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

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

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

**ENDORSEMENT**

**SANFILIPPO J.**

**Overview**

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

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

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

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

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

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

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

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

## I. BACKGROUND

### A. The Outstanding Accounts

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

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

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

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

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

### B. The Price Fixing by Valle Inc.

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

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

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

### C. The *Companies' Creditors Arrangement Act* Proceeding

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

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

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

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

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

### D. The Class Actions

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

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

### E. This Claim and Counterclaim

#### *Statement of Claim*

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

#### *Statement of Defence and Counterclaim*

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

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

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

***Reply and Defence to Counterclaim***

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

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

**F. The Class Action Settlement**

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

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

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

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

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

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

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

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

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

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

### G. The Motion for Summary Judgment

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

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

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

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

## II. PRINCIPLES APPLICABLE TO SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

## III. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## E. CONCLUSIONS

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

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

## F. DISPOSITION

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

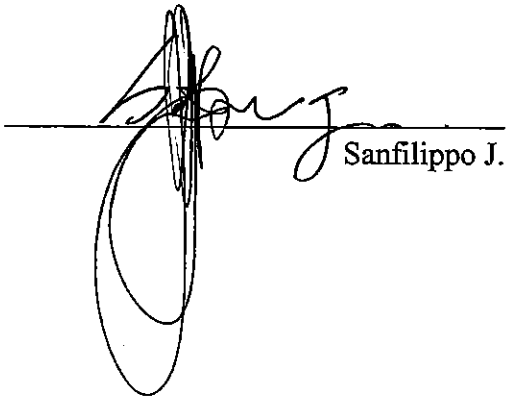
[86] I order that the Counterclaim is dismissed.

## G. COSTS

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

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

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



Sanfilippo J.

**Released:** April 8, 2019