

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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.

**FACTUM OF THE MOVING PERSON
DOMFOAM INC.**

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- Schedule "C" Excerpt from Agreement of Purchase and Sale – Draft #1
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- Schedule "E" Excerpt from Agreement of Purchase and Sale – Final Agreement

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PART I - OVERVIEW

1. This is a motion to set aside an order made without notice to Domfoam Inc., (“**Domfoam**”), an interested person, and for a declaration that certain sums should be paid to Domfoam.

2. In 2012, Domfoam purchased the assets, rights and undertakings of one of the applicants, with certain specified exclusions. The purchase agreement was approved by this Court. In 2018, that applicant received \$3.7 million in proceeds from class-action proceedings that had been litigated since 2004. The applicant’s chose-in-action in those proceedings had been sold to Domfoam. The proceeds belonged to Domfoam.

3. The applicant did not tell Domfoam about the payment. Instead, it moved without notice to Domfoam and obtained an order from this Court for the distribution of the proceeds to the applicant's creditors. The applicant had not sought that relief in its notice of motion and draft order. The motion was brought on the strength of an affidavit that was both silent concerning Domfoam's rights and sworn by an individual ignorant of the matters to which he deposed.

PART II – THE FACTS

The Agreement

4. During the winter of 2011, 4037057 Canada Inc. (the "**Purchaser**") offered to purchase the assets of the applicant Domfoam International Inc. (now known as 4362063 Canada Limited) (the "**Vendor**"). The offer was embodied in a draft asset purchase agreement dated December 22, 2011 ("**APA #1**").¹

5. Negotiations ensued, but ended on January 9, 2012.²

6. On January 12, 2012, the Vendor and the other applicants obtained protection under the CCAA. They had been rendered insolvent by declining business and by fines, exceeding \$12 million, imposed by the Competition Tribunal. The applicants had pled guilty to charges that they had breached the *Competition Act* by colluding with other

1 Affidavit of Jacques Vincent sworn September 13, 2018 (the "**Vincent Affidavit**"), Motion Record, Volume I, Tab 2, page 8, paragraph 12 and Exhibit "A"

2 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 8, paragraph 13

manufacturers of foam and related products to lessen competition in, and to fix or control the price for, these products.³

7. The applicants, including the Vendor, thereafter commenced a sale process respecting their assets, in which they formally invited “offers to purchase all of their assets, properties and undertakings...”⁴

8. Discussions between the Vendor and the Purchaser concerning the Vendor’s assets resumed.⁵ The Purchaser made another offer through a second draft asset purchase agreement (“**APA #2**”). As in APA#1, the second APA excluded certain assets that the Purchaser did not wish to buy.⁶

9. The Vendor and the Purchaser eventually executed the final asset purchase agreement (“**the Final APA**”) on March 8, 2012. The purchase price was approximately \$3.7 million.⁷

10. Concerning the assets purchased, the relevant terms of the Final APA were as follows.

3 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 9, paragraphs 12-16; Affidavit of Tony Vallecoccia sworn October 18, 2018 (the “Vallecoccia Affidavit”), Responding Record, Exhibit “F”, page 51, paragraph 5

4 “Sales Process”, Exhibit “B” to the Affidavit of Tony Vallecoccia sworn January 25, 2012, Exhibit 1 to the Cross-Examination of Tony Vallecoccia on November 16, 2018

5 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 9, paragraph 19 and Exhibit “B”

6 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit “B”, page 61

7 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 10, paragraphs 19 and 24, and Exhibit “C”

- (a) *Section 2.1*: “the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Purchased Assets on the Closing Date.”⁸
- (b) *Section 1.1 (hh)*: “Purchased Assets” means the right, title and interest of the Vendor in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets”.⁹
- (c) *Schedule 1.1(hh) “Purchased Assets”*: 1. All assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated, including without limitation the following... 1.16 **all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled** but excluding the Excluded Assets”.¹⁰
- (d) *Section 1.1(t)*: “Excluded Assets” has the meaning set out in Section 2.2”.¹¹
- (e) *Section 2.2*: “The Purchased Assets shall not include...those assets of the Vendor that are listed or described in Schedule 2.2 on the date hereof and those assets of the Vendor which are added to such Schedule 2.2 by the Purchaser during the Interim Period (collectively, the “Excluded Assets”).¹²
- (f) *Schedule 2.2*: “This Purchaser acknowledges and agrees that the following assets shall be considered excluded from this transaction”: accounts payable, except as otherwise provided; tax losses, except as otherwise provided; cash on hand or on deposit; debts due to the Vendor from any shareholder, director, officer or employee; certain equipment leases; shares in Valle Foam Industries (1995) Inc.; and shares in A-Z Sponge & Foam Products Ltd.¹³

8 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit “C”, page 203

9 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit “C”, page 200

10 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit “C”, page 230, emphasis added

11 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit “C”, page 199

12 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit “C”, page 203

11. Tony Vallecoccia ("**Vallecoccia**"), the president and CEO of the Vendor when the Final APA was negotiated and executed, later testified:

*101 Q. Now, when you -- when I say you, I mean the corporation, the numbered company. When you've put its assets up for sale, **were there any assets that you can recall that were not put up for sale, any of the assets of the company?***

*A. I don't know what – **I can't think of any assets that wouldn't be sold.** The company didn't own the real estate, so equipment and receivables.¹⁴*

12. The Final APA contained an entire agreement clause: "[t]his Agreement and the attached Schedules constitute the entire agreement between the parties with respect to the subject matter and supersede all prior negotiations and understandings" (the "**Entire Agreement Clause**").¹⁵

13. The Final APA was subsequently approved by this Court, pursuant to a Sale Approval and Vesting Order dated March 16, 2012.¹⁶

14. The Final APA was assigned by the Purchaser to the moving party, 8032858 Canada Inc. (now Domfoam Inc.) ("**Domfoam**") on March 26, 2012.¹⁷

The U.S. Class Action

15. At the time that the Final APA was approved by this Court:

13 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "C", page 237

14 Transcript of the Cross-Examination of Tony Vallecoccia on his affidavit sworn October 16, 2018 taken November 16, 2018 (the "**Vallecoccia Transcript**") at page 29, Q. 101, emphasis added

15 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "C", clause 7.9, page 223

16 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "D", pages 278-279

17 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 11, paragraph 26 and Exhibit "F", page 391

- (a) The Vendor was a class member in an anti-trust class-action that had been pending in the United States District Court for the District of Kansas since 2004 (the "**US Class Action**"). The defendants were Bayer AG, Bayer Corporation, Bayer MaterialScience LLC (the "**Bayer Defendants**"), BASF SE and BASF Corporation (the "**BASF Defendants**"), the Dow Chemical Company ("**Dow**"), Huntsman International LLC ("**Huntsman**") and Lyondell Chemical Company ("**Lyondell**").¹⁸
- (b) The Bayer Defendants had settled the US Class Action as against them in 2008 (the "**Bayer Settlement**"). The last distribution of settlement funds paid by the Bayer Defendants to class members had been made on August 25, 2011. The Vendor had received its share of these funds well in advance of the execution of the Final APA.¹⁹
- (c) The BASF Defendants had settled the US Class Action as against them in December 2011. The Vendor had not yet received its share of the settlement funds (the "**BASF Receivables**") as at the execution or approval of the Final APA. The Vendor told the Purchaser that the proceeds of the BASF Settlement would be approximately \$642,000.²⁰
- (d) The US Class Action was continuing against Dow.²¹

18 Affidavit of Tony Vallecoccia sworn October 18, 2018 (the "**Vallecoccia Affidavit**"), Responding Motion Record, Tab 1, pages 3-4, paragraph 9 and Exhibit "B", pages 18 and 19

19 Vallecoccia Affidavit, Responding Motion Record, Tab 1, pages 4-5, paragraph 13 and Exhibit "D"

20 Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 5, paragraph 14 and Exhibit "E"; Transcript of the Cross-Examination of Jacques Vincent on his affidavit sworn September 13, 2018 taken November 12, 2018, (the "**Vincent Transcript**"), at pages 24-25, Q. 93

21 Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 5, paragraph 16 and Exhibit "B", pages 18 and 19

16. The BASF Receivables were the subject of negotiation between the Vendor and the Purchaser, and were eventually excluded from the Final APA, (i.e. the right to the specific liquidated amount due to the Vendor from BASF stayed with the Vendor after the purchase), as follows.

(a) In APA #1, the "BASF Receivables" were among the assets to be purchased by the Purchaser. Section 2.9(c) of APA #1 ("BASF Receivables") stated, in total:

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 five thousand and two hundred dollars (\$385,200) calculated at a discount rate of 60%.

The purchase 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 the 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.²²

(b) In APA#2 and the Final APA, section 2.9(c) ("BASF Receivables") said only "Withdrawn",²³ in accordance with the last paragraph of section 2.9(c) in APA #1,

²² Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "A", page 29

²³ Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "B", page 124 and Exhibit "C", page 206

above: the Vendor had elected to use the BASF Receivables in the settlement of Canadian litigation, so the Purchaser had withdrawn its offer for that asset.²⁴

17. The chose-in-action then being pursued against Dow in the US Class Action was not listed as an “Excluded Asset” in the Final APA.²⁵

18. The US Class Action Litigation went to trial against Dow in 2013. On May 15, 2013 (i.e. fourteen months after the Final APA was approved by this Court), the US District Court for the District of Kansas entered judgment against Dow in the amount of US \$1,06 billion, plus interest. Dow appealed. The appeal was dismissed on September 29, 2014. On March 9, 2015, Dow launched a further appeal; the parties settled on February 25, 2016, (almost four years after approval of the Final APA). As part of the settlement, Dow agreed to pay US \$835 million to the class members.²⁶

The Vendor Takes the Money and Moves Without Notice

19. On March 21, 2018, (six years after approval of the Final APA), the Vendor received a cheque from the US Class Action fund in the amount of US \$3,741,639.62 (the “**2018 Dow Proceeds**”). This represents one instalment of the distribution due (in the aggregate, the “**Dow Settlement**”).²⁷

24 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 12, paragraph 31

25 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 12, paragraphs 33 and 34 and Exhibit “C”, page 237

26 Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 5, paragraph 16 and Exhibit “B”, page 19

20. The Vendor did not remit these funds to Domfoam, or even tell Domfoam that they had been received.²⁸ Instead, the Vendor obtained an order, without notice, approving the distribution of the net 2018 Dow proceeds, in the amount of \$3,470,000, to the Vendor's creditors.²⁹

21. Domfoam had been removed from the service list in this proceeding in 2015, and so did not receive the notice of motion or the record.³⁰ Further, the notice of motion did not seek a distribution of any funds to the creditors of the applicants, with the result that no one on the service list received notice of the applicants' intent to obtain that relief. (The notice of motion sought an order "substantially in the form contained at Tab 3...extending the Stay Period...and approving the Monitor's report, conduct and fees."³¹ The order contained at Tab 3 said nothing about a distribution of funds.)³²

22. The evidentiary support for the applicants' motion was the affidavit of Vallecoccia sworn May 22, 2018. Again, Vallecoccia had been the president and CEO of the Vendor when the Final APA was negotiated and executed. His affidavit was silent about the purchase of the Vendor's assets in 2012.³³

27 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 15, paragraph 44 and Exhibit "G", page 487

28 Vincent Affidavit, Motion Record, Volume I, Tab 2, pages 12-13, paragraphs 35-38

29 Order of the Honourable Justice Wilton-Siegel dated May 29, 2018 (the "**Order**"), Motion Record, Volume II, Tab 3

30 Affidavit of Jacques Vincent sworn November 12, 2018, at paragraph 3(c); Vincent Transcript at pages 63-64, Q. 209-213

31 Vincent Affidavit, Motion Record, Volume II, Tab 2, Exhibit "H", page 493

32 Vincent Affidavit, Motion Record, Volume II, Tab 2, Exhibit "H", pages 558-559

33 Vincent Affidavit, Motion Record, Volume II, Tab 2, Exhibit "H", pages 499-506

23. Also placed before Justice Wilton-Siegel on the return of the motion was the seventh report of the Monitor dated July 12, 2013. Concerning the Dow Settlement, the Monitor relied entirely upon Vallecoccia, stating, at paragraph 34:

*Mr. Vallecoccia's affidavit sworn July 11, 2013 provides that the Domfoam [i.e. the Vendor's] US Urethane Claim was specifically excluded from the Domfoam assets purchased by 4037057 Canada Inc...Accordingly, the net proceeds of the Domfoam US Urethane Claim...should be available for distribution to the creditors of Domfoam...*³⁴

24. In apparent reliance upon this evidence, Justice Wilton-Siegel made the Order *inter alia* approving the distribution of the net 2018 Dow proceeds, in the amount of \$3,470,000.

25. Shortly thereafter, Domfoam learned of the settlement with Dow, demanded payment of the 2018 Dow Proceeds, and was ignored. Upon learning of the Order, Domfoam immediately moved for an order setting it aside.³⁵

Vallecoccia's Evidence

26. The Vendor's response to this motion has been to rely entirely upon Vallecoccia's assertions concerning the intention behind, and meaning of, the APAs. The Vendor's responding motion record contains no fewer than eight affidavits sworn by Vallecoccia: a primary affidavit (sworn October 16, 2018) (again, the "**Vallecoccia Affidavit**") and the bodies of seven earlier affidavits, attached as exhibits.

34 Seventh Report of the Monitor dated July 12, 2013, Motion Record, Volume II, page 576

35 Vincent Affidavit, Motion Record, Volume I, Tab 2, pages 12-13, paragraphs 35-38

27. The weakness of Vallecoccia's evidence is apparent from the remarkable paragraph 5 of his Affidavit:

The APAs refer to something called the "BASF Receivables". I am reminded by counsel for the Applicants, David Ullman, who was counsel at the time and continues to be, that it was intended for the "BASF Receivables" to refer and encompass all receivables payable to 436 [the Vendor] from the US Class Action...³⁶

28. Vallecoccia then gives a multi-page description of the manner in which the proceeds of the US Class Action were purportedly treated during the negotiation of the Final APA, and the progress of that Class Action.³⁷

29. Vallecoccia's evidence disintegrated utterly when he was cross-examined.

Concerning the meaning of the term "BASF Receivables":

211 Q. *Let's go back to the start of your affidavit at paragraph six for a moment. You say there that in APA No. 1, Exhibit A to the Vincent affidavit, the purchase price included a value for the BASF receivables as defined in the APA. Now, what did you understand that definition to be? Do you have any understanding of what BASF receivables consisted of?*

A. **No.**

212 Q. *Do you have any understanding today of what they consisted of?*

A. *2011, I can only think of BASF payables. I can never think of receivables. We purchase it [sic] from BASF. How can we get receivables? So I don't know what it means.³⁸*

30. Concerning the BASF Receivables generally:

³⁶ Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 2, paragraph 5

³⁷ Vallecoccia Affidavit, Responding Motion Record, Tab 1, pages 2-5, paragraphs 6-16

³⁸ Vallecoccia Transcript at page 56, Q. 211-212, emphasis added

113 Q. *It says there [in section 2.9 (c) of APA #1]: "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 \$642,000." I take it, sir, that the prospective offeror or purchaser was informed of that either by your company or by the monitor? In other words, by Deloitte?*

A. *I wasn't aware that B[A]SF at that time owed us money.*

114 Q. *You weren't aware that they owed the money?*

A. *No.*

115 Q. *I see. Do you know now with the benefit of hindsight that they in fact had settled litigation and agreed to pay \$642,000?*

A. *I wasn't aware of that. We know we pay the bills to B[A]SF. Why they owe us money? Did they charge us too much? I don't know. We have no rebate program.*

116 Q. *This relates to a settlement out of court, is what it says, by BASF. BASF was involved in a class action in the U.S. They were sued. Do you know that?*

A. *I found out after I saw this. I didn't know at the time.*

[...]

120 Q. *Which year was that? [...]*

A. *Last year, probably. I don't remember, just whenever the report was issued. It doesn't mean anything to me. I just sign it.³⁹*

31. Concerning whether the Vendor had "intended" to retain the right to any of the proceeds of the US Class Action:

101 Q. *Now, when you -- when I say you, I mean the corporation, the numbered company. When you've put its assets up for sale, were there any assets that you can recall that were not put up for sale, any of the assets of the company?*

A. *I don't know what -- I can't think of any assets that wouldn't be sold. The company didn't own the real estate, so equipment and receivables.⁴⁰*

³⁹ Vallecoccia Transcript at pages 33-35, Q. 113-120, emphasis added

⁴⁰ Vallecoccia Transcript at page 29, Q. 101, emphasis added

[...]

150 Q. Take a moment to read paragraph 39 [of the Monitor's sixth report] and tell me whether that is, to the best of your knowledge, accurate.

A. I remember that the assets were being sold.

151 Q. Yes.

A. Don't ask me how much money was there and all that. That part I don't remember.

[...]

153 Q. The first sentence where it says that: "All the company's assets have been sold pursuant to separate transactions."

A. Right.

154 Q. Do you agree with that?

A. Yeah.

155 Q. **All of the assets of Domfoam International Inc. were sold. Correct?**

A. **Yes.**⁴¹

[...]

213 Q. If I asked you anything about a settlement with Bayer concerning this U.S. polyol class action litigation, **are you even aware that there was a lawsuit with Bayer?**

A. **I wasn't aware in 2011 or '12** whether it wasn't there. I'm aware now because I see it written here. I wasn't aware at the time.

214 Q. You weren't aware at the time. Have you since learned, sir, whether there was a settlement with Bayer?

A. I don't know.

215 Q. Do you know whether there was a settlement with Huntsman, like a Huntsman settlement? Are you aware of that?

A. No, with Huntsman. I didn't owe Huntsman any money.

216 Q. Are you aware whether there was a settlement with Lyondell? L-Y-O-N

⁴¹Vallecoccia Transcript at pages 43-44, Q. 150-155, emphasis added

A. Lyondell, yeah.

217 Q. Are you aware that there was a settlement?

A. No. **I'm not aware that there's any settlement with anybody.**⁴²

32. Concerning the Dow Settlement:

165 Q. [...] If I were to suggest to you that there was a lawsuit, a class action in the United States against Dow Chemical, you don't recall one way or the other?

A. **No. I wouldn't recall that.**

[...]

169 Q. If you want to **open up your affidavit** [sworn October 16, 2018] again, please, sir, to paragraph 22 and read that to yourself, please. [The paragraph asserts that the Vendor's estate was entitled to the Dow Settlement.]

A. I wasn't aware that that was being –

170 Q. Right. Have you had a chance to read the whole paragraph?

A. Yeah. "The judgment was upheld on appeals."

171 Q. Yes.

A. "Be expected to be met to the applicants. These receivables were sent to the applicant's estates." [Phon.] ["[S]ignificant distributions were expected to be made to the Applicants...[T]hese receivables were assets of the Applicants' estates."]

172 Q. That is what it says, yes. **Now, do you know what you just read is correct?**

A. **I don't know.**⁴³

33. Vallecoccia has sworn affidavits concerning matters of which he was ignorant. His affidavit evidence should not be given any weight.

⁴² Vallecoccia Transcript at pages 56-57, Q. 213-217, emphasis added

PART III – THE ISSUES AND THE LAW

34. The issues before this Honourable Court are as follows.

Procedure

1. What are the tests for setting aside an order pursuant to Rules 37.14(1) and 39.01(6)?

The Contract

2. What are the “BASF Receivables”?
3. What is the effect of the Entire Agreement Clause?

ISSUE ONE – RULES 37.14 AND 39.01(6)

35. Rule 37.14(1) is as follows.

37.14 (1) A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person’s attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

36. Domfoam submits that this motion falls within (1)(a), or alternatively 1(b) (“insufficient notice”). Domfoam is clearly affected by the Order: \$3.7 million that Domfoam

regards as its own will be paid to the Vendor's creditors if the Order is not set aside. The Order was made without notice to Domfoam, which had been removed from the service list in 2015. Respecting the distribution of the \$3.7 million, the motion was without notice to any party on the service list, as the notice of motion and draft order said nothing about the distribution of funds. Domfoam moved immediately after discovering the Order.

37. Once the requirements of Rule 37.14(1)(a) are satisfied, the matter is discretionary and requires a balancing of the interests of the parties involved.⁴⁴

*A motion to rescind is not an appeal, but a substantive motion. The question is not alone whether the order should have been made initially but, whether having been made, it should be set aside.*⁴⁵

38. In this case, there are no competing interests. Domfoam is the owner of the 2018 Dow Proceeds and the larger Dow Settlement, pursuant to a contract approved by this Court. The Vendor has attempted to use those Proceeds for its own benefit, on the strength of an affidavit sworn by a man who, under cross-examination, testified that he had absolutely no knowledge of the relevant facts to which he had deposed. Further, his affidavit, on a motion without notice, said nothing about Domfoam's claim to the 2018 Dow Proceeds. This silence clearly breaches Rule 39.01(6).

⁴⁴ *Liu v. Daniel Executive (Canada) Holdings Corp*, 2010 ONSC 537 at paragraph 15, aff'd 2011 ONSC 379 (Divisional Court)

⁴⁵ *Royal Bank v. 1552680 Ontario Inc.*, (2005) 18 C.P.C. (6th) 276, at paragraphs 21-22

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

39. It is beyond dispute a “material fact” that Domfoam is the owner of the funds to be distributed to the Vendor’s creditors pursuant to paragraph 5 of the Order. Justice Wilton-Siegel was not made aware of this fact at the hearing of the motion, which failure by the Vendor is sufficient ground for setting aside the Order.

ISSUES TWO AND THREE: THE CONTRACT

40. The APAs are clear about the meaning of the term “BASF Receivables”: it refers to a specific liquidated sum (\$642,000) which was due from BASF (and no one else) as a result of a settlement that had already occurred. “Evidence” that Vallecoccia was “reminded” that he intended the term to have another meaning is irrelevant due to the Entire Agreement Clause, as well as being inadmissible hearsay.

ISSUE TWO: THE MEANING OF “BASF RECEIVABLES”

41. The Vendor’s main argument is that the term “BASF Receivables” in the APAs includes not simply the BASF Receivables but all the fruits of the US Class Action, including those which were not receivables at the time the Final APA was executed, but were merely choses-in-action.⁴⁶ The argument is predicated upon the Vendor’s lawyer’s

⁴⁶ Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 2, paragraph 5

reminder to Vallecoccia concerning Vallecoccia's intent during negotiations, some 6 ½ years ago.⁴⁷

42. The cross-examination established beyond any doubt that Vallecoccia had none of the knowledge concerning the APAs or the US Class Action that he had sworn to in his affidavits. There is, therefore, no evidentiary basis for the Vendor's resistance to this motion.

43. Further, the meaning of the term "BASF Receivables" in section 2.9(c) of the APAs is clear. APA #1 described the "BASF Receivables" as a specific liquidated sum (\$642,000) already due "from BASF" as a result of "a settlement out of court by BASF" that had occurred by December 16, 2011. This specific liquidated sum was to be purchased by the Purchaser at a 60% discount (\$385,200).⁴⁸

44. This treatment of the "BASF Receivables" is consistent with the legal definition of a "receivable". The most considered analysis of the term was conducted by the New Zealand Court of Appeal, in a 2013 insolvency case. The Court concluded:

*[82] Accordingly, in our view, the term "accounts receivable" in sch 7, cl 2(1) of the Companies Act has the same meaning as given in s 16 of the PPSA, namely a **monetary obligation** that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance".*

*[83] Under this definition any "monetary obligation" that is not expressly excluded is included. In this context a "**monetary obligation**" is an existing legal obligation*

47 Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 2, paragraph 5

48 Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "A", page 29

on another party to pay an identifiable monetary sum to the company on an ascertainable date. The obligation must be legally enforceable by the company (at the date of the receivership or liquidation) on the basis that the other party has an existing liability to make the payment.

[...]

[85] A mere right to claim will not be included within the definition until it is converted into a legally enforceable obligation by a judgment of a court.⁴⁹

45. In fact and in law, then, the term “BASF Receivables” in the Final APA cannot include a hypothetical, unidentifiable and unliquidated amount, (rather than an existing monetary obligation), that might become due from Dow, (not BASF), at some point after the execution of the Final APA (and that was, therefore, not legally enforceable when the Final APA was executed). Concerning Dow, all the Vendor possessed when the Final APA was executed was a “mere right to claim” (a chose-in-action), which right was not an Excluded Asset in the Final APA, and which right was therefore transferred by the Vendor to the Purchaser, and by the Purchaser to Domfoam.

46. Vallecoccia’s Affidavit makes the secondary argument that the proceeds of the US Class Action “were not marketed for sale in the sales process in these proceedings”⁵⁰ and “were assets of the Applicants’ estates.”⁵¹ The first paragraph of the Monitor’s Sale Process document invites “offers to purchase all of [the applicants’] assets, properties and undertakings”, without exception.⁵² Vallecoccia testified that all of the Vendor’s assets were sold during cross-examination and in his March 13, 2012 affidavit.⁵³

49 *Strategic Finance Limited (in receivership & in liquidation) et al v Bridgeman et al*, [2013] NZCA 357 at paragraphs 82-85, emphasis added

50 Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 7, paragraph 20

51 Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 8, paragraph 22

52 “Sales Process”, Exhibit “B” to the Affidavit of Tony Vallecoccia sworn January 25, 2012, Exhibit 1 to

ISSUE THREE – INTENT AND THE ENTIRE AGREEMENT CLAUSE

47. A retrospective description of Vallecoccia's (or Vallecoccia's lawyer's) thinking during the negotiations is irrelevant due to the Entire Agreement Clause. The Court of Appeal for Ontario has held that:

43 *An entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of the negotiations. In limiting the expression of the parties' intentions to the written form, the clause attempts to provide certainty and clarity.*

44 *In Inntrepreneur Pub. Co. v. East Crown Ltd., [2000] 41 E.G. 209 (Eng. Ch. Div.), Lightman J. colourfully described the purpose of an entire agreement clause as follows:*

*The purpose of an entire agreement clause is to preclude a party to a written agreement threshing the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty... **For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere.***

[Emphasis added.]

45 *Legal commentators appear to be united in their view that entire agreement clauses are, generally speaking, retrospective in nature. According to Angela Swan, "An "entire agreement" clause deals only with what was done or said before the agreement was made and seeks to exclude those statements and acts from muddying the interpretation of the agreement; it is a contractual invocation of the parol evidence rule": [citations omitted]⁵⁴*

48. "Evidence" (even if otherwise admissible and not hearsay) that Vallecoccia intended "BASF Receivables" to have a meaning other than that set out in the APAs should not be given any consideration.

the Cross-Examination of Tony Vallecoccia on November 16, 2018

53 Vallecoccia Transcript at page 29, Q. 101; Vallecoccia Affidavit, Responding Motion Record, Tab 1, at Exhibit "F", page 58, paragraph 37

54 *Soboczynksi v Beauchamp*, 2015 ONCA 282, at paragraphs 43-45, application for leave to appeal

PART IV – ORDER SOUGHT

49. Domfoam requests an order:

1. setting aside the order of Justice Wilton-Siegel dated May 29, 2018;
2. directing the Vendor to pay the 2018 Dow Proceeds to Domfoam;
3. declaring that all further proceeds received by the Vendor from the US Class Action are to be paid to Domfoam as and when received by the Vendor or the Monitor herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY



FRED TAYAR

COLBY LINTHWAITE

OF COUNSEL FOR DOMFOAM INC.

DATE: November 26, 2018

Schedule "A"

SCHEDULE “A”

Authorities Cited

1. *Liu v. Daniel Executive (Canada) Holdings Corp*, 2010 ONSC 537, aff'd 2011 ONSC 379 (Divisional Court)
2. *Royal Bank v. 1552680 Ontario Inc.*, (2005) 18 C.P.C. (6th) 276
3. *Strategic Finance Limited (in receivership & in liquidation) et al v Bridgeman et al*, [2013] NZCA 357
4. *Soboczynski v Beauchamp*, 2015 ONCA 282, application for leave to appeal dismissed, [2015] S.C.C.A. No. 243

Schedule "B"

SCHEDULE "B"

Statutes and Regulations Cited

RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194

37.14 (1) *A party or other person who,*

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[...]

39.01[...]

Full and Fair Disclosure on Motion or Application Without Notice

(6) *Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.*

Schedule "C"

NOW THEREFORE this Agreement witnesses that in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged by each party to the other, the parties agree as follows:

Section 1 — INTERPRETATION

1.1 Definitions

In this Agreement:

- (a) ...
- (gg) "**Purchase Price**" has the meaning set out in Section 2.9;
- (hh) "**Purchased Assets**" means the right, title and interest of the Vendor in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets;
- (ii) "**Purchased Inventories**" has the meaning set out in Section 2.9;
- (jj) "**Purchased Receivables**" has the meaning set out in Section 2.9;
- (kk) "**Purchased Working Capital**" has the meaning set out in Section 2.10;

Section 2 — SALE AND PURCHASE AND ASSIGNMENT

2.1 Sale and Purchase of Assets

Subject to the terms and conditions hereof, the Vendor shall sell to the Purchaser and the Purchaser shall purchase the Purchased Assets on the Closing Date. The Purchaser acknowledges that it is not purchasing any other property or assets of the Vendor other than the Purchased Assets. The Purchaser acknowledges and agrees that this Agreement contains a condition (not capable of waiver) that, prior to the Closing, the Vendor shall have obtained the Approval Order and the Vesting Order, all as provided in this Agreement. If the Vendor shall not have obtained both the Approval Order and the Vesting Order after making application for them, this Agreement shall automatically terminate without any further action on the part of any of the Vendor or the Purchaser and neither party hereto shall be under any further obligation to the others to complete the transactions of purchase and sale contemplated by this Agreement and each party hereto shall be released immediately of all of its obligations hereunder, other than as set forth in Sections 6.6(b) (return of the Deposit), 4.1(c) (Confidentiality Agreement) and 7.3 (Cost and Expenses).

2.2 Excluded Assets

The Purchased Assets shall not include (i) any assets of the Vendor other than the Purchased Assets or (ii) those assets of the Vendor that are listed or described in Schedule 2.2 on the date hereof and those assets of the Vendor which are added to such Schedule 2.2 by the Purchaser during the Interim Period (collectively, the "**Excluded Assets**"). If any of the Excluded Assets or any proceeds in respect thereof shall at any time come into the possession of or under the control of the Purchaser or any of its employees, officers or agents, such assets and proceeds shall be held by the Purchaser in trust for the benefit of the Vendor. Within twenty (20) Business days from the date on which the Purchaser, or any of its employees, officers or agents, comes into possession of or obtains control over any of such assets or proceeds, as applicable, the Purchaser shall (a) by notice in writing delivered to the Vendor and the Monitor in accordance with the provisions hereof, so advise the Vendor and the Monitor, and (b) forthwith account and deliver over to the Vendor or the Monitor any such assets or proceeds, less any cost incurred by the Purchaser in executing said obligations.

2.8 Purchaser's Right to Exclude

Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Purchased Assets from the Transaction prior to the Closing Date, whereupon such Purchased Assets shall be Excluded Assets, provided, however, that there shall be no corresponding reduction in the Purchase Price. For greater certainty, the Purchaser shall be entitled to exclude any of the Contracts described in Schedule 1.1(m) hereto (with the exception of the collective bargaining agreement relating to the Unionized Employees) and any of the Customer Contracts described in Schedule 1.1(o) hereto, provided, that, if such an exclusion occurs, the related Required Consent shall also become automatically excluded from Schedule 1.1 (mm).

2.9 Purchase Price

The purchase price for the Purchased Assets would be, calculated as of December 16, 2011, the aggregate amount of three million five hundred fifty four thousand eight hundred and eighty dollars (\$3,554,880) plus the assumption of the Assumed Obligations, said purchase price to be established as of the Closing Date (the "**Purchase Price**").

The Purchase Price is divided as follow:

(A)	Purchased Receivables:	\$1,919,385
(B)	Purchased Inventories:	\$1,068,928
(C)	BASF Receivables:	\$385,200
(D)	All other Purchased Assets:	\$250,000
(E)	Excess rebates to customers	(\$68,633)

For more clarity, the Purchase Price has been established on the following method of calculation as for the Purchased Receivables and the Purchased Inventories, and same method of calculation shall be used to establish the final amount of the Purchase Price as of the Closing Date:

(A) Purchased Receivables

As of December 16, 2011, the total amount of all the Vendor's accounts receivable (the "Purchased Receivables") is five million one hundred ten thousand and forty eight dollars (\$ 5,110,048) (the "Offer Date Receivable Value"), and is detailed in Schedule 2.9(A) — Section 1.

The portion of the Purchase Price attributed to the Purchased Receivables is one million nine hundred nineteen thousand three hundred and eighty five dollars (\$1,919,385) and is calculated as described in Schedule 2.9(A) — Section 2.

(B) Purchased Inventories

As of December 17, 2011, the total amount of all the Vendor's inventory (raw material, work in progress and finished goods inventory) (the "Purchased Inventories") is three million five hundred seventy thousand eight hundred and ninety one dollars (\$3,570,891) (the "Offer Date Inventory Value") in Schedule 2.9(B) — Section 1.

The portion of the Purchase Price attributed to the Purchased Inventories is one million sixty eight thousand nine hundred and twenty eight dollars (\$1,068,928) and is calculated as described in Schedule 2.9(B) — Section 2.

(C) 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 five thousand and two hundred dollars (\$385,200) calculated at a discount rate of 60%.

The purchase 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.

(D) Other Purchased Assets

The Purchaser is ready to pay the Vendor the amount of two hundred and fifty thousand dollars (\$250,000) for all the other Purchased Assets.

E) Excess rebates to customers

The Purchase Price shall be reduced by the total amount of rebates earned by the Vendor's customers for the calendar year 2011 and not already applied to the outstanding invoices for each said customer at the Closing Time. As of December 16, 2011, the excess rebates to customers totalize sixty eight thousand six hundred and thirty three dollars (\$68,633) as calculated in Schedule 2.9(E) and shall be adjusted as at the Closing Date using the same parameters.

Schedule 1.1(hh)

Purchased Assets

1. All assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated; including without limitation the following:
 - 1.1. The Purchased Receivables;
 - 1.2. The Purchased Inventories;
 - 1.3. All goods other than goods listed in section 1.2 hereinabove that are held for sale, lease or rental (whether such goods are saleable, obsolete or damaged) in relation to the Business carried on by the Vendor including, materials and supplies;
 - 1.4. The Contracts;
 - 1.5. The Customer Contracts;
 - 1.6. The Equipment;
 - 1.7. The Vendor's Intellectual Property;
 - 1.8. All customer lists and lists of prospective customers and marketing and sales materials and databases not already included in the Vendor's Intellectual Property;
 - 1.9. All corporate names used by the Vendor;
 - 1.10. All rights, title and interest in orders on hand and other contractual arrangements with the customers to the extent that they can be assigned and that the Purchaser wishes to avail itself thereof;
 - 1.11. All the benefit of all unfulfilled orders received by and in favour of the Vendor;
 - 1.12. All other tangible and intangible assets and property used in connection with the Business;
 - 1.13. The exclusive right of the Purchaser to represent itself as carrying on such business in continuation of and in succession to the Vendor;
 - 1.14. All Books and Records;
 - 1.15. All plans, sketches and other documents related to (i) the operations of the Business and (ii) the customers of the Vendor;
 - 1.16. all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled to but excluding the Excluded Assets;

- 1.17. All R & D receivables, income tax receivables, tax refunds, deposit and deposit letters;
- 1.18. All the prepaid amounts related to:
 - 1.18.1. Insurance - Property and Liability
 - 1.18.2. Insurance — 2002 Ford
 - 1.18.3. Coface (receivables)
 - 1.18.4. Directors and Officers liability
 - 1.18.5. All the taxes (municipal, business and school) for all the Leased Premises
 - 1.18.6. CN non freight — tracts
 - 1.18.7. Canadiens hockey tickets
 - 1.18.8. Microsoft (Navision Licence)
- 1.19. The season tickets from Club de Hockey Canadien for the seats 104-J, #13 and #14 together with all the rights attached to said season tickets and any renewal thereof;
- 1.20. All the Equipment Operating Leases that the Purchaser wishes to avail itself thereof and not specifically an Excluded Assets as per Schedule 2.2 attached to this Agreement; and
- 1.21. The assets described in Schedule 5.1(o) of this Agreement.

Schedule 2.2
Excluded Assets

1. The Purchaser acknowledges and agrees that the following assets shall be considered excluded of the Transaction:
 - 1.1. The accounts payable, except as otherwise provided in this Agreement;
 - 1.2. The tax losses, except as otherwise provided in this Agreement;
 - 1.3. The cash on hand or on deposit with banks or other depositaries;
 - 1.4. The debts due to the Vendor from any shareholder, director, officer or employee of the Vendor or any other person who does not deal at arm's length with the Vendor;
 - 1.5. The following Equipment Operating Leases:
 - 1.5.1. Ryder - Lease No. 332467 - 1FUJA6CK97LY49529
 - 1.5.2. Ryder - Lease No. 332468 - 1FUJA6CK57LY49530
 - 1.5.3. Ryder - Lease No. 332469 - 1FUJA6CK77LY49531
 - 1.5.4. Ryder - Lease No. 329316 - 1FUJA6CK37LY49526
 - 1.5.5. Ryder - Lease No. 329317 - 1FUJA6CK57LY49527
 - 1.5.6. Ryder - Lease No. 329318 - 1FUJA6CK77LY49528
 - 1.5.7. Ryder - Lease No. 336256 - 1HTSCAAMXXH227668
 - 1.5.8. Ryder - Lease No. 336257 - 1FUJA6CK97LY61325
 - 1.5.9. Ryder - Lease No. 336256 - 1FUJA6CK77LY61324
 - 1.5.10. Ryder - Lease No. 325581 - 1FUJA6CK87LY49523
 - 1.5.11. Ryder - Lease No. 325582 - 1FUJA6CKX7LY49524
 - 1.5.12. Ryder - Lease No. 324854 - 1FUJA6CK47LY49521
 - 1.5.13. Ryder - Lease No. 324855 - 1FUJA6CK67LY49522
 - 1.5.14. Toshiba - Lease No. 344371-205533 — Main photocopieur
 - 1.5.15. Toshiba - Lease No. 344371-205455 - Plant & Sales Photocopier
 - 1.6. The shares issued and outstanding of the capital of "VALLE FOAM INDUSTRIES (1995) INC." registered in the name of the Purchaser; and
 - 1.7. The shares issued and outstanding of the capital of "A-Z SPONGE & FOAM PRODUCTS LTD." registered in the name of the Purchaser.

Schedule "D"

NOW THEREFORE this Agreement witnesses that in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged by each party to the other, the parties agree as follows:

Section 1 — INTERPRETATION

1.1 Definitions

In this Agreement:

- (a) ...
- (gg) "**Purchase Price**" has the meaning set out in Section 2.9;
- (hh) "**Purchased Assets**" means the right, title and interest of the Vendor in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets;
- (ii) "**Purchased Inventories**" has the meaning set out in Section 2.9;
- (jj) "**Purchased Receivables**" has the meaning set out in Section 2.9;
- (kk) "**Purchased Working Capital**" has the meaning set out in Section 2.10;

Section 2 — SALE AND PURCHASE AND ASSIGNMENT

2.1 Sale and Purchase of Assets

Subject to the terms and conditions hereof; the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Purchased Assets on the Closing Date. The Purchaser acknowledges that it is not purchasing any other property or assets of the Vendor other than the Purchased Assets. The Purchaser acknowledges and agrees that this Agreement contains a condition (not capable of waiver) that, prior to the Closing, the Vendor shall have obtained the Approval and Vesting Order, as provided in this Agreement. If the Vendor shall not have obtained the Approval and Vesting Order after making application for the same, this Agreement shall automatically terminate without any further action on the part of any of the Vendor or the Purchaser and neither party hereto shall be under any further obligation to the others to complete the Transactions and each party hereto shall be released immediately of all of its obligations hereunder, other than as set forth in Sections 6.6(b) (return of the Deposit), 4.1(c) (Confidentiality Agreement) and 7.3 (Cost and Expenses).

2.2 Excluded Assets

The Purchased Assets shall not include (i) any assets of the Vendor other than the Purchased Assets or (ii) those assets of the Vendor that are listed or described in Schedule 2.2 on the date hereof and those assets of the Vendor which are added to such Schedule 2.2 by the Purchaser during the Interim Period (collectively, the "Excluded Assets"). If any of the Excluded Assets or any proceeds in respect thereof shall at any time come into the possession of or under the control of the Purchaser or any of its employees, officers or agents, such assets and proceeds shall be held by the Purchaser in trust for the benefit of the Vendor. Within fifteen (15) Business Days from the date on which the Purchaser, or any of its employees, officers or agents, comes into possession of or obtains control over any of such assets or proceeds, as applicable, the Purchaser shall (a) by notice in Writing delivered to the Vendor and the Monitor in accordance with the provisions hereof, so advise the Vendor and the Monitor, and (b) forthwith account and deliver over to the Vendor or the Monitor any such assets or proceeds, less any reasonable costs incurred by the Purchaser in executing said obligations.

2.8 Purchaser's Right to Exclude

Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Purchased Assets from the Transaction prior to the Closing Date, whereupon such Purchased Assets shall be Excluded Assets, provided, however, that there shall be no corresponding reduction in the Purchase Price. For greater certainty, the Purchaser shall be entitled to exclude any of the Contracts described in Schedule 1.1(m) hereto (with the exception of the collective bargaining agreement relating to the Unionized Employees) and any of the Customer Contracts described in Schedule 1.1(n) hereto.

2.9 Purchase Price

The Purchase Price for the Purchased Assets would be, calculated as described hereinafter, the aggregate amount of three million five hundred sixty two thousand nine hundred and seventy five dollars (\$3,562,975) plus the assumption of the Assumed Obligations, said Purchase Price to be established as of the Closing Date (the "**Purchase Price**").

The Purchase Price is divided as follow:

(A)	Purchased Receivables:	\$2,450,976
(B)	Purchased Inventories:	\$946,586
(C)	<i>Withdrawn</i>	
(D)	All other Purchased Assets:	\$200,000
(E)	Excess rebates to customers	(\$34,587)

For more clarity, the Purchase Price has been established on the following method of calculation as for the Purchased Receivables and the Purchased Inventories, and same method of calculation shall be used to establish the final amount of the Purchase Price as of the Closing Date:

(A) Purchased Receivables

As of January 31, 2012, the total amount of all the Vendor's accounts receivable (the "**Purchased Receivables**") is five million nine hundred ninety six thousand six hundred and ninety two dollars (\$ 5,996,692) (the "**Offer Date Receivable Value**"), and is detailed in Schedule 2.9(A) — Section 1.

The portion of the Purchase Price attributed to the Purchased Receivables is two million four hundred fifty thousand nine hundred and seventy six dollars (\$2,450,976) and is calculated as described in Schedule 2.9(A) — Section 2.

(B) Purchased Inventories

As of January 11, 2012 (and for Chemicals (majors) and Small Chemicals, as of January 31, 2012), the total amount of all the Vendor's inventory (raw material, work in progress and finished goods inventory) (the "**Purchased Inventories**") is three million fifty six thousand and eleven dollars (\$3,056,011) (the "**Offer Date Inventory Value**") in Schedule 2.9(B)— Section 1.

The portion of the Purchase Price attributed to the Purchased Inventories is nine hundred forty six thousand five hundred and eighty six dollars (\$946,586) and is calculated as described in Schedule 2.9(B) — Section 2.

(C) BASF Receivables

Withdrawn

(D) Other Purchased Assets

The Purchaser is ready to pay the Vendor the amount of two hundred thousand dollars (\$200,000) for all the other Purchased Assets.

(E) Excess rebates to customers

The Purchase Price shall be reduced by the total amount of rebates earned by the Vendor's customers for the calendar year 2011 and not already applied to the outstanding invoices for each said customer at the Closing Time. As of January 27, 2012, the excess rebates to customers total thirty four thousand five hundred and eighty seven dollars (\$34,587) as calculated in Schedule 2.9(E) and shall be adjusted as at the Closing Date using the same parameters.

Schedule 1.1(hh)
Purchased Assets

1. All assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated; including without limitation the following:
 - 1.1. The Purchased Receivables;
 - 1.2. The Purchased Inventories;
 - 1.3. All goods other than goods listed in section 1.2 hereinabove that are held for sale, lease or rental (whether such goods are saleable, obsolete or damaged) in relation to the Business carried on by the Vendor including, materials and supplies;
 - 1.4. The Contracts;
 - 1.5. The Customer Contracts;
 - 1.6. The Equipment;
 - 1.7. The Vendor's Intellectual Property;
 - 1.8. All customer lists and lists of prospective customers and marketing and sales materials and databases not already included in the Vendor's Intellectual Property;
 - 1.9. All corporate names used by the Vendor;
 - 1.10. All rights, title and interest in orders on hand and other contractual arrangements with the customers to the extent that they can be assigned and that the Purchaser wishes to avail itself thereof;
 - 1.11. All the benefit of all unfulfilled orders received by and in favour of the Vendor;
 - 1.12. All other tangible and intangible assets and property used in connection with the Business;
 - 1.13. The exclusive right of the Purchaser to represent itself as carrying on such business in continuation of and in succession to the Vendor;
 - 1.14. All Books and Records;
 - 1.15. All plans, sketches and other documents related to (i) the operations of the Business and (ii) the customers of the Vendor;
 - 1.16. all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled to but excluding the Excluded Assets;

- 1.17. All R & D receivables, income tax receivables, tax refunds, deposit and deposit letters;
- 1.18. All the prepaid amounts related to:
 - 1.18.1. Insurance - Property and Liability
 - 1.18.2. Insurance — 2002 Ford
 - 1.18.3. Coface (receivables)
 - 1.18.4. Directors and Officers liability
 - 1.18.5. All the taxes (municipal, business and school) for all the Leased Premises
 - 1.18.6. CN non freight — tracts
 - 1.18.7. Canadiens hockey tickets
 - 1.18.8. Microsoft (Navision Licence)
- 1.19. The season tickets from Club de Hockey Canadien for the seats 104-J, #13 and #14 together with all the rights attached to said season tickets and any renewal thereof;
- 1.20. All the Equipment Operating Leases that the Purchaser wishes to avail itself thereof and not specifically an Excluded Assets as per Schedule 2.2 attached to this Agreement; and
- 1.21. The assets described in Schedule 5.1(o) of this Agreement.

Schedule 2.2
Excluded Assets

1. The Purchaser acknowledges and agrees that the following assets shall be considered excluded of the Transaction:
 - 1.1. The accounts payable, except as otherwise provided in this Agreement;
 - 1.2. The tax losses, except as otherwise provided in this Agreement;
 - 1.3. The cash on hand or on deposit with banks or other depositaries;
 - 1.4. The debts due to the Vendor from any shareholder, director, officer or employee of the Vendor or any other person who does not deal at arm's length with the Vendor;
 - 1.5. The following Equipment Operating Leases:
 - 1.5.1. Ryder - Lease No. 332467 - 1FUJA6CK97LY49529
 - 1.5.2. Ryder - Lease No. 332468 - 1FUJA6CK57LY49530
 - 1.5.3. Ryder - Lease No. 332469 - 1FUJA6CK77LY49531
 - 1.5.4. Ryder - Lease No. 329316 - 1FUJA6CK37LY49526
 - 1.5.5. Ryder - Lease No. 329317 - 1FUJA6CK57LY49527
 - 1.5.6. Ryder - Lease No. 329318 - 1FUJA6CK77LY49528
 - 1.5.7. Ryder - Lease No. 336256 - 1HTSCAAMXXH227668
 - 1.5.8. Ryder - Lease No. 336257 - 1FUJA6CK97LY61325
 - 1.5.9. Ryder - Lease No. 336256 - 1FUJA6CK77LY61324
 - 1.5.10. Ryder - Lease No. 325581 1FUJA6CK87LY49523
 - 1.5.11. Ryder - Lease No. 325582 - IFUJA6CKX7LY49524
 - 1.5.12. Ryder - Lease No. 324854 - 1FUJA6CK47LY49521
 - 1.5.13. Ryder - Lease No. 324855 - 1FUJA6CK67LY49522
 - 1.5.14. Toshiba - Lease No. 344371-205533 — Main photocopieur
 - 1.5.15. Toshiba - Lease No. 344371-205455 - Plant & Sales Photocopier
 - 1.6. The shares issued and outstanding of the capital of "VALLE FOAM INDUSTRIES (1995) INC." registered in the name of the Purchaser; and
 - 1.7. The shares issued and outstanding of the capital of "A-Z SPONGE & FOAM PRODUCTS LTD." registered in the name of the Purchaser.

Schedule "E"

NOW THEREFORE this Agreement witnesses that in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged by each party to the other, the parties agree as follows:

Section 1 — INTERPRETATION

1.1 Definitions

In this Agreement:

- (a) ...
- (gg) "**Purchase Price**" has the meaning set out in Section 2.9;
- (hh) "**Purchased Assets**" means the right, title and interest of the Vendor in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets;
- (ii) "**Purchased Inventories**" has the meaning set out in Section 2.9;
- OD "**Purchased Receivables**" has the meaning set out in Section 2.9;
- (kk) "**Purchased Working Capital**" has the meaning set out in Section 2.10;

Section 2 — SALE AND PURCHASE AND ASSIGNMENT

2.1 Sale and Purchase of Assets

Subject to the terms and conditions hereof, the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Purchased Assets on the Closing Date. The Purchaser acknowledges that it is not purchasing any other property or assets of the Vendor other than the Purchased Assets. The Purchaser acknowledges and agrees that this Agreement contains a condition (not capable of waiver) that, prior to the Closing, the Vendor shall have obtained the Approval and Vesting Order, as provided in this Agreement. If the Vendor shall not have obtained the Approval and Vesting Order after making application for the same, this Agreement shall automatically terminate without any further action on the part of any of the Vendor or the Purchaser and neither party hereto shall be under any further obligation to the others to complete the Transactions and each party hereto shall be released immediately of all of its obligations hereunder, other than as set forth in Sections 6.6(b) (return of the Deposit), 4.1(c) (Confidentiality Agreement) and 7.3 (Cost and Expenses).

2.2 Excluded Assets

The Purchased Assets shall not include (i) any assets of the Vendor other than the Purchased Assets or (ii) those assets of the Vendor that are listed or described in Schedule 2.2 on the date hereof and those assets of the Vendor which are added to such Schedule 2.2 by the Purchaser during the Interim Period (collectively, the "**Excluded Assets**"). If any of the Excluded Assets or any proceeds in respect thereof shall at any time come into the possession of or under the control of the Purchaser or any of its employees, officers or agents, such assets and proceeds shall be held by the Purchaser in trust for the benefit of the Vendor. Within fifteen (15) Business Days from the date on which the Purchaser, or any of its employees, officers or agents, comes into possession of or obtains control over any of such assets or proceeds, as applicable, the Purchaser shall (a) by notice in writing delivered to the Vendor and the Monitor in accordance with the provisions hereof, so advise the Vendor and the Monitor, and (b) forthwith account and deliver over to the Vendor or the Monitor any such assets or proceeds, less any reasonable costs incurred by the Purchaser in executing said obligations.

2.8 Purchaser's Right to Exclude

Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Purchased Assets, other than any of the Equipment, from the Transaction prior to the Closing Date, whereupon such Purchased Assets shall be Excluded Assets, provided, however, that there shall be no corresponding reduction in the Purchase Price. For greater certainty, the Purchaser shall be entitled to exclude any of the Contracts described in Schedule 1.1(m) hereto (with the exception of the collective bargaining agreement relating to the Unionized Employees) and any of the Customer Contracts described in Schedule 1.1(n) hereto.

2.9 Purchase Price

The Purchase Price for the Purchased Assets would be, calculated as described hereinafter, the aggregate amount of three million six hundred sixty two thousand nine hundred and seventy five dollars (\$3,662,975) plus the assumption of the Assumed Obligations, said Purchase Price to be established as of the Closing Date (the "**Purchase Price**").

The Purchase Price is divided as follow:

(A)	Purchased Receivables:	\$2,450,976
(B)	Purchased Inventories:	\$946,586
(C)	<i>Withdrawn</i>	
(D)	All other Purchased Assets:	\$300,000
(E)	Excess rebates to customers	(\$34,587)

For more clarity, the Purchase Price has been established on the following method of calculation as for the Purchased Receivables and the Purchased Inventories, and same method of calculation shall be used to establish the final amount of the Purchase Price as of the Closing Date:

(A) Purchased Receivables

As of January 31, 2012, the total amount of all the Vendor's accounts receivable (the "Purchased Receivables") is five million nine hundred ninety six thousand six hundred and ninety two dollars (\$ 5,996,692) (the "Offer Date Receivable Value"), and is detailed in Schedule 2.9(A) — Section I.

The portion of the Purchase Price attributed to the Purchased Receivables is two million four hundred fifty thousand nine hundred and seventy six dollars (\$2,450,976) and is calculated as described in Schedule 2.9(A) — Section 2.

(B) Purchased Inventories

As of January 11, 2012 (and for Chemicals (majors) and Small Chemicals, as of January 31, 2012), the total amount of all the Vendor's inventory (raw material, work in progress and finished goods inventory) (the "Purchased Inventories") is three million fifty six thousand and eleven dollars (\$3,056,011) (the "Offer Date Inventory Value") in Schedule 2.9(B) — Section I.

The portion of the Purchase Price attributed to the Purchased Inventories is nine hundred forty six thousand five hundred and eighty six dollars (\$946,586) and is calculated as described in Schedule 2.9(B) — Section 2.

(C) BASF Receivables

Withdrawn

(D) Other Purchased Assets

The Purchaser is ready to pay the Vendor the amount of three hundred thousand dollars (\$300,000) for all the other Purchased Assets.

(E) Excess rebates to customers

The Purchase Price shall be reduced by the total amount of rebates earned by the Vendor's customers for the calendar year 2011 and not already applied to the outstanding invoices for each said customer at the Closing Time. As of January 27, 2012, the excess rebates to customers total thirty four thousand five hundred and eighty seven dollars (\$34,587) as calculated in Schedule 2.9(E) and shall be adjusted as at the Closing Date using the same parameters.

Schedule 1.1(hh)
Purchased Assets

1. All assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated; including without limitation the following:
 - 1.1. The Purchased Receivables;
 - 1.2. The Purchased Inventories;
 - 1.3. All goods other than goods listed in section 1.2 hereinabove that are held for sale, lease or rental (whether such goods are saleable, obsolete or damaged) in relation to the Business carried on by the Vendor including, materials and supplies;
 - 1.4. The Contracts;
 - 1.5. The Customer Contracts;
 - 1.6. The Equipment;
 - 1.7. The Vendor's Intellectual Property;
 - 1.8. All customer lists and lists of prospective customers and marketing and sales materials and databases not already included in the Vendor's Intellectual Property;
 - 1.9. All corporate names used by the Vendor;
 - 1.10. All rights, title and interest in orders on hand and other contractual arrangements with the customers to the extent that they can be assigned and that the Purchaser wishes to avail itself thereof;
 - 1.11. All the benefit of all unfulfilled orders received by and in favour of the Vendor;
 - 1.12. All other tangible and intangible assets and property used in connection with the Business;
 - 1.13. The exclusive right of the Purchaser to represent itself as carrying on such business in continuation of and in succession to the Vendor;
 - 1.14. All Books and Records;
 - 1.15. All plans, sketches and other documents related to (i) the operations of the Business and (ii) the customers of the Vendor;
 - 1.16. all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled to but excluding the Excluded Assets;

- 1.17. All R & D receivables, income tax receivables, tax refunds, deposit and deposit letters;
- 1.18. All the prepaid amounts related to:
 - 1.18.1. Insurance - Property and Liability
 - 1.18.2. Insurance — 2002 Ford
 - 1.18.3. Coface (receivables)
 - 1.18.4. Directors and Officers liability
 - 1.18.5. All the taxes (municipal, business and school) for all the Leased Premises
 - 1.18.6. CN non freight — tracts
 - 1.18.7. Canadiens hockey tickets
 - 1.18.8. Microsoft (Navision Licence)
- 1.19. The season tickets from Club de Hockey Canadien for the seats 104-J, #13 and #14 together with all the rights attached to said season tickets and any renewal thereof;
- 1.20. All the Equipment Operating Leases that the Purchaser wishes to avail itself thereof and not specifically an Excluded Assets as per Schedule 2.2 attached to this Agreement; and
- 1.21. The assets described in Schedule 5.1(o) of this Agreement.

Schedule 2.2
Excluded Assets

1. The Purchaser acknowledges and agrees that the following assets shall be considered excluded of the Transaction:
 - 1.1. The accounts payable, except as otherwise provided in this Agreement;
 - 1.2. The tax losses, except as otherwise provided in this Agreement;
 - 1.3. The cash on hand or on deposit with banks or other depositaries;
 - 1.4. The debts due to the Vendor from any shareholder, director, officer or employee of the Vendor or any other person who does not deal at arm's length with the Vendor;
 - 1.5. The following Equipment Operating Leases:
 - 1.5.1. Ryder - Lease No. 332467 - 1FUJA6CK97LY49529
 - 1.5.2. Ryder - Lease No. 332468 - 1FUJA6CK57LY49530
 - 1.5.3. Ryder - Lease No. 332469 - 1FUJA6CK77LY49531
 - 1.5.4. Ryder - Lease No. 329316 - 1FUJA6CK37LY49526
 - 1.5.5. Ryder - Lease No. 329317 - 1FUJA6CK57LY49527
 - 1.5.6. Ryder - Lease No. 329318 - 1FUJA6CK77LY49528
 - 1.5.7. Ryder - Lease No. 336256 - 1HTSCAAMXXH227668
 - 1.5.8. Ryder - Lease No. 336257 - 1FUJA6CK97LY61325
 - 1.5.9. Ryder - Lease No. 336256 - 1FUJA6CK77LY61324
 - 1.5.10. Ryder - Lease No. 325581 - 1FUJA6CK87LY49523
 - 1.5.11. Ryder - Lease No. 325582 - 1FUJA6CKX7LY49524
 - 1.5.12. Ryder - Lease No. 324854 - 1FUJA6CK47LY49521
 - 1.5.13. Ryder - Lease No. 324855 - 1FUJA6CK67LY49522
 - 1.5.14. Toshiba - Lease No. 344371-205533 — Main photocopieur
 - 1.5.15. Toshiba - Lease No. 344371-205455 - Plant & Sales Photocopier
 - 1.6. The shares issued and outstanding of the capital of "VALLE FOAM INDUSTRIES (1995) INC." registered in the name of the Purchaser; and
 - 1.7. The shares issued and outstanding of the capital of "A-Z SPONGE & FOAM PRODUCTS LTD." registered in the name of the Purchaser.

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

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD. 4362063
CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding Commenced at Toronto

**FACTUM OF THE MOVING PERSON
DOMFOAM INC.**

**FRED TAYAR & ASSOCIATES
Professional Corporation**

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