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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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.

RESPONDING FACTUM OF DOMFOAM INC.

(ON APPLICANTS' MOTION TO ADDUCE EVIDENCE)

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TO: THE SERVICE LIST

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FACTUM OF THE RESPONDING PERSON DOMFOAM INC.

PART I - OVERVIEW

1. The moving party seeks leave to examine two witnesses, after having completed its cross-examinations. It cannot meet any element of the four-part test for such an order.

PART II – THE FACTS

2. On March 8, 2012, the applicant Domfoam International Inc. (now known as 4362063 Canada Limited) (the "**Vendor**") and 4037057 Canada Inc. (the "**Purchaser**") executed an agreement of purchase and sale respecting all of the Vendor's assets, save

certain specified minor exceptions (the "**Final APA**").[1] The Purchaser later assigned the Final APA to Domfoam.[2]

3. When the Final APA was executed, 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**").[3] Except for certain "BASF Receivables", the Purchaser bought the Vendor's rights in that Class Action.[4]

4. The balance of the facts relevant to the primary motion before this Court (the "**Primary Motion**") are set out in Domfoam's factum on that motion, dated November 26, 2018. The object of the Primary Motion is to have an order of this Court (the "**Order**") set aside on the basis that it was made without notice to Domfoam, and without the necessary disclosure of facts to the Court, and that it directs the distribution of funds for the benefit of the Vendor, which funds are fruits of the US Class Action and belong to Domfoam pursuant to the Final APA.

5. Below are the facts relevant to the motion by the Vendor (the "**Motion**") for leave under rule 39.03 to conduct examinations after the completion of cross-examinations respecting the Primary Motion.

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1 Affidavit of Jacques Vincent sworn September 13, 2018 (the "**Vincent Affidavit**"), Motion Record, (Primary Motion), Volume I, Tab 2, page 10, paragraphs 19 and 24, and Exhibit "C"
2 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 11, paragraph 26 and Exhibit "F", page 391
3 Affidavit of Tony Vallecoccia sworn October 18, 2018 (the "**Vallecoccia Affidavit**"), Responding Motion Record, (Primary Motion), Tab 1, pages 3-4, paragraph 9 and Exhibit "B", pages 18 and 19
4 Vincent Affidavit, Motion Record, Volume I, Tab 2, page 12, paragraphs 31, 33 and 34 and Exhibits "A"-

The Court Ordered Schedule

6. This Motion is the latest of the Vendor's attempts to delay the hearing of the Primary Motion.

7. On August 27, 2018, Domfoam and the Vendor appeared before Justice Hainey of this Court respecting the Primary Motion. His Honour ordered that the parties comply with the following schedule:

- Domfoam (moving party) record – September 14th, 2018
- Vendor (responding party) record – October 5th
- Reply materials – October 15th
- Examinations to be completed by November 9th[5]

8. The parties then obtained a November 29th return date before Justice Wilton-Siegel, the judge who made the Order. His Honour advised the parties that his availability to hear the Primary Motion was extremely limited.

9. Domfoam delivered its two-volume motion record on September 14th, in compliance with the schedule; the Vendor was twelve days late in serving its responding record. Domfoam sought to complete its cross-examination of the Vendor's affiant by November 9th, the deadline set in Justice Hainey's schedule; the Vendor offered to produce its affiant only on November 16th. The Vendor did not serve its notice of examination respecting

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"C"

5 Responding Record of Domfoam Inc. (on Applicants' Motion to Adduce Evidence) at Tab 1

Domfoam's affiant until November 15th, and did not perform that cross-examination until November 20th.

The Vendor Needs to Cooper Up its Case

10. In paragraph 22 of its notice of motion, the Vendor lists nine purportedly "key questions" that must be answered on the Primary Motion. The purpose of the proposed further examinations is to obtain answers to these questions.[6] The examinations are said to be "of critical importance" because the evidence the Vendor hopes to elicit "may significantly improve [the Vendor's] ability to defend [Domfoam's] motion."[7]

11. The nine questions relate to four "issues":

1. the meaning of the term "BASF Receivables" in the Final APA, (paragraph 22(b) and (f));

2. the meaning of the term "[a]ll other Purchased Assets" in the Final APA (paragraph 22 (g));

3. the Purchaser's knowledge of the US Class Action (22 (a), (c), (e), and (h)); and

4. when the Purchaser learned that the Vendor intended to take the Purchaser's asset (the fruits of a settlement in the US Class Action which occurred years after the Final APA was executed) (paragraphs 22(d) and (i)).

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6 Notice of Motion (Re: Leave to Examine Witnesses and Adjournment), ("**Notice of Motion**"), at paragraphs 24-25

12. Each of these "issues" was indisputably known to the Vendor before it cross-examined Domfoam's affiant, Jacques Vincent ("**Vincent**").

(a) The four matters were explicitly addressed in Vincent's affidavits sworn September 14, 2018 (the "**Vincent Affidavit**")[8] and November 12, 2018 (the "**Second Vincent Affidavit**").[9] Stated differently, the "key questions" had been answered *before* Vincent's examination. The Vendor simply does not like the answers.

i. Concerning the meaning of "BASF Receivables" (questions (22(b) and (f))): see paragraphs 30-32 of the Vincent Affidavit.

ii. Concerning "what the purchaser understood it was purchasing" (question 22(g)): see paragraphs 21-22 and 34 in the Vincent Affidavit and paragraph 3(a) in the Second Vincent Affidavit.

iii. Concerning the Purchaser's knowledge of the US Class Action (questions (22 (a), (c), (e), and (h)): see paragraphs 3-6 and 29-35 in the Vincent Affidavit.

iv. Concerning when Domfoam discovered that one of the assets it had purchased "was not going to be provided to it" (question (22(d) and (i)): see paragraphs 35-41 of the Vincent Affidavit and 3(c) of the Second Vincent Affidavit.

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7 Notice of Motion at paragraph 25
8 Motion Record, (Primary Motion), Volume I, Tab 2
9 Supplementary Motion Record (Primary Motion)

(b) The Vendor's affiant, Tony Vallecoccia ("**Vallecoccia**") made explicit or implicit statements concerning each of the four "issues"[10] in his affidavit sworn October 16, 2018 (the "**Vallecoccia Affidavit**").

(c) One of the witnesses the Vendor now seeks leave to examine is John Chalmers Howard, ("**Howard**"). Vallecoccia devoted a paragraph of his affidavit to discussion of the knowledge of the US Class Action and the Vendor's conduct that Howard "would" have.[11] Further, Exhibit "C" to the Vallecoccia Affidavit was a 2008 "Services Agreement" (the "**Agreement**") between Refund Recovery Services LLC ("**Refund**") and the applicants, the Vendor among them. The Agreement was related to the US Class Action. The Agreement was executed on behalf of the applicants by Howard, who identified himself as the general manager of the applicants. (Howard is now a Domfoam employee.) Howard's execution of the Agreement was described in another paragraph of the Vallecoccia Affidavit.[12]

(d) The second proposed witness is Terry Pomerantz ("**Pomerantz**") of the Purchaser and Domfoam. Howard's communications with Pomerantz concerning the US Class Action are mentioned by Vincent in paragraph 35 of his Affidavit.

13. The Vendor therefore knew that Howard and Pomerantz possessed possibly relevant knowledge at the latest by the time it served the Vallecoccia Affidavit, a month in

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10 Concerning the BASF Receivables, see paragraphs 5-8; concerning what the Purchaser purchased, see paragraphs 5-8, 20, and 22;concerning what the Purchaser knew about the US Class Action, see paragraphs 5-8 and 17-23; concerning when Domfoam discovered that the Vendor intended to keep the new settlement funds, see paragraphs 17-23

11 See paragraph 23

12 See paragraph 11

advance of Vincent's examination. (Domfoam regards the knowledge of these individuals as irrelevant to the Primary Motion.)

Vincent Supplements the Answers

14. The Vendor omits from its account the fact that during his cross-examination Vincent was asked and agreed by way of undertaking to ask questions of Pomerantz, and that the answers to these questions provided the following information, which obviates the stated need for an examination of Pomerantz.

a) The Purchaser had not done an investigation of the US Class Action in late 2011 or early 2012.

b) Pomerantz did not know that there was one US lawsuit with one court file number.

c) Pomerantz had first seen Exhibit "B" to the Vallecoccia Affidavit (information concerning the US Class Action available on the internet) in the Vallecoccia Affidavit.

d) Pomerantz had first seen Exhibit "D" to the Vallecoccia Affidavit (a Kansas Court order concerning the distribution of funds from the settlement of the US Class Action by Bayer) in the Vallecoccia Affidavit.

e) Pomerantz had first seen Exhibit "E" to the Vallecoccia Affidavit (a Kansas Court order concerning the distribution of funds from the settlement of the US Class Action by BASF) in the Vallecoccia Affidavit.

f) Pomerantz had not (previously) been aware that the orders attached as Exhibits "D" and "E" to the Vallecoccia Affidavit had been made.

g) Howard had not told Pomerantz that he (Howard) had signed the Agreement.

h) Pomerantz had never contacted or communicated with Recovery.

i) Pomerantz is unaware of any Domfoam employee monitoring the US Class Action between 2012 and 2018, and had not asked any to do so.[13]

The Vendor's Evidence

15. The Vendor needs evidence to "improve [the Vendor's] ability to defend [Domfoam's] motion"[14] for three reasons.

16. The first is that the evidence in the record does not aid the Vendor's case. The Vendor's questions have been answered, but it does not like those answers (as above).

17. The second is that cross-examination of Vallecoccia demonstrated beyond doubt that he was completely ignorant concerning the matters relevant to the Primary Motion to which he had deposed in his Affidavit. (His cross-examination is quoted at length in Domfoam's November 26th factum.) (Remarkably, the Vendor relies heavily on Vallecoccia's Affidavit in its factum on this Motion.)

18. The third is that the Vendor proceeded upon the inexplicable assumption that it could cross-examine Vincent concerning Howard's and Pomerantz' private knowledge and

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13 Responding Record of Domfoam Inc. (on Applicants' Motion to Adduce Evidence) at Tab 2
14 Notice of Motion at paragraph 25

intent. Vincent could not, of course, testify for other individuals. The Vendor now claims to be stymied by Vincent's clearly-foreseeable inability to mind-read.[15]

19. The result is that the Vendor is currently without evidence to support an argument against Domfoam's motion.

PART III – THE ISSUES AND THE LAW

20. The issue before this Honourable Court is as follows.

1. Has the Vendor met the four-part test for the granting of leave pursuant to Rule 39.02(2)?

ISSUE ONE – RULE 39.02(2)

21. Rule 39.02(2) states:

> *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.*

22. The moving party, here the Vendor, bears the onus of establishing that leave should be granted. Granting leave is the exception, not the rule. Morawetz, R.S.J. put it this way:[16]

> ***There is a high threshold for admissibility under Rule 39.02(2).***

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15 Notice of Motion at paragraphs 15 and 23

16 *Redstone Investment Corp., Re*, 2016 ONSC 513 (Ont. S.C.J.), at paras. 9-10, emphasis added

In Shah v. LG Chem, Ltd., 2015 ONSC 776 (Ont. S.C.J.) (CanLII) at para. 23, Perell J. summarized the principles that have emerged in Rule 39.02(2) jurisprudence:

1. *Leave under Rule 39.02(2) should be granted* ***sparingly****.*

2. ***The moving party has a very high threshold to meet****.*

3. ***The rule about the delivery of subsequent affidavits should not be used as a "mechanism for correcting deficiencies in the motion materials"***

4. *The rule is designed to fairly regulate and provide closure to the evidence gathering process for motions and applications.*

23. The Divisional Court has established the following test for motions brought pursuant to this rule.[17]

1. *Is the evidence 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 to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?*

4. *Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?*

24. The Vendor cannot meet any of the four elements of this test.

(i) Is the Evidence Relevant?

25. It is not. Justice Pepall's observation is apposite here:

[…] a distinction should be made between that which is truly relevant and that which is speculative — a fishing expedition that is designed to hook the gills and pull at the innards of some respondent with a view to uncovering new grounds of complaint.[18]

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17 *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2013 ONSC 6935 (Ont. Div. Ct.)

18 *Catalyst Fund Ltd. Partnership II v IMAX Corp*, [2008] O.J. No. 873 (Sup. Ct. – Commercial List), at

26. The proposed examinations are for the stated purpose of eliciting evidence extrinsic to the construction of the Final APA, which is clear on its face and which includes an Entire Agreement Clause.

27. Concerning the evidence "needed" from Pomerantz on Domfoam's knowledge of the US Class Action and the Vendor's attempt to take Domfoam's asset, the Vendor has its answers.

28. This leaves Howard's knowledge or belief concerning the Agreement with Recovery, and by extension the US Class Action and its fruits, real or potential. Howard's testimony, if obtained, would not be relevant. There is no evidence that he was involved in the negotiation and execution of the Final APA. Vincent negotiated that agreement for the Purchaser, and he has been cross-examined.

29. The Vendor's notice of motion states that it wishes to argue that Domfoam is estopped from claiming the new proceeds of the US Class Action because it had notice, in documents served in this proceeding, that the Vendor was claiming those funds as its own. Pomerantz' knowledge of this proceeding is said to be relevant to that argument.[19] The argument is fanciful, and cannot succeed. The Court of Appeal for British Columbia has held:

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paragraph 8
19 Notice of Motion at paragraph 20

> *30 […] There is nothing in any of the cases which suggests that there is any duty to tell the other party that, in the view of the party sought to be estopped, the other party has wrongly interpreted the contract. […]*
>
> *31* ***In commercial cases where both parties are of equal bargaining strength, there is no compelling reason why the modern doctrine of estoppel […] should be extended to cases where the party sought to be estopped has failed to advise the other party that in its opinion the other party has misinterpreted the contract****.*
>
> *32 The law of contract is designed to create certainty in the market place and to accede to the argument of counsel for Erickson would be to create uncertainty where none now exists.*[20]

(ii) Does the Evidence Respond to a Matter Raised on the Cross-Examination?

30. It does not. As set out above, the Vendor knew months ago of the potential relevance (from its perspective) of Howard's and Pomerantz' testimony on the "key" issues.

31. By stating that the proposed examinations "may significantly improve [the Vendor's] ability to defend [Domfoam's] motion", the Vendor has admitted that those examinations are for the impermissible purpose of "correcting deficiencies in the motion materials"[21], and for its failure to conduct the examinations before cross-examining Vincent.

(iii) Would Granting Leave Result in Non-compensable Prejudice?

32. If the consequence of an adjournment would be that Justice Wilton-Siegel could not hear the Primary Motion, Domfoam will suffer non-compensable prejudice. Rule 37.14(4)(a) directs that a motion to set aside should be heard by the judge who made the

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20 *Cusac Industries Ltd. v. Erickson Gold Mining Corp.*, (1990) 45 B.C.L.R. (2d) 347 (C.A.) at paragraphs 30-32, emphasis added

order; this is because that judge will be best placed to determine whether the making of the order was just in the circumstances.

33. Provided that Justice Wilton-Siegel ultimately hears the Primary Motion, the Vendor can be compensated for the granting of leave and the adjournment of the Primary Motion with an award for the costs of this motion.

(iv) Did the Vendor Provide a Reasonable or Adequate Explanation for Why the Evidence was Not Included at the Outset?

34. It did not. The Vendor did not deliver new affidavit evidence in support of its motion. Instead, it relied upon the material (save the transcript of the cross-examination of their affiant, Vallecoccia, in which he denied any knowledge of the US Class Action and said that Domfoam had purchased all of the Vendor's assets) filed on the Primary Motion.

35. The only "explanation" provided is argument in the Vendor's notice of motion and factum. The argument amounts to "We were surprised to discover that Vincent could not testify to our satisfaction concerning the knowledge of other individuals". This does not meet the "very high threshold" for the granting of leave established by the jurisprudence.

> *9 I believe that the words "ought to be permitted to respond" found in rule 39.02(2) impose a burden on a party who seeks leave to show more than an absence of non-compensable prejudice to the opposite party. In my view those words import* ***a requirement for the party who seeks leave under rule 39.02(2) to provide, by way of evidence on the motion for leave, a satisfactory explanation for its failure to include the proposed additional evidence as part of its pre-cross-examination case. The court should scrutinize carefully the reasons for the omission and the evidence offered in support of that***

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21 *Redstone Investment Corp., Re*, 2016 ONSC 513 (Ont. S.C.J.), at paragraph 10

> ***explanation.*** *To approach the issue otherwise undermines the integrity of the evidentiary framework for motions and applications that is mandated by the rules.* ***Absent some reasonable explanation for the original omission, leave should be refused.***[22]

36. Further, the granting of the order sought would nullify Justice Hainey's order for the delivery of material and would require the adjournment of a motion scheduled some time ago. Such results have recently been disapproved by the Superior Court.

> *33 I accept that the material which the Plaintiff wishes to file is important to her. It is relevant to the authenticity of a loan document in an action where she is seeking to be repaid monies.*
>
> *34 It can be said the court has an interest in seeking the truth and merits of any action after hearing the relevant evidence.*
>
> *35 Conversely, the courts expect their orders to be followed. Time limits were set out for the filing of evidence.*
>
> *36 Apart from Rule 39.02, Justice McSweeney ordered that there can be no further filings without leave. This is after an endorsement two weeks earlier setting a time limit for the filing of material relating to the cross-examinations of Ms. Sandhu.*
>
> *37 On that background it seems to me that the threshold for granting leave is even higher than the threshold in regards to Rule 39.02(2).*[23]

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22 *Brock Home Improvement Products v Corcoran,* (2002) 58 O.R. (3d) 722 (Sup. Ct.) at paragraph 9, emphasis added

23 *Zaib v Sandhu*, 2018 ONSC 4671, at paragraphs 33-37

PART IV – ORDER SOUGHT

37. For these reasons, Domfoam requests an order dismissing the Vendor's motion, and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

FRED TAYAR

COLBY LINTHWAITE

OF COUNSEL FOR DOMFOAM INC.

DATE: November 28, 2018

SCHEDULE "A"

Authorities Cited

1. *Redstone Investment Corp., Re*, 2016 ONSC 513 (Ont. S.C.J.)
2. *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2013 ONSC 6935 (Ont. Div. Ct.)
3. *Catalyst Fund Ltd. Partnership II v IMAX Corp*, [2008] O.J. No. 873 (Sup. Ct. – Commercial List)
4. *Cusac Industries Ltd. v. Erickson Gold Mining Corp.*, (1990) 45 B.C.L.R. (2d) 347 (C.A.)
5. *Brock Home Improvement Products v Corcoran*, (2002) 58 O.R. (3d) 722 (Sup. Ct.)
6. *Zaib v Sandhu*, 2018 ONSC 4671

SCHEDULE "B"

Statutes and Regulations Cited

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

Rule 39.02:

(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.

[...]

***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. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 (2).

[...]

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

(a) to the judge who made it, at any place; or

(b) to any other judge, at a place determined in accordance with rule 37.03 (place of hearing of motions).

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Proceeding Commenced at Toronto

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