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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(the "**Applicants**")

NOTICE OF MOTION
(Re: Stay Extension, Returnable April 24, 2019)

April 18, 2019

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Barristers and Solicitors
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SERVICE LIST
(as at April 17, 2019)

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INDEX

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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**")

INDEX

TAB 1

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(the "**Applicants**")

NOTICE OF MOTION
(Re: Stay Extension, Returnable April 24, 2019)

THE MOVING PARTIES, 3113736 Canada Ltd. (formerly known as Valle Foam Industries (1995)) ("**Valle Foam**"), 4362063 Canada Ltd. (formerly known as Domfoam International Inc.) ("**Domfoam**"), and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**") will make a motion to a judge presiding over the Commercial List at 10:00 a.m. on April 24, 2019, or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

This motion is to be heard orally.

THE MOTION IS FOR:

1. An Order substantially in the form contained at Tab 3 of the Applicants' Motion Record, extending the Stay Period (as that term is defined in the Initial Order of the Honourable Mr. Justice Newbould dated January 12, 2012) to and including October 31, 2019 and approving the Monitor's report, conduct and fees; and

2. such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

3. On January 12, 2012, the Applicants sought and were granted protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**"), as amended pursuant to the Order of the Honourable Mr. Justice Newbould (the "**Initial Order**");

4. Deloitte & Touche Inc., now known as Deloitte Restructuring Inc., was appointed in the Initial Order to act as monitor in these CCAA proceedings ("**Monitor**");

5. As a result of the sale of assets of the Applicants, Valle Foam changed its name to 3113736 Canada Ltd., and Domfoam changed its name to 4362063 Canada Ltd. The style of cause of these proceedings was changed by the Order of Justice Brown, dated June 15, 2012 to reflect the change of names;

6. The Order of the Honourable Mr. Justice Brown, dated June 15, 2012 established a process to identify pre- and post-filing claims against the Applicants and/or their officers and directors ("**Claims Process Order**")

7. The Meeting Order was approved by the Honourable Mr. Justice Penny on September 6, 2016, accepting Domfoam's Plan of Compromise and Arrangement ("**Plan**") for filing with the Court and authorizing Domfoam to seek approval of the Plan at the meeting of the creditors ("**Creditors' Meeting**");

8. The Creditors Meeting was held on October 19, 2016;

9. The Applicants achieved the required statutory "double majority" needed to approve the Plan. Proven Creditors holding 92% in number and 99% in value voted to approve the Resolution in favour of the Plan;

10. The Plan was sanctioned by way of Order from the Honourable Mr. Justice Hainey, dated January 24, 2017;

11. The conditions precedent to Plan implementation have been satisfied or waived, and the Plan has been implemented;

12. Each of the Applicants are claimants in a U.S. class action proceeding relating to price fixing for a product known as "Polyether Polyol" (the "**US Urethane Proceeding**"). A settlement was entered into with one of the defendants in the US Urethane Proceeding, in which the defendant agreed to pay $834 million USD for distribution to the class members, including the Applicants ("**Polyols Settlement**");

13. On or about March 21, 2018, an initial distribution representing 85% of the total recovery from the Polyols Settlement was made to the class members, including the Applicants. The final distribution from the Polyols Settlement authorizing the distribution of the holdback was approved by the US Court on November 5, 2018 ("**Final Distribution Order**"). Per the Final Distribution Order, the funds will be disbursed once the appeal period with respect to the order expires;

14. The company that purchased the assets of Domfoam, Domfoam Inc. (formerly known as 4037047 Canada Inc.) ("**Purchaser**"), has brought a motion directing the Applicants to pay the proceeds recovered from the Polyols Settlement to the Purchaser. The Company takes the position that the Purchaser's motion is without merit. This motion has not yet been heard;

15. In connection with the Purchaser's motion, Domfoam brought a motion under Rule 29.02(2) of the *Rules of Civil Procedure* for leave to examine Mr. Terry Pomerantz ("**Mr. Pomerantz**"), the President of the Purchaser, and Mr. John Howard, an employee of the Purchaser. This motion was heard on November 29, 2018;

16. On February 13, 2019, the Court released its Endorsement granting Domfoam leave to examine Mr. Pomerantz. The examination of Mr. Pomerantz is currently scheduled for April 22, 2019;

17. The Applicants may also be class members in a certified class action in Ontario relating to the price fixing of polyether polyols products purchased in Canada ("**Canadian Urethane Proceeding**"). Settlement funds are being held in trust for the benefit of the class members in the Canadian Urethane Proceeding, and the Applicants are in the process of determining if they have any entitlement to receive any funds from the Canadian Urethane Proceeding;

18. Valle Foam continues its collection and enforcement efforts to pursue outstanding receivables;

Extension of Stay Period

19. The Initial Order granted a Stay Period until February 10, 2012;

20. The Stay Period granted under the Initial Order was subsequently extended for all of the Applicants from time to time by orders of this Honourable Court;

21. Most recently, the Stay Period was extended to April 30, 2019, by the Order of the Honourable Mr. Justice Wilton-Siegel, dated November 29, 2018;

22. The Applicants have been acting and continue to act in good faith and with due diligence in these CCAA proceedings;

23. It is just and convenient and in the interests of the Applicants and their stakeholders that the requested Order be granted and the Stay Period extended;

24. Although the Plan has been approved, the continuation of the stay of proceedings in the Domfoam estate is required to ensure the orderly collection and distribution of the remaining assets and settlement funds from the various class actions;

25. The proposed extension of the Stay Period is supported by the Monitor and there is no known opposition;

Approval of Monitor's fees, conduct and report

26. Following the implementation of the Plan, the Monitor made a distribution of funds on hand to the creditors in accordance with the Plan and the Orders of this Court;

27. the provisions of the CCAA and the inherent and equitable jurisdiction of this Honourable Court;

28. Rule 1.04, 1.05, 2.03, 3.02, 16 and 37 of the Ontario *Rules of Civil Procedure*, RSO 1990, Reg. 194, as amended, and section 106 of the Ontario *Courts of Justice Act*, RSO 1990, c C 43, as amended; and

29. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

30. The Affidavit of Tony Vallecoccia, to be sworn;

31. The Twentieth Report of the Monitor, to be filed; and

32. Such further and other material as counsel may advise and this Court may permit.

April 18, 2019

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Lawyers for the Applicants

TO: SERVICE LIST

TAB 2

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

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

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(the "**Applicants**")

AFFIDAVIT OF TONY VALLECOCCIA
(Sworn April 18, 2019)

I, **TONY VALLECOCCIA**, of the Town of Milton, in the Regional Municipality of Halton, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am the President and Chief Executive Officer of 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc. ("**Valle Foam**"), and of 4362063 Canada Ltd., formerly known as Domfoam International Inc. ("**Domfoam**"), and a director of Valle Foam, Domfoam and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**"), and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.

2. To the extent that the matters deposed to in this affidavit are based on my review of documents or information and belief, I have stated the source of my information and belief and do verily believe the information to be true.

3. All defined terms not otherwise set out in this affidavit have the meaning ascribed to them in my affidavit, sworn November 16, 2018.

4. I swear this affidavit in support of the Applicants' motion for an Order, *inter alia*, extending the stay of proceedings for all of the Applicants to and including October 31, 2019, and approving the Twentieth Report of the Monitor, to be filed separately.

Extension of the Stay Period

5. The background to these proceedings is set out in my affidavit, sworn November 16, 2018 ("**November Affidavit**"), a copy of which is attached hereto and marked as **Exhibit "A"**.

6. I am advised by our counsel, Alexandra Teodorescu, that the Stay Period expires on April 30, 2019. A copy of Justice Wilton-Siegel's Order, dated November 29, 2018, extending the Stay Period to and including April 30, 2019 is attached hereto and marked as **Exhibit "B"**.

7. I understand that there are outstanding issues which need to be resolved before the estates can be completed. As such, the Applicants are seeking to extend the Stay Period up to and including October 31, 2019.

8. I believe that the Applicants are acting in good faith and with due diligence in pursuing the orderly wind down of Domfoam and collecting outstanding amounts owed to Valle Foam (as explained in further detail below). I am informed by Ms. Teodorescu that the Monitor supports the request to extend the Stay Period to October 31, 2019.

9. An extension of the Stay Period is required to allow the Applicants to deal with a motion brought by the Purchaser (as defined below) with respect to its claim to a large amount of funds recently received by Domfoam, and to allow Valle Foam to continue its collection efforts.

10. In particular, I understand that the entity which purchased Domfoam (now known as 4362063 Canada Ltd.), Domfoam Inc. (formerly known as 4037057 Canada Inc.) ("**Purchaser**"), is claiming that it owns certain amounts received by Domfoam from the Polyols Settlement. The amount is a multi-million dollar amount, which, I am advised by my counsel, would otherwise be paid to the creditors of Domfoam. I am advised by Ms. Teodorescu that the Purchaser's motion was originally scheduled for November 29, 2018, but has not yet been heard.

11. I am advised by my counsel, Alexandra Teodorescu, that a motion was heard on November 29, 2018 and that the decision was released on February 13, 2019. The Court's decision is attached hereto and marked as **Exhibit "C"**.

12. I am further advised by Ms. Teodorescu that the February 13th decision allows for the examination of Mr. Terry Pomerantz in connection with the Purchaser's motion to deal with the Polyols Settlement.

13. I am advised by Ms. Teodorescu and verily believe that the examination of Mr. Pomerantz is currently scheduled for April 22, 2019, and that the parties hope to book a return date for the Purchaser's motion following that examination, which will be significantly after the current stay expires on April 30, 2019.

Canadian Class Action

14. I am advised by my counsel, Alexandra Teodorescu, that the Applicants filed placeholder claims in the Canadian Urethane Proceeding in February 2019.

15. I am further advised by Ms. Teodorescu that, on April 1, 2019, she received an e-mail from the claims administrator in the Canadian Urethane Proceeding stating that the Applicants' claims

were selected for an audit, and seeking supporting documentation for the claims. The Applicants are in the process of responding to this request. The Applicants hope to recover additional funds from the Canadian Urethane Proceeding for the benefit of the creditors of the respective estates.

Valle Foam Collection Efforts

16. As set out in my November Affidavit, Valle Foam has two outstanding collection actions.

17. I am advised by the Applicant's counsel, Varoujan Arman, that in respect of Valle Foam's action against Cozy Corner Bedding Inc., a summary judgment motion was heard on March 29, 2019. I am further advised by Mr. Arman that the decision was released on April 8, 2019, and Valle Foam was entitled to judgment against the defendant in the amount of $184,319.34, plus interest. A copy of the summary judgment decision is attached hereto and marked as **Exhibit "D"**.

18. With respect to the second outstanding matter, I am advised by Mr. Arman that a mediation was held on April 15, 2019, but no settlement was reached.

19. Extending the Stay Period will provide Valle Foam with the breathing room required to continue pursuing its collection and enforcement efforts.

A-Z Foam

20. Although the business of A-Z Foam has been ceased for several years at this point in time, it is an affiliated entity of the Applicants, and the continuation of the stay is convenient as there remains inter-company accounting to be resolved.

21. No one has at any time during the CCAA Proceedings objected to the continuation of the stay with respect to A-Z Foam, and I am not aware of any objections at this time.

22. I swear this affidavit in support of the Applicants' motion for an Order, *inter alia*, extending the Stay Period to and including October 31, 2019, and for no improper purpose.

SWORN before me at the Town of Milton in the Province of Ontario, this 18th of April, 2019

(A commissioner for taking affidavits)

Matthew Barry Wilks, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 10, 2020.

TONY VALLECOCCIA

EXHIBIT A

This is **Exhibit "A"** referred to in the Affidavit of Tony Vallecoccia sworn before me this 10th day of April, 2019.

Matthew Wilks

A Commissioner for Taking Oaths, Affidavits (or as may be) in Ontario

Matthew Barry Wilks, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires March 10, 2020.

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

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(the "**Applicants**")

AFFIDAVIT OF TONY VALLECOCCIA
(Sworn November 16, 2018)

I, TONY VALLECOCCIA, of the Town of Milton, in the Regional Municipality of Halton, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am the President and Chief Executive Officer of 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc. ("**Valle Foam**"), and of 4362063 Canada Ltd., formerly known as Domfoam International Inc. ("**Domfoam**"), and a director of Valle Foam, Domfoam and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**"), and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.

2. To the extent that the matters deposed to in this affidavit are based on my review of documents or information and belief, I have stated the source of my information and belief and do verily believe the information to be true.

3. I swear this affidavit in support of the Applicants' motion for an Order, *inter alia*, extending the stay of proceedings for all of the Applicants to and including April 30, 2019, and approving the Nineteenth Report of the Monitor, to be filed separately.

Background

4. On January 12, 2012, the Applicants sought and were granted protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("**CCAA**"), pursuant to the Order of the Honourable Mr. Justice Newbould (the "**Initial Order**").

5. Deloitte & Touche Inc., now known as Deloitte Restructuring Inc., was appointed in the Initial Order to act as monitor in these CCAA proceedings ("**Monitor**").

6. As a result of the sale of assets of the Applicants, Valle Foam changed its name to 3113736 Canada Ltd., and Domfoam changed its name to 4362063 Canada Ltd. The style of cause of these proceedings was changed by the Order of Justice Brown dated June 15, 2012 to reflect the change of names. For the purpose of this affidavit, the said Applicants will still be referred to as Valle Foam, Domfoam and A-Z Foam.

7. On September 6, 2016, the Honourable Mr. Justice Penny approved the Applicants' order seeking acceptance of Domfoam's Plan of Compromise and Arrangement, dated August 23, 2016 ("**Plan**") for filing with the Court and authorizing Domfoam to seek approval of the Plan at a meeting of the creditors ("**Meeting Order**").

8. Pursuant to the Meeting Order, the meeting of the creditors of Domfoam was held on October 19, 2016 ("**Creditors' Meeting**"). The Plan was approved by an overwhelming majority (92% in number and 99% in value) of creditors at the Creditors' Meeting.

9. The Plan was approved and sanctioned by the Honourable Mr. Justice Hainey on January 24, 2017.

10. The prerequisites to the implementation of the Plan have all now been satisfied, and, on June 23, 2017, the Monitor filed with the Court its Plan Implementation Certificate, a copy of which is attached hereto and marked as **Exhibit "A"**.

11. Following the sanction and implementation of the Plan, the Monitor has the ongoing responsibility to collect funds from the Polyols Settlement (discussed below), and to distribute those funds to creditors with proven claims under the Plan.

Extension of the Stay Period

12. The Initial Order granted a stay of proceedings ("**Stay Period**") until February 10, 2012.

13. The Stay Period granted under the Initial Order was subsequently extended from time to time by orders of the Court, the most recent being the Order of the Honourable Mr. Justice Wilton-Siegel, dated May 29, 2018, which extended the Stay Period to November 30, 2018.

14. The Applicants are seeking to extend the Stay Period up to and including April 30, 2019.

15. No cash flow is being provided with this affidavit as the Applicants have limited expenses and no employees. I am confident that the Applicants each have sufficient funds on hand to meet their obligations on a go forward basis for the period of the proposed extension.

16. I believe that the Applicants have acted, and continue to act, in good faith and with due diligence in pursuing the orderly wind down of Domfoam and collecting outstanding amounts

owed to Valle Foam (as explained in further detail below). I am informed by the Monitor that it supports the request to extend the Stay Period to April 30, 2019.

17. An extension of the Stay Period is required to allow the Applicants to continue collecting outstanding accounts as well as funds due under the Polyols Settlement (as defined below), and to allow the Monitor to distribute these funds to creditors with proven claims.

Collection of the Polyols Settlement

18. Each of the Applicants are claimants in a U.S. class action proceeding that relates to price fixing for a product known as "Polyether Polyol" (the "**US Urethane Proceeding**").

19. There was a trial in respect of one of the defendants in the US Urethane Proceeding, the Dow Chemical Company ("**Dow**"), in which a judgment was rendered against Dow in the amount of $1.06 billion ("**Judgment**").

20. In March 2016, Dow withdrew its appeal of the Judgment to the United States Supreme Court and accepted a settlement under which it agreed to pay $834 million USD, for distribution to the class members, including the Applicants (the "**Polyols Settlement**").

21. Refund Recovery Services LLC (now known as Lex Recovery Group) ("**Lex Recovery**") was retained as the Applicants' exclusive agent to assist in filing the necessary documents to secure their share of the Polyols Settlement funds. Lex Recovery has filed claims with the administrator on behalf of the Applicants in accordance with the deadlines set out in the US Urethane Proceeding.

22. A distribution hearing with respect to the Polyols Settlement took place on December 19, 2017 in Kansas City, Kansas, and the Court approved the proposed distribution of the Polyols Settlement funds on that date.

23. On or about March 21, 2018, an initial distribution representing 85% of the total recovery from the Polyols Settlement was made to the creditors. The Applicants each received the following amounts from the Polyols Settlement:

a) Valle Foam received $5,542,999.25 USD;

b) Domfoam received $3,741,639.62 USD; and

c) A-Z Foam received $732,651.37 USD.

Attached hereto and marked as **Exhibit "B"** is a copy of the letters from US class action counsel in the US Urethane Proceeding to the Applicants enclosing the respective cheques. I am advised by my counsel, David Ullmann, that these cheques have been sent to the Monitor.

24. The Applicants were required to pay $2,504,322.56 USD to Lex Recovery from the funds they received from the Polyols Settlement, which represents the 25% fee owing to Lex Recovery based on the retainer with the Applicants to assist and recover their claims in the US Urethane Proceeding. I am advised by my lawyer, Alexandra Teodorescu, that this fee was paid to Lex Recovery by the Monitor in May 2018.

25. The Applicants are set to receive a second and final tranche of money from the Polyols Settlement holdback. On November 5, 2018, the United States District Court for the District of Kansas approved the distribution of the balance of the Polyols Settlement holdback ("**Final Distribution Order**"). A copy of the Final Distribution Order is attached hereto and marked as

Exhibit "C". The Final Distribution Order provides that the holdback funds will be disbursed after the appeal period from the Order has run out. If no appeal is filed, it is expected that funds will be distributed by the end of the year, but as of the swearing of this affidavit, no exact date is known.

26. I am advised by CJ Kishish of Lex Recovery that the Applicants are expected to receive the following gross amounts, which are subject to a 25% fee in favour of Lex Recovery:

a) Valle Foam: $992,796

b) Domfoam: $670,158

c) A-Z Foam: $131,223

27. An extension of the Stay Period is required to allow for further distributions to be made to the Applicants pursuant to the Polyols Settlement. The funds paid to Domfoam under the Polyols Settlement will be distributed to proven creditors *pro-rata* under the Plan.

28. It should be noted that the purchaser of Domfoam (now known as 4362063 Canada Ltd.), Domfoam Inc. (formerly known as 4037057 Canada Inc.) ("**Purchaser**"), has brought a motion directing the Applicants to pay the proceeds recovered from the Polyols Settlement to the Purchaser. I have sworn an affidavit in response to the Purchaser's motion, which is attached hereto and marked as **Exhibit "D"**. The Purchaser's motion is currently scheduled to be heard on November 29, 2018.

Canadian Class Action

29. A similar class action was initiated and certified against Dow and a number of other defendants in Ontario. The class action was certified on behalf of all persons in Canada who purchased polyether polyol products between January 1, 1999 and December 31, 2004 ("**Canadian Urethane Proceeding**").

30. Settlements have been reached in the Canadian Urethane Proceeding with several defendants wherein the defendants agreed to pay a total of $13.3 million. Dow agreed to contribute $5,080,000 CDN into the settlement funds, which are being held in trust for the benefit of the class members.

31. Class counsel for the Canadian Urethane Proceeding, Siskinds LLP, intends to implement a claims process in order to determine the class members entitled to a distribution from the Canadian settlement funds. Attached hereto and marked as **Exhibit "E"** is a copy of a summary of the Canadian Urethane Proceeding from the website of class counsel, and the proposed distribution protocol.

32. The Applicants with the assistance of Lex Recovery are currently in the process of determining whether or not they are class members in the Canadian Urethane Proceeding. The Applicants hope to recover additional funds from the Canadian class action for the benefit of the creditors of the respective estates.

Valle Foam Collection Efforts

33. As set out in my previous affidavits, there were eight actions initiated by Valle Foam to collect various outstanding receivables. Judgment has now been obtained with respect to three

of these actions, and Valle Foam has diligently been enforcing these judgments during the stay period. In addition, two of these actions have been settled, and one has been dismissed on consent without costs.

34. With respect to the remaining two pieces of litigation, Valle Foam continues to vigorously pursue these actions. A summary judgment motion is currently scheduled to be heard on December 8, 2018 in regards to one of the outstanding matters, and the second matter is potentially proceeding to a mediation. The Monitor has been advised of the status of each of these actions.

35. Extending the Stay Period will provide Valle Foam with the breathing room required to continue pursuing its collection and enforcement efforts.

A-Z Foam

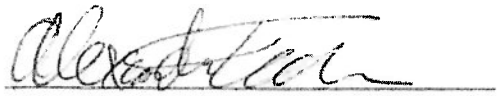
36. Although the business of A-Z Foam has been ceased for several years at this point in time, it is an affiliated entity of the Applicants, and the continuation of the stay is convenient as there remain amounts to collect from the Polyols Settlement and inter-company accounting to be resolved.

37. No one has at any time during the CCAA Proceedings objected to the continuation of the stay with respect to A-Z Foam, and I am not aware of any objections at this time.

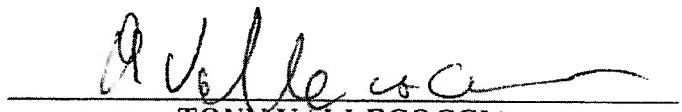
38. I swear this affidavit in support of the Applicants' motion for an Order, *inter alia*, extending the Stay Period to and including April 30, 2019, and for no improper purpose.

38. I swear this affidavit in support of the Applicants' motion for an Order, *inter alia*, extending the Stay Period to and including April 30, 2019, and for no improper purpose.

SWORN before me at the Town of Milton in the Province of Ontario, this 16th of November, 2018



(A commissioner for taking affidavits)
Alexandra Teodorescu



TONY VALLECOCCIA

EXHIBIT B

This is **Exhibit "B"** referred to in the Affidavit of Tony Vallecoccia sworn before me this 17th day of April , 2019.

Matth Wilks

A Commissioner for Taking Oaths, Affidavits (or as may be) in Ontario

Matthew Barry Wilks, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires March 10, 2020.

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

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 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

EXHIBIT C

This is **Exhibit "C"** referred to in the Affidavit of Tony Vallecoccia sworn before me this 18 day of April, 2019.

A Commissioner for Taking Oaths, Affidavits (or as may be) in Ontario

Matthew Barry Wilks, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires March 10, 2020.

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, Hunstman 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.

Wilton-Siegel J.

Date: February 13, 2019

EXHIBIT D

This is **Exhibit "D"** referred to in the Affidavit of Tony Vallecoccia sworn before me this 18th day of April , 2019.

A Commissioner for Taking Oaths, Affidavits (or as may be) in Ontario

Matthew Barry Wilks, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires March 10, 2020.

CITATION: 3113736 Canada Ltd. v. Cozy Corner Bedding Inc., 2019 ONSC 2249
COURT FILE NO.: CV-13-479393
DATE: 20190408

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
3113736 CANADA LTD.	)	*Varoujan C. Arman*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
COZY CORNER BEDDING INC.	)	*Doug LaFramboise*, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** March 29, 2019

ENDORSEMENT

SANFILIPPO J.

Overview

[1] The Plaintiff, 3113736 Canada Ltd. ("3113736 Ltd."), was previously known as Valle Foam Industries (1995) Inc. ("Valle Inc."), which carried on business as a manufacturer and distributor of flexible polyurethane foam products. The defendant, Cozy Corner Bedding Inc. ("Cozy Inc.") was a long-standing customer of Valle Inc., stating that it purchased foam products from Valle Inc. from 2001 to 2012.

[2] The parties do not dispute that in the period from August 5, 2011 to January 27, 2012, Valle Inc. sold to Cozy Inc. product totaling $199,003.01, of which $190,882 remained unpaid and outstanding on April 8, 2013 when the Plaintiff made demand for its payment. When Cozy Inc. did not pay the outstanding amount, the Plaintiff initiated this action on May 1, 2013.

[3] Cozy Inc. admitted that it received the product represented by the unpaid invoices, and conceded that there was no issue of quality and that the product was used in its manufacturing

process. But Cozy Inc. stated that there were other factors that impact its payment obligations to Valle Inc.

[4] Cozy Inc. stated that it refused to pay these invoices because it learned in January 2012 that Valle Inc. had plead guilty to price fixing. Cozy Inc. thereby concluded that it had chronically overpaid Valle Inc. for a large quantity of foam products, which meant that Valle Inc. owed Cozy Inc. more than the $190,882 remaining to be paid on the outstanding invoices.

[5] Cozy Inc. advanced this argument by counterclaim, pleading that by reason of Valle Inc.'s admitted price fixing, Cozy Inc. overpaid for the $4.1 million in products it purchased from Valle Inc. in the eleven year period from 2001 to 2012. Cozy Inc. pleaded that it overpaid for these products by at least 10% by reason of inflated pricing, thereby entitling it to recover $410,000 in its counterclaim.

[6] On this motion, the Plaintiff sought the stay of the Counterclaim on the basis of a Stay Order rendered on January 12, 2012 in the proceeding commenced to protect Valle Inc. and related companies under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Additionally, the Plaintiff sought the dismissal of the Counterclaim on two grounds: that the Counterclaim has been released as part of the settlement of a class action brought against Valle Inc. and others for price fixing in the foam product sector, in regard to which Cozy Inc. did not opt out, and; alternatively, that Cozy Inc. did not 'put its best foot forward' in this motion by failing to lead evidence to support its Counterclaim, including evidence of price fixing by Valle Inc. during times that are material to the collection claim, or any evidence of the percentage of over-charging that was attributable to the price fixing.

[7] For the reasons that follow, I find that the Plaintiff is entitled to recover from Cozy Inc. the sum of $184,319.34, plus pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act,* R.S.O. 1990, c. C.43. I order that the Counterclaim is dismissed.

I. BACKGROUND

A. The Outstanding Accounts

[8] The parties have throughout agreed that from August 5, 2011 to January 27, 2012, Valle Inc. sold flexible polyurethane foam products to Cozy Inc., which were used by Cozy Inc. in the manufacture and sale of its bedding products.

[9] The Plaintiff produced, through the affidavit of Catherine Hristow, Chartered Professional Accountant, sworn July 12, 2018 (the "Hristow Affidavit"), 92 pages of invoices from Valle Inc. to Cozy Inc. bearing dates from August 5, 2011 to January 27, 2012 representing the sale of product worth $199,003.01 (the "2011-2012 Invoices").

[10] By letter dated April 8, 2013, then-counsel for the Plaintiff demanded that the Defendant pay the amount outstanding under the 2011-2012 Invoices that, at that time, had been paid down such that the balance owing was $190,882.

[11] Cozy Inc. did not pay the balance said by the Plaintiff to be outstanding. Cozy Inc.'s owner, Mohinder Singh, stated in an affidavit sworn September 20, 2018 (the "Singh Affidavit"), that he

had learned in January 2012 that Valle Inc. had pleaded guilty to charges under the *Competition Act*, R.S.C. 1985, c. C-34 for having conspired with competitors to fix the price of polyurethane foam products of the type supplied to Cozy Inc. Mr. Singh swore that he believed that he had overpaid on product purchased from Valle Inc. since the start of their relationship in 2001, and wanted this addressed together with the amounts that Valle Inc. claimed to be outstanding. In cross-examination, Mr. Singh testified that he stopped making payments in regard to the 2011-2012 Invoices only because of the *Competition Act* charges on which Valle Inc. was convicted, and not for any other reason.

B. The Price Fixing by Valle Inc.

[12] In 2010, Valle Inc. was charged under section 45(1)(c) of the *Competition Act* with conspiring, combining, agreeing or arranging to prevent or lessen, unduly, competition in the sale or supply of slab form and carpet cushion foam products within Canada for the time period from January 1, 1999 to March 11, 2010. It was also charged under section 45(1)(a) of the *Competition Act* with conspiring, and agreeing or arranging to fix, maintain, increase or control the price for the supply of slab form and carpet cushion foam products in the period from March 12, 2010 to July 27, 2010.

[13] On January 5, 2012, Valle Inc. pleaded guilty to these offenses, which taken together pertained to price fixing in the sale of foam products during the time from January 1, 1999 to July 2010 (the "Offence Period"). It is important to note that the time period for which Valle Inc. admitted to price fixing through its guilty plea was *before* the time of the 2011-2012 Invoices for product sold by Valle Inc. to Cozy Inc. (August 5, 2011 to January 27, 2012).

[14] Mr. Tony Vallecoccia, the President and CEO of Valle Inc. stated in an affidavit sworn January 11, 2012 (the "Vallecoccia Affidavit") that Valle Inc. was fined a total of $6.5 million by reason of its conviction of the *Competition Act* charges.

C. The *Companies' Creditors Arrangement Act* Proceeding

[15] On January 12, 2012, pursuant to the Initial Order of Newbould J. (the "Initial Order"), Valle Inc. was granted protection under the *CCAA*. Deloitte Restructuring Inc. ("Deloitte") was appointed as the Monitor. Ms. Hristow, the affiant of the Hristow Affidavit, is Deloitte's Senior Vice President.

[16] In paragraph 13 of the Initial Order, the Court ordered a stay of any legal proceeding against Valle Inc. (the "Stay Order"):

> THIS COURT ORDERS that until and including February 10, 2012, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

[17] The Stay Period in the Stay Order has been extended by further court Order, most recently by the November 29, 2018 Order of Wilton-Siegel J., which extended the Stay Period to April 30, 2019.

[18] In the *CCAA* process, Valle Inc. sold its assets but maintained its accounts receivable. This asset sale transaction was completed in accordance with the Order of Brown J. dated March 16, 2012. In paragraph 8 of that Order, Valle Inc. was authorized to change its company name and did so, becoming 3113736 Canada Ltd.

D. The Class Actions

[19] In his affidavit, Mr. Vallecoccia deposed that as at January 11, 2012, there were five class action proceedings pending in relation to the price-fixing allegations in the polyurethane foam industry, and that Valle Inc. was a defendant in four of the class actions. He stated that the class actions were brought on behalf of a broad group of purchasers of polyurethane foam products from 1999 to January 11, 2012. These purchasers included Cozy Inc.

[20] Mr. Vallecoccia testified that a proposed national class settlement had been reached with the Class Plaintiffs in respect of all Canadian Class Proceedings, subject to separate court approvals by the courts in Ontario, British Columbia and Quebec. The proposed national class settlement was, he stated, designed to discontinue current claims against Valle Inc., to release any liability for price fixing in the sale of foam products for the class settlement period, and to bar any such future claims arising out of the matters released.

E. This Claim and Counterclaim

Statement of Claim

[21] It was in the context of Valle Inc. being in *CCAA* protection, and in the throes of implementing a proposed national class action settlement that, on May 1, 2013, 3113736 Ltd. issued its simple thirteen paragraph statement of claim, seeking payment of the 2011-2012 Invoices, claiming the amount of $190,882 plus pre-judgment and post-judgment interest and costs.

Statement of Defence and Counterclaim

[22] Cozy Inc. delivered its statement of defence and counterclaim on June 13, 2013. It conceded the purchase of foam products from Valle Inc. as represented by the 2011-2012 Invoices, but denied the amount owing of $190,882. Cozy Inc. pleaded that it was a customer of Valle Inc. from 2001 to 2012, which included the Offence Period, and stated that during this time it paid the Plaintiff over $4.1 million for product that it claimed was over-priced due to price fixing.

[23] Cozy Inc. pleaded that as these purchases had taken place during a time period in which the Plaintiff was found to have been in breach of the *Competition Act,* Cozy Inc. had overpaid the Plaintiff, presumptively by at least ten percent on each invoice rendered. On the basis of these allegations, the Defendant advanced a counterclaim against the Plaintiff in the amount of $410,000, representing its alleged entitlement to recover ten percent of the amount paid in the

purchase of these products during the time that Valle Inc. had engaged in price fixing, in breach of the *Competition Act*.

Reply and Defence to Counterclaim

[24] In its reply and defence to counterclaim delivered on June 18, 2013, the Plaintiff pleaded that the payments owed pursuant to the 2011-2012 Invoices were in relation to products sold by the Plaintiff and received by the Defendant *after* the Offence Period. As such, the Plaintiff contended that the price-fixing activity for which it admitted guilt under the *Competition Act*, did not affect the products delivered pursuant to the 2011-2012 Invoices.

[25] The Plaintiff pleaded and relied on the Stay Order as supporting the stay of the Counterclaim. In submissions at the summary judgment motion, the Defendant was critical of the Plaintiff for not defending the Counterclaim by pleading the impact of the settlement of the class actions against Valle Inc. However, the proposed national class action settlement was not implemented until February 11, 2014, some eight months after the close of pleadings in this action.

F. The Class Action Settlement

[26] On February 11, 2014, Leitch J. issued an Order (the "Class Action Order") approving the Domfoam Settlement Agreement, which attached the Canadian Polyurethane Foam Class Actions National Settlement Agreement dated January 10, 2012 (together, the "Class Settlement Agreement"). Valle Inc. is a party to the Class Settlement Agreement and is thereby one of the "Settling Defendants" under the Class Action Order.

[27] Paragraph 4 of the Class Action Order incorporates the Class Settlement Agreement, and binds the Ontario General Foam Settlement Class. Section 1(46) of the Class Settlement Agreement defines the Ontario Settlement Class as follows:

> ***Ontario Settlement Class*** means: all Persons resident in Canada who purchased Foam Products in Canada during the Settlement Class Period, except Excluded Persons and Persons who are included in the B.C. Settlement Class and the Quebec Settlement Class.

[28] Section 1(75) of the Class Settlement Agreement defines "Settlement Class Period" as the period from January 1, 1999 to the Execution Date, which is January 10, 2012.

[29] Section 1(47) of the Class Settlement Agreement defines the Ontario Settlement Class Members as: "all Persons included in the Ontario Settlement Class who do not validly opt out of the Ontario Proceedings".

[30] Section 1(48) of the Class Settlement Agreement defines "Opt Out" as follows:

> ***Opt out*** means a member of a Settlement Class who has submitted a timely and valid written election to opt out of the Proceedings in accordance with orders of the Courts.

[31] Section 6.1 of the Class Settlement Agreement outlines the procedure for opting out:

> A Person may opt out of the Proceedings by completing and signing the Opt Out Form, and by sending the Opt Out Form, by pre-paid mail, courier or fax to the Opt Out Administrator at an address and coordinates to be identified in the Notice of Certification and Settlement Approval contemplated by section 11.1 of this Settlement Agreement.

[32] If a person does not opt out of the Class Settlement Agreement then on the Effective Date, according to section 7.1 of the Class Settlement Agreement the "Releasors [i.e. the Ontario Settlement Class members] forever and absolutely release the Releasees from the Released Claims". Additionally, all "Other Actions" commenced by any Releasor are deemed to be discontinued.

G. The Motion for Summary Judgment

[33] In this Summary Judgment motion the Plaintiff seeks the following:

(a) Judgment on its claim in the main action for payment of the 2011-2012 Invoices, reduced in submission to the amount of $184,319.34, in accordance with *Rule* 20.01(1);

(b) Judgment dismissing the Counterclaim, or alternatively staying the Counterclaim, in accordance with *Rule* 20.01(3).

[34] The Defendant resists the Summary Judgment motion on the basis that the action and Counterclaim raise genuine issues requiring a trial.

II. PRINCIPLES APPLICABLE TO SUMMARY JUDGMENT

[35] The Plaintiff's motion for summary judgment in the main action is based on *Rule* 20.01(1) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, which provides as follows:

> A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

[36] The Plaintiff's motion to dismiss the Counterclaim is based on *Rule* 20.01(3), which provides a defendant with a procedure by which to move for dismissal of a claim. By operation of *Rule* 20.09, *Rule* 20.01(3) is applicable to a motion to dismiss a counterclaim.

[37] *Rule* 20.04(2) describes when a court can grant summary judgment. It directs as follows:

> 20.04(2) The court shall grant summary judgment if,
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
> ...

> 20.04(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial;
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.
>
> 20.04(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[38] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court emphasized that the important objective of ensuring access to justice requires an effective and accessible process for the enforcement of rights. The procedural tool refined in *Hryniak*, the summary judgment motion, was emphasized as a means to achieve timely and efficient adjudication in certain, but not all, cases. In *Hryniak*, the Supreme Court provided the template by which *Rule* 20 is to be applied.

[39] In *Hryniak*, at para. 66, the court sets out a two-part test for considering summary judgment under *Rule* 20.04(2)(a), termed the "Roadmap". The first step is that the motion judge must determine whether there is a genuine issue requiring trial based only on the evidence contained in the motion record, specifically without using any of the powers set out in *Rule* 20.04(2.1). There will be no genuine issue requiring trial where the evidentiary record on the motion provides the judge with the evidence necessary to reach a fair and just determination in a process that is timely, proportionate and affordable, as is stated in *Hryniak* at paras. 4, 28, 66 and specifically at 49. Paragraph 49 states:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[40] The second step in the "Roadmap" is activated when a judge finds that there is a genuine issue requiring a trial. The court should then determine whether the issue can be decided using the powers set out in *Rules* 20.04(2.1) and (2.2). These powers are to be employed where they will lead to a fair and just result but not where they do not serve the goals of affordability and proportionality, as stated in *Hryniak* at para. 66:

> She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[41] The foundational themes in *Hryniak* focus on the goals of proportionate, cost-effective and timely adjudication on an evidentiary record and in a process that allows for a fair and just determination. The Supreme Court emphasized that when a judge can fairly and justly adjudicate a case using the new powers under *Rules* 20.04(2.1) and (2.2), it will be in the interest of justice to do so. The decision to use these powers is within the discretion of the judge: *Hryniak* at para. 68.

[42] The initial task on this motion is to analyze the record to determine whether there is an evidentiary basis on which the plaintiffs can establish an entitlement to judgment, and dismissal of the counterclaim, without requiring a trial. If there are genuine issues for trial, the next step would be to determine whether they are capable of adjudication using the tools set out in *Rules* 20.04(2.1) and (2.2).

III. ANALYSIS

A. The Plaintiff's Claim for Judgment on the Outstanding Invoices

[43] Cozy Inc. admitted that it received the product represented by the 2011-2012 Invoices, totaling $199,003.01, which by April 2013 had been paid down to $190,882. Mr. Singh conceded in cross-examination that he had no complaint of non-receipt of the product. He had no complaint that the product was of inferior quality. He admitted that Cozy Inc. used the foam product in its manufacturing process. He testified that Cozy Inc. did not pay these invoice amounts only because he learned of the *Competition Act* charges on which Valle Inc. was convicted, and not for any other reason.

[44] In the course of its submissions on the summary judgment motion, the Plaintiff reduced the amount of its claim to $184,319.34, being the amount of the 2011-2012 Invoices for foam product sold prior to January 10, 2012. The Plaintiff waived recovery of the sum of $6,562.66, which represented the total of the eight invoices rendered to Cozy Inc. *after* the Settlement Class Period (January 1, 1999 to January 10, 2012).

[45] I find that the Plaintiff has established that there is no genuine issue requiring a trial that Valle Inc. sold foam products to the Defendant represented by the 2011-2012 Invoices, for the period from August 5, 2011 to January 10, 2012 in the amount of $184,319.34, that the products were received by the Defendant in good condition and used in its manufacturing process, but not paid for.

[46] The defence that the Defendant raises is that it has a valid Counterclaim against the Plaintiff that ought to be set-off against the amounts that the Plaintiff seeks to recover in the main action. I will next analyze whether the Counterclaim raises a genuine issue requiring a trial.

B. The Plaintiff's Claim for Dismissal of the Counterclaim on the Basis of the Class Action Order

[47] Cozy Inc.'s Counterclaim seeks damages arising from Valle Inc.'s price-fixing which, it is said, resulted in Cozy Inc. being over-charged and thereby overpaying for products purchased over many years, including those for which Judgment is sought by the Plaintiff.

[48] To assess whether the claims pleaded by the Defendant in its Counterclaim are released by the Class Action Order, and whether that Order causes the Counterclaim to be dismissed, I must analyse the Class Action Order and the Class Settlement Agreement that it approved.

(a) Do the Claims Pleaded in the Counterclaim come within the Scope of Release Contained in the Class Action Order?

[49] The Class Action Order declares that the Class Settlement Agreement is "fair, reasonable and in the best interests" of the class (para. 1), and incorporates the terms of the Class Settlement Agreement by reference so that it forms part of the Class Action Order (para. 4).

[50] If Cozy Inc. is a member of the plaintiff class in the class action against Valle Inc. and the other foam manufacturers, the claims pleaded by the Defendant in its Counterclaim are released by the Class Settlement Agreement. Cozy Inc.'s claim meets every other definition necessary to bring it within the scope of section 7.1 of the Class Settlement Agreement, which states:

> **Release of Releasees**
>
> Upon the Effective Date, and in consideration of payment of the Settlement Amount and for other valuable consideration set forth in the Settlement Agreement, the Releasors forever and absolutely release the Releasees from the Released Claims.

[51] The Plaintiff, 3113736 Ltd., meets the definition of a "Releasee" under the Class Settlement Agreement, even though it was not a defendant in the class action. The definition of "Releasees" is contained in section 1(67) of the Class Settlement Agreement, and includes Valle Inc. as well as its "successors, purchasers, heirs, executors, administrators and assigns".

[52] The Counterclaim also meets the definition of "Released Claims" in the Class Settlement Agreement. Section 1(66) of the Class Settlement Agreement defines the scope of the claims that are released in its definition of "Released Claims", which includes the following:

> ***Released Claims*** mean any and all manner of claim, demands, actions ..., damages whenever incurred, damages of any kind including compensatory, punitive or other damages, liabilities of any nature whatsoever, ... relating in any way to any conduct occurring anywhere, from January 1, 1999 to the date hereof [January 10, 2012] in respect of the purchase, sale, pricing, discounting, marketing, distributing of or compensation for, Foam Products, or relating to any conduct alleged (or which could have been alleged) in the Proceedings or the Other Actions ...

[53] The subject matter of the Counterclaim, being price-fixing by Valle Inc. in relation to the sale of "Foam Products" totaling $184,319.34 in the period from August 5, 2011 to January 10, 2012, comes entirely within the Settlement Class Period of January 1, 1999 to January 10, 2012.

[54] Accordingly, the Counterclaim also meets the definition of "Other Actions". The term "Other Actions" is defined in section 1(52) of the Class Settlement Agreement as "actions or

proceedings, other than the Proceedings, relating to the Released Claims commenced by a Settlement Class Member either before or after the Effective Date".

[55] Additionally, if Cozy Inc. is a member of the plaintiff class in the class action against Valle Inc. and the other foam manufacturers, Cozy Inc.'s action is deemed discontinued by the Class Settlement Agreement. Sections 7.5(1) and 7.5(2) of the Class Settlement Agreement state as follows:

> **7.5 Discontinuance of Other Actions against the Domfoam Defendants**
>
> (1) Upon the Effective Date, all Other Actions which were commenced in Ontario, British Columbia or any other jurisdiction in Canada except Quebec by any Settlement Class Member *who does not opt out* shall be deemed discontinued against the Domfoam Defendants.
>
> (2) Upon the Effective Date, each member of the Ontario Settlement ... who does not opt out shall be deemed to irrevocably consent to the discontinuance of his, her or its Other Actions against the Domfoam Defendants. [Emphasis added]

I have already determined that the Counterclaim meets the definition of an "Other Action".

[56] The final question to consider, then, is whether Cozy Inc. is an "Ontario Settlement Class Member". If Cozy Inc. is an "Ontario Settlement Class Member", it is also a "Releasor", as the definition of "Releasors" contained in section 1(68) of the Class Settlement Agreement includes the "Settlement Class Members" which, by operation of section 1(74), includes the "Ontario Settlement Class Members".

[57] Cozy Inc. became an "Ontario Settlement Class Member" by reason of its purchase of "Foam Products" from a defendant during the Settlement Class Period of January 1, 1999 to January 10, 2012. However, Cozy Inc. had the option to opt out of remaining an "Ontario Settlement Class Member" (and thereby a Releasor). This is because of section 1(47) of the Class Settlement Agreement, which states:

> ***Ontario Settlement Class Members*** mean: all Persons included in the Ontario Settlement Class who *do not validly opt out of* the Ontario Proceedings. [Emphasis added]

[58] The claims pleaded by the Defendant in its Counterclaim would constitute "Released Claims", and would thereby be released, and the Counterclaim would constitute one of the "Other Actions", and thereby be deemed to be discontinued, if Cozy Inc. did not "validly opt out" of the Ontario Settlement Class.

(b) Is There a Genuine Issue for Trial Regarding the Opt Out Issue?

[59] Cozy Inc.'s principal, Mr. Singh, testified that he was simply not aware that there was a class action lawsuit. He swore that he was not aware of having received any mail or notifications about his rights as a customer of Valle Inc. in the Class Proceedings.

[60] Cozy Inc. tendered into evidence a letter from the class counsel, Heather Rumble Peterson of Strosberg Sasso Sutts LLP dated March 1, 2019, which responded to inquiries made by counsel for Cozy Inc. concerning the class settlement. The evidence obtained, and on which Cozy Inc. relies on this motion, includes the following:

(a) The Class Action was certified for settlement purposes against Valle Inc. in July, 2013;

(b) Cozy Inc. and Cozy Corner Upholstery appeared on Valle Inc.'s customer list. Their address for service was the same as their current business address;

(c) In August 2013, the court-appointed notice administrator mailed the notice of certification and settlement approval hearing to Valle Inc.'s customer list, which included Cozy Inc. In addition, these notices were the subject of a broad media publication in newspapers, industry magazines, and websites, in all three Provinces in which class actions had been instituted against Valle Inc., including Ontario, at a publication cost of over $1.0 million. A copy of the notice was adduced in evidence, and states in pertinent part as follows:

> If you do not want to participate in the Actions, you must complete and send an Opt Out form to the opt out administrator by October 18, 2013 (the "Opt Out Deadline"). ... If you do not opt out of the Actions by the Opt Out Deadline, you will be bound by the settlement and will not be able to opt out of the Actions in the future."

(d) No one opted out of the class actions.

[61] The Plaintiff's Monitor, Ms. Hristow, testified that Cozy Inc. did not opt out of the class settlement. The Defendant provided no evidence on whether Cozy Inc. opted out, but testified that Cozy Inc. had no knowledge of the Class Actions, allowing for my conclusion that Cozy Inc. did not take any step to opt out. I have determined that there is no genuine issue requiring trial regarding whether Cozy Inc. opted out of the Class Settlement Agreement. On the evidence presented on this motion, I find that it did not.

[62] Cozy Inc. submitted, at length, that it did not receive the direct mailing of the notice of certification and settlement approval hearing and therefore did not have actual knowledge of the Class Settlement Agreement and therefore ought not to be bound by the releases and discontinuance of action provided for by the Class Settlement Agreement as implemented by the Class Action Order.

[63] Section 29(3) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 states that: "A settlement of a class proceeding that is approved by the court binds all class members." Under Ontario's statutory class action scheme, a class member may opt out in order to not be bound.

[64] Counsel for Cozy Inc. was not able to identify a single case authority, or principle, or provision in the *Class Proceedings Act*, that supports the Defendant's position that in the absence of actual knowledge, Cozy Inc. is not bound by the Class Settlement Agreement as implemented by the Class Action Order. The Plaintiff relied on *Lepine v. Societe Canadienne des postes,* 2009

SCC 16, [2009] 1 S.C.R. 549 at para. 43 to establish that in the context of uncontroverted evidence of direct mailing to the Defendant and a $1.0 million publication program, the Plaintiff does not have to establish that the Defendant had actual knowledge of the content of the notice of certification and settlement approval hearing materials, including the Class Settlement Agreement, in order to rely on the resultant release:

> In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients.

[65] For the right to opt out to be meaningful, the notice to the unnamed class plaintiff must be adequate: *Currie v. McDonald's Restaurants of Canada Ltd. et al.* (2005), 75 O.R. (3d) 321 (C.A.) at paras. 28-30. But adequate notice does not mean actual notice. In *Crider v. Nguyen,* 2016 ONSC 4400, at para. 46, a party argued that she ought not to be included as a class member because she did not receive actual notice of her right to opt out. Perell J. stated, at para. 50, that actual notice was not required to bind the party as a class member: "However, in protecting the right to opt out, a court need not ensure that the person with the right to opt out has actual notice of the right to opt out."

[66] In *Airia Brands Inc. v. Air Canada,* 2017 ONCA 792 at para. 86, the Ontario Court of Appeal quoted an article by Peter W. Hogg and S. Gordon McKee, "Are National Class Actions Constitutional?" (2010) 26 Nat'l J. Const. L. 279, in discussing the role of notice in opt out regimes like Ontario's: "We have noticed that the courts will insist that "sufficient notice" be given to the members of the plaintiff class, but so far the courts have not insisted that actual notice be given to every member of the class. Therefore, a class action judgment in Ontario (for example) may apply to some members of the plaintiff class who in fact know nothing about the proceedings brought on their behalf".

[67] By the notice procedure that the class counsel undertook, Cozy Inc. was given an opportunity to exercise its right to opt out. In *Eidoo v. Infineon Technologies AG,* 2012 ONSC 7299, at paras. 28-32, Perell J. held that the right to opt-out is a procedural right that is properly exercisable once in a class action, in that case on the basis of a certification notice. Similarly, in *Nutech Brands Inc. v. Air Canada* (2008), 59 C.P.C. (6th) 166 (Ont. S.C.J.), involving a class action for damages resulting from price fixing, Leitch J. stated, at paras. 17-21, that the right contained in section 9 of the *Class Proceedings Act* that allows class members to opt out is not a substantive right, but rather a procedural right, in that "it requires class members to choose the venue in which to pursue their substantive claims". In this case, the option to opt-out provided in the notice was sufficient to satisfy the requirements of the *Class Proceedings Act*.

[68] By not opting out, Cozy Inc. chose to pursue its remedy against Valle Inc. in the administration of the class settlement as opposed to through its Counterclaim. Mr. Singh's testimony that he was not aware of any direct mailings from the claims administrator was contradicted by his own evidence adduced from class counsel that this was done. In any event, whether Cozy Inc. received the direct mailing that class counsel advised was sent containing the notice of certification and settlement approval hearing materials does not determine whether Cozy Inc. is bound by the Class Action Order in light of the broad publication that accompanied it. Just

like all other purchasers of foam products during the Class Settlement Period, the lack of actual notice to Cozy Inc. does not allow it to have those entitlements that it would have had if it had opted out.

[69] Last, Cozy Inc. did not bring any motion before Leitch J. to extend the time for opting out of the Class Action Settlement Agreement. This would have been the procedure for Cozy Inc. to have sought relief from its alleged lack of actual notice: not as a defence to this summary judgment motion.

(c) Conclusion: The Counterclaim Is Released and Discontinued by the Class Action Order

[70] I conclude that there is no genuine issue requiring trial that the claims pleaded in the Counterclaim come within the Released Claims that are released by the Class Action Order. The claims pertain to price-fixing in the sale of foam products for one of the Settlement Defendants during the Settlement Class Period. I find that there is no genuine issue for trial that Cozy Inc. did not opt out of the Class Settlement Agreement. I conclude that the claims pleaded in the Counterclaim are released by the Class Action Order, particularly paragraph 10:

> THIS COURT ORDERS AND DECLARES that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims.

[71] I conclude as well that there is no genuine issue requiring trial that the Counterclaim constitutes one of the "Other Actions" and is thereby deemed discontinued by the Class Action Order, particularly paragraph 7:

> THIS COURT ORDERS AND DECLARES that, upon the Effective Date, each Other Action commenced in Ontario by any member of the Ontario General Foam Settlement Class who does not validly opt out of the Ontario General Foam Action shall be and is hereby discontinued against the Domfoam Defendants, without costs.

[72] I thereby order that the Counterclaim be dismissed.

C. The Plaintiff's Claim for Dismissal of the Counterclaim on the Defendant's Lack of Evidence to Support the Relief Sought

[73] In light of my determination that the Counterclaim is dismissed on the basis of the Class Action Order, it is not necessary to find whether the Counterclaim ought to be dismissed on the basis of the Defendant's failure to lead and establish evidence to support the relief sought. I will nonetheless address this issue, for completeness of analysis.

[74] In a motion for summary judgment, "[e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried": *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11, citing *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434. A court is entitled to assume that the record on a motion for summary judgment contains all the evidence that would be presented at trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014

ONSC 1200 at para. 27, aff'd 2014 ONCA 878, leave to appeal dismissed, [2015] S.C.C.A. No. 97.

[75] In an affidavit sworn by Mr. Singh on October 18, 2018, he testified as follows in paragraph 14:

> I purchased over $3 million in product from Valle Foam when they were over charging and I should be due a credit for these illegal acts as I have produced here as an example of 2009 invoices totaling $445,000.

[76] Cozy Inc. did not produce any evidence of price-fixing by Valle Inc. during the period of the 2011-2012 Invoices, recalling that the Offence Period admitted by Valle Inc. in its guilty plea under the *Competition Act* charges (January 1, 1999 to July 2010) pre-dated the 2011-2012 purchases in question. Section 9.1 of the Class Settlement Agreement specifically states that any step taken by Valle Inc. in the Class Action settlement "shall not be deemed, construed or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability" by Valle Inc.

[77] In regard to the 2009 invoices, Cozy Inc. did not produce any evidence of the amount of over-charging said to have resulted from price fixing by Valle Inc. so as to establish a quantification of the damage claim that it asserted. The 10% over-pricing value pleaded by Cozy Inc. was not established by any evidence. Cozy Inc. submitted that it could not produce this evidence because the Plaintiff had refused to provide it. I agree with Corbett J. in *Sweda*, at para. 28, that "a burden of persuasion rests on [the responding party] to establish that it has taken reasonable steps to obtain the evidence it needs for the motion for summary judgment, and that the missing evidence would be material to the disposition of the motion". Cozy Inc. has not shown that it took reasonable steps to obtain the evidence that it says the Plaintiff has on the over-pricing value.

[78] Had I not dismissed the Counterclaim on the basis of the Class Action Order, I would have dismissed it on the basis of the Defendant's failure to lead and establish evidence to support the relief sought.

D. The Plaintiff's Claim for a Stay based on the *CCAA* Stay Order

[79] In light of my determination that the Counterclaim is dismissed on the basis of the Class Action Order, it is not necessary to assess whether the Counterclaim ought to be stayed on the basis of the *CCAA* Stay Order. However, I have assessed this issue and had I not decided that the Plaintiff had established a basis for the dismissal of the Counterclaim, I would have denied the Plaintiff's motion for a stay of the Counterclaim, because of the common law principle that a set-off claim responsive to the claim by the party under *CCAA* protection is not stayed by a stay order.

[80] The parties were in agreement that a claim for equitable set-off can be continued in response to a claim brought by a party protected by a *CCAA* proceeding notwithstanding a stay order: *Fraser Papers Inc. (Re)* (2009), 61 C.B.R. (5th) 277 (Ont. S.C.J.), applying section 21 of the *CCAA*.

[81] In *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226 at para. 23, the British Columbia Court of Appeal adopted the statement by Houlden and Morawetz in *Bankruptcy and Insolvency Law of Canada*, as describing the purpose for allowing a party to raise a claim for set-off in response to a claim by a party otherwise protected by bankruptcy or reorganization:

> The object of set-off is to avoid the perceived injustice to a man who has had mutual dealings with a bankrupt of having to pay in full what he owes to the bankrupt while having to rest content with a dividend on what the bankrupt owes him. At the same time the effect of the set-off is to prefer one creditor over the general body of creditors, and accordingly, it is confined within narrow limits.

[82] Had I not decided that the counterclaim must be dismissed on the basis of the Class Action Order, I would have denied the Plaintiff's motion for a stay of the Counterclaim, as it is a form of set-off responsive to the claim by the party under *CCAA* protection.

E. CONCLUSIONS

[83] I have concluded that there is no genuine issue requiring a trial concerning the Plaintiff's claim for judgment against the Defendant in the amount of $184,319.34 for product sold to the Defendant under the 2011-2012 Invoices and not paid for by the Defendant. The Plaintiff is entitled to an award of pre-judgment interest in accordance with section 128 of the *Courts of Justice Act* and an award of post-judgment interest in accordance with section 129 of the *Courts of Justice Act.*

[84] I have concluded, as well, that there is no genuine issue requiring a trial that the claims pleaded in the Counterclaim come within the Released Claims that are released by the Class Action Order, and that the Counterclaim is deemed discontinued by the Class Action Order.

F. DISPOSITION

[85] I order that the Plaintiff, 3113736 Canada Ltd., is entitled to Judgment against the Defendant, Cozy Corner Bedding Inc., in the amount of $184,319.34 plus pre-judgment interest and post-judgment interest, in accordance with the *Courts of Justice Act*.

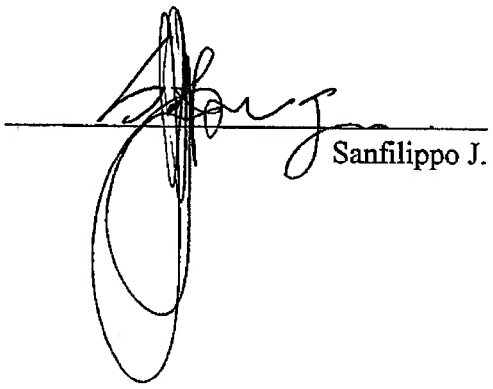
[86] I order that the Counterclaim is dismissed.

G. COSTS

[87] I encourage the parties to discuss and agree on the issue of costs.

[88] If the parties are not able to agree on the issue of costs by April 30, 2019, the Plaintiff may deliver to me written submissions on costs, of no more than 4 pages in length (plus its cost outline, any offer to settle and authorities relied on) by no later than May 15, 2019. The Respondent shall then deliver to me its written submissions on costs, of a similar length, within 15 days of receipt of the Plaintiff's cost submissions or by May 30, 2019, whichever is earlier.

[89] If neither party delivers written costs submissions by May 30, 2019, I will deem the issue of costs to have been settled.



Sanfilippo J.

Released: April 8, 2019

TAB 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 24TH DAY
	)	
	)	OF APRIL, 2019

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 31, 2019 was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Tony Vallecoccia sworn April 18, 2019 and the exhibits thereto (the "**Vallecoccia Affidavit**") and the Twentieth Report of Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) (the "**Twentieth 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 ● sworn ●, filed;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Twentieth 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 Twentieth 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 November 29, 2018, is hereby extended from April 30, 2019 to and including October 31, 2019.

MONITOR'S REPORT, ACTIONS AND FEES

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

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

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

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

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

MOTION RECORD
Returnable April 24, 2019

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