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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(the "**Applicants**")

COMPENDIUM OF THE RESPONDING & CROSS-MOVING PARTIES
(Re: Motion and Cross-Motion returnable October 7, 2020)

Date: October 1, 2020

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

David T. Ullmann LSO #42357I
Tel: (416) 596-4289
Fax: (416) 594-2437
E: DUllmann@blaney.com

Varoujan Arman LSO #60025K
Tel: (416) 596-2884
Fax: (416) 593-2960
E: VArman@blaney.com

Lawyers for the Applicants

TO: SERVICE LIST

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

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(the "**Applicants**")

SERVICE LIST
(as at August 11, 2020)

TO:	**DELOITTE RESTRUCTURING INC.** 181 Bay Street, Suite 1400 Toronto ON M5J 2V1 **Catherine Hristow** 416-601-6415 christow@deloitte.ca **Paul Casey** paucasey@deloitte.ca The Monitor
AND TO:	**THORNTON GROUT FINNIGAN LLP** TD West Tower, TD Centre 100 Wellington Street West, Suite 3200 Toronto ON M5K 1K7 **Grant B. Moffat** 416-304-0599 416-304-1313 fax gmoffat@tgf.ca Lawyers for the Monitor, Deloitte Restructuring Inc.

AND TO:	**BLAKES, CASSELS & GRAYDON LLP** Commerce Court West 199 Bay Street Suite 4000 Toronto, ON, M5L 1A9 **Linc Rogers** 416-863-4168 416-863-2653 fax Linc.rogers@blakes.com Court Appointed Chief Restructuring Officer of the Applicants
AND TO:	**BLANEY MCMURTRY LLP** 2 Queen Street East, Suite 1500 Toronto, Ontario M5C 3G5 **David T. Ullmann** 416-596-4289 416-594-2437 fax dullmann@blaney.com **Varoujan Arman** 416-596-2884 416-593-2960fax varman@blaney.com Lawyers for the Applicants
AND TO:	**TANNER & GUINEY** 130 Adelaide Street West Suite 3425 Toronto ON M5H 3P5 **Robert G. Tanner** 416-862-7745 416-862-7874 fax rgtanner@tannerguiney.com Lawyers for Tony Vallecoccia

AND TO:	**ATTORNEY GENERAL OF CANADA** c/o Department of Justice Ontario Regional Office The Exchange Tower, Box 36 130 King Street West Suite 3400 Toronto ON M5X 1K6 **Jacqueline Dais-Visca** 416-952-6010 416-973-0809 fax jacqueline.dais-visca@justice.gc.ca
AND TO:	**KRONIS, ROTSZTAIN, MARGLES, CAPPEL LLP** 25 Sheppard Ave. West Suite 1100 Toronto, ON M2N 6S6 **Mark Lieberman** 416-225-8750 ext 252 416-225-2593 fax mlieberman@krmc-law.com Lawyers for Bayer Inc.
AND TO:	**BRANCH MACMASTER LLP** 1410 – 777 Hornby Street Vancouver BC V7G 3E2 **Luciana P. Brasil** 604-654-2999 604-684-3429 fax lbrasil@branmac.com Lawyers for "Hi! Neighbor" Floor Covering Co. Limited, Majestic Mattress Mfg. Ltd., Trillium Project Management Ltd., Option Consummateurs and Karine Robillard

AND TO:	**MINISTRY OF FINANCE (ONTARIO)** **LEGAL SERVICES BRANCH** 33 King Street West 6th floor Oshawa ON L1H 8H5 **Kevin J. O'Hara** 905-433-6934 905-436-4510 fax kevin.ohara@fin.gov.on.ca
AND TO:	**KAMINSKY & COMPANY** Associated Lawyers 7525 King George Boulevard Suite 220 Surrey BC V3W 5A8 **Hargo Mundi** 604-591-7877 ext. 114 604-591-1978 fax hsm@kaminskyco.com Lawyers for 0932916 BC Ltd.
AND TO:	**REVENU QUEBEC** 3800, rue de Marly Secteur 5-1-8 Quebec G1X 4A5 **Jacques Duperron** 866-374-7286 fax jacques.duperron@revenuquebec.ca
AND TO:	**REVENU QUEBEC** Complexe Desjardins Secteur D231L0, C. P.3000 Montreal QC H5B 1A4 **Yvon Julien** yvon.julien@revenuquebec.ca **Jacques Duperro** Jacques.duperron@revenuquebec.ca

AND TO:	**REVENU QUEBEC** Complexe Desjardins, secteur D221LC C. P.5000, succursale Desjardins Montreal QC H5B 1A7 **Normand Berube** 514-287-6161 514-873-8992 fax normand.berube@revenuquebec.ca
AND TO:	**SUTTS STROSBERG LLP** 600 Westcomt Place 215 Goyeau Street Windsor ON N9A 6V4 **Harvey T. Strosberg** harvey@strosbergco.com **Heather Rumble Peterson** hpeterson@strosbergco.com 519-561-6248 519-561-6203 fax Lawyers for Ontario Class Plaintiffs
AND TO:	**CAMP FIORANTE MATTHEWS MOGERMAN** #400-856 Homer Street Vancouver BC V6B 2W5 **J.J.Camp, Q.C.** jjcamp@cfmlawyers.ca **Reider Mogerman** rmogerman@cfmlawyers.ca **Sharon L. Wong** swong@cfmlawyers.ca 604-689-7555 604-689-7554 fax Lawyers for B.C. Class Plaintiffs

AND TO:	**BERKOW YOUD LEV-FARRELL DAS LLP** 141 Adelaide Street West Suite 400 Toronto ON M5H 3L5 **Jack Berkow** jberkow@byldlaw.com **Scott Crocco** scrocco@byldlaw.com 416-364-4900 416-364-3865 fax Lawyers for Remaining Individual Settling Parties
AND TO:	**BLACK & ASSOCIATES** 2175 King Road King City ON L7B 1G3 **Laith Hahn** 905-893-8050 905-893-8025 fax lhahn@blackandassociates.ca Lawyers for Quality & Company Inc.
AND TO:	**REVENU QUEBEC** Complexe Desjardins, secteur D221LC C.P. 5000, succursale Place-Desjardins Montreal QC H5B 1A7 **Jean Duval** 514-287-8821 514-285-5348 fax jean.duval@revenuquebec.ca

AND TO:	**MINISTRY OF JUSTICE** Legal Services Branch 1675 Douglas Street Suite 400 Victoria BC V8W 9J7 **David J. Hatter** **c/o Rikki Schierer** 250-387-1274 250-387-0700 fax Rikki.Schierer@gov.bc.ca Lawyers for BC Ministry of Finance
AND TO:	**CHUBB INSURANCE COMPANY OF CANADA** 1250, boul. René-Lévesque Ouest, bureau 2700 Montréal QC H3B 4W8 **Catherine Rayle-Doiron** 514-938-2300, 5325 514-938-2288 fax crayledoiron@chubb.com
AND TO:	**FRED TAYAR & ASSOCIATES INC.** Professional Corporation 65 Queen St. West Suite 1200 Toronto, Ontario M5H 2M5 **Fred Tayar** 416-363-1800 416-363-3356 fax fred@fredtayar.com Lawyers for Domfoam Inc.

AND TO:	**KAMACHI LAW GROUP** 15240 56 Ave., Suite 205 Surrey, British Columbia V3S 5K7 **Dave Kamachi** 604-813-6493 604-909-2683 fax dmk@kamachilaw.com Lawyers for 0932916 BC Ltd.
AND TO:	**DALE McNEILL** 245 Wheellihan Way Campbellville, ON, L0P 1B0 (By Courier)

E-MAIL SERVICE LIST

christow@deloitte.ca; paucasey@deloitte.ca gmoffat@tgf.ca; Linc.rogers@blakes.com ; dullmann@blaney.com; varman@blaney.com; rgtanner@tannerguiney.com; jacqueline.dais-visca@justice.gc.ca; mlieberman@krmc-law.com; lbrasil@branmac.com; kevin.ohara@fin.gov.on.ca; hsm@kaminskyco.com; Jacques.duperron@revenuquebec.ca; yvon.julien@revenuquebec.ca; Normand.Berube@revenuquebec.ca; Harvey@strosbergco.com; hpeterson@strosbergco.com; jjcamp@cfmlawyers.ca; rmogerman@cfmlawyers.ca; swong@cfmlawyers.ca; jberkow@byldlaw.com; scrocco@byldlaw.com; lhahn@blackandassociates.ca; jean.duval@revenuquebec.ca; Rikki.Schierer@gov.bc.ca; crayledoiron@chubb.com; fred@fredtayar.com; dmk@kamachilaw.com

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TAB 1

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Applicants

AFFIDAVIT OF MINDY TAYAR
(Affirmed July 27, 2020)

I, MINDY TAYAR, of the City of Toronto, in the Province of Ontario, solicitor,

AFFIRM AND SAY AS FOLLOWS:

1. I am a lawyer with the law firm of Fred Tayar & Associates Professional Corporation, the lawyers for Domfoam Inc. ("**Domfoam**"), and as such have knowledge of the matters to which I hereinafter depose. Where I do not have such knowledge, I have identified the source of my information and verily believe that information to be true.

2. For reasons articulated in the affidavits of Jacques Vincent sworn September 13, 2018 and November 12, 2018 (which form part of the within motion record), and in Domfoam's notice of motion, in June 2018 Domfoam put 4362063 Canada Limited (the "**Vendor**") on notice of its intent to bring a motion (the

"**Domfoam Motion**") to set aside an order made by Justice Wilton-Siegel on May 29, 2018 (the "**2018 Order**"), and for other related relief.

3. Lawyers for Domfoam and the Vendor appeared before Justice Wilton-Siegel on July 24, 2018 for the purpose of scheduling the Domfoam Motion. A true copy of His Honour's endorsement is attached as **Exhibit "A"**.

4. On August 27, 2018, lawyers for Domfoam and the Vendor appeared at a Chambers appointment before Justice Hainey to set a schedule for the delivery of material in advance of the hearing of the Domfoam Motion. A true copy of Justice Hainey's endorsement of August 27, 2018 is attached as **Exhibit "B"**. A true copy of Domfoam's notice of motion respecting the Domfoam Motion is attached as **Exhibit "C"**.

5. Justice Hainey directed the Vendor to serve its responding material by October 5th. The Vendor did not do so. On October 10, 2018, Fred Tayar, ("**Tayar**") lawyer for Domfoam, wrote to David Ullmann ("**Ullmann**"), lawyer for the Vendor, to request dates for an attendance before Justice Hainey. A true copy of Tayar's letter is attached hereto as **Exhibit "D".**

6. Ultimately, the Vendor served its responding record on October 16, 2018. A true copy of the cover page of the Vendor's responding record is attached hereto as **Exhibit "E"**.

7. I have been advised by Tayar that after the cross-examinations on the motion material had been completed, and Domfoam's factum served, the Vendor brought a motion for leave to conduct Rule 39.02(2) examinations of two witnesses. The Vendor did so two days prior to the November 29, 2018 return date for Domfoam's Motion, and one day before serving its factum in response to Domfoam's Motion. A true copy of the Vendor's notice of motion dated November 27, 2018 is attached hereto as **Exhibit "F"**. A true copy of the Vendor's factum in response to Domfoam's Motion is attached hereto as **Exhibit "G"**.

8. Justice Wilton-Siegel heard the Vendor's motion on November 29, 2018, and decided it in Reasons issued February 13, 2019. The hearing of the Domfoam Motion was adjourned. Justice Wilton-Siegal allowed the Vendor's motion in part, and granted the Vendor leave to examine Domfoam's president, Terry Pomerantz. A true copy of Wilton-Siegel J.'s Reasons for Decision are attached as **Exhibit "H"**.

9. As may be seen from the cover of the relevant transcript, the Vendor conducted the examination of Mr. Pomerantz on April 22, 2019. A true copy of the cover of this document is attached hereto as **Exhibit "I"**.

10. On September 10, 2019, Ullmann wrote Justice Conway to assert that "in our view, the motion brought by Domfoam Inc. is a significant claim and as such is

more properly the subject of a trial with discoveries, mandatory production obligations, and mediation." A true copy of Ullmann's letter is attached hereto as **Exhibit "J"**.

11. On September 11, 2019, Ullmann, Tayar and Grant Moffat, counsel for the Monitor, appeared before Justice Conway at a Chambers appointment. During that Chambers appointment, Ullmann, on behalf of the Vendor, consented to the setting aside of the 2018 Order for the distribution of approximately $4 million to the Vendor's creditors. A true copy of Justice Conway's endorsement is attached hereto as **Exhibit "K"**.

12. Domfoam seeks costs of its Motion, in the amount of $54,888.73 on a partial indemnity basis. Attached hereto as **Exhibit "L"** is Domfoam's Costs Outline.

13. On October 7, 2019, Justice Conway conducted a further Chambers appointment in this matter. I have been advised by Tayar that during the appointment, Ullmann again requested that the Vendor and Domfoam exchange affidavits of documents, attend mediation, and that there be a trial of the issue of whether the Vendor is entitled to the funds which are the subject matter of the Domfoam Motion. I had been advised by Justice Conway's endorsement that she ordered that the parties were to exchange affidavits of documents within 45 days, and that the parties were to attend a mediation. A true copy of Madam Justice Conway's endorsement dated October 7, 2019 is attached as **Exhibit "M"**.

14. On November 1, 2019, Tayar wrote Ullmann to advise that Domfoam "has recently received a cheque, in the amount of $1,399,002.24, from the administrator of the settlement of the Canadian Polyether Polyol Price Fixing Settlement". Tayar also provided Ullmann with a copy of the cheque. A true copy of Tayar's letter is attached hereto as **Exhibit "N"**, and a true copy of his email to Ullmann attaching a copy of the cheque is attached hereto as **Exhibit "O"**.

15. Ullmann replied to Tayar to say that the Vendor "likely will assert an interest in these funds" and that the Vendor appreciated and respected Tayar's decision to bring this to the Vendor's attention. A true copy of Ullmann's November 1, 2019 email to Tayar is attached hereto as **Exhibit "P"**.

16. Domfoam served its affidavit of documents on November 27, 2019. Attached as **Exhibit "Q"** is a true copy of Domfoam's Affidavit of Documents.

17. The Vendor did not serve an affidavit of documents within the 45-day period ordered by Justice Conway. On January 15, 2020, Colby Linthwaite ("**Linthwaite**") of FTA wrote Ullmann to remind him that his affidavit of documents was significantly overdue, and to request a range of dates for a Chambers appointment to speak to the matter. A true copy of Linthwaite's email to Ullmann is attached as **Exhibit "R"**.

18. On January 20, 2020, Tayar wrote Ullmann to say that Ullmann's client was in default of Justice Conway's order, and asked him for dates for a 9:30 appointment with Justice Conway. Ullmann replied the same day to apologize and said that he would "*have something for you this afternoon which will likely address your issue*". A true copy of Tayar and Ullmann's email exchange is attached as **Exhibit "S"**.

19. Later on January 20, 2020, Ullmann sent Tayar what he (Ullmann) referred to in his covering letter as a "*draft affidavit of documents*". Ullmann stated that the "*affidavit may change when we are able to get complete instructions*". A true copy of Ullmann's letter to Tayar of January 20, 2020 is attached as **Exhibit "T"**. A true copy of the "draft affidavit of documents" is attached as **Exhibit "U"**.

20. The Vendor continues to be in default of Justice Conway's October 7, 2019 order, in that it has not served an affidavit of documents.

Security for Costs

21. For the following reasons, I believe that the Vendor has insufficient assets in Ontario to pay Domfoam's costs of the adjudication of the entitlement to the Funds.

22. In the Twenty-First Report of the Monitor dated October 18, 2019, the Monitor reports that the Vendor obtained protection from its creditors in 2012

(paragraph 1), that "all of the assets utilized by the Companies [including the Vendor] have been sold" and that certain of the proceeds of those sales have been distributed to creditors (at paragraph 4), and that the admitted claims against the Vendor exceed $27 million (at paragraph 22). The Monitor also states that due to Domfoam's claim to the Funds (and a similar claim by the purchaser of the applicant A-Z Foam), the Monitor has "suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor...[and] in the meantime, all such fees will be paid from the Valle Foam estate..." (at paragraph 59). These statements cause me to believe that the only asset in the Vendor's estate is the latter's disputed claim to the Funds at issue in this litigation. True copies of the Twenty-First and Twenty-Second Reports of the Monitor are attached hereto as **Exhibits "V" and "W"**, respectively.

23. I have estimated Domfoam's costs of this proceeding to the end of a trial at $213,132.90, as set out in the projected Bill of Costs attached hereto as **Exhibit "X"**. Included in this projected Bill of Costs are the costs sought above (Exhibit L). If costs for the motion consented-to are granted, $54,883.73 must be subtracted from the amount sought to be paid into Court as security for costs.

AFFIRMED before me at the City of Toronto, in the Province of Ontario, this 27th day of July 2020

A Commissioner, etc.
Fred Tayar

MINDY TAYAR

TAB 2

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(the "**Applicants**")

AFFIDAVIT OF TONY VALLECOCCIA
(Sworn October 16, 2018)

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

1. I am the President and Chief Executive Officer of 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc., and of 4362063 Canada Ltd., formerly known as Domfoam International Inc. ("**436**"), and a director of Valle Foam, Domfoam and A-Z Sponge & Foam Products Ltd. (collectively, the "**Applicants**"), and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.

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

3. I swear this affidavit in response to a motion brought by Domfoam Inc., the entity that purchased 436 ("**Domfoam**" or the "**Purchaser**"), for an Order, *inter alia*, setting aside the Order of Justice Wilton-Siegel, dated May 29, 2018, and directing the Applicants to pay the

proceeds recovered from Dow (as defined below) in the amount of approximately $3.6 million USD to Domfoam.

APA with Domfoam

4. I have reviewed the Affidavit of Jacques Vincent, sworn September 13, 2018 ("**Vincent Affidavit**"), and the versions of the Asset Purchase Agreement ("**APA**") between 4037057 Canada Inc. and 436 attached as Exhibit A, B and C. I can confirm that the APA attached as Exhibit C to the Vincent Affidavit is the final form of agreement between the parties. It was approved by Justice Brown on March 16, 2012. A copy of the Sale Approval and Vesting Order is attached hereto and marked as **Exhibit "A"**.

5. The APAs refer to something called the "BASF Receivables." I am reminded by counsel for the Applicants, David Ullmann, 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 from the US Class Action (as defined below).

6. In the APA dated December 22, 2011 ("**APA #1**") at Exhibit "A" to the Vincent Affidavit the purchase price included a value for the BASF Receivables (as defined in the APA). The total purchase price of $3,554,880 was comprised of the following components in APA #1:

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

7. By contrast, the BASF Receivables were "withdrawn" from the APA dated February 22, 2012 ("**APA #2**") found at Exhibit "B" to the Vincent Affidavit and the total purchase price was adjusted accordingly. The total purchase price in APA #2 was $3,562,975. I note from looking at APA #2 that the slight increase in price (despite the removal of the BASF Receivables) occurred as a result of the large increase in the value of Purchased Receivables from $5.1 million in APA #1 to $5.9 million in APA #2. The purchase price was calculated as follows:

	Item	**Value ($)**
(A)	Purchased Receivables	2,450,976
(B)	Purchased Inventories	946,586
(C)	*Withdrawn*	
(D)	All other Purchased Assets	200,000
(E)	Excess rebates to customers	(34,587)

8. The BASF Receivables continued to remain "withdrawn" in the final APA, dated March 8, 2012 and attached as Exhibit "C" to the Vincent Affidavit. The purchase price was adjusted to $3,662,975 due to a $100,000 increase in the value of the Purchased Assets.

US Urethane Antitrust Litigation

9. In 2004, a class action lawsuit was commenced alleging that certain companies unlawfully fixed the prices of polyether polyol products sold in the United States between January 1, 1999 and December 31, 2004. This class action was commenced in the United States District Court for the District of Kansas ("**US Court**") under the case name "In Re: Urethane Antitrust Litigation" ("**US Class Action**"). The defendants were Bayer AG, Bayer Corporation,

Bayer MaterialScience LLC (collectively, "**Bayer**"), BASF SE, BASF Corporation (collectively, "**BASF**"), the Dow Chemical Company ("**Dow**"), Huntsman International LLC ("**Huntsman**") and Lyondell Chemical Company (collectively, the "**Defendants**"). As purchasers of polyether polyol products in the relevant time period, the Applicants were class members in the US Class Action. An overview of the US Class Action from the "Urethane Antitrust Litigation" website is attached here and marked as **Exhibit "B"**.

10. All claims against the Defendants were being pursued under the umbrella of the US Class Action. Put differently, there was one class action that dealt with the price fixing claims against all of the Defendants in one court file.

11. In 2008, the Applicants retained the services of Refund Recovery Services, LLC ("**RRS**") as agent to assist the Applicants with filing a claim in the US Class Action in order to participate in any recoveries to the class from the Defendants. Attached hereto and marked as **Exhibit "C"** is a copy of the Services Agreement between the Applicants and RRS. John Howard executed the agreement on behalf of the Applicants.

12. The plaintiffs in the US Class Action reached negotiated settlements of the claims against Bayer, BASF, Huntsman and Lyondell, which were approved by the US Court.

13. As reported in my affidavit attached as Exhibit "G", a settlement in the US Class Action was reached with Bayer in 2008. I am advised by my counsel, Alexandra Teodorescu, that the final distribution of the Bayer settlement funds was approved by the US Court on August 25, 2011. Attached hereto and marked as **Exhibit "D"** is a copy of the Order Approving Final Distribution of the Bayer Settlement Fund.

14. A subsequent settlement was reached with BASF and Huntsman, which was approved by the US Court on December 12, 2011. A copy of the Order Approving Class Plaintiffs' Plan of Allocation and Distribution for the Huntsman and BASF Settlement Funds is attached hereto and marked as **Exhibit "E"**.

15. The proceeds from the BASF and Huntsman settlement were paid out to the class members, including the Applicants, in three tranches.

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

Notice Provided to Domfoam

17. Counsel for the Purchaser, Jacques Vincent, was provided with notice of the motion to approve the APA heard by Justice Brown on March 16, 2012. A copy of the affidavit I swore in support of that motion is attached hereto and marked as **Exhibit "F"**.

18. I am advised by my lawyer, Alexandra Teodorescu, that she has reviewed the Service Lists for the motions in this proceeding on the Monitor's website. I am further advised by Ms. Teodorescu that, based on the Service Lists, Mr. Vincent was served with all motions in this matter until the fall of 2015.

19. Between March 2012 and October 2015, I made numerous references to the anticipated receivables payable to the Applicants from the US Class Action and, in particular, the payments coming from the settlement with Dow. I also provided sworn evidence on more than one occasion that I believed that these receivables were assets of the Applicants and not the Purchaser.

20. The following evidence is set out in my affidavits:

Affidavit of Tony Vallecoccia, Date Sworn	**Sworn Evidence**	**Exhibit No.**
June 12, 2012	"There is also a further substantial amount due from a litigation settlement entered into by each of Domfoam and Valle Foam prior to the CCAA process in connection with a class action with BASF where Domfoam and Valle Foam were part of a class of plaintiffs. This receivable was not sold to Domfoam Newco and remains an asset of Domfoam." [emphasis added]	G
February 22, 2013	"...I am advised by David Ullmann that one of the defendants, The Dow Chemical Company in the US Polyol litigation has refused to settle. A trial is proceeding with that defendant. It is anticipated that there could either by a substantial settlement, or a substantial award made in respect of that remaining defendant, which could result in further funds being payable to the Applicants." ... "The extension sought herein will provide the Applicants with the time necessary to...attend to the collection of the further instalments of the US Polyol settlement funds..."	H
July 11, 2013	"I am advised by David Ullmann that there has now been a trial in respect of one of the defendants, The Dow Chemical Company ("**Dow**"), in which a judgment has been rendered against Dow in the amount of $1.2 Billion. This judgment will be appealed. The Applicants could receive a further significant payment from this	I

	judgment, or any related settlements. The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates. The first $200,000.00 of the Polyol claims was assigned to the Class Action Settlement. The Polyol claims were not marketed for sale in the sale process conducted in these proceedings. The Polyol claims were not listed as an asset available for sale in the sale process conducted by the Applicants and the Monitor. The Polyol claims were not included as an asset to be acquired by any purchaser in any of [the] agreements of purchase and sale with the Applicants." [emphasis added]	
December 12, 2013	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates. ... It is anticipated at this time that, net of fees to RRS, the aggregate of the payments to the Applicants should be approximately $140,000.00 (A-Z - $8,000, Domfoam - $58,000, Valle Foam - $73,000)." [emphasis added]	J
April 22, 2014	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates." [emphasis added]	K
October 22, 2014	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates. ... I am advised by our counsel that, in the event the Dow judgment is upheld and payment is made by Dow in the full amount of the claim, the recovery to the Applicants could be significant. On a rough calculation, the gross amount, before attorney fees, payable in respect of the Applicants' claim in the Polyol proceedings, in the event of a one billion dollar judgment, could be as high as: Valle Foam $6,000,000.00. Domfoam $4,900,000.00 and A-Z Foam $690,000.00."	L

21. The various Monitor's reports that were prepared during this time and served upon Mr. Vincent on behalf of the Purchaser similarly provided updates on the anticipated distributions from the US Class Action.

22. Based on the above, the Purchaser was notified that: (a) a trial judgment in the amount of $1.2 billion had been obtained against Dow in the US Class Action; (b) the judgment was upheld on appeal; (c) significant distributions were expected to be made to the Applicants; and (d) these receivables were assets of the Applicants' estates.

23. In addition, Robert Tanner at Tanner & Guiney represents the former directors and officers of 436, including Mr. John Howard, who was a former officer of 436. I understand that Mr. Howard now works for Domfoam. I am advised by my counsel, Alexandra Teodorescu, that Mr. Tanner has been on the Service List since at least the fall of 2015 to the present, and would have received notice of the Plan (as defined below) and distributions received from Dow. Correspondingly, Mr. Howard would have received updates from Mr. Tanner of subsequent steps in the CCAA process in his capacity as a former officer of 436, which events were relevant to the claim Domfoam is currently making.

Claims Bar and Plan of Arrangement

24. A claims solicitation procedure was approved by the Court on June 15, 2012. A copy of the Order of Justice Brown, dated June 15, 2012 ("**Claims Solicitation Order**"), is attached hereto and marked as **Exhibit "M"**. The Claims Solicitation Order established a claims bar date of August 31, 2012. The Monitor published a notice of the claims bar date in The Globe and Mail newspaper (national edition) and La Presse. I am advised by the Monitor that Domfoam

did not submit a claim in accordance with the Claims Solicitation Order, or at any time after the claims bar date.

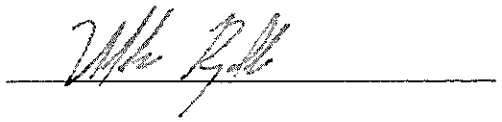
25. 436 put forward a Plan of Compromise and Arrangement ("**Plan**"), which was approved by the creditors at a meeting held in October 2016, pursuant to the Meeting Order of Justice Penny, dated September 6, 2016, a copy of which is attached hereto and marked as **Exhibit "N"**. The Monitor published notice of the creditors' meeting in the Globe and Mail (national edition) pursuant to the Meeting Order. The notice also directed that creditors could find and review the Plan on the Monitor's website.

26. The Plan was approved by Justice Hainey on January 24, 2017. A copy of the Sanction Order (which appends a copy of the Plan) is attached hereto and marked as **Exhibit "O"**.

27. The purpose of the Plan was to allow 436 to distribute proceeds from the liquidation of its assets and the proceeds it received from the settlement with Dow to its Proven Creditors on a *pro-rata* basis.

28. I swear this affidavit in response to the Vincent Affidavit and Domfoam's motion to have the Applicants pay the proceeds recovered from the US Class Action in the amount of approximately $3.6 million USD to Domfoam, and for no improper purpose.

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



(A commissioner for taking affidavits)

TONY VALLECOCCIA

Nicholas Bruce Reynolds, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 10, 2020.

TAB 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR. JUSTICE H.J. WILTON-SIDDALL	)	TUESDAY, THE 29TH DAY OF MAY, 2018

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

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

(the "**Applicants**")

ORDER

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

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

SERVICE

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

DEFINITIONS

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

STAY EXTENSION

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

INTERIM DISTRIBUTIONS

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

5. **THIS COURT ORDERS** that the Monitor is hereby authorized to make an interim Distribution of the Domfoam Proceeds in the amount of $3,470,000 to the Domfoam

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

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

MONITOR'S REPORT, ACTIONS AND FEES

7. **THIS COURT ORDERS** that the Eighteenth Report and the actions, decisions and conduct of the Monitor as set out in the Eighteenth Report arehereby authorized and approved.

8. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Eighteenth Report, the Affidavit of Paul Casey sworn on May 24, 2018 and the Affidavit of Grant B. Moffat sworn on May 23, 2018, and the exhibits attached thereto, are hereby authorized and approved.

9. **THIS COURT HEREBY** requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

10. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty

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

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:
MAY 29 2018
PER / PAR:

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at TORONTO

ORDER

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

David T. Ullmann LSUC #42357I
Tel: (416) 596-4289
Fax: (416) 594-2437

Alexandra Teodorescu LSUC #63899D
Tel: (416) 596-4279
Fax: (416) 593-5437

Lawyers for the Applicants

TAB 4

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(the "**Applicants**")

NOTICE OF MOTION
(Re: Stay Extension, Returnable May 29, 2018)

THE MOVING PARTIES, 3113736 Canada Ltd. (formerly known as Valle Foam Industries (1995)) ("**Valle Foam**"), 4362063 Canada Ltd. (formerly known as Domfoam International Inc.) ("**Domfoam**"), and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**") will make a motion to a judge presiding over the Commercial List at 10:00 a.m. on May 29, 2018, or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

This motion is to be heard orally.

THE MOTION IS FOR:

1. an Order substantially in the form contained at Tab 3 of the Applicants' Motion Record, extending the Stay Period (as that term is defined in the Initial Order of the Honourable Mr. Justice Newbould dated January 12, 2012) to and including November 30, 2018 and approving the Monitor's report, conduct and fees; and

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

THE GROUNDS FOR THE MOTION ARE:

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

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

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

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

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

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

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

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

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

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

13. On or about March 21, 2018, an initial distribution representing 85% of the total recovery from the Polyols Settlement was made to the class members, including the Applicants. A second and final tranche of money representing up to 15% is payable to the Applicants from the Polyols Settlement;

14. The Applicants may also be class members in a certified class action in Ontario relating to the price fixing of polyether polyols products purchased in Canada ("**Canadian Urethane Proceeding**"). Settlement funds are being held in trust for the benefit of the class members in the Canadian Urethane Proceeding, and a claims process will be initiated to determine distribution to the class;

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

Extension of Stay Period

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

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

18. Most recently, the Stay Period was extended to May 31, 2018, by the Order of the Honourable Mr. Justice Myers, dated November 24, 2017;

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

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

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

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

Approval of Monitor's fees, conduct and report

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

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

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

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

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

27. The Affidavit of Tony Vallecoccia, sworn May 22, 2018;

28. The Eighteenth Report of the Monitor, to be filed; and

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

May 22, 2018

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

David T. Ullmann LSUC #42357I
Tel: (416) 596-4289
Fax: (416) 594-2437

Alexandra Teodorescu LSUC #63899D
Tel: (416) 596-4279
Fax: (416) 593-5437

Lawyers for the Applicants

TO: SERVICE LIST

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 29TH DAY
	)	
	)	OF MAY, 2018

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

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

(the "**Applicants**")

ORDER

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

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

SERVICE

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

DEFINITIONS

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

STAY EXTENSION

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

MONITOR'S REPORT, ACTIONS AND FEES

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

5. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Eighteenth Report, the Affidavit of •, sworn •, and the exhibits attached thereto, are hereby authorized and approved.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at TORONTO

ORDER

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

David T. Ullmann LSUC #42357I
Tel: (416) 596-4289
Fax: (416) 594-2437

Alexandra Teodorescu LSUC #63899D
Tel: (416) 596-4279
Fax: (416) 593-5437

Lawyers for the Applicants

TAB 5

THIS IS EXHIBIT "M"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

COUNSEL SLIP

COURT FILE NO.: CV-12-00009545-00CL DATE: Monday October 7 2019

NO. ON LIST (4)

TITLE OF PROCEEDING: Valle Foam Industries 1985 Inc et al v 631400 Ontario Limited et al

COUNSEL FOR:
- ☐ PLAINTIFF(S)
- ☑ APPLICANT(S) David Ullmann, Varoujan Arman

PHONE 416-596-4289
FAX 416-593-2960
EMAIL dullmann@blaney.com

COUNSEL FOR:
- ☐ DEFENDANT(S) FRED TAYAR
- ☐ RESPONDENT(S) COBY CINTHUJAITH FOR PURCHASER DOMFOAM INC.

PHONE 416 363 1800 x 200
FAX 416 363 3356
EMAIL fred@fredtayar.com

JUDICIAL NOTES: GRANT MOFFAT for Deloitte as Monitor

416-304-0599
304 1313
gmoffat@tgf.ca

October 7/19

The following procedure has been worked out w counsel today:

(1) The parties will be exchanging affs of docs within 45 days, relating only to the issues of surrounding circumstances (what the parties knew about the class action LOI & SAA on at the time – not re what their subjective intentions were or prior drafts – all as per Sattva) and re the "estoppel issue" re Domfoam's claim to $4 million. Shared

(2) The parties will proceed to mediation thereafter.

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

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

Conway J.

Endorsement of Justice Conway October 7, 2019

The following procedure has been worked out with counsel today:

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

2. The parties will proceed to mediation thereafter;

3. If the matter does not resolve at mediation, they shall return to a 1 hr CC [case conference] before me (to be scheduled thorough the CL [Commercial List] office) for directions on how this motion will proceed and what evidence (written and VV [*viva voce*]) will be put before the court.

"Conway, J."

TAB 6

THIS IS EXHIBIT "K"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

COUNSEL SLIP

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

NO ON LIST 2.

TITLE OF PROCEEDING Valle Foam Industries (1985) Inc. et al
vs.
631400 Ontario Limited et al.

COUNSEL FOR:			PHONE & FAX NOS
PLAINTIFF(S)	D. Ullmann	for 4382063 Canada Ltd.	416-596-2882 (F)
APPLICANT(S)	V. Arman	for " (o/a Domfoam)	416-593-2960 (F)
PETITIONER(S)			

FRED TAYAR

COUNSEL FOR:	new purchaser Domfoam Inc - non-party tel (416) 363-1800	PHONE & FAX NOS
DEFENDANT(S)		fax (416) 363-3356
RESPONDENT(S)		

GRANT MOFFAT for Deloitte as Monitor 416-304-0599
304-1313

Sept 11/19

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

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.

Endorsement of Justice Conway

(September 11, 2019)

I have decided to schedule a case conference to determine whether Mr. Tayar's motion to obtain the $4 million should best proceed as a motion or some form of trial procedure. There appears to be no issue that Justice Wilton-Siegel's order re distribution of these funds be set aside and the entitlement to those be adjudicated. Case conference set for October 7, 2019 – 1 hour – before me – confirmed. Mr. Tayar may file his factum for the case conference. Mr. Ullmann may file his notice of motion to comment and up to 5 pages in submissions.

"Conway, J."

TAB 7

THIS IS EXHIBIT "J"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

Blaney McMurtry LLP

Blaney McMurtry LLP | Lawyers
2 Queen Street East | Suite 1500
Toronto, Ontario M5C 3G5

T 416-593-1221
W Blaney.com

David T. Ullmann

D: 416-596-4289 F: 416-594-2437
dullmann@blaney.com

September 10, 2019

BY EMAIL

The Honourable Justice Conway
Superior Court of Justice – Commercial List
330 University Avenue
Toronto, ON
M5G 1R8

Dear Justice Conway:

Re: Domfoam Inc. and 4362063 Canada Ltd., Motion to Set Aside Order of Justice Wilton-Siegel dated May 29, 2019 and other relief

We are counsel for the applicants in connection with the above-noted matter. Counsel for Domfoam Inc., Fred Tayar, is copied on this letter, along with counsel for the Monitor, Grant Moffat.

Mr. Tayar's client has a pending motion for the setting aside of the Order of Justice Wilton-Siegel dated May 29, 2018, and for payment of nearly $4 million USD. Our clients wish to bring a motion to convert Domfoam Inc.'s motion to a trial of an issue. The primary reason for our clients' motion is that, in our view, the motion brought by Domfoam Inc. is a significant claim and as such is more properly the subject of a trial with discoveries, mandatory production obligations, and mediation.

Both motions remain to be scheduled, which is the reason for the chambers appointment scheduled to proceed on September 11, 2019 at 9:30 a.m. In advance of the chambers appointment, we wish to provide you with a copy of our clients' draft Notice of Motion for the motion to convert the matter to a trial, in order that you may review the issues prior to the chambers appointment should you wish. We had previously sent the draft Notice of Motion to Justice Hainey prior to the last case conference call. A copy of the draft Notice of Motion is enclosed here.

Thank you for your assistance and we look forward to meeting with you tomorrow morning.

Yours very truly,

Blaney McMurtry LLP

David T. Ullmann

DTU/va

cc: Fred Tayar, Grant Moffat

Encl.

TAB 8

THIS IS EXHIBIT "V"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

TWENTY-FIRST REPORT OF THE MONITOR
DATED OCTOBER 18, 2019

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EXHIBITS

EXHIBIT A:	Initial Order dated January 12, 2012
EXHIBIT B:	U.S. Recognition Order dated February 24, 2012
EXHIBIT C:	Claims Solicitation Procedure Order dated June 15, 2012
EXHIBIT D:	Distribution Order dated September 29, 2015
EXHIBIT E:	Sanction Order dated January 24, 2017
EXHIBIT F:	Second Distribution Order dated May 29, 2018
EXHIBIT G:	Copy of Email dated March 5, 2019 from the Monitor to Fybon
EXHIBIT H:	Statement of Receipts and Disbursements for Valle Foam for the period March 29, 2012 to October 11, 2019
EXHIBIT I:	Statement of Receipts and Disbursements for Domfoam for the period March 29, 2012 to October 11, 2019
EXHIBIT J:	Statement of Receipts and Disbursements for A-Z Foam for the period March 29, 2012 to October 11, 2019
EXHIBIT K:	Affidavit of Catherine A. Hristow of Deloitte Restructuring Inc., sworn on October 17, 2019
EXHIBIT L:	Affidavit of Grant Moffat of Thornton Grout Finnigan LLP, sworn on October 17, 2019

INTRODUCTION

1. By Order of the Court dated January 12, 2012 (the "**Initial Order**"), Valle Foam Industries (1995) Inc. ("**Valle Foam**"), Domfoam International Inc. ("**Domfoam**") and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**" or the "**Companies**"), obtained protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The CCAA proceeding with respect to the Applicants is referred to herein as the "**CCAA Proceeding**".

2. Pursuant to the Initial Order, Deloitte & Touche Inc. was appointed monitor of the Applicants as part of the CCAA Proceeding (the "**Monitor**"). Pursuant to the Initial Order, all proceedings against the Applicants were stayed until February 10, 2012, or until such later date as this Court would order (the "**Stay Period**"). A copy of the Initial Order is attached hereto as Exhibit "**A**".

3. On July 1, 2013, Deloitte & Touche Inc. changed its name to Deloitte Restructuring Inc. (hereafter, "**Deloitte**").

4. All of the assets utilized by the Companies in connection with operation of their businesses have been sold. As described below, certain of the proceeds of the Companies' assets (collectively, the "**Proceeds**") have been distributed to the Companies' creditors. Following the sale of its assets, Valle Foam changed its name to 3113736 Canada Ltd. and Domfoam changed its name to 4362063 Canada Ltd. Throughout this Report, references to Valle Foam mean 3113736 Canada Ltd. and references to Domfoam mean 4362063 Canada Ltd.

5. By Order of the United States Bankruptcy Court, Northern District of Ohio (Western Division) (the "**U.S. Bankruptcy Court**") dated February 24, 2012 (the "**U.S. Recognition Order**"), the CCAA Proceeding was recognized as a foreign main proceeding. A copy of the U.S. Recognition Order is attached hereto as Exhibit "**B**".

6. The Court has periodically extended the Stay Period, most recently by order dated April 24, 2019. Unless extended, the Stay Period will expire on October 31, 2019.

7. Pursuant to the Order of the Court dated June 15, 2012 (the "**Claims Solicitation Procedure Order**"), the Monitor conducted and completed a claims process with respect to the Companies (the "**Claims Solicitation Procedure**"). The claims bar date under the Claims Solicitation Procedure was August 31, 2012 (the "**Claims Bar Date**"). A copy of the Claims Solicitation Procedure Order is attached as Exhibit "**C**".

8. By Order of the Court dated September 29, 2015 (the "**Distribution Order**"), the Monitor was authorized and directed to make an interim distribution of the Valle Foam Proceeds and A-Z Foam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors and A-Z Foam Creditors holding Proven Claims (the "**First Distribution**"), subject to the holdbacks described in the Distribution Order in respect of amounts secured by the Administration Charge and Directors' Charge. A copy of the Distribution Order is attached as Exhibit "**D**".

9. By Order dated September 6, 2016 (the "**Meeting Order**"), the Court authorized Domfoam to file a Plan of Compromise and Arrangement pursuant to the CCAA dated August 23, 2016 (as amended, varied or supplemented from time to time in accordance with the terms thereof, the "**Plan**") and authorized Domfoam to call, hold and conduct a meeting of one class of unsecured creditors for the purpose of considering and voting on a resolution to approve the Plan (the "**Meeting**").

10. The Meeting was held on October 19, 2016 in Toronto, Ontario. The Plan was approved by the requisite majorities of creditors present in person or by proxy at the Meeting. By Order dated January 24, 2017 (the "**Sanction Order**"), the Court approved and sanctioned the Plan and authorized the Monitor, Domfoam and its directors and officers to take all steps necessary to implement the Plan. A copy of the Sanction Order is attached as Exhibit "**E**".

11. The conditions precedent to implementation of the Plan were satisfied and the Monitor filed its Plan Implementation Certificate with the Court on June 23, 2017. As described in more detail below, the Monitor carried out the distribution to the Creditors of Domfoam (the "**First Domfoam Distribution**") within 30 days of the June 23, 2017 Plan Implementation Date as required by the Plan.

12. By Order of the Court dated May 29, 2018 (the "**Second Distribution Order**"), the Monitor was authorized and directed to make a second interim distribution of the Valle Foam Proceeds, A-Z Foam Proceeds and Domfoam Proceeds on a *pro rata*, *pari passu* basis to the Valle Foam Creditors, A-Z Foam Creditors and Domfoam Creditors respectively holding Proven Claims. A copy of the Second Distribution Order is attached as Exhibit "**F**".

13. As described below, the Monitor has not carried out the second interim distribution of the Domfoam Proceeds pending resolution of the claim to the Dow Settlement Funds (as defined below) asserted by Domfoam Inc. (formerly 4037057 Canada Inc.) (the "**Domfoam Purchaser**").

14. The Initial Order together with related Court documents, the Notice to Creditors dated January 17, 2012 and the Monitor's First through Twentieth Reports to the Court (collectively, the "**Prior Reports**") have been posted on the Monitor's website at www.deloitte.com/ca/vallefoam (the "**Monitor's Website**"). The Monitor has also established a dedicated e-mail address at vallefoam@deloitte.ca for creditors and other interested parties to contact the Monitor with questions or concerns regarding the CCAA Proceeding.

PURPOSE OF REPORT

15. The purpose of this report (the "**Twenty-First Report**") is to provide the Court with information on the following:

    (a) the Monitor's activities since the filing of the Twentieth Report;

(b) the status of the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser; and

(c) the Companies' request for an extension of the Stay Period from October 31, 2019 to April 30, 2020.

TERMS OF REFERENCE

16. In preparing the Twenty-First Report, the Monitor has relied upon unaudited financial information, the Companies' books and records, the financial information prepared by the Companies, and discussions with management ("**Management**") and legal counsel for the Companies.

17. Unless otherwise stated, all dollar amounts contained in this Twenty-First Report are expressed in Canadian dollars.

18. Capitalized terms not otherwise defined in this Twenty-First Report are as defined in the Initial Order, the Claims Solicitation Procedure Order or the Plan.

BACKGROUND

19. The Companies operated together as one of Canada's leading and largest manufacturers and distributors of flexible polyurethane foam products from facilities located in Ontario, Quebec and British Columbia. The operations of Valle Foam and Domfoam historically comprised substantially all of the Companies' operations. A-Z Foam and Valle Foam are wholly owned subsidiaries of Domfoam.

20. Mr. Anthony Vallecoccia is the President and Chief Executive Officer of Domfoam, President of Valle Foam, and the sole officer and director of A-Z Foam.

21. Other than security interests which may have been claimed by certain equipment lessors, the Monitor is not aware of any secured creditors of the Companies.

CLAIMS SOLICITATION PROCEDURE

22. Listed below is a summary of the Prefiling Claims and Postfiling Claims which have been admitted by the Monitor in accordance with the Claims Solicitation Procedure Order and the Distribution Order (which authorized the Monitor to admit certain late filed Proofs of Claim).

Company	Pre-Filing (Admitted)	Post-Filing (Admitted)	Pending Resolution	Total
Valle Foam Industries (1995) Inc.	$27,822,834.03	$ 168,255.98	$ -	**$ 27,991,090.01**
Domfoam International Inc.	$26,956,342.34	$ 54,241.01	$ 80,973.52	**$ 27,091,556.87**
A-Z Sponge & Foam Products Ltd.	$ 4,084,071.70	$ 135,372.59		**$ 4,219,444.29**

23. As described in the Prior Reports, the Applicants were named as Defendants in certain class action lawsuits in Canada and the United States (collectively, the "**Class Actions**"), based upon allegations of price fixing by certain of the Applicants and other manufacturers in the slab foam industry. The Canadian Class Actions consisted of two proceedings commenced in each of British Columbia and Ontario and a proceeding commenced in Quebec. The Canadian Class Actions advanced joint and several claims against the Companies and certain other defendants or respondents on behalf of proposed classes comprised of all persons or entities who purchased polyurethane foam and polyurethane foam products in Canada from and after January 1, 1999 (collectively, the "**Class**").

24. The most significant Proven Claims against the Companies were filed in respect of the Canadian Class Actions in the total amount of CAD$40 million (allocated to each of Valle Foam and Domfoam in the amount of CAD$18 million and to A-Z Foam in the amount of CAD$4 million) and by the Competition Bureau against both Valle Foam and Domfoam each in the amount of CAD$6 million.

RECEIPTS FROM THE US URETHANE PROCEEDINGS

25. The Companies had previously advised the Monitor that they each were claimants in a class action proceeding before the United States District Court for the District

of Kansas under the caption In Re Urethane AntiTrust Litigation (the "**US Urethane Proceedings**"). As previously reported in the Monitor's Seventh Report to the Court dated July 12, 2013 (the "**Seventh Report**"), pursuant to a 2008 services agreement between the Companies and Refund Recovery Services, LLC ("**RRS**") (the "**Services Agreement**"), the Companies retained RRS to assist in asserting and recovering their claims in the US Urethane Proceedings in consideration of a fee equal to 25% of all funds paid to the Companies. Thereafter, Enterprise Law Group ("**ELG**") was retained by RRS to assist in recovering the Valle Foam claim only in the US Urethane Proceedings. Subsequently, Lex Group, LLC, ("**Lex Group**") the successor to RRS, assigned to ELG its rights under the Services Agreement to receive the 25% commission in respect of any funds paid to Valle Foam only pursuant to the US Urethane Proceedings. The Monitor has been advised by Lex Group that it assigned its rights under the Services Agreement to Lex Acquisition Group, LLC ("**Lex Acquisition**") on January 7, 2015.

26. The initial distributions received by the Companies with respect to their claims in the US Urethane Proceedings related to two separate settlements with BASF Corporation and Huntsman International LLC. In January 2013, the Companies' legal counsel received correspondence from ELG including a cheque in the amount of US$331,928.29 for Valle Foam in respect of the US Urethane Proceedings, which was delivered to the Monitor. No deduction was made from these funds in respect of the 25% fee payable pursuant to the Services Agreement. As noted in the Seventh Report, the Monitor paid from these funds the 25% fee to ELG in accordance with the terms of the Services Agreement. The net amount of these funds were distributed to Valle Foam's creditors as part of the First Distribution.

27. Also in January 2013, the Companies' legal counsel received correspondence from Lex Group enclosing cheques in the amount of US$196,802.78 and US$28,325.87 for Domfoam and A-Z Foam respectively, net of the 25% fee payable to RRS. These funds were delivered to the Monitor and were distributed to Domfoam's and A-Z

Foam's creditors as part of the First Domfoam Distribution and the First Distribution respectively.

28. A further settlement was reached in the US Urethane Proceedings with The Dow Chemical Company ("**Dow**"). By letter dated March 21, 2018, class counsel delivered to the Companies their share of the initial distribution of 85% of the USD$835 million settlement reached with Dow in the US Urethane Proceedings (the "**Dow Settlement**") as follows: USD$732,651.37 to A-Z Foam, USD$5,542,999.25 to Valle Foam and USD$3,741,639.62 to Domfoam (collectively, the "**Initial Dow Settlement Funds**"). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies. In accordance with the terms of the Services Agreement, the Monitor paid to Lex Acquisition its agreed fee equal to 25% of the Initial Dow Settlement Funds received by Valle Foam, Domfoam and A-Z Foam.

29. In December 2018, the Monitor received from class counsel the Companies' remaining 15% share of the Dow Settlement as follows: USD$130,519.67 to A-Z Foam, USD$987,486.91 to Valle Foam and USD$666,562.02 to Domfoam (collectively, the "**Residual Dow Settlement Funds**" and together with the Initial Dow Settlement Funds, the "**Dow Settlement Funds**"). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies. In accordance with the terms of the Services Agreement, the Monitor paid to Lex Acquisition its agreed fee equal to 25% of the Residual Dow Settlement Funds received by Valle Foam, Domfoam and A-Z Foam.

SECOND INTERIM DISTRIBUTION TO CREDITORS OF VALLE FOAM AND A-Z FOAM

30. In accordance with the Second Distribution Order, the Monitor carried out an interim distribution in June 2018 of Valle Foam's share of the Dow Settlement Funds in the amount of $5,600,000 to the Valle Foam Creditors holding Proven Claims on a *pro rata, pari passu* basis (the "**Second Valle Foam Distribution**"). Each Creditor

holding a Prefiling Claim against Valle Foam received approximately $0.20 for each dollar of its Proven Claim.

31. In accordance with the Second Distribution Order, the Monitor carried out an interim distribution in June 2018 of A-Z Foam's share of the Initial Dow Settlement Funds in the amount of $707,950 to the A-Z Foam Creditors holding Proven Claims on a *pro rata, pari passu* basis (the "**Second A-Z Foam Distribution**"). Each Creditor holding a Prefiling Claim against A-Z Foam received approximately $0.15 for each dollar of its Proven Claim.

SECOND INTERIM DISTRIBUTION TO DOMFOAM CREDITORS

32. Pursuant to the Second Distribution Order, the Monitor was authorized to distribute Domfoam's share of the Initial Dow Settlement Funds in the amount of $3,470,000 on a *pro rata, pari passu* basis to the Domfoam Creditors holding Proven Claims (the "**Second Domfoam Distribution**"). This would have resulted in each Creditor holding a Prefiling Claim against Domfoam receiving approximately $0.13 for each dollar of its Proven Claim.

33. However, prior to the Monitor carrying out the Second Domfoam Distribution, the Domfoam Purchaser asserted a proprietary claim to Domfoam's share of the Initial Dow Settlement Funds. The Domfoam Purchaser claims that Domfoam's interest in the Dow Settlement Funds is included in the "Purchased Assets" conveyed to the Domfoam Purchaser pursuant to the Asset Purchase Agreement dated March 8, 2012 between Domfoam as vendor and the Domfoam Purchaser as purchaser (the "**Domfoam APA**").

34. As noted in the Seventh Report, the affidavit of Mr. Vallecoccia sworn July 11, 2013 provides that each of Domfoam, Valle Foam and A-Z Foam did not intend to sell to the purchaser of its assets its claim in the US Urethane Proceedings (the "**Domfoam US Urethane Claim**", the "**Valle Foam US Urethane Claim**", the "**A-Z Foam US Urethane Claim**" respectively and, collectively, the "**US Urethane Claims**"), and

that the US Urethane Claims remain assets of the Companies' estates. The Monitor was not involved in any of the negotiations between the Companies and the purchasers of their assets.

35. Pursuant to a notice of motion dated September 14, 2018, the Domfoam Purchaser sought an order setting aside the Second Distribution Order and directing Domfoam and the Monitor to pay to the Domfoam Purchaser the Dow Settlement Funds attributable to Domfoam. The foregoing motion was returnable on November 29, 2018. However, at the hearing of the motion, Domfoam sought leave to examine the President and an employee of the Domfoam Purchaser.

36. By reasons dated February 13, 2019, Justice Wilton-Siegel granted Domfoam's motion to examine the President of the Domfoam Purchaser (which examination has been conducted), but denied its motion to examine the employee of the Domfoam Purchaser.

37. Following the date of the Twentieth Report, Domfoam consented to the Second Distribution Order being set aside with respect to the second interim distribution of the Domfoam Proceeds. However, it is Domfoam's position that the Domfoam Purchaser's proprietary claim to Domfoam's share of the Dow Settlement Funds should proceed as a trial rather than as a motion.

38. A case conference was held before Justice Conway on October 7, 2019 to address the manner in which the Domfoam Purchaser's claim to Domfoam's share of the Dow Settlement Funds shall be determined. Following submissions by the parties, the Court ordered that: (i) the parties shall exchange affidavits of documents within 45 days, relating only to the issues of surrounding circumstances (i.e., what each party knew about the US Urethane Proceedings at the time – not what their subjective intentions were or prior drafts of the Domfoam APA) and the "estoppel issue" (i.e., Domfoam's position that the Domfoam Purchaser's claim may be subject to an estoppel argument or the expiry of an applicable limitation period); (ii) thereafter, the parties will proceed to mediation; and (iii) if the dispute regarding

entitlement to Domfoam's share of the Dow Settlement Funds is not resolved at mediation, a further case conference shall be held for directions regarding the manner in which the dispute will be heard by the Court, including what evidence (both written and oral) will be admissible.

39. The Monitor has agreed that it will not distribute any further amount from Domfoam's share of the Dow Settlement Funds pending disposition of the Domfoam Purchaser's motion.

A-Z FOAM PURCHASER'S CLAIM TO RESIDUAL DOW SETTLEMENT FUNDS

40. 0932916 BC Ltd. (the "**A-Z Purchaser**") purchased certain of A-Z Foam's assets pursuant to the Asset Purchase Agreement between A-Z Foam as vendor and the A-Z Purchaser as purchaser dated February 21, 2012 (the "**A-Z Foam APA**"). Mr. Vallecoccia's affidavit sworn July 11, 2013 indicates that A-Z Foam did not intend to sell the A-Z Foam US Urethane Claim to the A-Z Purchaser. In the Monitor's Seventh Report, which was served upon the A-Z Purchaser, the Monitor noted that, barring any claim to the A-Z Foam US Urethane Claim by the A-Z Purchaser, it appears that the net proceeds thereof should be available for distribution to the creditors of A-Z Foam.

41. On November 5, 2018, subsequent to the Second A-Z Foam Distribution (but prior to receipt of the Residual Dow Settlement Funds), the A-Z Purchaser contacted the Monitor to advise of its position that the A-Z Foam US Urethane Claim was conveyed to the A-Z Purchaser pursuant to the A-Z APA. The A-Z Purchaser remains on the Service List in this proceeding and was served with the Monitor's Eighteenth Report in connection with the Companies' motion for the Second Distribution Order. The A-Z Purchaser has retained new legal counsel who confirmed with the Monitor on November 22, 2018 the above noted position of the A-Z Purchaser. The Monitor will continue to review this issue with the A-Z Purchaser and will update the Court as appropriate. In the meantime, the Monitor

will not distribute any further amount from A-Z Foam's share of the Residual Dow Settlement Funds or any future receipts from the A-Z Foam US Urethane Claim.

STATUS OF VALLE FOAM'S SHARE OF THE RESIDUAL DOW SETTLEMENT FUNDS

42. Fybon Industries Limited ("**Fybon**") purchased certain of Valle Foam's assets pursuant to the Asset Purchase Agreement between Valle Foam as vendor and Fybon as purchaser dated February 22, 2012 (the "**Valle Foam APA**"). As noted in the Seventh Report, which was served upon Fybon, it appears that the Valle Foam assets purchased by Fybon did not include the Valle Foam US Urethane Claim since Valle Foam's accounts receivable were not included as purchased assets under that transaction. As far as the Monitor is aware, Fybon has not asserted any claim to the Valle Foam US Urethane Claim. Fybon was removed from the Service List following the Applicants' motion for the Distribution Order.

43. As noted in the Twentieth Report, by email dated March 5, 2019, a copy of which is attached as Exhibit "**G**", the Monitor advised Fybon of (i) the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser; and (ii) the claim to the Residual Dow Settlement Funds asserted by the A-Z Purchaser. Fybon has advised the Monitor that it has sold the assets it purchased from Valle Foam and confirmed that it does not have any concerns at this time. Accordingly, it appears that Valle Foam's share of the Residual Dow Settlement Funds and any future proceeds of the Valle Foam US Urethane Claim should be available for distribution to the creditors of Valle Foam.

COURT ORDERED CHARGES

44. Pursuant to the Initial Order, the Administration Charge was declared to be a first charge upon the Property to the maximum amount of $500,000 and the Directors' Charge was declared to be a second charge upon the Property to the maximum amount of $1,000,000. Pursuant to the Distribution Order, the Directors' Charge

was discharged as against the A-Z Foam Property and the Directors' Charge was amended such that the Directors of Valle Foam were granted a charge upon the Valle Foam Property only to the maximum amount of $200,000 (the "**Valle Foam Directors' Charge**") and the Directors of Domfoam were granted a charge upon the Domfoam Property only to the maximum amount of $1,000,000 (the "**Domfoam Directors' Charge**").

45. In accordance with the Sanction Order, the Domfoam Directors' Charge was permanently discharged as a charge against the Domfoam Property on the Plan Implementation Date.

46. Pursuant to the Distribution Order, the Monitor was authorized to hold back from the Valle Foam Interim Distribution $225,000 as security for the Administration Charge (the "**Valle Foam Administration Charge Holdback**") and $200,000 as security for the Valle Foam Directors' Charge (the "**Valle Foam Directors' Charge Holdback**"). As of October 11, 2019, the balances of the Valle Foam Administration Charge Holdback and Valle Foam Directors' Charge Holdback were nil and $115,281.34, respectively, after payment of certain professional fees secured by such charges.

47. Pursuant to the Distribution Order, the Monitor was authorized and directed to hold back A-Z Foam Proceeds in the amount of $50,000 (the "**A-Z Foam Holdback**") from the First Distribution as security for the Administration Charge. The balance of the A-Z Foam Holdback as at October 11, 2019 after payment of certain professional fees is $6,179.75.

ACTIVITIES OF THE MONITOR

48. As described in certain of the Prior Reports, the Monitor held back from the First Domfoam Distribution the sum of $80,973.52 pending resolution of Revenu Quebec's outstanding claim against Domfoam in this amount for certain unpaid employee source deductions (the "**Disputed RQ Claim**"). The Monitor has been

seeking support from Revenu Quebec to substantiate its position that the amount comprising the Disputed RQ Claim is subject to a deemed trust in accordance with the provisions of the *Income Tax Act* (Canada). On August 15, 2019, the Monitor received confirmation from Revenu Quebec that it is no longer asserting that the Disputed RQ Claim is subject to a deemed trust and that such amount is included in its unsecured claim against Domfoam. Therefore, the summary of admitted claims is as follows:

Company	Pre-Filing (Admitted)	Post-Filing (Admitted)	Total
Valle Foam Industries (1995) Inc.	$ 27,822,834.03	$ 168,255.98	**$ 27,991,090.01**
Domfoam International Inc.	$ 27,037,315.86	$ 54,241.01	**$ 27,091,556.87**
A-Z Sponge & Foam Products Ltd.	$ 4,084,071.70	$ 135,372.59	**$ 4,219,444.29**

49. In addition to the activities described above, since the date of the Twentieth Report, the Monitor has monitored the financial position of the Applicants, assisted the Applicants in collection of outstanding accounts receivable and prepared this Twenty-First Report.

STATEMENTS OF CASH RECEIPTS AND DISBURSEMENTS

50. The following chart summarizes the cash on hand in the Companies' estates as at October 11, 2019:

	As at October 11, 2019		
	Valle Foam	**Domfoam**	**A-Z Foam**
Cash on hand as at October 11, 2019	$ 728,451.81	$ 4,361,056.04	$ 136,380.67
Directors' Charge Holdback	115,281.34		
Balance of Administration Charge Holdbacl	-		6,179.75
Total cash available as at October 11, 2019	$ 843,733.15	$ 4,361,056.04	$ 142,560.42

51. Attached as Exhibit "**H**" is the Statement of Receipts and Disbursements for Valle Foam for the period March 29, 2012 to October 11, 2019. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds, reimbursement of legal fees and other receipts are $16,124,702.08. Total disbursements are $15,396,250.27, which includes the First Distribution payment of $5,585,546.00 and the Second Valle Foam Distribution of $5,602,260.97 (which includes a distribution of $2,271.97 made to an additional creditor after the First Distribution was completed), and payments for the Administration Charge and accruals for the Valle Foam Directors' Charge, of which $115,281.34 remains. Net cash on hand as of October 11, 2019 is $728,451.81. This amount excludes any possible recovery of funds that may not be required to pay amounts secured by the Valle Foam Directors' Charge.

52. Attached as Exhibit "**I**" is the Statement of Receipts and Disbursements for Domfoam for the period March 29, 2012 to October 11, 2019. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds and other receipts are $10,493,937.49. Total disbursements are $6,132,881.45, which includes the First Distribution payment of $1,524,785.47. Net cash on hand as at October 11, 2019 is $4,361,056.04, which includes the amount of $80,973.52 formerly accrued as a potential disbursement with respect to certain unpaid employee source deductions claimed by Revenu Quebec (the "**2011 Source Deductions**"). As described previously in this Report, the Monitor has now resolved Revenu Quebec's claim for the 2011 Source Deductions.

53. Attached as Exhibit "**J**" is the Statement of Receipts and Disbursements for A-Z Foam for the period March 29, 2012 to October 11, 2019. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds and other receipts are $2,339,402.78. Total disbursements are $2,203,022.11, which includes the First Distribution payment of $624,054.25, the Second A-Z Foam Distribution of $707,950.00 and the accrual for the Administration Charge in the amount of $50,000.00 of which $6,179.75 remains. Net cash on hand as at October 11, 2019

is $136,380.67, which excludes any possible recovery for funds that may not be required for the Administration Charge.

54. The Monitor anticipates that the only meaningful disbursements during the requested stay extension period to April 30, 2020 will be on account of professional fees in connection with (i) the claims advanced by the Domfoam Purchaser to Domfoam's share of the Dow Settlement Funds and by the A-Z Purchaser to A-Z Foam's share of the Residual Dow Settlement Funds; (ii) the distribution of that part of the Dow Settlement Funds held by the Monitor which is determined by the Court to be available for distribution to the Creditors; and (iii) the pending appeal of an order for summary judgment obtained by one of the Companies in connection with an outstanding account receivable.

PROFESSIONAL FEES

55. The Monitor and its independent legal counsel, Thornton Grout Finnigan LLP ("**TGF**"), have maintained detailed records of their professional time and costs since the issuance of the Initial Order. Pursuant to paragraph 29 of the Initial Order, the Monitor and TGF were directed to pass their accounts from time to time before this Court.

56. The total fees of the Monitor during the period from April 1, 2019 to September 30, 2019 amount to $14,965.00, together with disbursements of nil and harmonized sales tax ("**HST**") in the amount of $1,945.46, totalling $16,910.46 (the "**Monitor Fees**"). The time spent by the Monitor is more particularly described in the Affidavit of Catherine A. Hristow of Deloitte sworn on October 17, 2019 in support hereof and attached hereto as Exhibit "**K**".

57. The total legal fees incurred by the Monitor during the period March 1, 2019 to September 30, 2019 for services provided by TGF as the Monitor's independent legal counsel amount to $26,722.50, together with disbursements in the amount of $158.32 and HST in the amount of $3,494.51, totalling $30,375.33. The time spent

by TGF personnel is more particularly described in the Affidavit of Grant Moffat, a partner of TGF, sworn on October 17, 2019 in support hereof and attached hereto as Exhibit "**L**".

ALLOCATION OF PROFESSIONAL FEES

58. As noted in the Monitor's Eleventh Report to the Court, the Applicants, with the concurrence of the Monitor, determined that the appropriate *pro rata* allocation of professional fees to Valle Foam, Domfoam and A-Z Foam should be 45%, 45% and 10%, respectively. In its Sixteenth Report to the Court, the Monitor recommended that since the great majority of the professional fees and disbursements incurred by the Monitor, its counsel and counsel to the Applicants for the periods referenced in the Sixteenth Report related to the Plan alone, that all such fees and disbursements should be paid entirely from the Domfoam Proceeds. As noted in the Monitor's Seventeenth Report to the Court, the 45%/45%/10% professional fee allocation was reinstated following implementation of the Plan.

59. Given the claims advanced by the Domfoam Purchaser and the A-Z Purchaser described above, the Monitor has suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor attributable to Domfoam and the Residual Dow Settlement Funds attributable to A-Z Foam pending determination by the Court of entitlement to those funds. In the meantime, all such fees will be paid from the Valle Foam estate and reimbursed by Domfoam and A-Z Foam if appropriate.

EXTENSION OF THE STAY PERIOD

60. The Companies have asked the Court to approve an extension of the Stay Period from October 31, 2019 to April 30, 2020. The basis for this request is to complete the appeal of the summary judgment order described above, to resolve the claims of the Domfoam Purchaser and the A-Z Purchaser described above and, if appropriate,

for the Monitor to carry out further distributions to the Companies' Proven Creditors.

61. The Monitor believes that the Companies are acting in good faith and with due diligence and the Monitor therefore supports the extension of the Stay Period to April 30, 2020.

MONITOR'S RECOMMENDATIONS

62. For the reasons set out above, the Monitor recommends that:

(a) the Stay Period be extended until April 30, 2020;

(b) the Twenty-First Report and the activities of the Monitor as described in the Twenty-First Report be approved; and

(c) the professional fees and disbursements of the Monitor and TGF be approved and the Monitor be authorized to pay all such fees and disbursements in the manner described above.

All of which is respectfully submitted at Toronto, Ontario this 18th day of October, 2019.

DELOITTE RESTRUCTURING INC.
solely in its capacity as the Monitor
of the Companies (as defined herein),
and without personal or corporate liability

Paul M. Casey, CPA, CA, FCIRP, LIT
Senior Vice-President

TAB 9

THIS IS EXHIBIT "W"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

TWENTY-SECOND REPORT OF THE MONITOR
DATED APRIL 22, 2020

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EXHIBITS

EXHIBIT A:	Initial Order dated January 12, 2012
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EXHIBIT E:	Sanction Order dated January 24, 2017
EXHIBIT F:	Second Distribution Order dated May 29, 2018
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EXHIBIT J:	Statement of Receipts and Disbursements for Valle Foam for the period March 29, 2012 to April 17, 2020
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EXHIBIT L:	Statement of Receipts and Disbursements for A-Z Foam for the period March 29, 2012 to April 17, 2020
EXHIBIT M:	Affidavit of Catherine A. Hristow of Deloitte Restructuring Inc., sworn on April 16, 2020
EXHIBIT N:	Affidavit of Grant Moffat of Thornton Grout Finnigan LLP, sworn on April 16, 2020

INTRODUCTION

1. By Order of the Court dated January 12, 2012 (the "**Initial Order**"), Valle Foam Industries (1995) Inc. ("**Valle Foam**"), Domfoam International Inc. ("**Domfoam**") and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**") (collectively, the "**Applicants**" or the "**Companies**"), obtained protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The CCAA proceeding with respect to the Applicants is referred to herein as the "**CCAA Proceeding**".

2. Pursuant to the Initial Order, Deloitte & Touche Inc. was appointed monitor of the Applicants as part of the CCAA Proceeding (the "**Monitor**"). Pursuant to the Initial Order, all proceedings against the Applicants were stayed until February 10, 2012, or until such later date as this Court would order (the "**Stay Period**"). A copy of the Initial Order is attached hereto as Exhibit "**A**".

3. On July 1, 2013, Deloitte & Touche Inc. changed its name to Deloitte Restructuring Inc. (hereafter, "**Deloitte**").

4. All of the assets utilized by the Companies in connection with operation of their businesses have been sold. As described below, certain of the proceeds of the Companies' assets (collectively, the "**Proceeds**") have been distributed to the Companies' creditors. Following the sale of its assets, Valle Foam changed its name to 3113736 Canada Ltd. and Domfoam changed its name to 4362063 Canada Ltd. Throughout this Report, references to Valle Foam mean 3113736 Canada Ltd. and references to Domfoam mean 4362063 Canada Ltd.

5. By Order of the United States Bankruptcy Court, Northern District of Ohio (Western Division) (the "**U.S. Bankruptcy Court**") dated February 24, 2012 (the "**U.S. Recognition Order**"), the CCAA Proceeding was recognized as a foreign main proceeding. A copy of the U.S. Recognition Order is attached hereto as Exhibit "**B**".

6. The Court has periodically extended the Stay Period, most recently by order dated October 23, 2019. Unless extended, the Stay Period will expire on April 30, 2020.

7. Pursuant to the Order of the Court dated June 15, 2012 (the "**Claims Solicitation Procedure Order**"), the Monitor conducted and completed a claims process with respect to the Companies (the "**Claims Solicitation Procedure**"). The claims bar date under the Claims Solicitation Procedure was August 31, 2012 (the "**Claims Bar Date**"). A copy of the Claims Solicitation Procedure Order is attached hereto as Exhibit "**C**".

8. By Order of the Court dated September 29, 2015 (the "**Distribution Order**"), the Monitor was authorized and directed to make an interim distribution of the Valle Foam Proceeds and A-Z Foam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors and A-Z Foam Creditors holding Proven Claims (the "**First Distribution**"), subject to the holdbacks described in the Distribution Order in respect of amounts secured by the Administration Charge and Directors' Charge. A copy of the Distribution Order is attached hereto as Exhibit "**D**".

9. By Order dated September 6, 2016 (the "**Meeting Order**"), the Court authorized Domfoam to file a Plan of Compromise and Arrangement pursuant to the CCAA dated August 23, 2016 (as amended, varied or supplemented from time to time in accordance with the terms thereof, the "**Plan**") and authorized Domfoam to call, hold and conduct a meeting of one class of unsecured creditors for the purpose of considering and voting on a resolution to approve the Plan (the "**Meeting**").

10. The Meeting was held on October 19, 2016 in Toronto, Ontario. The Plan was approved by the requisite majorities of creditors present in person or by proxy at the Meeting. By Order dated January 24, 2017 (the "**Sanction Order**"), the Court approved and sanctioned the Plan and authorized the Monitor, Domfoam and its directors and officers to take all steps necessary to implement the Plan. A copy of the Sanction Order is attached hereto as Exhibit "**E**".

11. The conditions precedent to implementation of the Plan were satisfied and the Monitor filed its Plan Implementation Certificate with the Court on June 23, 2017. As described in more detail below, the Monitor carried out the distribution to the Creditors of Domfoam (the "**First Domfoam Distribution**") within 30 days of the June 23, 2017 Plan Implementation Date as required by the Plan.

12. By Order of the Court dated May 29, 2018 (the "**Second Distribution Order**"), the Monitor was authorized and directed to make a second interim distribution of the Valle Foam Proceeds, A-Z Foam Proceeds and Domfoam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors, A-Z Foam Creditors and Domfoam Creditors respectively holding Proven Claims. A copy of the Second Distribution Order is attached hereto as Exhibit "**F**".

13. As described below, the Monitor has not carried out the second interim distribution of the Domfoam Proceeds pending resolution of the claim to the Dow Settlement Funds (as defined below) asserted by Domfoam Inc. (formerly 4037057 Canada Inc.) (the "**Domfoam Purchaser**").

14. The Initial Order together with related Court documents, the Notice to Creditors dated January 17, 2012 and the Monitor's First through Twenty-First Reports to the Court (collectively, the "**Prior Reports**") have been posted on the Monitor's website at www.deloitte.com/ca/vallefoam (the "**Monitor's Website**"). The Monitor has also established a dedicated e-mail address at vallefoam@deloitte.ca for creditors and other interested parties to contact the Monitor with questions or concerns regarding the CCAA Proceeding.

PURPOSE OF REPORT

15. The purpose of this report (the "**Twenty-Second Report**") is to provide the Court with information on the following:

    (a) the Monitor's activities since the filing of the Twenty-First Report;

(b) the status of the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser;

(c) the need for the appointment of a chief restructuring officer ("**CRO**") of the Companies;

(d) the status of the Companies' claims to certain additional settlement funds described below; and

(e) the need for an extension of the Stay Period from April 30, 2020 to October 30, 2020.

TERMS OF REFERENCE

16. In preparing the Twenty-Second Report, the Monitor has relied upon unaudited financial information, the Companies' books and records, the financial information prepared by the Companies and discussions with legal counsel for the Companies. As described below, in preparing the Twenty-Second Report, the Monitor has been unable to discuss the contents hereof with management of the Companies ("**Management**").

17. Unless otherwise stated, all dollar amounts contained in the Twenty-Second Report are expressed in Canadian dollars.

18. Capitalized terms not otherwise defined in the Twenty-Second Report are as defined in the Initial Order, the Claims Solicitation Procedure Order or the Plan.

BACKGROUND

19. The Companies operated together as one of Canada's leading and largest manufacturers and distributors of flexible polyurethane foam products from facilities located in Ontario, Quebec and British Columbia. The operations of Valle Foam and Domfoam historically comprised substantially all of the Companies' operations. A-Z Foam and Valle Foam are wholly owned subsidiaries of Domfoam.

20. Mr. Anthony Vallecoccia is the President and Chief Executive Officer of Domfoam, President of Valle Foam, and the sole officer and director of A-Z Foam. Although the records maintained by Corporations Canada indicate that Mr. Vallecoccia and Dale McNeill are directors of both Valle Foam and Domfoam, the Monitor understands that Mr. Vallecoccia is the only remaining director and officer of the Companies. The records maintained by B.C. Registry Services disclose that A-Z Foam is active but in the process of being dissolved. The records maintained by Corporations Canada disclose that Domfoam and Valle Foam were dissolved for non-compliance on December 7, 2019.

CLAIMS SOLICITATION PROCEDURE

21. Listed below is a summary of the Prefiling Claims and Postfiling Claims which have been admitted by the Monitor in accordance with the Claims Solicitation Procedure Order and the Distribution Order (which authorized the Monitor to admit certain late filed Proofs of Claim).

Company	Pre-Filing (Admitted)	Post-Filing (Admitted)	Total
Valle Foam Industries (1995) Inc.	$ 27,822,834.03	$ 168,255.98	**$ 27,991,090.01**
Domfoam International Inc.	$ 27,037,315.86	$ 54,241.01	**$ 27,091,556.87**
A-Z Sponge & Foam Products Ltd.	$ 4,084,071.70	$ 135,372.59	**$ 4,219,444.29**

22. As described in the Prior Reports, the Applicants were named as Defendants in certain class action lawsuits in Canada and the United States (collectively, the "**Class Actions**"), based upon allegations of price fixing by certain of the Applicants and other manufacturers in the slab foam industry. The Canadian Class Actions consisted of two proceedings commenced in each of British Columbia and Ontario and a proceeding commenced in Quebec. The Canadian Class Actions advanced joint and several claims against the Companies and certain other defendants or respondents on behalf of proposed classes comprised of all persons or entities who purchased polyurethane foam and polyurethane foam products in Canada from and after January 1, 1999 (collectively, the "**Class**").

23. The most significant Proven Claims against the Companies were filed in respect of the Canadian Class Actions in the total amount of $40.0 million (allocated to each of Valle Foam and Domfoam in the amount of $18.0 million, and to A-Z Foam in the amount of $4.0 million), and by the Competition Bureau against both Valle Foam and Domfoam each in the amount of $6.0 million.

RECEIPTS FROM THE US URETHANE PROCEEDINGS

24. The Companies had previously advised the Monitor that they each were claimants in a class action proceeding before the United States District Court for the District of Kansas under the caption In Re Urethane AntiTrust Litigation (the "**US Urethane Proceedings**").

25. As previously reported in the Monitor's Seventh Report to the Court dated July 12, 2013 (the "**Seventh Report**"), pursuant to a 2008 services agreement (the "**Services Agreement**") between the Companies and Refund Recovery Services, LLC ("**RRS**"), the Companies retained RRS to assist in asserting and recovering their claims in the US Urethane Proceedings in consideration of a fee equal to 25% of all funds paid to the Companies. Thereafter, Enterprise Law Group ("**ELG**") was retained by RRS to assist in recovering the Valle Foam claim only in the US Urethane Proceedings. Subsequently, Lex Group, LLC ("**Lex Group**"), the successor to RRS, assigned to ELG its rights under the Services Agreement to receive the 25% commission in respect of any funds paid to Valle Foam only pursuant to the US Urethane Proceedings. The Monitor has been advised by Lex Group that it assigned its rights under the Services Agreement to Lex Acquisition Group, LLC ("**Lex Acquisition**") on January 7, 2015.

26. In 2013, the Companies received initial distributions with respect to their claims in the US Urethane Proceedings related to two separate settlements with BASF Corporation and Huntsman International LLC. The net amount of these settlement funds, after deduction of the 25% fee payable to ELG and Lex Group (the "**Agent**

Fee"), was distributed to the creditors of Valle Foam and A-Z Foam as part of the First Distribution and to the creditors of Domfoam as part of the First Domfoam Distribution.

27. A further settlement was reached in the US Urethane Proceedings with The Dow Chemical Company ("**Dow**"). By letter dated March 21, 2018, class counsel delivered to the Companies their share of the initial distribution of 85% of the USD$835 million settlement reached with Dow in the US Urethane Proceedings (the "**Dow Settlement**") as follows: USD$732,651.37 to A-Z Foam, USD$5,542,999.25 to Valle Foam and USD$3,741,639.62 to Domfoam (collectively, the "**Initial Dow Settlement Funds**"). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies, following which the Monitor paid the Agent Fee from such funds.

28. In December 2018, the Monitor received from class counsel the Companies' remaining 15% share of the Dow Settlement as follows: USD$130,519.67 to A-Z Foam, USD$987,486.91 to Valle Foam and USD$666,562.02 to Domfoam (collectively, the "**Residual Dow Settlement Funds**" and together with the Initial Dow Settlement Funds, the "**Dow Settlement Funds**"). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies, following which the Monitor paid the Agent Fee from such funds.

SECOND INTERIM DISTRIBUTION TO CREDITORS OF VALLE FOAM AND A-Z FOAM

29. In accordance with the Second Distribution Order, the Monitor carried out an interim distribution in June 2018 of Valle Foam's share of the Initial Dow Settlement Funds in the amount of $5,600,000 to the Valle Foam Creditors holding Proven Claims on a *pro rata, pari passu* basis (the "**Second Valle Foam Distribution**"). Each Creditor holding a Prefiling Claim against Valle Foam received approximately $0.20 for each dollar of its Proven Claim. As described below, Valle Foam's share of the

Residual Dow Settlement Funds after payment of the Agent Fee is currently being held by the Monitor.

30. In accordance with the Second Distribution Order, the Monitor carried out an interim distribution in June 2018 of A-Z Foam's share of the Initial Dow Settlement Funds in the amount of $707,950 to the A-Z Foam Creditors holding Proven Claims on a *pro rata, pari passu* basis (the "**Second A-Z Foam Distribution**"). Each Creditor holding a Prefiling Claim against A-Z Foam received approximately $0.15 for each dollar of its Proven Claim. As described below, A-Z Foam's share of the Residual Dow Settlement Funds after payment of the Agent Fee is currently being held by the Monitor.

SECOND INTERIM DISTRIBUTION TO DOMFOAM CREDITORS

31. Pursuant to the Second Distribution Order, the Monitor was authorized to distribute Domfoam's share of the Initial Dow Settlement Funds in the amount of $3,470,000 on a *pro rata, pari passu* basis to the Domfoam Creditors holding Proven Claims (the "**Second Domfoam Distribution**"). This would have resulted in each Creditor holding a Prefiling Claim against Domfoam receiving approximately $0.13 for each dollar of its Proven Claim.

32. However, prior to the Monitor carrying out the Second Domfoam Distribution, the Domfoam Purchaser asserted a proprietary claim to Domfoam's share of the Initial Dow Settlement Funds. The Domfoam Purchaser claims that Domfoam's interest in the Dow Settlement Funds is included in the "Purchased Assets" conveyed to the Domfoam Purchaser pursuant to the Asset Purchase Agreement dated March 8, 2012 between Domfoam as vendor and the Domfoam Purchaser as purchaser (the "**Domfoam APA**").

33. As noted in the Monitor's Seventh Report, the affidavit of Mr. Vallecoccia sworn July 11, 2013 provides that each of Domfoam, Valle Foam and A-Z Foam did not intend to sell to the purchaser of its assets its claim in the US Urethane Proceedings

(the "**Domfoam US Urethane Claim**", the "**Valle Foam US Urethane Claim**", the "**A-Z Foam US Urethane Claim**" respectively and, collectively, the "**US Urethane Claims**"), and that the US Urethane Claims remain assets of the Companies' estates. The Monitor was not involved in any of the negotiations between the Companies and the purchasers of their assets.

34. Pursuant to a notice of motion dated September 14, 2018, the Domfoam Purchaser sought an order setting aside the Second Distribution Order and directing Domfoam and the Monitor to pay to the Domfoam Purchaser the Dow Settlement Funds attributable to Domfoam. The foregoing motion was returnable on November 29, 2018. However, at the hearing of the motion, Domfoam sought leave to examine the President and an employee of the Domfoam Purchaser.

35. By reasons dated February 13, 2019, Justice Wilton-Siegel granted Domfoam's motion to examine the President of the Domfoam Purchaser (which examination has been conducted), but denied its motion to examine the employee of the Domfoam Purchaser.

36. Domfoam later consented to the Second Distribution Order being set aside with respect to the second interim distribution of the Domfoam Proceeds. However, it is Domfoam's position that the Domfoam Purchaser's proprietary claim to Domfoam's share of the Dow Settlement Funds should proceed as a trial rather than as a motion.

37. A case conference was held before Justice Conway on October 7, 2019 to address the manner in which the Domfoam Purchaser's claim to Domfoam's share of the Dow Settlement Funds shall be determined. Following submissions by the parties, the Court ordered that: (i) the parties shall exchange affidavits of documents within 45 days, relating only to the issues of surrounding circumstances (i.e., what each party knew about the US Urethane Proceedings at the time – not what their subjective intentions were or prior drafts of the Domfoam APA) and the "estoppel issue" (i.e., Domfoam's position that the Domfoam Purchaser's claim may be subject to an estoppel argument or the expiry of an applicable limitation period); (ii)

thereafter, the parties will proceed to mediation; and (iii) if the dispute regarding entitlement to Domfoam's share of the Dow Settlement Funds is not resolved at mediation, a further case conference shall be held for directions regarding the manner in which the dispute will be heard by the Court, including what evidence (both written and oral) will be admissible.

38. The Monitor has agreed that it will not distribute any further amount from Domfoam's share of the Dow Settlement Funds pending disposition of the Domfoam Purchaser's motion.

39. The mediation was originally scheduled for April 17, 2020. Given the effects of the COVID-19 pandemic, it has been rescheduled for May 25, 2020.

A-Z FOAM PURCHASER'S CLAIM TO RESIDUAL DOW SETTLEMENT FUNDS

40. 0932916 BC Ltd. (the "**A-Z Purchaser**") purchased certain of A-Z Foam's assets pursuant to the Asset Purchase Agreement between A-Z Foam as vendor and the A-Z Purchaser as purchaser dated February 21, 2012 (the "**A-Z Foam APA**"). Mr. Vallecoccia's affidavit sworn July 11, 2013 indicates that A-Z Foam did not intend to sell the A-Z Foam US Urethane Claim to the A-Z Purchaser. In the Monitor's Seventh Report, which was served upon the A-Z Purchaser, the Monitor noted that, barring any claim to the A-Z Foam US Urethane Claim by the A-Z Purchaser, it appears that the net proceeds thereof should be available for distribution to the creditors of A-Z Foam.

41. On November 5, 2018, subsequent to the Second A-Z Foam Distribution (but prior to receipt of the Residual Dow Settlement Funds), the A-Z Purchaser contacted the Monitor to advise of its position that the A-Z Foam US Urethane Claim was conveyed to the A-Z Purchaser pursuant to the A-Z APA. The A-Z Purchaser remains on the Service List in this proceeding and was served with the Monitor's Eighteenth Report in connection with the Companies' motion for the Second Distribution Order. The A-Z Purchaser has retained new legal counsel who

confirmed with the Monitor on November 22, 2018 the above noted position of the A-Z Purchaser. The Monitor will continue to review this issue with the A-Z Purchaser and will update the Court as appropriate. To date, the A-Z Purchaser has not filed any motion materials with respect to its purported entitlement to the Residual Dow Settlement Funds. It is the Monitor's view that the A-Z Purchaser is waiting for the resolution of the Domfoam Purchaser's entitlement to the Dow Settlement Funds. In the meantime, the Monitor will not distribute any further amount from A-Z Foam's share of the Residual Dow Settlement Funds.

STATUS OF VALLE FOAM'S SHARE OF THE RESIDUAL DOW SETTLEMENT FUNDS

42. Fybon Industries Limited ("**Fybon**") purchased certain of Valle Foam's assets pursuant to the Asset Purchase Agreement between Valle Foam as vendor and Fybon as purchaser dated February 22, 2012 (the "**Valle Foam APA**"). As noted in the Seventh Report, which was served upon Fybon, it appeared that the Valle Foam assets purchased by Fybon did not include the Valle Foam US Urethane Claim since Valle Foam's accounts receivable were not included as purchased assets under that transaction. As far as the Monitor is aware, Fybon has not asserted any claim to the Valle Foam US Urethane Claim. Fybon was removed from the Service List following the Applicants' motion for the Distribution Order.

43. By email dated March 5, 2019, a copy of which is attached hereto as Exhibit "**G**", the Monitor advised Fybon of (i) the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser; and (ii) the claim to the Residual Dow Settlement Funds asserted by the A-Z Purchaser. Fybon advised the Monitor that it sold the assets it purchased from Valle Foam and confirmed that it did not have any concerns at that time. The Monitor has not yet distributed to Valle Foam's creditors Valle Foam's share of the Residual Dow Settlement Funds.

RECEIPTS FROM CANADIAN POLYOLS CLASS PROCEEDING

44. As described in the Affidavit of Mr. Vallecoccia sworn on November 16, 2018 ("**November 2018 Affidavit**") in connection with the Companies' motion for an extension of the Stay Period, a class proceeding was commenced before the Ontario Superior Court of Justice under the style of cause *Crosslink Technology Inc.* v *BASF Canada et al*, Ontario Superior Court of Justice, London (Court File No. 50305CP) (the "**Canadian Polyols Proceeding**"), seeking similar relief to that sought in the US Urethane Proceedings. A copy of the November 2018 Affidavit (with only Exhibit E included) is attached hereto as Exhibit "**H**".

45. Exhibit E to the November 18 Affidavit is a summary of the Canadian Polyols Proceeding extracted from the website maintained by class counsel, Siskinds LLP (the "**Siskinds Polyols Site**"). As described on the Siskinds Polyols Site, the Canadian Polyols Proceeding alleges that the defendants unlawfully conspired to fix, increase, and/or maintain prices in the market for Polyether Polyols, defined as polyether polyols, monomeric or polymeric diphenylmethane diisocyanate (MDI), toluene diisocyanate (TDI), and polyether polyol systems.

46. As disclosed on the Siskinds Polyols Site, settlements were reached in the Canadian Polyols Proceeding with Bayer Inc. and certain related entities, Lyondell Chemical Company, Huntsman International LLC, BASF Corporation, BASF Canada Inc. and most recently with the Dow Chemical Company and Dow Chemical Canada Inc.

47. As described in paragraph 32 of the November 2018 Affidavit, Mr. Vallecoccia advised that the Applicants, with the assistance of Lex Acquisition, were in the process of determining whether or not they are class members in the Canadian Polyols Proceeding.

48. Counsel to the Companies advised the Monitor that it was retained by Lex Acquisition to file the Companies' claims in the Canadian Polyols Proceeding. As set out in Mr. Vallecoccia's affidavit sworn April 18, 2019, counsel to the

Companies filed placeholder claims in February 2019. Counsel to the Companies have confirmed to the Monitor that the claims were submitted through the on-line claim portal administered by RicePoint Administration Inc. as the claims administrator in the Canadian Polyols Proceeding (the "**Claims Administrator**").

49. By letter dated November 1, 2019, counsel for the Domfoam Purchaser advised that the Domfoam Purchaser had received a cheque in the amount of $1,399,002.24 (the "**Domfoam Canadian Polyols Funds**") from the Claims Administrator. Counsel to Domfoam has advised counsel to the Domfoam Purchaser that Domfoam asserts an interest in the foregoing funds and requested that such funds be held by counsel to the Domfoam Purchaser pending resolution of the competing claims to such funds. The Monitor understands that counsel to the Domfoam Purchaser has not yet confirmed if it is holding the Domfoam Canadian Polyols Funds in trust, or if the Domfoam Purchaser is in receipt of same.

50. Prior to receipt of the foregoing correspondence from counsel to the Domfoam Purchaser, the Monitor was not aware that the Domfoam Canadian Polyols Funds had been paid to Domfoam. Thereafter, the Monitor contacted the Claims Administrator on multiple occasions to determine the status of payments that may have been issued to Valle Foam and A-Z Foam.

51. In December 2019, the Monitor received from the Claims Administrator copies of two cheques dated October 11, 2019, the first payable to "Valle Foam Industries 1995 Inc." in the amount of $1,892,110.59 (the "**Valle Foam Canadian Polyols Funds**") and the second payable to "A-Z Sponge & Foam Ltd." in the amount of $239,277.74 (the "**A-Z Canadian Polyols Funds**"). Based on the address details included on each cheque, it appears that the cheques were delivered to the premises occupied by each of Valle Foam and A-Z Foam prior to the sale of their assets.

52. The information on each of the cheques references the Polyether Polyol Price Fixing Settlement and *Crosslink Technology* v *BASF Canada et al.* Each cheque face includes a statement that, "Based on the value of your Aggregate Purchases and

other information you provided in your claim form we have determined that your 'Notional Entitlement' is" $42,053,748.69, $31,094,001.00, and $5,318,082.18 for Valle Foam, Domfoam and A-Z Foam respectively. The Notional Entitlement was used to calculate the prorated distribution of the Canadian Polyols Funds.

53. The Monitor immediately contacted VPC Group Inc., which the Monitor was advised is the party to whom Fybon sold the assets it had purchased from Valle Foam (the **"New Valle Foam Purchaser"**), as well as counsel to the A-Z Foam Purchaser, in each case requiring the immediate delivery of such funds to the Monitor.

54. Counsel to the A-Z Purchaser advised that the A-Z Purchaser had not received the cheque for the A-Z Canadian Polyols Funds. The Monitor was then advised by the Claims Administrator that the cheque had been negotiated. The Monitor again followed up with counsel to the A-Z Purchaser, who again confirmed that the A-Z Purchaser did not receive that cheque. The Monitor has requested a copy of the negotiated cheque from the Claims Administrator on three occasions and will continue its efforts to determine the status of these funds. Upon the appointment of a CRO as discussed in paragraphs 61 to 66 in this Report, the Monitor will work with the CRO to investigate commencing legal proceedings against the Claims Administrator and/or any party in possession of the A-Z Canadian Polyols Funds.

55. The New Valle Foam Purchaser requested that the Monitor provide a copy of the agreement of purchase and sale between Valle Foam and the Valle Foam Purchaser to verify that the Valle Foam Canadian Polyols Funds were excluded from that transaction. The Monitor directed the New Valle Foam Purchaser to the copy of the APA posted on the Monitor's website. However, despite several follow up emails, the New Valle Foam Purchaser did not deliver the Valle Foam Canadian Polyols Funds to the Monitor.

56. By letter dated February 13, 2020, counsel to Valle Foam demanded the return of the Valle Foam Canadian Polyols Funds by no later than February 26, 2020, failing

which counsel reserved the right to seek the necessary injunctive relief from the Court. Exchanges between counsel continued thereafter.

57. On March 19, 2020, counsel to the New Valle Foam Purchaser advised counsel to Valle Foam that the Valle Foam Canadian Polyols Funds would be sent to the Monitor.

58. On March 26, 2020, the Monitor received a wire transfer in the amount of the Valle Foam Canadian Polyols Funds.

59. Thereafter, Lex Acquisition delivered to the Monitor its invoice for the 25% Agent Fee payable by Valle Foam in connection with collection of the Valle Foam Canadian Polyols Funds, which counsel to the Companies has confirmed is payable to Lex Acquisition in accordance with the retainer of Lex Acquisition by Valle Foam. The Monitor paid the Agent Fee of $473,027.65 to Lex Acquisition on April 17, 2020.

60. Lex Acquisition has also issued an invoice to Domfoam in the amount of $349,750.56 for the applicable 25% Agent Fee in connection with the claims filed on behalf of Domfoam in the Canadian Polyols Proceeding. As noted above, the Monitor is not in possession of the Domfoam Canadian Polyols Funds or the A-Z Canadian Polyols Funds. Lex Acquisition will issue the invoice for the A-Z Foam Agent Fee once it has been determined who is in possession of the A-Z Canadian Polyols Funds.

APPOINTMENT OF CRO

61. As noted above, Mr. Vallecoccia is the sole remaining director and officer of the Companies. The Monitor has previously been advised by counsel to the Companies that counsel to the Companies is unable to obtain instructions from the Companies through Mr. Vallecoccia. On April 16, 2020, counsel to Mr. Vallecoccia advised that he no longer feels capable of continuing his duties as a director. Counsel to Mr.

Vallecoccia advised that it will be difficult to obtain a signed resignation from Mr. Vallecoccia and that Mr. Vallecoccia has requested that he be removed as a director of the Companies.

62. Mr. Vallecoccia's affidavit sworn January 11, 2012 in support of the application for the Initial Order in this proceeding provides that Valle Foam and A-Z Foam are subsidiaries of Domfoam and that Mr. Vallecoccia is one of the shareholders of Domfoam. The other shareholders of Domfoam are not identified and the Monitor is not aware of who the other shareholders of Domfoam may be.

63. The substantive issues that remain to be addressed in the within proceeding are the entitlement of the Domfoam Purchaser to the Dow Settlement Funds and the Domfoam Canadian Polyols Funds and the entitlement of the A-Z Purchaser to A-Z Foam's share of the Residual Dow Settlement Funds and the A-Z Canadian Polyols Funds. These issues will either be addressed through litigation or possibly settlement with these parties. Given that counsel to the Companies is unable to obtain instructions from Mr. Vallecoccia, the Monitor recommends that an independent third party be appointed by the Court as the Chief Restructuring Officer ("**CRO**") of the Companies with the mandate and powers necessary to resolve the foregoing issues and take any other steps necessary to complete the administration of the Companies' estates in this proceeding.

64. The Monitor has identified Linc Rogers, a partner with Blake, Cassels & Graydon LLP in Toronto, as a recommended candidate for this role. Mr. Rogers is recognized as a leading insolvency lawyer and appears regularly before the Court. A copy of Mr. Rogers' website bio is attached hereto as Exhibit "**I**".

65. As with the Monitor and counsel to the Monitor, the Monitor recommends that the fees of the CRO be based on the amount of professional time required multiplied by the CRO's hourly rate, plus applicable taxes and disbursements. If appointed as CRO, Mr. Rogers has requested a retainer and the Monitor has agreed to same in the amount of $25,000. The hourly fee chargeable by Mr. Rogers will be $875.00. As

with the Monitor and counsel to the Monitor, all fees charged by the CRO will be subject to approval by the Court.

66. Given the pending expiry of the Stay Period on April 30, 2020 and the upcoming mediation with the Domfoam Purchaser, it is essential that the CRO be appointed as soon as possible to provide the necessary instructions to counsel for the Companies to address these issues.

ALLOCATION OF CRO FEES

67. As noted in the Monitor's Eleventh Report to the Court, the Applicants, with the concurrence of the Monitor, determined that the appropriate *pro rata* allocation of professional fees to Valle Foam, Domfoam and A-Z Foam should be 45%, 45% and 10%, respectively. In its Sixteenth Report to the Court, the Monitor recommended that since the great majority of the professional fees and disbursements incurred by the Monitor, its counsel and counsel to the Applicants for the periods referenced in the Sixteenth Report related to the Plan alone, that all such fees and disbursements should be paid entirely from the Domfoam Proceeds. As noted in the Monitor's Seventeenth Report to the Court, the 45%/45%/10% professional fee allocation was reinstated following implementation of the Plan.

68. As reported in the Monitor's Twenty-First Report, given the claims advanced by the Domfoam Purchaser and the A-Z Purchaser described above, the Monitor has suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor attributable to Domfoam and the Residual Dow Settlement Funds attributable to A-Z Foam pending determination by the Court of entitlement to those funds. In the meantime, professional fees will continue to be paid from Valle Foam's share of the Residual Dow Settlement Funds held by the Monitor and will be reimbursed by Domfoam and A-Z Foam if appropriate.

STATEMENTS OF CASH RECEIPTS AND DISBURSEMENTS

69. The following chart summarizes the cash on hand in the Companies' estates as at April 17, 2020

	As at April 17, 2020		
	Valle Foam	**Domfoam**	**A-Z Foam**
Cash on hand as at April 17, 2020	$ 2,052,687.93	$ 4,397,131.76	$ 138,636.40
Directors' Charge Holdback	115,281.34	-	-
Balance of Administration Charge Holdback	-	-	6,179.75
Total cash available as at April 17, 2020	**$ 2,167,969.27**	**$ 4,397,131.76**	**$ 144,816.15**

70. Attached hereto as Exhibit "**J**" is the Statement of Receipts and Disbursements for Valle Foam for the period March 29, 2012 to April 17, 2020. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds, reimbursement of legal fees and other receipts are $18,037,209.72. Total disbursements are $15,984,521.79 which includes the First Distribution payment of $5,585,546.00 and the Second Valle Foam Distribution of $5,602,260.97 (which includes a distribution of $2,271.97 made to an additional creditor after the First Distribution was completed), and the accruals for the Administration Charge and the Valle Foam Directors' Charge in the amounts of $225,000.00 and $200,000.00, respectively, of which nil and $115,281.34 remain. Net cash on hand as of April 17. 2020 is $2,052,687.93. This amount excludes any possible recovery of funds that may not be required to pay amounts secured by the Valle Foam Directors' Charge.

71. Attached hereto as Exhibit "**K**" is the Statement of Receipts and Disbursements for Domfoam for the period March 29, 2012 to April 17, 2020. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds and other receipts are $10,532,901.17. Total disbursements are $6,135,769.41 which includes the First Distribution payment of $1,524,785.47. Net cash on hand as at April 17, 2020 is $4,397,131.76.

72. Attached hereto as Exhibit "**L**" is the Statement of Receipts and Disbursements for A-Z Foam for the period March 29, 2012 to April 17, 2020. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds and other receipts are $2,342,276.50. Total disbursements are $2,203,640.10 which includes the First Distribution payment of $624,054.25, the Second A-Z Foam Distribution of $707,950.00 and the accrual for the Administration Charge in the amount of $50,000.00, of which $6,179.75 remains. Net cash on hand as at April 17, 2020 is $138,636.40, which excludes any possible recovery for funds that may not be required for the Administration Charge.

73. The Monitor anticipates that the only meaningful disbursements during an extension of the Stay Period will be on account of professional fees in connection with (i) the claims advanced by the Domfoam Purchaser to Domfoam's share of the Dow Settlement Funds and the Domfoam Canadian Polyols Funds, and by the A-Z Purchaser to A-Z Foam's share of the Residual Dow Settlement Funds and the entitlement to the A-Z Canadian Polyols Funds; and (ii) once those claims are resolved, a final distribution to be carried out by the Monitor to the Companies' Proven Creditors.

PROFESSIONAL FEES

74. The Monitor and its independent legal counsel, Thornton Grout Finnigan LLP ("**TGF**"), have maintained detailed records of their professional time and costs since the issuance of the Initial Order. Pursuant to paragraph 29 of the Initial Order, the Monitor and TGF were directed to pass their accounts from time to time before this Court.

75. The total fees of the Monitor during the period from October 1, 2019 to March 31, 2020 amount to $16,557.50, together with disbursements of nil and harmonized sales tax ("**HST**") in the amount of $2,152.49, totalling $18,709.99 (the "**Monitor Fees**"). The time spent by the Monitor is more particularly described in the Affidavit of

Catherine A. Hristow of Deloitte sworn on April 16, 2020 in support hereof and attached hereto as Exhibit "**M**".

76. The total legal fees incurred by the Monitor during the period October 1, 2019 to March 31, 2020 for services provided by TGF as the Monitor's independent legal counsel amount to $28,122.50, together with disbursements in the amount of $126.18 and HST in the amount of $3,672.33, totalling $31,921.01. The time spent by TGF personnel is more particularly described in the Affidavit of Grant Moffat, a partner of TGF, sworn on April 16, 2020 in support hereof and attached hereto as Exhibit "**N**".

ALLOCATION OF PROFESSIONAL FEES

77. As noted in the Monitor's Eleventh Report to the Court, the Applicants, with the concurrence of the Monitor, determined that the appropriate *pro rata* allocation of professional fees to Valle Foam, Domfoam and A-Z Foam should be 45%, 45% and 10%, respectively. In its Sixteenth Report to the Court, the Monitor recommended that since the great majority of the professional fees and disbursements incurred by the Monitor, its counsel and counsel to the Applicants for the periods referenced in the Sixteenth Report related to the Plan alone, that all such fees and disbursements should be paid entirely from the Domfoam Proceeds. As noted in the Monitor's Seventeenth Report to the Court, the 45%/45%/10% professional fee allocation was reinstated following implementation of the Plan.

78. Given the claims advanced by the Domfoam Purchaser and the A-Z Purchaser described above, the Monitor has suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor attributable to Domfoam and the Residual Dow Settlement Funds attributable to A-Z Foam pending determination by the Court of entitlement to those funds. In the meantime, all such fees will be paid from the Valle Foam estate and reimbursed by Domfoam and A-Z Foam if appropriate.

EXTENSION OF THE STAY PERIOD

79. Unless otherwise extended, the Stay Period will expire on April 30, 2020. An extension of the Stay Period is required to resolve the claims of the Domfoam Purchaser and the A-Z Purchaser described above and, if appropriate, for the Monitor to carry out further distributions to the Companies' Proven Creditors. However, if the CRO is not appointed or the inability of counsel to the Companies to obtain instructions is not otherwise addressed, it will not be possible to continue this proceeding and a bankruptcy would likely be required. In the Monitor's view, the appointment of the CRO is the most cost effective and timely method to resolve the corporate governance challenge facing the Companies, particularly given the limited number of remaining issues in this proceeding.

80. The Monitor believes that the Companies have acted in good faith and with due diligence and, provided that the CRO is appointed for the reasons set out above, the Monitor supports an extension of the Stay Period to October 30, 2020.

MONITOR'S RECOMMENDATIONS

81. For the reasons set out above, the Monitor recommends that:

(a) the Twenty-Second Report and the activities of the Monitor as described in the Twenty-Second Report be approved;

(b) the CRO be appointed on the terms set out in the draft appointment order;

(c) the Stay Period be extended until October 30, 2020;

(d) the professional fees and disbursements of the Monitor and TGF be approved and the Monitor be authorized to pay all such fees and disbursements in the manner described above.

All of which is respectfully submitted at Toronto, Ontario this 22nd day of April, 2020.

DELOITTE RESTRUCTURING INC.
solely in its capacity as the Monitor
of the Companies (as defined herein),
and without personal or corporate liability

P. Casey.

Paul M. Casey, CPA,CA, FCIRP, LIT
Senior Vice-President

TAB 10

THIS IS EXHIBIT "T"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

Blaney McMurtry LLP

Blaney McMurtry LLP | Lawyers
2 Queen Street East | Suite 1500
Toronto, Ontario M5C 3G5

T 416-593-1221
W Blaney.com

David T. Ullmann
T: (416) 596-4289 F: (416) 594-2437
E: dullmann@blaney.com

January 20, 2020

BY COURIER & COURTESY COPY
OF LETTER BY EMAIL

Mr. Fred Tayar
Fred Tayar & Associates
Professional Corporation
Barristers & Solicitors
65 Queen Street West, Suite 1200
Toronto, ON, M5H 2M5

Dear Mr. Tayar:

Re: In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and in the matter of a plan of compromise or arrangement of 3113736 Canada Ltd., 4362063 Canada Ltd., and A-Z Sponge & Foam Products Ltd. (Court File No. CV-12-9545-00CL)

Enclosed you will find our draft affidavit of documents. It is being delivered to you in draft because we have discovered that we may have a capacity issue with Mr. Tony Vallecoccia. Apparently Mr. Vallecoccia has had a stroke which has likely left him unable to provide us with instructions, including reviewing and signing off on this affidavit. We had hoped that his condition might improve over the holiday period, but we have no information that this has happened.

As such, we are providing this to you in draft so that you can begin your review and prepare for the pending mediation, mindful of the fact that the affidavit may change when we are able to get complete instructions.

With respect to Mr. Vallecoccia's capacity issues, we have reviewed this with the Monitor and intend to schedule a 9:30 with the court to discuss appropriate alternatives to ensure that the litigation and the CCAA are able to continue. We are intending to schedule this for later this week or early next week.

Yours very truly,
Blaney McMurtry LLP

David T. Ullmann
DTU/ab
Encl.: *Sent by courier only*
cc: Grant Moffat – *letter only*
Varoujan Arman
Alex Fernet Brochu

TAB 11

THIS IS EXHIBIT "N"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

FRED TAYAR & ASSOCIATES
PROFESSIONAL CORPORATION
BARRISTERS & SOLICITORS

65 QUEEN STREET W, SUITE 1200
TORONTO, CANADA M5H 2M5

TELEPHONE (416) 363-1800
FACSIMILE (416) 363-3356
fred@fredtayar.com

FILE NO. 18-2985
WRITER'S EXTENSION: 200

November 1, 2019

VIA EMAIL

Mr. David Ullmann
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5

Dear Mr. Ullman:

Re: Domfoam Inc. and 4362063 Canada Ltd.

My client has recently received a cheque, in the amount of $1,399,002.24, from the administrator of the settlement of the Canadian Polyether Polyol Price Fixing Settlement, which arose out of the Crosslink Technology Inc. class action. I write only as a courtesy, since your client has consistently taken the position that its claim is only to the proceeds of the US class action. My client will negotiate the cheque at its convenience.

Yours very truly,

FRED TAYAR & ASSOCIATES
PROFESSIONAL CORPORATION

Per:

Fred Tayar

cc: Varoujan Arman
Grant Moffat, Thornton Grout
Client

THIS IS EXHIBIT "O"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

Fred Tayar 117

From: Fred Tayar
Sent: November 1, 2019 11:53 AM
To: David T. Ullmann; 'Grant Moffat'
Subject: FW: TR: Class Action
Attachments: DOC101519-10152019114333.pdf

David,
Attached is a copy of the Canadian proceeds cheque.
Fred

Fred Tayar
Fred Tayar & Associates
Professional Corporation
65 Queen St. West
Suite 1200
Toronto, Ontario
M5H 2M5

tel: (416)363-1800 x200
fax: (416)363-3356
fred@fredtayar.com

Polyether Polyol Price Fixing Settlement
c/o RicePoint Administration Inc.
PO Box 4454, Toronto Station A
25 The Esplanade
Toronto, ON M5W 4B1

000002

DOMFOAM INC
8785 LANGELIER BLVD
ST-LEONARD QC H1P 2C9
CANADA

Holder Account Number

C0000000647 BIQQ_DSB

ClaimID	100008119
Date	10/11/2019
Cheque Amount:	CAD $1,399,002.24
Cheque Number	02100062

Re: Polyether Polyol Products Class Action

Dear Claimant:

Enclosed is a payment for your share of the settlement funds in the Polyether Polyol Products Price-Fixing Class Action. This payment was calculated in accordance with the court-approved protocol for the distribution of the settlement funds.

Here is a summary of your Claim as approved:

Based on the value of your Aggregate Purchases and other information you provided in your claim form, we determined that your "Notional Entitlement" is $31,094,001.00.

Your Notional Entitlement was used to calculate your share of the settlement funds. Settlement benefits are being distributed *pro rata* (proportionally) based on the value of your Notional Entitlement as against the value of all qualifying settlement class members' Notional Entitlements.

You should consult your tax adviser to determine the tax consequences, if any, of this payment.

Please promptly cash the enclosed cheque, as the cheque will become void after 180 days.

If you have any questions, contact the claims administrator at the email address or toll-free phone number listed below. Please reference your claim ID.

Very truly yours,

Polyether Polyol Products Class Action Claims Administrator

1-866-674-1760
polyether@ricepoint.com
www.polyethersettlement.com

003CD70008 01JFFA

PLEASE CASH/DEPOSIT THIS CHEQUE PROMPTLY.

BIQQ.FDX.E.pulls/000002/000002/i

Crosslink Technology Inc v BASF Canada et al
RicePoint Administration, Inc.
Computershare Investor Services

VOID AFTER April 08, 2020

BIQQ_DSBD01
Cheque Number 02100062
Payable Date 11 10 2019
DD MM YYYY

Pay to DOMFOAM INC
8785 LANGELIER BLVD
ST-LEONARD QC H1P 2C9
CANADA

$ ***1,399,002.24
Canadian Dollars

The sum of ***ONE MILLION THREE HUNDRED NINETY-NINE THOUSAND TWO DOLLARS AND TWENTY-FOUR CENTS CANADIAN FUNDS ONLY***

The Bank of Nova Scotia
Toronto Branch
Toronto, Ontario

Authorized Signature(s)

⑈0210006 2⑈ ⑆47696⑆002⑆ 0567⑆⑈18⑈

TAB 12

THIS IS EXHIBIT "P"

TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY 27, 2020

FRED TAYAR

A Commissioner, etc.

Fred Tayar

From: David T. Ullmann <DUllmann@blaney.com>
Sent: November 1, 2019 12:32 PM
To: 'Grant Moffat'; Fred Tayar
Subject: Re: TR: Class Action

Fred,

As per my voicemail, we likely will assert an interest in these funds. I would ask that your client deposit these funds with your firm for the time being. We appreciate and respect your decision to bring this to our attention.

David

Get Outlook for Android

From: Fred Tayar <fred@fredtayar.com>
Sent: Friday, November 1, 2019, 11:53 a.m.
To: David T. Ullmann; 'Grant Moffat'
Subject: FW: TR: Class Action

David,
Attached is a copy of the Canadian proceeds cheque.
Fred

Fred Tayar
Fred Tayar & Associates
Professional Corporation
65 Queen St. West
Suite 1200
Toronto, Ontario
M5H 2M5

tel: (416)363-1800 x200
fax: (416)363-3356
fred@fredtayar.com

On Fri, Nov 1, 2019 at 11:53 AM -0400, "Fred Tayar" <fred@fredtayar.com> wrote:

> David,
> Attached is a copy of the Canadian proceeds cheque.
> Fred

TAB 13

This is Exhibit “A”

to the Affidavit of Linc Rogers

sworn August 9, 2020

_____

Varoujan Arman

A Commissioner, etc.

Blaney McMurtry LLP | Lawyers
2 Queen Street East | Suite 1500
Toronto, Ontario M5C 3G5
T 416-593-1221
W Blaney.com

Varoujan Arman
416-596-2884
varman@blaney.com

April 14, 2020

BY EMAIL

Fred Tayar
Fred Tayar & Associates
Professional Corporation
Barristers & Solicitors
65 Queen Street West, Suite 1200
Toronto, ON M5H 2M5

Dear Mr. Tayar:

Re: Domfoam Inc. and 4362063 Canada Ltd.

This is further to your email to David Ullmann dated November 1, 2019, regarding the cheque received by your client in the amount of $1,399,002.24. During our last conference call on January 30, 2020, Mr. Ullmann asked that you inquire as to the current location of these funds. We need to ensure that these funds are paid into your trust account for safe keeping. Please confirm in writing that these funds are being paid into your firm's trust account in the very near future if that has not already occurred.

We look forward to hearing from you.

Yours very truly,

Blaney McMurtry LLP

Varoujan Arman

VA/da

TAB 14

This is Exhibit “B”

to the Affidavit of Linc Rogers

sworn August 9, 2020

_____

Varoujan Arman

A Commissioner, etc.

Debbie Alderson

From: Varoujan Arman
Sent: April 24, 2020 8:33 AM
To: 'fred@fredtayar.com'
Cc: David T. Ullmann; Debbie Alderson
Subject: RE: Domfoam Inc. and 4362063 Canada Ltd.
Attachments: 2020-04-14 LT Tayar re cheque.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Fred,

May I please hear back from you in reply to my letter of April 14? Copy attached here.

Regards,
Varoujan

Varoujan Arman
Partner
varman@blaney.com
416-596-2884 | 416-593-2960

From: Debbie Alderson
Sent: April 14, 2020 5:38 PM
To: 'fred@fredtayar.com' <fred@fredtayar.com>
Cc: Varoujan Arman <VArman@blaney.com>
Subject: Domfoam Inc. and 4362063 Canada Ltd.

Good afternoon,

Enclosed please find correspondence from Mr. Arman,

Regards,

Debbie Alderson

Blaney McMurtry | 2 Queen Street East | Suite 1500 Toronto, Ontario M5C 3G5

Debbie Alderson
Assistant
dalderson@blaney.com
416-593-1221 ext. 1973
Blaney.com

TAB 15

This is Exhibit “C”

to the Affidavit of Linc Rogers

sworn August 9, 2020

_____

Varoujan Arman

A Commissioner, etc.

Debbie Alderson

From: Varoujan Arman
Sent: May 1, 2020 11:49 AM
To: 'fred@fredtayar.com'
Cc: David T. Ullmann; Debbie Alderson
Subject: RE: Domfoam Inc. and 4362063 Canada Ltd.
Attachments: 2020-04-14 LT Tayar re cheque.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Fred,

May I please hear back from you on this without further delay? Please respond to our letter of April 14 (copy attached). We need confirmation that the noted funds are being held safely by your firm in trust.

Regards,
Varoujan

Varoujan Arman
Partner
varman@blaney.com
416-596-2884 | 416-593-2960

From: Varoujan Arman
Sent: April 24, 2020 8:33 AM
To: 'fred@fredtayar.com' <fred@fredtayar.com>
Cc: David T. Ullmann <dullmann@blaney.com>; Debbie Alderson <DAlderson@blaney.com>
Subject: RE: Domfoam Inc. and 4362063 Canada Ltd.

Fred,

May I please hear back from you in reply to my letter of April 14? Copy attached here.

Regards,
Varoujan

Varoujan Arman
Partner
varman@blaney.com
416-596-2884 | 416-593-2960

From: Debbie Alderson
Sent: April 14, 2020 5:38 PM
To: 'fred@fredtayar.com' <fred@fredtayar.com>
Cc: Varoujan Arman <VArman@blaney.com>
Subject: Domfoam Inc. and 4362063 Canada Ltd.

Good afternoon,

Enclosed please find correspondence from Mr. Arman,

Regards,

Debbie Alderson

Debbie Alderson
Assistant

dalderson@blaney.com
416-593-1221 ext. 1973
Blaney.com

TAB 16

This is Exhibit “D”

to the Affidavit of Linc Rogers

sworn August 9, 2020

_____

Varoujan Arman

A Commissioner, etc.

Debbie Alderson

From: Varoujan Arman
Sent: May 7, 2020 5:55 PM
To: 'Colby Linthwaite'; Fred Tayar
Cc: 'Grant Moffat'; David T. Ullmann; 'Robert G. Tanner'
Subject: RE: Domfoam

Follow Up Flag: Follow up
Flag Status: Flagged

Fred and Colby,

Thank you for your email. As you know, we wanted, and still want, to have a (virtual) meeting to try to discuss how this matter goes forward. We do not agree that examining Tony Vallecoccia is appropriate or, more importantly, of any value towards the pending Monitor's motion. Indeed, the purpose behind the Monitor's motion seems to be to enable the litigation to move forward, which we would have thought would be in our mutual interest. We were surprised by your opposition to it, especially since you have known for months that such a motion was coming.

We oppose any examination of Tony. As you know, Tony is not well and has not been able to provide us with useful instructions for some time. You yourself raised concerns about his memory when you last examined him. To the extent he is able to understand this matter at all, he has asked that he be removed from this process. Robert Tanner spoke with Tony three weeks ago, and reported that Tony advised that both his strength and his memory have been left significantly diminished. David and I spoke with Tony's wife last week to follow up on this. His wife advised that Tony is now under the care of psychiatrists, and he does not have capacity to serve as a director. She described his memory as being significantly challenged and confirmed again that he had suffered a heart attack last year. Although this was not expressly said in the Monitor's materials, this is the circumstance we are facing.

We cannot imagine what evidence you could extract from Tony which would assist you in opposing the Motion. If you persist in pursuing an examination without meeting with us to explain its purpose, it will be opposed and you will have to bring a motion. We encourage you to reconsider. We have no doubt that the court will protect Tony from a pointless interrogation which will likely only frustrate you and embarrass him.

Status of Funds Received by Domfoam Inc.

We would also like to meet with you to discuss why it is that you have not responded to our letter of April 14, 2020, despite follow up, to confirm that your client has paid the $1,399,002.24 it received into your firm's trust account. You have known for some time that our client asserts an interest in those funds. We are growing concerned about the whereabouts and safekeeping of these funds. Please immediately advise if the funds are in your firm's trust account. If the funds are not in your trust account already, please confirm the funds will be paid into trust by no later than end of business on May 13, 2020. Failing that, we expect to be instructed to bring a motion to have the funds paid into court, and in that case, costs will be sought against your client.

Mediation Dates (May 25 and June 24 Reserved)

Given the adjournment of the Monitor's motion to appoint a CRO, the mediation dates need to be revisited. At a minimum, the May date is not going to be feasible, so we suggest that we update Justice Cumming, and perhaps also reserve an additional date in July in case it becomes necessary.

We are available to meet with you on Tuesday or Wednesday next week in the early afternoon on either day to discuss the above.

Regards,
Varoujan

Varoujan Arman
Partner
varman@blaney.com
416-596-2884 | 416-593-2960

From: Colby Linthwaite [mailto:colby@fredtayar.com]
Sent: May 7, 2020 2:53 PM
To: Varoujan Arman
Cc: Fred Tayar ; 'Grant Moffat' ; David T. Ullmann
Subject: RE: Domfoam

Varoujan,

Please respond respecting Mr. Vallecoccia's availability for examination. The applicant's refusal to do so, and its refusal to explain why it is refusing to do so, are holding up this case. Mr. Vallecoccia has both a corporate lawyer and a personal lawyer he is instructing. He is capable of swearing affidavits, and he therefore is quite capable of being examined as a witness.

Regards,

Colby Linthwaite
Barrister and Solicitor
Fred Tayar & Associates
Professional Corporation
65 Queen Street West, Suite 1200
Toronto, ON M5H 2M5
416.363.1800 ext. 300

From: Colby Linthwaite
Sent: Friday, May 1, 2020 4:44 PM
To: Varoujan Arman <VArman@blaney.com>
Cc: Fred Tayar <fred@fredtayar.com>; 'Grant Moffat' <GMoffat@tgf.ca>; David T. Ullmann <DUllmann@blaney.com>
Subject: RE: Domfoam

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If you have evidence of Mr. Vallecoccia's illness, please provide it. Please also state what this additional information is.

Again, please confirm that Mr. Vallecoccia will be produced for his examination. Once we have that, we can discuss the rest of your agenda.

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We have additional information to share with you and a number of other topics we'd like to discuss, as evidenced by my agenda below. A phone call is the easiest way to handle this. Just two emails ago you agreed we could have a call early next week. So again, we are requesting your available times. I think we should budget 30 minutes.

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Despite a number of requests going back months, we have not seen any evidence of Mr. Vallecoccia'a alleged illness. If you have some, please provide it.

Please confirm that Mr. Vallecoccia will be produced for his examination. Once we have that, we can discuss the rest of your agenda.

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Subject: RE: Domfoam

Colby,

Here is a proposed agenda for the call:

1. Monitor's motion for CRO and discussion of incapacity of Tony Vallecoccia, and need for and appropriateness of examination
2. Status of $1,399,002.24 received by Domfoam Inc. and lack of response to our letter of April 14, 2020
3. Mediation dates

Please get back to me with your availability.

Regards,
Varoujan

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Subject: RE: Domfoam

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We can set up a call for next week, but I'd like to know what the issue is before then, so that we can have an informed discussion.

Thanks.

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There are a few matters we'd like to speak with you and Fred about, that being one of them. Can you please let me know your availability for a call early next week?

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Cc: Fred Tayar <fred@fredtayar.com>
Subject: Domfoam

David,

During the tele-hearing with Justice Conway, you said that there was an issue with the examination of Mr. Vallecoccia. Justice Conway prevented you from describing that issue, on the basis that counsel should work it out amongst themselves. I would like to comply with Justice Conway's direction. Please describe the issue. If you will not, then please provide Mr. Vallecoccia's availability for his examination.

Yours,

Colby Linthwaite
Barrister and Solicitor
Fred Tayar & Associates
Professional Corporation
65 Queen Street West, Suite 1200
Toronto, ON M5H 2M5
416.363.1800 ext. 300

TAB 17

This is Exhibit “E”

to the Affidavit of Linc Rogers

sworn August 9, 2020

_____

Varoujan Arman

A Commissioner, etc.

Debbie Alderson

From: Colby Linthwaite <colby@fredtayar.com>
Sent: May 11, 2020 10:31 AM
To: Varoujan Arman; Fred Tayar
Cc: 'Grant Moffat'; David T. Ullmann; 'Robert G. Tanner'
Subject: RE: Domfoam

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Varoujan,

The following will respond to your statements in the order in which they were made.

Our client is not bound by your estimation of whether the examination of Mr. Vallecoccia would be “of value”.

We have been trying to move this matter to a hearing for more than a year. It is your client - first with its request to examine new witnesses after having completed its cross, then by taking the position that discovery and a trial were necessary - that has delayed the matter.

We do not “know” that Tony is not well. This is because we have seen no evidence of an illness, despite many requests therefor. Commencing some months ago, Mr. Ullman said (verbally) to us that he had had recent trouble getting instructions from Mr. Vallecoccia. Mr. Ullman said at first that this may be because Mr. Vallecoccia had had a stroke and later because he had had a heart attack. It may be the case that Mr. Ullman had trouble getting instructions because Mr. Vallecoccia wanted to resign his directorship. Commencing the same number of months ago, we asked for evidence of the alleged illness, and have been ignored. There is no such evidence anywhere in the Court file, including the monitor’s recent report, which relies on hearsay from Mr. Vallecoccia’s attorney to the effect that Mr. Vallecoccia no longer wishes to be involved in the applicant’s affairs.

This is the first time it has been asserted that Tony’s memory has deteriorated.

When you, Grant Moffat, and I spoke three weeks ago about the examination of Mr. Vallecoccia, you did not raise the possibility that he was medically impaired, or that his memory was untrustworthy. You did say that your office had not spoken to Mr. Vallecoccia in quite some time.

Neither I nor Fred “raised concerns about” Mr. Vallecoccia’s memory when we examined him.

The $1.3 million is being held in an interest-bearing account. This information is intended to give your client comfort, but it is without prejudice to our client’s right take the position that there is no reason to hold those funds without using them. There is no Mareva injunction in place. Our client is prepared to give Blaney's seven days notice of any change in our client's position.

We agree that until the issue of the examination of Mr. Vallecoccia and the appointment of a CRO has been resolved, the mediation cannot go ahead, and that Justice Cumming should be apprised of that.

Regards,

Colby Linthwaite

Barrister and Solicitor
Fred Tayar & Associates
Professional Corporation
65 Queen Street West, Suite 1200
Toronto, ON M5H 2M5
416.363.1800 ext. 300

From: Varoujan Arman
Sent: Thursday, May 7, 2020 5:55 PM
To: Colby Linthwaite ; Fred Tayar
Cc: 'Grant Moffat' ; David T. Ullmann ; 'Robert G. Tanner'
Subject: RE: Domfoam

Fred and Colby,

Thank you for your email. As you know, we wanted, and still want, to have a (virtual) meeting to try to discuss how this matter goes forward. We do not agree that examining Tony Vallecoccia is appropriate or, more importantly, of any value towards the pending Monitor's motion. Indeed, the purpose behind the Monitor's motion seems to be to enable the litigation to move forward, which we would have thought would be in our mutual interest. We were surprised by your opposition to it, especially since you have known for months that such a motion was coming.

We oppose any examination of Tony. As you know, Tony is not well and has not been able to provide us with useful instructions for some time. You yourself raised concerns about his memory when you last examined him. To the extent he is able to understand this matter at all, he has asked that he be removed from this process. Robert Tanner spoke with Tony three weeks ago, and reported that Tony advised that both his strength and his memory have been left significantly diminished. David and I spoke with Tony's wife last week to follow up on this. His wife advised that Tony is now under the care of psychiatrists, and he does not have capacity to serve as a director. She described his memory as being significantly challenged and confirmed again that he had suffered a heart attack last year. Although this was not expressly said in the Monitor's materials, this is the circumstance we are facing.

We cannot imagine what evidence you could extract from Tony which would assist you in opposing the Motion. If you persist in pursuing an examination without meeting with us to explain its purpose, it will be opposed and you will have to bring a motion. We encourage you to reconsider. We have no doubt that the court will protect Tony from a pointless interrogation which will likely only frustrate you and embarrass him.

Status of Funds Received by Domfoam Inc.

We would also like to meet with you to discuss why it is that you have not responded to our letter of April 14, 2020, despite follow up, to confirm that your client has paid the $1,399,002.24 it received into your firm's trust account. You have known for some time that our client asserts an interest in those funds. We are growing concerned about the whereabouts and safekeeping of these funds. Please immediately advise if the funds are in your firm's trust account. If the funds are not in your trust account already, please confirm the funds will be paid into trust by no later than end of business on May 13, 2020. Failing that, we expect to be instructed to bring a motion to have the funds paid into court, and in that case, costs will be sought against your client.

Mediation Dates (May 25 and June 24 Reserved)

Given the adjournment of the Monitor's motion to appoint a CRO, the mediation dates need to be revisited. At a minimum, the May date is not going to be feasible, so we suggest that we update Justice Cumming, and perhaps also reserve an additional date in July in case it becomes necessary.

We are available to meet with you on Tuesday or Wednesday next week in the early afternoon on either day to discuss the above.

Regards,
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Yours,

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Fred Tayar & Associates
Professional Corporation
65 Queen Street West, Suite 1200
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416.363.1800 ext. 300

TAB 18

This is Exhibit “F”

to the Affidavit of Linc Rogers

sworn August 9, 2020

_____

Varoujan Arman

A Commissioner, etc.

Blaney McMurtry LLP | Lawyers
2 Queen Street East | Suite 1500
Toronto, Ontario M5C 3G5
T 416-593-1221
W Blaney.com

Varoujan Arman
416-596-2884
varman@blaney.com

July 17, 2020

BY EMAIL

Fred Tayar
Fred Tayar & Associates
Professional Corporation
Barristers & Solicitors
65 Queen Street West, Suite 1200
Toronto, ON M5H 2M5

Dear Mr. Tayar:

Re: Domfoam Inc. and 4362063 Canada Ltd.

This is further to our letter of April 14, 2020, and subsequent emails exchanged with Colby Linthwaite of your office, regarding the cheque received by your client in the amount of $1,399,002.24, being class action settlement proceeds. As you know, these funds are the subject of a dispute between our respective clients. It is our client's position that these funds should be held by the Monitor in trust, for safekeeping until the dispute between our respective clients is resolved or determined.

By email dated May 11, 2020, Mr. Linthwaite advised that the funds are being held by your client, and the information provided was without prejudice to your client's right to take the position that there is no reason to hold the funds without using them, and finally, that your client is prepared to provide us with seven days' notice of any change in position. This is not acceptable. The funds are clearly the subject of a dispute and it would be inappropriate for your client to spend or transfer any portion of the funds in any way. The obviously appropriate place for the funds to be safeguarded is the Monitor's trust account.

Given that the mediation failed to facilitate a consensual resolution of this matter, we are now instructed by the court-appointed Chief Restructuring Officer to bring a motion to require your client to pay the funds to the Monitor, to be held pending further order of the court. In that regard, we note that the balance of the funds in dispute between our clients are already being held by the Monitor. We will seek costs against your client on a substantial indemnity basis if forced to bring a motion. In an effort to avoid these unnecessary costs, and what ought to be an unnecessary motion, we are prepared to provide your client with one final indulgence to comply with this demand until July 24, 2020. Please confirm in writing before that time, that your client will pay the funds to the Monitor to be held until the determination of the dispute.

We look forward to hearing from you on or before the end of business on July 24, 2020. After that time, we will be preparing motion materials and costs will be insisted upon as a term of any subsequent resolution. This letter will be provided to the court (as will our April 14, 2020 letter) in support of our submissions on costs.

Yours very truly,

Blaney McMurtry LLP

Varoujan Arman

VA/da

cc: Grant Moffat, Linc Rogers

TAB 19

Rules of Civil Procedure, RRO 1990, Reg 194

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 1.03 (definition for "proceeding" only)

"proceeding" means an action or application

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 25.11

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 37.06

CONTENT OF NOTICE

37.06 Every notice of motion (Form 37A) shall,

(a) state the precise relief sought;

(b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on, and

(c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg.194, r. 37.06.

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 56.01

WHERE AVAILABLE

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 37.06 (Cont'd.)

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 60.12

FAILURE TO COMPLY WITH INTERLOCUTORY ORDER

60.12 Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,

(a) stay the party's proceeding;

(b) dismiss the party's proceeding or strike out the party's defence; or

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 60.12.

https://www.ontario.ca/laws/regulation/900194

TAB 20

CITATION: Kerlow v. Corrigan, 2019 ONSC 5181
COURT FILE NOS.: CV-12-453011; CV-11-423910
MOTIONS HEARD: 20190808
REASONS RELEASED: 20190906

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

JOSEPH KERLOW

Plaintiff

- and-

KATHLEEN ANN CORRIGAN and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

[Related Action: Brian Fulop v. Kathleen Ann Corrigan, Michael Sills and Her Majesty the Queen in Right of Ontario, Court File No. CV-11-423910]

BEFORE: MASTER M.P. McGRAW

COUNSEL: J. Glick and R. Mann
Email: Jeremy.Glick@Ontario.ca
-Counsel for the Defendants, Kathleen Ann Corrigan and Her Majesty the Queen in Right of Ontario

H. Epstein
Email: hepstein@bainspartner.com
-Counsel for the Plaintiffs, Joseph Kerlow and Brian Fulop

REASONS RELEASED: September 6, 2019

Reasons for Endorsement

I. Introduction

[1] The Defendants Kathleen Ann Corrigan and Her Majesty the Queen in right of Ontario (collectively, the "Defendants") bring motions in these actions seeking security for costs from the Plaintiffs Joseph Kerlow and Brian Fulop pursuant to section 10 of the *Public Authorities Protection Act* (Ontario)(the "Act") and Rule 56.01(1) of the *Rules of Civil Procedure*. These motions were brought after these actions were set down for trial raising an issue of whether the Defendants require leave under Rule 48.04(1) and if so, if leave should be granted.

II. The Criminal Investigation and Proceedings, the Actions and the Motions

The Criminal Investigation and Proceedings

[2] These actions arise from criminal investigations of the Plaintiffs led by the Defendant Detective Constable Kathleen Ann Corrigan ("Detective Corrigan") of the Quinte West Detachment of the Ontario Provincial Police (the "OPP"). The Plaintiffs were charged and ultimately acquitted on multiple charges related to alleged sexual assaults involving 4 female complainants related to 4 incidents from April 2007-July 2008.

[3] On May 23, 2008, the first complainant ("N.D.") filed a complaint of sexual assault against Mr. Kerlow and another man. N.D. alleged that Mr. Kerlow and the other man put a date rape drug in her drink, sexually assaulted her and recorded the sexual assault on video without her consent. Mr. Kerlow provided a voluntary statement admitting to engaging in sexual activity with N.D. but alleged that she consented to the sexual activity and recording.

[4] In executing search warrants at the residences of Mr. Kerlow and the other man, the Defendants seized computer equipment, cell phones and other storage equipment containing numerous pornographic videos of females who appeared to be in various stages of consciousness. Through further investigation, Detective Corrigan identified the Plaintiffs, the other man and some of the women in the videos. Detective Corrigan also received information identifying the Plaintiffs as 2 of 3 men in a video with another woman ("B.T.").

[5] During Detective Corrigan's investigation of the women identified in the photos and videos, a second complainant ("S.M.") and B.T., the third complainant, both advised that they had no recollection of participating in any sexual activity with the Plaintiffs, had not consented to the sexual activity or recordings and that they wished to pursue charges. A fourth complainant ("E.M.") who had been in a relationship with Mr. Kerlow also alleged that Mr. Kerlow sexually assaulted her.

[6] On September 14, 2008, Mr. Kerlow was arrested and charged with sexual assault with respect to N.D. contrary to s. 271 of the *Criminal Code* (Canada); surreptitiously observing and recording by visual recording contrary to s. 162(1) of the *Criminal Code;* and intent to enable the commission of the offence of a stupefying substance contrary to s. 246(b) of the *Criminal Code*. Mr. Kerlow was also charged with possession of child pornography contrary to s. 163.1 of the *Criminal Code* unrelated to the alleged assaults. On April 16, 2009, Mr. Kerlow was arrested and charged under ss. 271 and 246(b) of the *Criminal Code* with respect to S.M. and ss. 271, 162(1) and 246(b) with respect to B.T. On July 21, 2009, Mr. Kerlow was arrested and charged under s. 271 of the *Criminal Code* related to E.M. On April 10, 2009, Mr. Fulop was arrested and charged with 3 counts pursuant to ss. 271, 162 (1) and 246(b) of *Criminal Code* with respect to B.T.

[7] On September 16, 2009, after a preliminary inquiry, the Plaintiffs and the third man were committed to trial on all charges, Mr. Kerlow with respect to N.D., S.M. and B.T. and Mr.

Fulop with respect to B.T. The child pornography charge against Mr. Kerlow was withdrawn prior to trial. The Plaintiffs elected to be tried by Judge alone.

[8] On June 18, 2010, after an 8-day trial, the Plaintiffs were acquitted of all charges. On November 2, 2011, after a two-day trial, Mr. Kerlow was acquitted of all charges with respect to E.M.

The Actions

[9] Mr. Fulop commenced his action by Statement of Claim issued on April 7, 2011 seeking general damages of $1,000,000 for wrongful arrest, wrongful detention, negligent investigation, breach of his *Charter* rights and malicious prosecution; $500,000 in special damages; and $1,000,000 in punitive damages. Mr. Kerlow commenced his action by Statement of Claim issued on May 14, 2012 claiming general damages of $1,000,000 for negligent investigation, malicious prosecution and/or mental and/or emotional distress, together with claims for $1,000,000 in special damages and $1,000,000 in punitive damages. Mr. Fulop and Mr. Kerlow claim their legal fees of for the criminal proceedings of $100,000 and $260,000, respectively. Pursuant to the Order of Master McAfee dated April 20, 2016, these actions will be tried together or one after the other.

[10] The parties attended trial scheduling court in September 2017 and consented to a 20-day trial of these actions which is currently scheduled for November 20, 2019. The parties' expert reports were due in December 2018. On December 18, 2018, the Defendants served the Expert Report dated September 1, 2018 of Pamela Bruce, an expert in police sexual assault investigations (the "Defence Report"). The Plaintiffs did not deliver an expert report by the deadline but advised that they intended to do so (the "Plaintiffs' Report").

[11] The Plaintiffs subsequently requested access to the audio-visual materials relied on by the OPP in laying charges. The Defendants brought a motion for their production under Rule 30.10 which was granted by Order of Justice Nakatsuru dated May 23, 2019.

[12] The Plaintiffs were then required to deliver the Plaintiffs' Report by June 20, 2019 but have still not done so. Plaintiffs' counsel advised the Court that the Plaintiffs have retained an expert and still intend to deliver the Plaintiffs' Report, however, cannot provide an estimated date for its delivery. The Defendants submit that, given the limited time before trial and the need to respond to the Plaintiffs' Report, an adjournment of the current trial date will likely be necessary.

The Motions

[13] The Plaintiffs filed affidavits in response to these motions and were cross-examined on June 4, 2019.

[14] Mr. Kerlow has resided in Winnipeg, Manitoba since 2016. He is a Corporal with the Royal Canadian Air Force employed as an Aircraft Structures Technician. He purchased a

condominium in Winnipeg in 2016 for $269,000 and his estimated gross income for 2019 is $72,000. Mr. Kerlow's vehicle is worth approximately $15,000, he has $35,000 in RRSPs and has $83,000 available on a $100,000 line of credit secured against his condominium which he obtained to pay his legal fees of the criminal proceedings. Mr. Kerlow did not file any bank records, a summary of his expenses or evidence of any further borrowing ability. Mr. Kerlow does not have a contingency fee arrangement with counsel.

[15] Mr. Fulop resides in Calgary, Alberta where he is employed as a countertop installer by FloForm Industries. He earned $51,565 in 2018. Contrary to his affidavit, Mr. Fulop admitted on cross-examination that he did not move to Alberta because of the criminal proceedings, but because his common law partner (who he referred to as his girlfriend in his affidavit) obtained a teaching job in Calgary. He further admits that the criminal charges were not the reason he did not attend college and that his current job pays him $10,000 more annually than a similar job in Ontario. Mr. Fulop borrowed approximately $100,000 to pay for his criminal defence, $15,000 under a bank loan and $85,000 from his parents, who sold their home in 2010.

[16] While Mr. Fulop has provided evidence of his bank loan of $15,000, he has not provided any bank statements for himself or his partner or any information with respect to his partner's income. He has also not filed any evidence of the debt owed to his parents (though he says that he cannot borrow further from his parents, who are now separated), a statement of expenses and failed to disclose in his affidavit that his common law partner owns her vehicle and that both he and his partner own motorcycles. Mr. Fulop has a contingency fee arrangement with his counsel and only pays for disbursements.

[17] The Defendants initially sought security for costs of $150,000 from each of the Plaintiffs. However, Defendants' counsel advised the Court that they now seek an order requiring each of the Plaintiffs to post an amount in the range of $50,000-$55,000 which may be paid in instalments before trial.

III. The Law and Analysis

Generally

[18] These motions require an analysis of the interaction between s. 10 of the Act and Rules 48.04(1) and 56.01(1). This includes whether or not the Defendants require leave to bring their security for costs motions and the test for security for costs.

[19] Rule 48.04(1) provides that any party who has set an action down for trial or who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

[20] Two divergent approaches have emerged with respect to the exercise of the court's discretion under Rule 48.04(1) to grant leave: i.) a more established test which requires the moving party to demonstrate that there has been a substantial or unexpected change in circumstances; and ii.) a broader more liberal and flexible approach which does not require the

finding of a substantial or unexpected change but that the court may grant leave and make the order that is just in the circumstances where the interlocutory step is necessary in the interests of justice considering all of the circumstances of each case and Rule 1.04(1)(*BNL Entertainment Inc.* v. *Ricketts*, 2015 ONSC 1737 at para. 12).

[21] Section 10 of the Act states:

> "Where an action is brought against a justice of the peace or against any person for any act done in pursuance or execution or intended execution of any public duty, statutory or otherwise, or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, the defendant may, at any time after the service of the writ, make a motion for security for costs if it is shown that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, and that the defendant has a good defence upon the merits, or that the grounds of action are trivial or frivolous."

[22] In *Rackley* v. *Rice* (1992), 8 O.R. (3d) 105, the Divisional Court held that a "good defence on the merits" means that the defence is likely to succeed which in turn means that the grounds of the action are trivial and frivolous (*Rackley* at para. 15). Master Dash adopted this definition of "likely to succeed" in considering the meaning of "good defence on the merits" under similar security for costs provisions at s. 12(1) of the *Libel and Slander Act* (Ontario)(*Browne* v. *Toronto Star Newspapers Limited*, 2015 ONSC 2376 at para. 119).

[23] Rule 56.01(1) states:

> "The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
> (a) the plaintiff or applicant is ordinarily resident outside Ontario;
> (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
> (f) a statute entitles the defendant or respondent to security for costs.

[24] Rule 56.01(1) does not create a *prima facie* right to security for costs but rather triggers an enquiry whereby the court, using its broad discretion, considers multiple factors to make such order as is just in the circumstances. These factors include the merits of the claim, the financial circumstances of the plaintiff and the possibility of an order for security for costs preventing a bona fide claim from proceeding (*Stojanovic* v. *Bulut*, 2011 ONSC 874 at paras. 4-5).

[25] More recently, the Court of Appeal provided the following guidance in Y*aiguaje* v. *Chevron Corp.*, 2017 ONCA 827:

> "23 The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of rr. 56 or 61 have been met.
>
> 24 Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the litigation. See: *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63 (S.C.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55 (S.C.); *Wang v. Li*, 2011 ONSC 4477 (S.C.); and *Brown v. Hudson's Bay Co.*, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).
>
> 25 While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made."

[26] The Court of Appeal subsequently provided additional guidance in *Novak* v. *St. Demetrius (Ukrainian Catholic) Development Corporation*, 2018 ONCA 219:

> "7 Justice Epstein's order was made prior to the release of this court's decision in *Chevron Corp. v. Yaiguaje*, 138 O.R. (3d) 1, 2017 ONCA 827, which was included in the appellant's materials. We do not read that decision as altering the established test for ordering security for costs. The established test requires a judge, after analysing the specific factors spelled out in the rules, to consider the overall justness of the order sought. In *Yaiguaje v. Chevron Corp.* the court found that the motion judge had erred in principle in her consideration of the justness of the order.
>
> 8 In this case, we are satisfied the Epstein J.A. did not err in considering the ordering of security for costs to be just. Unlike in *Yaiguaje v. Chevron Corp*, the appellant in this case has a direct economic interest in the appeal. The respondent is not a global enterprise but a not-for-profit senior citizens care centre operated by a church. Unrecoverable costs will reduce the respondent's resources it can dedicate to the care of its clients. There is no indication the respondent sought security for costs as

> a litigation tactic to end the appeal. The appeal raises no overarching, important, or novel issue. There is no apparent overriding public interest in allowing the appeal to proceed without the posting of ordered security for costs."

[27] I recently summarized the law on security for costs in *Canadian Metal Buildings Inc.* v. *1467344 Ontario Limited,* 2019 ONSC 566. The law on security for costs was also summarized by J.R. Henderson J. in *2311888 Ontario Inc.* v. *Ross,* 2017 ONSC 1295 at para. 17 and Master Muir in *2179548 Ontario Inc.* v. *2467925 Ontario Inc.* [2017] O.J. No. 246 at para. 8.

[28] The initial onus is on the defendants to show that the plaintiff falls within one of the four enumerated categories in Rule 56.01. If the defendant meets the initial onus, the plaintiff can rebut the onus and avoid security for costs by showing that they have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs order; the order is unjust or unnecessary; or the plaintiff should be permitted to proceed to trial despite its impecuniosity should it fail (see *Travel Guild Inc.* v. *Smith,* 2014 CarswellOnt 19157 (S.C.J.) at para.16; *Coastline Corp.* v. *Canaccord Capital Corp.*, [2009] O.J. No. 1790 (ONSC) at para. 7; *Cobalt Engineering v. Genivar Inc.*, 2011 ONSC 4929 at para. 16).

[29] Master Glustein (as he then was) summarized the applicable principles at paragraph 7 of *Coastline:*

> "7 I apply the following legal principles:
>
> (i) The initial onus is on the defendant to satisfy the court that it "appears" there is good reason to believe that the matter comes within one of the circumstances enumerated in Rule 56.01 (*Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.J.) at 123);
>
> (ii) Once the first part of the test is satisfied, "the onus is on the plaintiff to establish that an order for security would be unjust" (*Uribe v. Sanchez* (2006), 33 C.P.C. (6th) 94 (Ont. S.C.J. - Mast) ("*Uribe*") at para. 4);
>
> (iii) The second stage of the test "is clearly permissive and requires the exercise of discretion which can take into account a multitude of factors". The court exercises a broad discretion in making an order that is just (*Chachula v. Baillie* (2004), 69 O.R. (3d) 175 (S.C.J.) at para. 12; *Uribe*, at para. 4);
>
> (iv) The plaintiff can rebut the onus by either demonstrating that:
>
> (a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation,
>
> (b) the plaintiff is impecunious and that justice demands that the plaintiff be permitted to continue

with the action, *i.e.* an impecunious plaintiff will generally avoid paying security for costs if the plaintiff can establish that the claim is not "plainly devoid of merit", or

(c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must meet a high threshold to satisfy the court of its chances of success (See *Willets v. Colalillo*, [2007] O.J. No. 4623 (S.C.J. - Mast.) at paras. 46, 47, and 55; *Uribe*, at para. 5; *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.) at para. 50; *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2007] O.J. No. 4096 (S.C.J. - Mast.) ("*Bruno*") at para. 35);

(v) Merits have a role in any application under Rule 56.01, but in a continuum with Rule 56.01(1)(a) at the low end (*Padnos v. Luminart Inc.*, [1996] O.J. No. 4549 (Gen. Div.) ("*Padnos*"), at para. 4; *Bruno*, at para. 36);

(vi) The court on a security for costs motion is not required to embark on an analysis such as in a motion for summary judgment. The analysis is primarily on the pleadings with recourse to evidence filed on the motion, and in appropriate cases, to selective references to excerpts of the examination for discovery where it is available (*Padnos*, at para. 7; *Bruno*, at para. 37);

(vii) "If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious" (*Wall v. Horn Abbott Ltd.*, [1999] N.S.J. No. 124 (C.A.) at para. 83);

…

(xiii) When an action is in its early stages, an installment (also known as "pay-as-you-go") order for security for costs is usually the most appropriate (*Bruno*, at para. 65; *Hawaiian Airlines, Inc. v. Chartermasters Inc., et al.* (1985), 50 O.R. (2d) 575 (S.C.O. - Mast.).”

[30] The defendant’s onus under Rule 56.01(d) is a light one to show that there is good reason to believe that the plaintiff has insufficient assets in Ontario to satisfy a costs award (*Georgian Windpower Corp.* v. *Stelco Inc.*, [2012] O.J. No. 158 (ONSC) at para. 7).

[31] The plaintiff's financial disclosure requires "robust particularity" including: the amount and source of all income; a description of all assets (including values); a list of all liabilities and other significant expenses; an indication of the extent of the ability of the plaintiffs to borrow funds; and details of any assets disposed of or encumbered since the cause of action arose (*General Products Inc.* v. *Actiwin Company Limited*, 2015 ONSC 6923; *Al Masri* v. *Baberakubona*, 2010 ONSC 562 at para. 19).

[32] In *General Products*, Lemon J. identified the relevant factors when considering the sufficiency of evidence put forward by a plaintiff attempting to demonstrate that it has sufficient assets in Ontario to satisfy a costs award:

> i.) the court must critically consider the quality as well as the sufficiency of the assets presently held and whether they are bona fide assets of the company;
> ii.) there must be demonstrated exigible assets. It is insufficient for the plaintiff to show that it is profitable since the focus of the rule is not on income, but rather on the nature and sufficiency of assets;
> iii.) the court must consider the liabilities of the company as well as its assets and in particular whether the assets to which the defendant is expected to look are secured to another creditor;
> iv.) the rule does not countenance extensive and speculative inquiries as to the further value and availability of the asset. A mere possibility that the assets may be removed at some future time is not, without more, grounds for security;
> v.) the failure of a plaintiff to respond to a defendant's enquiry as to the availability of assets may raise a doubt as to the existence of assets." (*General Products* at para. 19)

Do The Defendants Require Leave and If So, Should Leave Be Granted?

[33] The Defendants submit that since s. 10 of the Act provides that a security for costs motion may be brought "at any time after the service of the writ", leave is not required. The Defendants also rely on case law which provides that a security for costs motion under Rule 56.01(1) can be brought at any time (*855191 Ontario Ltd.* v. *Turner*, 2011 ONSC 918 at paras. 14-16). Alternatively, the Defendants submit that they have met the relevant test and leave should be granted.

[34] I reject the Defendants' argument that leave is not required. The Defendants submit that imposing this requirement would put Rule 48.04(1), a regulation, in conflict with s. 10 of the Act, a statutory provision. Rule 48.04(1) does not prohibit the bringing of a security for costs motion, rather, it imposes an additional requirement in specific circumstances, namely, after an action has been set down for trial. In my view, this does not conflict with or fetter s. 10 of the Act because a security for costs motion can still be brought at any time. Put simply, it does not stop the motion from being brought, it only adds an additional step for the moving party. Further, in *Turner*, the Court's conclusion that a security for costs motion can be brought any time was the basis for granting leave. The Court did not conclude that leave was not required.

[35] In determining whether the Defendants should be granted leave, I adopt the liberal, flexible approach which takes all of the relevant circumstances of each particular case into consideration. Applying this approach, I am satisfied, having considered all of the relevant factors and circumstances, that it is reasonable, appropriate and just to grant leave.

[36] In granting leave I adopt the reasoning in *Turner*. However, I am also satisfied that the Defendants have sufficiently explained the timing of these motions including any delay and that the motions are necessary in the interests of justice. In my view, since the timing of the Defendants' motions will be more fully considered under the test for security for costs, it does not require a comprehensive analysis here. For the purposes of granting leave, it is sufficient that I conclude that it was reasonable for the Defendants to bring this motion after receiving the Defence Report and that granting leave at this time will cause no prejudice to the Plaintiffs. In considering the timing of the Defendants' motion and any prejudice, it is also relevant that the Defendants accommodated the Plaintiffs' late request for production of the audio-visual evidence and brought the motion to facilitate its production. Further, the Plaintiffs have missed numerous deadlines for the delivery of the Plaintiffs' Report and still cannot estimate when it may be delivered which may result in an adjournment of the trial date. In addition, as set out below, I am satisfied that there is merit to the Defendants' security for costs motions.

Should the Plaintiffs Be Required to Pay Security For Costs?

[37] The Defendants submit that the Plaintiffs have insufficient assets to satisfy a costs award, they have a good defence on the merits and it is just that security for costs be ordered. The Defendants submit that if security for costs is not ordered, they will be left with unenforceable costs awards. The Defendants take no issue with the fact that the Plaintiffs reside in Manitoba and Alberta given that both are reciprocating jurisdictions.

[38] Mr. Kerlow submits that he has sufficient assets to satisfy a costs award but at the same time claims that it would be unjust to order security for costs as he would be unable to proceed to trial if ordered to do so. Mr. Fulop concedes that he does not have sufficient assets to satisfy a costs award (he does not assert that he is impecunious) and also submits that it would be unjust to order him to post security for costs because he would be unable to continue to trial. The Plaintiffs both argue that the Defendants do not have a good defence on the merits.

[39] Under both s. 10 of the Act and Rule 56.01(1), I must first consider whether the Plaintiffs have insufficient assets to satisfy a costs award. While Mr. Fulop concedes this point, I turn to a consideration of whether it appears there is good reason to believe that Mr. Kerlow has insufficient assets to satisfy a costs award.

[40] In support of their position that Mr. Kerlow will be unable to satisfy a costs order, the Defendants refer to their Bill Of Costs estimating that the costs of trial preparation and a 20-day trial are $267,300 on a partial indemnity scale and $400,950 on a substantial indemnity scale. In support of their position that these amounts are fair and reasonable, the Defendants cite the costs awarded against unsuccessful plaintiffs in recent police negligence decisions. These include $480,000 on a partial indemnity scale for a 13-day trial in *Payne* v. *Mak*, 2017 ONSC 3660 and

$518,000 on a substantial indemnity scale for a 2-week trial in *Kreiser* v. *Gerber*, 2019 ONSC 3241.

[41] On its face, it would seem that with his annual salary, condominium, line of credit and vehicle, Mr. Kerlow has sufficient assets to satisfy a costs order. However, his contradictory position that he has sufficient assets to pay a costs award but would be unable to proceed to trial if ordered to pay security for costs suggests otherwise. If, as Mr. Kerlow submits, he has sufficient assets to pay a costs award, it would not seem to follow that ordering him to pay security for costs at this stage of the proceedings would deplete his assets to the extent that he would be unable to proceed to trial. The Defendants assert that Mr. Kerlow's position demonstrates that since he must pay legal fees through trial, his assets will be depleted by the end of trial and he will have insufficient assets to pay a costs award if he is unsuccessful. Unfortunately, Mr. Kerlow has not provided enough information, including an estimate of his legal fees, to reconcile these two positions nor was his counsel able to provide much explanation.

[42] I further conclude that Mr. Kerlow has not provided satisfactory evidence of the sufficiency and availability his assets with the requisite robust particularity. Specifically, Mr. Kerlow has not filed any bank statements or any evidence of his liabilities and significant expenses (including his estimated legal fees through trial).

[43] Having considered all of the relevant factors and circumstances, I am satisfied that the Defendants have met the light threshold and onus of establishing that there is good reason to believe that Mr. Kerlow has insufficient assets in Ontario to satisfy a costs award. Mr. Kerlow has not rebutted this onus.

[44] I now turn to a consideration of the merits. Typically, the merits will always be a factor on a security for costs motion and the issue is where on the continuum they fall in each particular case including whether or not the merits cannot be determined due to issues of complexity and credibility and therefore are a neutral factor which should not affect the outcome of the motion (*Sadat* at paras. 40-43). Given that s. 10 of the Act requires the Defendants to demonstrate that they have a good defence on the merits, the merits are a prominent factor on these motions.

[45] Notwithstanding that s. 10 of the Act elevates the importance of the merits, it is not this Court's role nor is it necessary to undertake a deeper analysis such as one akin to a summary judgment motion. In determining if the Defendants have a defence that is likely to succeed such that it is a good defence on the merits, I have relied primarily on the facts of the criminal proceedings, the case law on police negligence and the admissions of the Plaintiffs.

[46] The conduct of a police officer during an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted, a flexible standard based upon an analysis of the circumstances apparent to the officer at the time of the arrest and not based upon what the officer or anyone else learned later (*Hill* v. *Hamilton Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 3; *Wong* v. *Toronto Police Services Board*, [2009] O.J. No. 5067 at para. 61). The Supreme Court has held that in considering the tort of negligent investigation, the standard of care related to an investigating officer is informed

by the legal requirement of reasonable and probable grounds to believe that the suspect is guilty (*Hill* at para. 68).

[47] I.F. Leach J. provided a comprehensive summary of the law related to negligent investigation in *J.H.* v. *Windsor Police Services Board et al.*, 2017 ONSC 6507. In setting out the relevant principles, Leach J. stated the following:

> "The particular conduct required by the applicable standard of care is informed by the stage of the investigation and applicable legal considerations. In relation to arrests and laying of charges by the police, the standard of care applicable to negligent investigation claims is informed by the requirement of "reasonable and probable grounds", and does not rise higher than that criminal law standard. Where reasonable and probable grounds exist for an arrest and/or laying of charges, the applicable duty of care is met and there will be no police negligence in that regard. In cases based on alleged police negligence in making an arrest or laying charges, the plaintiff accordingly must establish an absence of reasonable and probable grounds as an essential element of the tort, and the existence of reasonable and probable grounds will be fatal to the claim. In that regard, principles relating to "reasonable and probable grounds" include the following:
>
> …
>
> - The determination as to whether there were reasonable and probable grounds is based upon an analysis of the circumstances apparent to the officer at the time of the officer's decision to make an arrest or lay charges, and not upon what the officer or anyone else may have learned later. In particular, if reasonable and probable grounds existed at the relevant time, they still exist in the sense required even where the information relied upon changes at a later date, or otherwise turns out to be deficient or inaccurate.
>
> …
>
> - A preliminary inquiry is not a trial, but another pre-trial screening procedure aimed at filtering out weak cases that do not merit trial; its paramount purpose is to protect an accused from a needless and improper exposure to public trial where the enforcement agency is not in possession of evidence to warrant continuation of the proceeding. The presiding justice is required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction. A committal for trial after a preliminary inquiry therefore also provides strong evidence supporting the existence of reasonable and probable grounds, and failure to place weight on a committal for trial is an error in law." [citations omitted](*J.H.* at para. 6)

[48] In order to prove negligence, the Plaintiffs must establish the absence of reasonable and probable grounds, which underlies all of their claims. Therefore, determining if the Defendants' have a good defence on the merits turns largely on whether they are likely to succeed in refuting the Plaintiffs' allegations that the Defendants did not have reasonable and probable grounds to charge the Plaintiffs. Consistent with *J.H.*, the fact that the Plaintiffs were committed to trial on all charges after a preliminary inquiry is strong evidence of reasonable and probable grounds. Placing significant weight on this factor, I conclude that the Defendants will likely be able to establish that there were reasonable and probable grounds such that their defence is likely to succeed and is a good defence on its merits. This conclusion is supported by the Plaintiffs' admissions that all of the complainants told Detective Corrigan that they did not consent to the sexual activity or videotaping which were the subject and basis of the charges. I place some, but less emphasis on Ms. Bruce's opinion in the Defence Report that Detective Corrigan had reasonable and probable grounds to charge the Plaintiffs and that there was overwhelming evidence to support the charges.

[49] While both parties, particularly the Plaintiffs, urge me to delve further into the merits, the evidence and the criminal case law, in my view it is unnecessary and inappropriate to do so. My conclusions above are sufficient to establish that the Defendants have satisfied the test that they have a good defence on the merits and any further consideration of the merits is more properly left to the trial Judge.

[50] I now turn to whether it is just that security for costs be ordered. As set out in *Yaiguage*, one of the primary factors with respect to the overriding interests of justice is whether the motions are being used by the Defendants as a litigation tactic to prevent the actions from proceeding to trial to be heard on the merits. In this regard, the timing of the Defendants' motions is important.

[51] In determining the justness of ordering security for costs, the decision of H.M. Pierce J. in *Rosin* v. *Dubic*, 2016 ONSC 6441, also a security for costs motion under s. 10 of the Act, is helpful and relevant. In that case, the plaintiff was living on disability benefits and his action against, among others, the Thunder Bay Police Service Board and the Attorney General of Canada was being funded by family and friends. The defendants each sought security for costs of $30,000. Although the Court found that the plaintiff was impecunious, he was ordered to pay security for costs of $15,000 in two instalments of $7,500:

> "37 If the plaintiff is unsuccessful in the litigation, each defendant runs the risk of obtaining an empty judgment for costs. The defendants each request security for costs in the sum of $30,000. Neither defendant has filed a bill of costs supporting that request.
>
> 38 Citizens are entitled to access to the courts for the purpose of determining disputes. Society's interest is in having disputes determined on their merits. The purpose of security for costs is to protect a defendant from the prospect of an unenforceable judgment for costs; that is a risk in this case if the plaintiff is unsuccessful. However, the amount of security to be posted should not be so onerous as to effectively block access to the courts.

> 39 While I am persuaded that security for costs is warranted in this case, I am concerned that the amounts claimed by the defendants, both individually and collectively, may have the effect of blocking the plaintiff's access to the court. I am mindful that the plaintiff's family and friends are paying for the litigation on the plaintiff's behalf. In my view, security for costs in a lesser amount is appropriate in this case." (*Rosin* at paras. 37-39)

[52] I also adopt the reasoning of Master Dash in *Ascent Inc.* v. *Fox 40 International Inc.*, [2007] O.J. No. 1800. In that case, Master Dash held that a balancing is required between ensuring meritorious claims are allowed to go forward and the consequences of being unable to collect costs where the plaintiff pursues an unsuccessful claim, adding: "if a plaintiff has money then it is fair that he be prepared to risk some in the event he loses." (*Ascent* at para. 3)

[53] The Defendants brought these motions after substantially all steps in these proceedings were completed. The Defendants explain that it was necessary for them to await delivery of the Defence Report given the general rule in *495793 Ontario Ltd.* v. *Barclay*, 2016 ONCA 656 (cited in *J.H.*) that the standard of care of a professional such as a police officer requires expert evidence and that it is generally not possible to determine police negligence without the benefit of expert evidence (*J.H.* at para. 6). Therefore, the Defendants submit that they required the Defence Report in order to establish that they have a good defence on the merits as required under s. 10 of the Act.

[54] The Plaintiffs acknowledge that the Defence Report is necessary to defend the Plaintiffs' claims of negligent investigation, however, submit that the Defence Report is unnecessary for the other causes of action. On this point, I agree with the Defendants that since the Defence Report provides an expert opinion on reasonable and probable grounds, which underlies all of the Plaintiffs' claims, it is necessary to defend all of the Plaintiffs' claims.

[55] While the Defendants' explanation regarding the Defence Report is not dispositive of the timing issue on its own, I am satisfied that when considered together with other relevant timing issues, it is reasonable in the circumstances. Most prominently, the Plaintiffs have missed 2 deadlines for the delivery of the Plaintiffs' Report and cannot provide an estimated date for its delivery leading to the strong possibility that the trial date will be adjourned. The Plaintiffs' request for production of the audio-visual materials was also made late in the proceedings and resulted in another motion. While the Defendants accommodated this request and brought the motion, it has contributed to the delay in these proceedings. Finally, I reject the Defendants' explanation that it was reasonable to wait to bring their motion given that trial preparation and trial are the costliest steps in these proceedings. In my view, these costs are generally known and can be estimated earlier in the proceedings and should not delay parties in moving for security for costs.

[56] Although the Plaintiffs were not cross-examined on their assertions that they would be unable to proceed to trial if ordered to pay security for costs, these claims require closer examination. Consistent with *Rosin* and *Ascent*, in striking the appropriate balance between the Plaintiffs' rights to have their actions heard on the merits with the Defendants' rights to be protected from unenforceable costs awards, it is necessary to determine if there are fair and

reasonable amounts which the Plaintiffs' could and should pay which are just in the circumstances and not so onerous as to block their access to the courts.

[57] Mr. Kerlow's counsel advised the Court that his position that he has sufficient assets to pay a costs award but would be unable to proceed to trial if ordered to pay security for costs is based on the Defendants' initial request for $150,000 in costs, not the $50,000-$55,000 they now seek. Counsel advised that she had no new evidence or instructions and confirmed that Mr. Kerlow maintains this position even if ordered to pay security for costs in the lower amount sought by the Defendants. Notwithstanding my previous finding that Mr. Kerlow has insufficient assets to pay a costs award, given his available assets and all of the circumstances, I am also not satisfied that if he is ordered to pay security for costs in the range of or below the amount now sought by the Defendants, that he would be unable to proceed to trial.

[58] With respect to Mr. Fulop, while he concedes that he does not have sufficient assets to pay a costs award, similarly, I am not convinced that an order for security for costs in an amount in the range of or lower than that now sought by the Defendants would prevent him from proceeding to trial. In drawing this conclusion, I rely on his available assets, the fact that he did not provide sufficient disclosure of his assets including the assets of his partner, was not forthcoming in his affidavit until cross-examined and the fact that he has a contingency fee arrangement and will only have to pay disbursements through trial. Mr. Fulop's submission that the reason he has insufficient assets is a result of the criminal proceedings is contradicted by his own admissions.

[59] My conclusions with respect to both Plaintiffs are premised on the fact that any amounts ordered at or below the range now sought by the Defendants would necessarily take into account the assets which they have available to pay security for costs to arrive at a fair, reasonable and just amount to strike the appropriate balancing of the parties' rights. Given that the Plaintiffs have some available assets, it is fair and just in the circumstances to require them to risk some assets in the event that they are unsuccessful. This is even more pronounced in the present case where I have concluded that the Defendants have a good defence on the merits (and the corresponding conclusion from *Rackley* that the grounds of the actions are trivial and frivolous). Further, both Plaintiffs are in a better position that the plaintiff in *Rosin* who was ordered to post security even though he was impecunious, receiving disability payments, living with his parents and his action was being funded by family.

[60] Having considered all of the relevant factors and balanced the interests of the Plaintiffs to have their claims decided on the merits and the Defendants to have some protection against an unenforceable costs award, applying a holistic approach, I conclude that it is just in the circumstances that security for costs be ordered. In arriving at this conclusion, I am satisfied that these motions are not a litigation tactic and that the Plaintiffs would not be prevented from proceeding to trial if security for costs is awarded. This conclusion is supported by my previous finding that the Defendants have a good defence on the merits, the amounts sought by the Plaintiffs in their actions, and the fact that this is private litigation with no public interest considerations.

[61] With respect to the quantum of security for costs, the court has broad discretion to determine a fair and reasonable amount which is substantially similar to the exercise of its discretion in fixing costs pursuant to Rule 57.01 (*Canadian Metal Buildings* at para. 27). The amount should reflect a number that falls within the reasonable contemplation of the parties reflecting what the successful defendant would likely recover and the factors set out in Rule 57.01 (*720441 Ontario Inc.* v. *The Boiler et al*, 2015 ONSC 4841 at para. 56; *Marketsure Intermediaries Inc.* v. *Allianz Insurance Co. of Canada*, 2003 CarswellOnt 1906 at paras. 17-20). In most cases, security for costs will be ordered on a partial indemnity scale (*The Boiler* at para. 58; *Marketsure* at paras. 17-18). It is appropriate in certain circumstances to order that security for costs be paid in tranches by stage(s) in the litigation on a "pay as you go" basis (*Marketsure* at paras. 13-15).

[62] Having considered the relevant factors and the Defendants' Bill of Costs, I am satisfied that it is fair, reasonable, within the reasonable contemplation of the parties and just in all of the circumstances for Mr. Kerlow to post security for costs in the amount of $40,000 and Mr. Fulop in the amount of $30,000, payable in 2 equal instalments within 30 days and 60 days of this Order. If the current trial date is adjourned, then the second instalment shall be paid 90 days before the new trial date.

[63] In my view, these amounts also reflect the nature and complexity of this action, are consistent with the principles set out in Rule 1.04(1) and proportionality and reflect a proper balancing of the parties' rights and the Plaintiffs' available assets. Perhaps most importantly, I am satisfied that these amounts are not so onerous as to prevent the Plaintiffs from proceeding to trial.

IV. Disposition and Costs

[64] Order to go as follows:

i.) Mr. Kerlow shall post security for costs with the Accountant of the Superior Court of Justice to the credit of this action in favour of the Defendants in the amount of $40,000 in two instalments: $20,000 within 30 days of this Order and $20,000 within 60 days of this Order;

ii.) Mr. Fulop shall post security for costs with the Accountant of the Superior Court of Justice to the credit of this action in favour of the Defendants in the amount of $30,000 in two instalments: $15,000 within 30 days of this Order and $15,000 within 60 days of this Order;

iii.) if the current trial date of November 20, 2019 is adjourned, then the second instalments for both Plaintiffs set out in paragraphs (i) and (ii) above shall be paid 90 days before the new trial date;

iv.) the Plaintiffs shall not take any further steps in this action until the first instalment set out in paragraphs (i) and (ii) above is posted and proof of same is provided to counsel for the Defendants.

[65] If the parties cannot agree on the costs of these motions, they may file written costs

submissions not to exceed 3 pages (excluding costs outlines) with me through the Masters' Administration Office on or before October 31, 2019 on a timetable to be agreed upon by counsel.

Released: September 6, 2019

Master M.P. McGraw

TAB 21

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, section 11

Section 11 of the CCAA grants the Court the broad discretion to make the required order.

The section provides:

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

https://laws-lois.justice.gc.ca/eng/acts/c-36/FullText.html

TAB 22

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

Applicants

AFFIDAVIT OF MINDY TAYAR
(Affirmed August 12, 2020)

I, MINDY TAYAR, of the City of Toronto, in the Province of Ontario, solicitor,

AFFIRM AND SAY AS FOLLOWS:

1. I am a lawyer with the law firm of Fred Tayar & Associates Professional Corporation, the lawyers for Domfoam Inc. ("**Domfoam**"), and as such have knowledge of the matters to which I hereinafter depose. Where I do not have such knowledge, I have identified the source of my information and verily believe that information to be true.

2. This affidavit is supplementary to my affidavit affirmed July 27, 2020, (my "**First Affidavit**") and uses terms defined therein. This affidavit is also in response to the affidavit of Linc Rogers ("**Rogers**") sworn August 9, 2020 (the "**Rogers Affidavit**").

3. On November 16, 2018, Tony Vallecoccia ("**Vallecoccia**") swore an affidavit in this proceeding in support of the applicants' motion for an order extending the stay period. A true copy of this affidavit, without exhibits, is attached hereto as **Exhibit "A"**.

4. On April 18, 2019, Vallecoccia swore another affidavit in this proceeding in support of a motion by the applicants for an extension of the stay period. This affidavit was served as part of the motion record of the applicants dated April 18, 2019. A true copy of this affidavit is attached hereto as **Exhibit "B"**.

5. On January 20, 2020, Ullmann wrote to Tayar enclosing a draft affidavit of documents. In his covering letter, Ullmann asserted that "*apparently Mr. Vallecoccia has had a stroke which has likely left him unable to provide us with instructions, including reviewing and signing off on this affidavit*". A true copy of this letter is attached as Exbibit "T" to my First Affidavit. For ease of reference, another copy is attached hereto as **Exhibit "C"**.

6. Tayar replied to Ullmann's letter on January 21, 2020. In his letter, Tayar wished Mr. Vallecoccia a complete and speedy recovery and asked that Ullmann "*provide my client with a medical report from the attending physician of Mr. Vallecoccia which articulates the date during which he suffered this unfortunate*

stroke, the diagnosis and prognosis". A true copy of this letter is attached hereto as **Exhibit "D"**.

7. I have been advised by Tayar that he did not receive a response to his January 21, 2020 letter.

8. I have been advised by Tayar that on January 30, 2020 he spoke to Ullmann on the telephone and again asked for production of a medical record concerning Vallecoccia and the stroke which Ullmann had said Vallecoccia had suffered. Attached hereto as **Exhibit "E"** is a true copy of Tayar's handwritten note concerning that telephone conversation.

9. Tayar has advised me that he did not receive a response from Ullmann concerning his (Tayar's) request for production of medical evidence of Mr. Vallecoccia's stroke.

10. On March 17, 2020, Linthwaite wrote Ullmann as follows.

> *When we last spoke, you said that you were going to bring a motion concerning your ability to obtain instructions. We haven't been served with any material, and the motion can't now proceed in advance of the scheduled mediation. Is Mr. Vallecoccia now well enough to instruct you?*

A true copy of this email is attached hereto as **Exhibit "F"**.

11. I have been advised by Linthwaite that he did not receive a response to his email.

12. On April 22, 2020, the Monitor served its motion record respecting its motion for an order appointing a chief restructuring officer for the Vendor. The Twenty-Second Report of the Monitor dated April 22, 2020, which was filed in support of this motion, is Exhibit "W" to my First Affidavit. Another copy of this document is attached hereto as **Exhibit "G"**, for ease of reference. In paragraph 61 of the Report, under the subheading "*Appointment of CRO*" the following statements are made.

> *As noted above, Mr. Vallecoccia is the sole remaining director and officer of the Companies. The Monitor has previously been advised by counsel to the Companies that counsel to the Companies is unable to obtain instructions from the Companies through Mr. Vallecoccia. On April 16, 2020, counsel to Mr. Vallecoccia advised that he no longer feels capable of continuing his duties as a director. Counsel to Mr. Vallecoccia advised that it will be difficult to obtain a signed resignation from Mr. Vallecoccia and that Mr. Vallecoccia has requested that he be removed as a director of the Companies.*

13. On April 24, 2020, Linthwaite wrote Grant Moffat, lawyer to the Monitor, copying Ullman, to state in part that Domfoam proposed to examine Mr. Vallecoccia under Rule 39.03. A true copy of this email is attached hereto as **Exhibit "H"**.

14. On May 1, 2020, Linthwaite wrote to Ullmann as follows.

> *During the tele-hearing with Justice Conway, you said that there was an issue with the examination of Mr. Vallecoccia. Justice Conway prevented you from describing that issue, on the basis that counsel should work it out amongst themselves. I would like to comply with Justice Conway's direction. Please describe the issue. If you will not, then please provide Mr. Vallecoccia's availability for his examination.*

A true copy of this email is attached hereto as **Exhibit "I"**.

15. Linthwaite's email to Ullman led to a series of email exchanges between Linthwaite and Varoujan Arman, Ullman's partner. A true copy of the relevant May 1 to May 11, 2020 email chain is attached as Exhibit "E" to the Rogers Affidavit. Another true copy of this email chain is attached hereto as **Exhibit "J"**, for ease of reference.

The Applicants' Cross Motion

16. At paragraph 25 of his affidavit, Rogers states that it is "*not known if the Purchasers submitted an independent claim in the class action proceeding or took some other affirmative action in order to obtain*" the cheque for $1,399,002.24 which is the subject-matter of the Vendor's cross-motion. I am not aware that the purchaser took any affirmative action in order to obtain these funds.

AFFIRMED before me at the City of Toronto, in the Province of Ontario, this 12th day of August 2020

A Commissioner, etc.
COLBY LINTHWAITE

MINDY TAYAR

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

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

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

COMPENDIUM OF THE RESPONDING & CROSS-MOVING PARTIES
(Re: Motion and Cross-Motion returnable October 7, 2020)

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

David T. Ullmann LSO #42357I
Tel: (416) 596-4289
Fax: (416) 594-2437
E: DUllmann@blaney.com

Varoujan Arman LSO #60025K
Tel: (416) 596-2884
Fax: (416) 593-2960
E: VArman@blaney.com

Lawyers for the Applicants