. or after 4:30 p.m. Mr. Linthwaite should provide me with 3 or 4 dates between October 26, 2020 and November 9, 2020 that work for all parties.

42. The object of the case conference will be to design a procedure that will allow this matter to be adjudicated on a real-time, expedited timetable. There has been enough uncertainty about who is entitled to the settlement funds. All parties are entitled to a decision on that issue.

43. If the parties have not agreed to an adjudicative process before the case conference, all parties should be prepared to make full, detailed arguments about why the procedures they advocate are appropriate or required.

Costs

44. the parties have agreed that costs for this motion are appropriate to set at \$17,000. Given that success has been divided, each side shall bear its own costs.



Koehnen J.

October 8, 2020

TAB 17

Joshua Tayar

From: Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>
Sent: Thursday, November 5, 2020 9:12 AM
To: Fred Tayar; Varoujan Arman; David T. Ullmann; Grant Moffat; Linc Rogers; Dais-Visca, Jacqueline; 'Reidar M. Mogerman'; Colby Linthwaite
Cc: Matt Gottlieb; Jasmine Landau; JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Subject: Re: fred tayar's Zoom Meeting

Further to my endorsement below, the hearing in this matter will be on February 3 and 4 2021 before Justice Cavanagh. Could I ask Mr. Tayar to send Justice Cavanagh and outlook invitation with a zoom and sync links embedded in it.

Justice Markus Koehnen

Ontario Superior Court of Justice
361 University Ave.
Toronto, Ont.
M5G 1T3
416-327-5284

From: Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>
Sent: Wednesday, November 4, 2020 2:45 PM
To: Fred Tayar <fred@fredtayar.com>; Varoujan Arman <VArman@blaney.com>; David T. Ullmann <DUllmann@blaney.com>; Grant Moffat <GMoffat@tgf.ca>; Linc Rogers <linc.rogers@blakes.com>; Dais-Visca, Jacqueline <Jacqueline.Dais-Visca@justice.gc.ca>; 'Reidar M. Mogerman' <RMogerman@cfmlawyers.ca>; Colby Linthwaite <colby@fredtayar.com>
Cc: Matt Gottlieb <mgottlieb@lolg.ca>; Jasmine Landau <jlandau@lolg.ca>; JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>
Subject: Re: fred tayar's Zoom Meeting

This email constitutes my direction arising out of the case conference I held in this matter on November 3, 2020 and should be placed into the court file.

Subject to the qualifications below, both parties have agreed that the dispute about their entitlement to funds arising from certain class actions should be determined by way of application on a paper record.

Mr. Gottlieb wishes to file two additional affidavits. Mr. Tayar submits that Mr. Gottlieb requires a motion for leave to do so. Mr. Gottlieb will be permitted to file an affidavit from Mr. Ullman and from a witness who will speak to what the parties have referred to as the estoppel issue. Mr. Tayar will have the right to file materials in reply to those affidavits.

An issue has arisen between the parties about the extent to which it might be desirable to have Mr. Ullman's evidence proceed viva voce before the judge hearing the application.

Once Mr. Tayar has received Mr. Ullman's affidavit he will decide whether he wishes to cross-examine Mr. Ullman out of court. If so, Mr. Ullman's affidavit will continue to form part of the record placed before the application judge.

If Mr. Tayar decides he would like to cross-examine Mr. Ullman viva voce before the application judge, then Mr. Ullman's affidavit will be discarded and he will testify both in chief and be cross-examined in front of the application judge. If that occurs, Mr. Tayar will not be permitted to make any use of the affidavit when cross-examining Mr. Ullman. The affidavit will be treated as a complete nullity.

The parties will endeavour to agree on a schedule. Two days of court time will be reserved after February 1, 2020. At the time of writing this endorsement, the server servicing the court's scheduling calendar is down, as a result of which I am not able to provide court dates. I will provide court dates as soon as the server is back up.

Justice Markus Koehnen
Ontario Superior Court of Justice
361 University Ave.
Toronto, Ont.
M5G 1T3
416-327-5284

From: Fred Tayar
Sent: Tuesday, October 13, 2020 10:33 AM
To: Fred Tayar <fred@fredtayar.com>; Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>; Varoujan Arman <VArman@blaney.com>; David T. Ullmann <DUllmann@blaney.com>; Grant Moffat <GMoffat@tgf.ca>; 'Rogers, Linc' <linc.rogers@blakes.com>; Dais-Visca, Jacqueline <Jacqueline.Dais-Visca@justice.gc.ca>; 'Reidar M. Mogergerman' <RMogergerman@cfmlawyers.ca>; Colby Linthwaite <colby@fredtayar.com>
Cc: Matt Gottlieb <mgottlieb@lolg.ca>; Jasmine Landau <jlandau@lolg.ca>
Subject: fred tayar's Zoom Meeting
When: Tuesday, November 3, 2020 6:00 PM-7:00 PM.
Where: <https://us02web.zoom.us/j/86511186543?pwd=amFxMjVBNVVTUUh3Z01USGN2VnJHQ09>

fred tayar is inviting you to a scheduled Zoom meeting.

Join Zoom Meeting

<https://us02web.zoom.us/j/86511186543?pwd=amFxMjVBNVVTUUh3Z01USGN2VnJHQ09>

Meeting ID: 865 1118 6543

Passcode: 186673

One tap mobile

+13462487799,,86511186543#,,,,,0#,,186673# US (Houston)

+16699006833,,86511186543#,,,,,0#,,186673# US (San Jose)

Dial by your location

+1 346 248 7799 US (Houston)

+1 669 900 6833 US (San Jose)

+1 929 205 6099 US (New York)

+1 253 215 8782 US (Tacoma)

+1 301 715 8592 US (Germantown)

+1 312 626 6799 US (Chicago)

Meeting ID: 865 1118 6543

Passcode: 186673

Find your local number: <https://us02web.zoom.us/u/kdJ4erZd4w>

TAB 18

Joshua Tayar

From: Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>
Sent: Wednesday, February 3, 2021 4:15 PM
To: Fred Tayar; Matt Gottlieb; Jasmine Landau; Colby Linthwaite; JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Cc: Varoujan Arman; Chelsea D. Hermanson; Grant Moffat
Subject: Re: fred tayar's Zoom Meeting--DOMFOAM CV-12-9545-00CL

Email Endorsement

1. I note that there were several parties at the case conference who are not recipients of this email. I would ask that Mr. Gottlieb and Mr. Linthwaite Courtney to ensure that all parties who attended the hearing receive a copy of this email. Four issues arose for consideration at today's case conference.

I. Estoppel Documents

2. The first issue concerns what the parties have referred to as the estoppel documents. Mr. Gottlieb contends that the purchaser is obliged to provide estoppel documents as part of its affidavit of documents. Estoppel documents are ones that relate to information about the proceeds of the US class action and what would be done with those proceeds.
3. Mr. Linthwaite says that Mr. Pomerantz has already advised that he has no such documents. That, however, is not the end of the inquiry. Mr. Gottlieb's client, the applicant, is particularly concerned about whether the corporation as a whole and in particular Mr. John Howard have possession, power or control over estoppel documents.

4. The purchaser shall make broader inquiries for estoppel documents beyond Mr. Pomerantz. In particular, the purchaser should ask Mr. Howard for any such documents in his power possession or control and should conduct a broader search to that effect within the purchaser Corporation. After conducting such a search, the purchaser shall advise the applicant of the results of the search.

II. Privileged Documents

5. The purchaser seeks production of communications between the Monitor and its counsel on the one hand and the applicant and its counsel on the other which deal with the proceeds of the US class action. The purchaser and the Monitor claim privilege over those documents.
6. Both parties agree with the concept that while the communication may be privileged, facts contained in those communications are not privileged. It appears that there are approximately 20 such privileged documents. For the most part they are single page documents.
7. Rather than embarking on an expensive motion to determine the issue, the parties have agreed on the following practical solution: Mr. Gottlieb and/or Mr. Finnigan will send me the documents in question. I will review them to determine whether there are any facts in those documents that relate to the proceeds of the US class action litigation which communications arose before the closing of the sale to Mr. Linthwaite's client.

8. In arriving at the population documents that I am to review, Mr. Gottlieb and Mr. Finnigan will send me documents that refer not only to the BASF receivable but also to documents that refer in any potential proceeds of the US class action. The documents I review will be limited to those created before the closing of the purchase by Mr. Linthwaite's client.

9. If there are any such facts, I will raise them with Mr. Gottlieb and Mr. Finnigan. I will also advise Mr. Linthwaite that I have raised certain facts with Messrs. Gottlieb and Finnigan but will not disclose those facts to Mr. Linthwaite. If Mr. Gottlieb and/or Mr. Finnigan are unable to agree to the disclosure of any such facts, I will hold a further case conference with the parties to determine how to resolve the issue.

III. Reply Evidence

10. In an earlier case conference endorsement, I granted the applicant leave to file an affidavit by Mr. Ullman. That endorsement also gave the purchasers the right to require Mr. Ullman to provide his evidence orally at the hearing and be cross-examined orally at the hearing. The earlier endorsement also authorized the purchaser to file reply material.

11. The purchaser has elected to have Mr. Ullman give evidence at the hearing rather than through his affidavit. The purchaser also wishes to introduce reply evidence orally at the hearing.

12. The applicant objects and says any reply should be delivered by affidavit in advance of the hearing.

That does not strike me as practical. It would be difficult for the purchaser to file reply evidence to evidence that has not been introduced yet. At the same time, I am sympathetic to the view that the purchaser may now have gained insight into Mr. Ullman's expected evidence by virtue of having seen the affidavit and that the applicant may be taken by surprise if the purchaser can introduce reply evidence at the last minute of which the applicant has no prior knowledge.

13. It strikes me that the playing field can be levelled by having the applicant provide a detailed will say statement of what Mr. Ullman is expected to testify to at the hearing. The purchaser will then be required to provide a detailed will say statement of any oral reply it intends to call at the hearing. The purchaser's oral reply will be limited to evidence provided by Mr. Ullman. Any other reply must be provided in affidavits.

IV. Sealed Court File

14. Some material in the underlying CCAA application was filed under seal. All parties agree that they should be entitled to see that material.

15. Neither I nor none of the parties at the case conference knew the precise nature of the sealed material. I do not therefore no whose interests might be detrimentally affected by unsealing the information.

16. Unfortunately, there was not enough time to explore the issue during the case conference. As a result, I have asked the parties to determine as best they can the nature of the sealed material. If the parties are able to confirm that the sealed material affects only the interests of those who are consenting to unsealing the court file, they can advise me of that and send me a draft order which effects that result.

17. If the parties are unable to confirm that the sealed material affects only the interests of those consenting or if the sealed material affect the interests of the parties whose consent to the unsealing cannot be obtained, the parties may get in touch with me directly for a further case conference to deal with the issue.

Justice Markus Koehnen
Ontario Superior Court of Justice
361 University Ave.
Toronto, Ont.
M5G 1T3
416-327-5284

TAB 19

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE) FRIDAY, THE
JUSTICE KOEHNEN) 26th DAY OF FEBRUARY,

2021

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**")

ORDER

(Unsealing of the Confidential Supplement to the Third Report of the Monitor)

WHEREAS by Order dated March 16, 2012, the Confidential Supplement to the Monitor's Third Report dated March 13, 2012 (the "**Confidential Supplement**") was sealed from the public record and placed separate from the other contents of the Court file in this proceeding in a sealed envelope bearing a statement that such envelope shall only be opened upon further order of the Court;

WHEREAS at a case conference held on February 3, 2021, Domfoam Inc. requested that the Confidential Supplement be unsealed. 3113736 Canada Ltd., 4362063 Canada Ltd., and A-Z Sponge & Foam Products Ltd. (collectively, the "**Applicants**") confirmed that they do not object to the Confidential Supplement forming part of the public record;

UPON BEING ADVISED by Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) in its capacity as the Court-appointed Monitor of the Applicants that none of the offerors identified in the Confidential Supplement objects to the Confidential Supplement forming part of the public record,

1. **THIS COURT ORDERS** that the Confidential Supplement, which was sealed from the public record by Order dated March 16, 2012, be unsealed and shall form part of the public record.

2. **THIS COURT ORDERS** that the sealed envelope in the Court file containing the Confidential Supplement shall be opened and the Confidential Supplement shall form part of the Court file in this proceeding.

3. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.

RAJ

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.

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

ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

ORDER

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Grant B. Moffat (LSO# 32380L)
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Lawyers for the Monitor

TAB 20

From: Cavanagh, Justice Peter (SCJ) <Peter.Cavanagh@scj-csj.ca>

Sent: May 10, 2021 10:14 AM

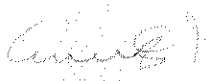
To: Matt Gottlieb <mgottlieb@lolg.ca>; Fred Tayar <fred@fredtayar.com>; Colby Linthwaite <colby@fredtayar.com>; Linc Rogers <linc.rogers@blakes.com>; 'Grant Moffat' <GMoffat@tgf.ca>; 'CHermanson@cfmlawyers.ca' <CHermanson@cfmlawyers.ca>

Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>

Subject: DOMFOAM CCAA Hearing - CV-12-9545-00CL

Endorsement:

This motion is adjourned to be heard on September 13, 14, the morning of the 15th, and the morning of the 17th. Counsel advise that the motion is ready for argument and they are able to argue this motion on earlier dates if they become available.



Cavanagh J.

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
COMMERCIAL LIST**

Proceeding Commenced at Toronto

BRIEF OF ORDERS AND ENDORSEMENTS

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