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**")

FACTUM OF THE APPLICANT, 4362063 CANADA LTD. (MOTION RE: CLASS ACTION PROCEEDS)

May 7, 2021

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PART I - INTRODUCTION

1. The Applicants 3113736 Canada Ltd. (formerly Valle Foam Industries (1995)) ("**Valle Foam**"), 4362063 Canada Ltd. (formerly Domfoam International Inc.) ("**Domfoam**") and A-Z Sponge & Foam Products Ltd. ("**A-Z Foam**"), are companies under a *Companies' Creditors Arrangement Act* ("***CCAA***") proceeding. Deloitte Restructuring Inc. acts as the court-appointed monitor (the "**Monitor**"). The current Domfoam Inc. (the "**Purchaser**") has brought this motion in an attempt to receive windfall payments of over CA$4.2 million in proceeds from a US Class Action proceeding, and a further CA$1.4 million from a Canadian Class Action proceeding.[1]

2. After concluding the Transaction in March 2012, the Applicants spent several years pursuing the US Class Action proceeds. The Applicants and the Monitor made dozens of public statements in affidavits and Monitor's reports, respectively, that the Applicants still owned and were pursuing these funds for the benefit of its *CCAA* stakeholders. The Purchaser received actual notice of most of these documents (and had access to the rest) and did nothing to object for **five** years.[2] In fact, the Purchaser's general manager actively encouraged the Applicants to pursue the funds.

3. When considered in its surrounding circumstances, and interpreted in a commercially reasonable manner, it becomes clear that the Final APA did not transfer these potential future proceeds to the Purchaser so as to have it receive an unearned windfall to the detriment of the Applicants and their creditors. By its own admission, the Purchaser did not contemplate acquiring this asset, did not bargain for it and by any measure, did not pay fair value for it.

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[1] Capitalized terms used in this Introduction section have the meaning ascribed to them below.
[2] A complete list of excerpts from *CCAA* court documents about this matter is attached as Schedule C.

4. Accordingly, interpreting the Final APA as the Purchaser proposes requires concluding that only one narrow subset of the US Class Action proceeds was not sold. The Purchaser bases this conclusion on a cherry-picked piece of extrinsic evidence relating to an un-negotiated, proposed narrow definition in a prior, superseded draft agreement. The result would be an unearned windfall for the Purchaser to the detriment of the *CCAA* stakeholders—a commercial absurdity whereby an insolvent company would in effect be paying the Purchaser to take its most valuable asset.

5. Even if the Final APA could be interpreted to allow this kind of windfall, the Purchaser cannot successfully pursue the proceeds at this late date and should be estopped from doing so. The Applicants and their *CCAA* stakeholders are entitled to rely on the *CCAA* process and the finality of the Plan, which provided for the distribution of the proceeds, and the order that sanctioned it. The Plan included releases that released all forms of claims against Domfoam, including the Purchaser's after the fact claim. Based on clearly articulated judicial principles, the Purchaser is not entitled to derive benefit from certain aspects of a *CCAA* process and then surface later in an attempt to undermine aspects of the process from which it did not benefit.

6. Further, the Purchaser should also be estopped from proceeding with this claim based on contract law principles of estoppel. The Purchaser expressly and by its conduct represented to the Applicants that it was not pursuing the claims for itself in 2012, 2013 and thereafter. Domfoam and its *CCAA* estate creditors have relied on these representations, undertaken the pursuit of these proceeds and relied on the incoming funds to their detriment. Indeed, as set out in detail in the Brasil Affidavit, the Class Action Against Domfoam plaintiffs settled their case and obtained court approvals based on statements that the proceeds would be distributed to them by

Domfoam.[3] It is inequitable for the Purchaser to show up after more than **six** years in an attempt to deprive stakeholders of the proceeds they were told to expect by the Applicants and the Monitor, on notice to the Purchaser. The Court should dismiss this motion.

PART II - SUMMARY OF FACTS

(i) The US Class Action

7. In 2004, a US class action claim was commenced under the umbrella of the file and name "In Re: Urethane Antitrust Litigation" (the "**US Class Action**") before the US District Court of Kansas (the "**US Court**"). The defendants were Bayer AG, Bayer Corporation, Bayer Material Science LLC (collectively "**Bayer**"), BASF SE, BASF Corporation (collectively "**BASF**"), Huntsman International LLC ("**Huntsman**"), Lyondell Chemical Company ("**Lyondell**"), and Dow Chemical Corporation ("**Dow**") (collectively the "**US Defendants**"). As purchasers of polyether polyol products in the relevant period, the Applicants were class members in the US Class Action.[4]

8. In 2008, the Applicants retained the services of Refund Recovery Services, LLC (the "**US Agent**") to act as their agent to assert and obtain any recoveries to the class from the US Defendants. John Howard was the General Manager of Domfoam at the time and executed the agreement with the US Agent on the Applicants' behalf (the "**Agent Agreement**").[5]

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

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[3] Affidavit of Luciana P. Brasil dated December 4, 2020 [**Brasil Affidavit**], Supplementary Motion Record of the Applicant (dated April 30, 2021) [**SMRA**], Tab 1.
[4] Affidavit of Tony Vallecoccia dated October 16, 2018, at paras 9-10, Responding Motion Record of the Applicants [**RMRA**], Tab 1.
[5] *Ibid* at para 11.

settled in 2006, and on August 25, 2011, the US Court approved of the final distribution of Bayer settlement funds.[6] On December 12, 2011, the US Court approved of the Lyondell, BASF and Huntsman settlements. Lyondell settled on a without-costs basis. The BASF and Huntsman settlement proceeds were paid out to the class members, including the Applicants, in three tranches thereafter. Dow did not settle at this time.[7]

(ii) The First Draft of the Asset Purchase Agreement

10. In late 2011, the Applicants encountered mounting financial challenges and began considering a sale of all or part of their businesses. They retained Minden Gross LLP, ("**MG**"), including then-partner David Ullmann, to consider their options.

11. In November 2011, Howard began discussing the possibility of selling Domfoam's business to Terry Pomerantz, whose father had owned Domfoam many years earlier. Howard told Ullmann that there was a possibility of a sale to Pomerantz's company 4037057 Canada Inc. (ultimately, the "**Purchaser**").[8]

12. On November 28, 2011, Ullmann had a phone call with Jacques Vincent, counsel for the Purchaser, where they discussed a potential transaction and information that Vincent would need to help his client perform due diligence on Domfoam, including the various outstanding litigation.

13. On November 29, 2011, MG forwarded a list of the Applicants' ongoing litigation to Vincent. The US Class Action was included at item 23.[9]

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[6] *Ibid* at paras 12-14.
[7] *Ibid* at para 15.
[8] Transcript of the examination of Terry Pomerantz, April 22, 2019, p 13-15, QQ 33-40 [**Pomerantz Examination**].
[9] Letter from Raymond Slattery to Jacques Vincent re Litigation dated November 29, 2011.

14. On November 30 and December 2, 2011, Howard provided full information briefs about the status of the BASF, Huntsman and Bayer settlement agreements in the US Class Action to Frank Gattinger, the main accountant at the Purchaser. Howard was often in direct communication with Pomerantz and others at the Purchaser during negotiations as they assessed Domfoam's assets.[10]

15. On December 22, 2011, Vincent sent Ullmann a first draft of the Asset Purchase Agreement (the "**First APA Draft**") that he prepared for the acquisition of Domfoam's business assets (the **"Transaction**"). Vincent had included the term "BASF Receivables" to encompass what he understood from discussions with Howard about the incoming US Class Action proceeds. Schedule 2.9(C) provided:

> (C) BASF Receivables
>
> As of December 16, 2011, the Purchaser has been informed that Domfoam was entitled to payments from BASF in lieu of a settlement out of court by BASF of class actions in the amount of approximately six hundred forty two thousand dollars ($642,000).
>
> The portion of the Purchase Price attributed to the BASF Receivables is three hundred eighty five thousand and two hundred dollars ($385,200) calculated at a discount rate of 60%.
>
> The purchase of the BASF Receivables is conditional upon production by Domfoam of all the supporting documents related to said BASF Receivables and the completion of its assignment from Domfoam to the Purchaser as of the Closing Date.
>
> If Domfoam does not want to sell the BASF Receivables because it would be used by Domfoam in the negotiation of the settlement out of court of the Canadian class action instituted against Domfoam, the Purchaser would then agree to withdraw its offer to purchase said BASF Receivables and the Purchase Price would be reduced by the amount attributed to the BASF Receivables.[11]

16. Vincent's draft contained several misapprehensions. The paragraph described the expected proceeds as coming entirely from BASF, and it described it as all being payable to

[10] Pomerantz Transcript, p 19, Q48 and p 22, Q 65.
[11] Transcript of the cross-examination of Jacques Vincent, November 20, 2018, p 26, Q97 [**Vincent Transcript**].

Domfoam. The amount was, in fact, payable by BASF and Huntsman and was payable to all three Applicants, not only to Domfoam.

17. The Purchaser allocated $385,200 of the purchase price to this asset, being apparently 60% of the anticipated amount. However, Domfoam's expected entitlement to funds from BASF and Huntsman was far less. As set out in the Monitor's Sixth Report, later, in January 2013, MG received a cheque for US $196,802.78 for Domfoam, net of the 25% US Agent's fee.[12]

(iii) Class Action Against Domfoam settles and CCAA Proceedings

18. In 2010 and 2011, several of the Applicants' customers filed class action claims in BC, Ontario and Quebec against the Applicants in respect of price fixing of various urethane products used to make polyurethane foam (the "**Class Action Against Domfoam**").[13] Luciana Brasil of Branch MacMaster LLP was one of the class counsel and has sworn an affidavit on this motion.

19. On January 10, 2012, immediately before the *CCAA* filing, the Applicants settled the Class Action Against Domfoam. The terms of that settlement provided for a cash payment of $1,226,000, and an assignment of up to $200,000 by the Applicants of their interests in any potential US Class Action proceeds. The terms also allowed the plaintiffs to reserve a right to assert their claims in any restructuring process.[14]

20. On January 12, 2012, the Applicants obtained creditor protection pursuant to the *CCAA*. The Monitor was appointed and all proceedings against the Applicants, including the Class Action Against Domfoam, were stayed.[15]

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[12] Sixth Report of the Monitor dated February 25, 2013 at para 35.
[13] Brasil Affidavit at paras 2-5, SMRA, Tab 1.
[14] Brasil Affidavit at paras 4-7 and Exhibit A, SMRA, Tab 1 and 1A.
[15] Initial Order of Justice Newbould dated January 12, 2012.

21. On January 16, 2012, Ullmann and Vincent discussed the First APA Draft. Counsel discussed the advantages of making the Transaction simpler by leaving behind any assets that were difficult to value, with a view to doing a quick sale that was easy to approve at the Court. They discussed that, in such a Transaction, anything related to the US Class Action would be withdrawn.

22. Ullmann and Vincent did not further discuss or negotiate anything related to the US Class Action, and Ullmann did not take any steps to point out the errors or negotiate the BASF Receivables, because anything relating to the US Class Action would be withdrawn and made available for the Class Action Against Domfoam plaintiffs.

23. On January 25, 2012, the Monitor issued its First Report, which recommended the Applicants' motion for approval of a sale process. The Monitor reiterated the terms upon which the Applicants had settled the Class Action Against Domfoam, namely by assigning a portion of the US Class Action proceeds and holding the settlement amounts aside from general creditor distribution.[16]

24. On January 27, 2012, the Applicants started a court-ordered sale process. The Applicants' claims in the US Class Action were never described or marketed as available for purchase. The marketing materials describe the Applicants' tangible assets, revenue and financial history, but there is no mention of potential proceeds from any class action settlements.[17]

[16] Brasil Affidavit at para 8; First Report of the Monitor dated January 25, 2012 at para 41.
[17] Marketing Flyer, online: https://www.insolvencies.deloitte.ca/Documents/ca_en_insolv_Valle_Flyer_013112.pdf.

(iv) Second Draft of the APA

25. On January 30, 2012, after reading the First Monitor's Report on the Monitor's website, Vincent followed up with Ullmann on the sale negotiations and reopened discussion about the Transaction.[18]

26. On February 27, 2012, the Purchaser provided an offer to buy assets from Domfoam, which included a second draft of the asset purchase agreement (the "**Second APA Draft**"). The Second APA Draft, Schedule 2.9(C) was changed to read as follows:

> (C) BASF Receivables
>
> Withdrawn

27. The Second APA Draft also removed the allocation of the purchase price for this asset from the previous amount and simply stated, "withdrawn." The Second APA Draft does not contain any definition for the phrase "BASF Receivables" or any other mention of the US Class Action.[19]

28. There were no further negotiations related to the "BASF Receivables" or the US Class Action, nor future amounts which may be payable from BASF or Huntsman, nor amounts which might be payable as the US Class Action proceeded against Dow. Vincent did not ask any questions about the status of the proceedings, the likelihood of further settlements, information regarding the claims against Dow, assignment agreements that may need to be executed or any other aspect relating to these proceedings.

29. The purchase price was adjusted to $3,662,975 due to a $100,000 increase in the value of the Purchased Assets. The price for "All other Purchased Assets" in the revised agreement was

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[18] Email from Vincent to Ullmann dated January 30, 2012.
[19] Letter from Ullmann to Vincent, dated March 2, 2012.

$300,000. This category includes the purchase of items such as the corporate name, trademarks, contracts, equipment, customer lists and pre-paid items such as insurance.[20] There was no allocation for the US Class Action or any related proceeds in the purchase price.

30. On his cross-examination, Vincent admitted that his client knew that no portion of the total purchase price was intended to purchase any potential settlement or judgment amounts arising from any litigation. In other words, the only possible category of money that could be construed as having been paid for the purported right to the disputed funds is the $300,000 paid for "All other Purchased Assets."[21]

31. On March 8, 2012, the parties finalized and executed the definitive asset purchase agreement (the "**Final APA**"). The BASF Receivables are marked as "withdrawn" in Schedule 2.9(C). There was no definition of BASF Receivables in the Final APA. The Agent Agreement was not included in the contract assignment section.[22] On March 16, 2012 the Court approved the Final APA.[23]

32. The parties took no steps to assign Domfoam's position in the US Class Action to the Purchaser. The Purchaser did not seek a specific assignment of the agreement with the US Agent. It did not take a direction from Domfoam to redirect payment and it did not put the US Agent on notice. It did not ask for contact information for the claims administrator in the US Class Action, nor did it ask for the latest correspondence related to the matter or join that service list in the US Class Action.

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[20] Affidavit of Jacques Vincent dated September 13, 2018, Exhibits B-C [**Vincent Affidavit**], Purchaser's Motion Record dated September 14, 2018 [**PMR**], Tabs 1B-C.
[21] Vincent Transcript, pp 56-57, QQ 194-196.
[22] Vincent Affidavit, Exhibits A-C, PMR, Tabs 1A-C.
[23] Sale Approval and Vesting Order of Justice Brown, dated March 16, 2012.

(v) The Dow Proceeds

33. On November 5, 2012, the US Agent advised Howard, now general manager at the **Purchaser**, directly about the pending payment of further amounts from the US Class Action settlement. Rick Hauser, counsel at the US Agent, was seeking to have a new Services Agreement and Limited Power of Attorney executed to confirm the US Agent's ongoing representation of Domfoam and the US Agent's right to collect funds owing on Domfoam's behalf. Howard directed Hauser to speak to Ullmann. On December 3, 2012, Hauser forwarded his request to Ullmann.

34. On December 11, 2012, Hauser and Ullmann discussed the US Class Action. Hauser confirmed that the remaining Huntsman and BASF payments were imminent, and that a large amount was hoped to come from Dow.

35. On January 25, 2013, the US Agent delivered cheques to Ullmann related to amounts payable to A-Z Foam and Domfoam for the remaining BASF and Huntsman settlement funds.

36. On February 7, 2013, Ullmann again spoke with the US Agent. The US Agent confirmed that larger amounts might be coming from Dow and that further payments were coming from Huntsman and BASF. Since the US Agent was entitled to receive a 25% commission, the Monitor asked Ullmann to review and confirm the US Agent's entitlement to such amounts before making remittance.

37. On March 12, 2013, Ullmann spoke with Howard to confirm the US Agent's identity and discuss that the possible Dow proceeds could be significant. Howard confirmed that the US Agent was legitimate and was entitled to its fee. At no time did Howard, the Purchaser or anyone else representing the Purchaser, assert an interest in these proceeds.

(vi) Dow trial judgment and Howard's encouragement

38. In early 2013, judgment was rendered against Dow in the US Class Action for US$1.2 billion. As a result, the Applicants had reason to believe that a large amount, materially larger than the BASF, Bayer or Huntsman settlements, would be payable to the estate.

39. On July 11, 2013, Tony Vallecoccia, then the Applicants' remaining principal, swore an affidavit with a detailed review of the funds received to date, the Dow judgment and the fees payable to the US Agent:

> 40. 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 judgment, or any related settlements.
>
> 41. The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.
>
> 42. The first $200,000.00 of the Polyol claims was assigned in 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.
>
> 43. The Polyol claims were not included as an asset to be acquired by any purchaser in any of agreements of purchase and sale with the Applicants.
>
> 44. In the case of the transaction for the sale of the Domfoam business Assets, the Polyol claims were specifically excluded from the assets being acquired by the purchaser of Domfoam. In the case of the Valle Foam and A-Z transactions, the Polyol claims were not addressed nor valued in the respective purchase agreements as neither the Applicants, nor to my knowledge the purchasers, intended for it to form part of the assets being purchased or sold.
>
> 45. Following the completion of the sale of the Polyol claims remain an asset of the Applicants and are anticipated to be part of the proceeds available to be distributed to the creditors of the Applicants.[24]

[24] Affidavit of Tony Vallecoccia dated July 11, 2013, paras 40-45.

The motion record was served on the Service List, including Vincent. Vincent did not raise any objection or concern at this time.

40. Howard also became aware of these developments and began contacting Domfoam to encourage follow up on the prospective Dow proceeds. On August 8, 2013, Howard and the Purchaser received an information circular from the US Court. The information circular notified Howard and Domfoam that: (a) there were material amounts still to be distributed with respect to Huntsman and BASF; and (b) that there had been a judgment against Dow in the amount of US$1,060,847,117.

41. On August 14, 2013, Howard emailed Ullmann and told him: "I believe there has been a settlement with Dow re the class action against the chemical companies. Domfoam, Valle and A-Z got some good $ [*sic*] from the Bayer, Huntsman etc settlements. You should probably look into the Dow one."

42. On August 22, 2013, Howard emailed the Monitor and Ullmann, and provided the US Agent's contact information once more because "There should be money due to Domfoam, Valle Foam and AZ from the Dow settlement."

43. Before Dow's appeal to the US Supreme Court was decided, the US Class Action parties reached a settlement in February 2016. Dow agreed to pay US$835 million, and distributions were made thereafter.[25] Domfoam received a first payment of US$3,741,639.62.[26] Domfoam retained CA$4,267,455.29 from the Dow proceeds, net of the US Agent's 25% fee.

[25] Vallecoccia Affidavit at para 16, RMRA, Tab 1.
[26] Affidavit of Tony Vallecoccia, sworn May 22, 2018, Motion Record of the Applicants (Re: Stay Extension, returnable May 29, 2018), Tab 2B.

(vii) CCAA Proceeding and Plan of Arrangement

44. On June 15, 2012, the Court approved a claims solicitation procedure that set a claims bar date of August 31, 2012. The Monitor published a notice of the claims bar date in The Globe and Mail (national edition) and La Presse newspapers. The Purchaser did not submit a claim in accordance with the Claims Solicitation Order, or at any time after the claims bar date.[27]

45. The Applicants repeatedly and unequivocally reported to the Service List from 2013 to 2018 that they did not sell any proceeds from the US Class Action to the Purchaser, that they anticipated payment from the Dow judgment and ensuing Dow settlement, and the expectation that it would be collected and distributed to the creditors. Vincent was served with all motions and Monitor's reports in this matter up to and including September 16, 2015.[28]

46. The evidence about the Dow proceeds in the various Vallecoccia affidavits and Monitor's Reports that were served on the Service List in the *CCAA* proceeding is set out in a chart at Schedule C to this factum.[29] For example, the April 22, 2014 Vallecoccia Affidavit includes the following statement: "The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates."[30] This was frequently repeated.

47. The various Monitor's reports that were prepared during this time and served on Vincent on behalf of the Purchaser similarly provided updates on the anticipated distributions from the US Class Action. Through answers to undertakings arising from his cross-examination, Pomerantz confirmed that the Purchaser or its accountant had received the fourth, fifth, sixth,

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[27] Vallecoccia Affidavit at paras 24-25, RMRA, Tab 1.
[28] Vallecoccia Affidavit at para 17, RMRA, Tab 1.
[29] See Schedule C.
[30] Vallecoccia Affidavit at para 21, RMRA, Tab 1; Vincent's Answers to Undertakings dated November 21, 2018, #9.

eighth and ninth Monitor's Reports from Vincent.[31] Except for the ninth Monitor's Report, the Purchaser also received the accompanying Motion Records in every instance and had notice of these developments and statements.

(viii) Class Action Against Domfoam Settlement

48. The class members of the Class Action Against Domfoam submitted claims in the *CCAA* proceeding, in the amount of $97.5 million. On April 25, 2014, these claims were settled with Domfoam as an approved $40 million claim, which had been carefully calculated by class counsel to factor in the US Class Action proceeds. Brasil and the other class counsel had "no reason to doubt statements from the Monitor" about the forthcoming funds; had they suspected that the ownership of the US Class Action funds was in dispute, they would have sought higher settlement amounts from Domfoam's alleged co-conspirators in the price fixing lawsuit.[32]

(ix) Plan of Compromise and Arrangement

49. On September 6, 2016, Domfoam filed a Plan of Compromise and Arrangement ("**Plan**"). The materials recommending the Plan to the creditors specifically highlighted the anticipated proceeds from the US Class Action as an asset to be distributed to the creditors. The Plan also provided Howard with a release connected with his time as an officer of Domfoam.[33]

50. 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

[31] The dates of the forwards from Vincent are June 14, 2012, October 22, 2012, February 27, 2013, December 13, 2013, and April 22, 2014.
[32] Brasil Affidavit at paras 10, 14-16.
[33] Order of Justice Penny, dated September 6, 2016.

review the Plan on the Monitor's website. The Meeting Order made clear that sufficient service was given to all persons entitled to receive it.[34]

51. The Plan was binding on all Persons (as defined in the Plan) who were forever barred, estopped and stayed from taking any further action against Domfoam. The Purchaser either had, or was deemed to have, knowledge of this fact and did not object.

52. Justice Hainey sanctioned the Plan on January 24, 2017.[35]

53. On May 29, 2018, Justice Wilton-Siegel ordered an interim distribution of the Domfoam proceeds in the amount of $3,470,000 (the "**Distribution Order**").[36]

(x) The Purchaser comes forward to claim the Dow Proceeds

54. In June 2018—more than **six years** after the Transaction closed—Vincent wrote to Ullmann and demanded that the US Class Action proceeds be paid to the Purchaser. The Purchaser then brought this motion to set aside the Distribution Order.[37]

(xi) 2018 Canadian Class Action claim against US Defendants

55. In late 2018, after this motion was filed, the Applicants, at the encouragement of the US Agent and with its assistance, conducted an analysis of a Canadian class action that was proceeding against the US Defendants (the "**Canadian Class Action**") and determined that a claim might be possible.

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[34] Brasil Affidavit at paras 25-27.
[35] Sanction Order of Justice Hainey, dated January 24, 2017.
[36] Order of Justice Wilton-Siegel, dated May 29, 2018.
[37] Vincent Affidavit, Exhibit E, PMR, Tab 1E.

56. In November 2018, the Applicants advised the Service List (and the Purchaser) that they were investigating the possibility of filing a claim, and proceeded to do so on February 11, 2019. The Applicants gave notice on April 18, 2019. The Purchaser did not assert an interest in the Applicants' claim, did not file its own claim in the Canadian Class Action, nor did it contact the claims administrator or the Agent.

57. On October 11, 2019, the claim administrator issued a cheque to the Applicants in the amount of $1.399 million. However, the cheque was mistakenly delivered to the Purchaser.

58. Although the Canadian Class Action was never discussed as part of the assets subject to the Transaction in 2012, and the claim was not made until six years after it closed, the Purchaser refused to provide the cheque to the Monitor, pending resolution of this dispute. Following a contested motion, this Court ordered that the Purchaser pay the funds into the trust account of Fred Tayar, the Purchaser's litigation counsel, pending the outcome of this dispute.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

59. There are three issues:

(a) Did Domfoam convey the US Class Action or Canadian Class Action proceeds in the Final APA? No. A proper interpretation of the Final APA leads to the opposite conclusion.

(b) Even if the Purchaser may have acquired rights to such proceeds, is the Purchaser barred from bringing its claim in the *CCAA*? Yes, the Sanction Order bars the Purchaser from bringing this claim for funds from Domfoam and the Purchaser is

estopped from doing so based on foundational CCAA principles regarding fairness and equity.

(c) Even if the Purchaser may have acquired rights to such proceeds, is the Purchaser estopped from asserting its claim by general principles of estoppel? Yes, by virtue of its conduct, representations and acquiescence, and the detrimental reliance of Domfoam and its stakeholders, the Purchaser is estopped.

A. COMMERCIAL REASONABLENESS AND THE CLASS ACTION PROCEEDS

60. Interpreting the Final APA as conveying the US Class Action and Canadian Class Action proceeds (collectively, the "**Class Action Proceeds**") is not a proper and commercially reasonable interpretation of the Final APA. The Purchaser's interpretation would lead to a commercially absurd result, giving it an unbargained-for windfall.

61. Contractual interpretation requires that the court consider "the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."[38] In *Sattva Capital Corp.*, the Supreme Court reiterated that when interpreting contracts, courts must adopt "a practical, common-sense approach not dominated by technical rules of construction."[39] The purpose of the exercise, according to the Court, is to ascertain the "objective intent of the parties – a fact-specific goal."[40]

62. In *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, the Ontario Court of Appeal held that courts should avoid an interpretation that would result in a commercial

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[38] *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para 47, [2014] 2 SCR 633, Tab 1 of BoA.
[39] *Ibid*, Tab 1 of BoA.
[40] *Ibid* at para 49, Tab 1 of BoA.

absurdity.[41] Instead, contracts should be objectively construed with "sound commercial principles and good business sense," assessed from the standpoint of each party, and not just one of them.[42] Absurd interpretations include those that result in a windfall or one-sided contractual risk exposure.[43]

63. Courts will also take into account how the parties attempted to protect their own interests during negotiations to ascertain the meaning of a contractual provision. For instance, in *Carras v. Altus Group Limited*, the Court examined the course of negotiations between the parties in interpreting how the parties intended a contractual provision to operate.[44]

64. The Purchaser's position is that it purchased the Class Action Proceeds based on an amorphous contractual "basket" clause. Such an interpretation, however, ignores the factual matrix, does not accord with common sense and is not a commercially reasonable interpretation. Indeed, such interpretation allows for an unintended windfall to the Purchaser that was not intended by the parties to the Final APA.

65. First, the surrounding circumstances illustrate that at no time did the parties discuss or agree that the Purchaser was acquiring future potential Class Action Proceeds. The US Class Action, at the time, had produced and would produce certain proceeds and it was agreed they were not to be part of the sale. The parties did not ever diligence the US Class Action, discuss it,

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[41] *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] OJ 4368 at para 27, Tab 2 of BoA. See also *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para 144, Tab 3 of BoA. See also *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374 at para 60, Tab 4 of BoA; *Unique Broadband Systems Inc., Re*, 2014 ONCA 538 at para 88, Tab 5 of BoA; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, *supra* note 41 at para 143, Tab 3 of BoA.

[42] *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, *supra* note 41 at para 27, Tab 2 of BoA; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, *supra* note 41 at para 155, Tab 3 of BoA.

[43] *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648 at para 55, Tab 6 of BoA; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, *supra* note 41 at para 155, Tab 3 of BoA.

[44] *Carras v. Altus Group Limited*, 2020 ONSC 2936 at paras 12-15, Tab 7 of BoA.

or consider any allocation of purchase price for it. It is objectively reasonable to conclude the parties thought it was “off the table.”

66. Second, there is no provision in the Final APA whereby the Purchaser took an assignment of the US Class Action. No such assignment ever took place. The Purchaser did not acquire the Agent Agreement, which was the only agreement that existed that dealt with Domfoam’s ability to obtain the proceeds.

67. Third, at or post-closing, the Purchaser took no steps to acquire the position of Domfoam as the claimant in any way.

68. Fourth, it is not a commercially reasonable interpretation that the Purchaser acquired a potentially valuable asset from a *CCAA* debtor, with the approval of the Monitor and Court, without valuing or even considering the value of the asset. Similarly, it is not a commercially reasonable interpretation that the Purchaser would be given such a windfall at the expense of the creditors of Domfoam.

69. Here, the Purchaser is seeking to obtain an unearned windfall of over CA$4.2 million from the US Class Action and a further CA$1.4 million from the Canadian Class Action where it has done absolutely nothing to investigate, value or move to take an assignment those claims. The total amount claimed is more than it paid for the entire Domfoam business. The result would be that an insolvent *CCAA* debtor company did not just donate its business assets to the Purchaser, but actually paid the Purchaser to take them.

70. In *Consolidated Bathurst Export Ltd.*, the Supreme Court held that as between two constructions, the more commercially reasonable one is that which produces a fair result.[45] Courts should "loath to support" a construction which would achieve a result "which could neither be sensibly sought nor anticipated at the time of the contract."[46]

71. In *RBC Dominion Securities Inc. v. Crew Gold Corporation*, the Ontario Court of Appeal held that an interpretation that avoids an unearned windfall is more commercially reasonable. Commercial reasonableness requires avoiding interpretations that give one party substantial sums of money without providing valuable consideration in exchange. Absent special circumstances, a court will prefer an interpretation that preserves a "causal link" or nexus between the consideration provided and the assets in dispute.[47] This applies even though a provision may, on its face, appear to require the windfall.[48]

72. In *Modugno v. Cira*, the Court considered a similar situation where the purchaser claimed a windfall as part of a share purchase. After the transaction closed, the purchaser was entitled to receive significant tax refunds through the purchased business.[49]

73. Upon examining the substance of the transaction and the contract as a whole, the Court arrived at two conclusions. First, terms like "account receivables and accounts payable" are not restricted to their strict accounting meaning unless the parties intended as such.[50] Second, although the parties had not identified the tax revenues as an excluded asset, the agreement's

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[45] *Consolidated Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 SCR 888, Tab 8 of BoA.
[46] *Ibid* at para 27, Tab 8 of BoA. See also *Old Navy (Canada) Inc. v. The Eglinton Town Centre Inc.*, 2019 ONSC 3740 at para 157, Tab 9 of BoA; *Cathay Hing Kee Investment Co. v. Chung*, [1993] OJ 514 at para 113, Tab 10 of BoA; *Ontario v. Imperial Tobacco Canada Ltd.*, 2012 ONSC 6027 at para 28, Tab 11 of BoA, affirmed *Ontario v. Imperial Tobacco Canada Ltd.*, 2013 ONCA 481, Tab 12 of BoA.
[47] *RBC Dominion Securities Inc. v. Crew Gold Corporation*, *supra* note 43 at para 26, Tab 6 of BoA.
[48] *Ibid* at para 55, Tab 6 of BoA.
[49] *Modugno v. Cira*, 2011 ONSC 3275, Tab 13 of BoA.
[50] *Ibid* at para 24, Tab 13 of BoA.

structure made the vendor responsible for business before closing and the responsibility shifted to the purchaser after closing.[51] Since the vendor still had responsibility to make all tax payments before closing, it would give the purchaser a windfall to pocket any tax overpayment in that period.

74. For the reasons above, to allow the Purchaser to receive this kind of windfall flies in the face of commercial reasonableness and contract interpretation in light of the surrounding circumstances. Further, it is absurd for the Purchaser to claim the proceeds of the Canadian Class Action when the claim was filed six years after the APA closed.

B. FINALITY IN THE CCAA CONTEXT

75. Even if the Purchaser may have a contractual right to the Class Action Proceeds, it is not at liberty to now confiscate value from the stakeholders. To do so would betray the foundational principles of the *CCAA*, which place a premium on certainty, finality and the integrity of the process and the orders promulgated by this Court.

76. The seminal case on the "building blocks" approach to *CCAA* proceedings is *Re Target Canada Co*, a decision of Morawetz RSJ (as he was then). Restructuring processes are processes built on a foundation that creates expectations as the cases develop. Creditors and stakeholders then rely on that foundation in making decisions during the proceeding.

> The CCAA process is one of building blocks. In this proceedings [*sic*], a stay has been granted and a plan developed. **During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected.** In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of

[51] *Ibid* at para 35, Tab 13 of BoA.

> the negotiated orders. **Such a development would run counter to the building block approach underlying these proceedings since the outset.**[52] [Emphasis added]

77. *CCAA* proceedings are intended to facilitate compromises and arrangements between companies and creditors. Therefore, according to section 6 of the *CCAA*, where a plan is "sanctioned by the court it is binding on the company and on *all* creditors" (emphasis in original) and "no action can be brought by a creditor to enforce its claim as if the compromise had not been sanctioned by the court."[53]

78. A court will reopen an approved plan of arrangement "sparingly and in exceptional circumstances only," which reflects the "potential violence done to the laudable goal of commercial certainty."[54] There must be no "prejudice to the interests of the company or the creditors."[55] Specifically, it would be unacceptable if the effect of the amendment "would be to render vulnerable to possible execution any assets."[56]

79. Courts will enforce the terms of an approved plan of arrangement if adequate—even if not actual—notice is provided that complies with legislation.[57] These finality concerns are so strong that even "a failure to give notice required under the [*CCAA*] will not necessarily render the proceeding void" unless "the failure works a substantial injustice having regard for all of the circumstances."[58]

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[52] *Target Canada Co. (Re)*, 2016 ONSC 316 at para 81, Tab 14 of BoA.
[53] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 6 [*CCAA*]; *Noma Co., Re*, [2004] OJ 4914 at paras 52-53, Tab 15 of BoA.
[54] *Algoma Steel Corp. v. Royal Bank*, 8 OR (3d) 449 at para 8, Tab 16 of BoA. *Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*, 2005 ABQB 324 at para 21, Tab 17 of BoA
[55] *Algoma Steel Corp. v. Royal Bank, supra* note 54, Tab 16 of BoA.
[56] *Ibid* at para 8, Tab 16 of BoA.
[57] See *677960 Alberta Ltd. v. Petrokazakhstan Inc.*, 2013 ABQB 47 at para 115, Tab 18 of BoA; *BCS Technology Inc., Re*, 12 CBR (4th) 23 at paras 5, 11, Tab 19 of BoA; *Lindsay v. Transtec Canada Ltd.*, 99 BCLR (2d) 73 at paras 61-62, 72, Tab 20 of BoA, aff'd *Lindsay v. Transtec Canada Ltd.*, 2 BCLR (3d) 304, Tab 21 of BoA.
[58] *BCS Technology Inc., Re, supra* note 57 at para 8, Tab 19 of BoA.

80. In *Lindsay v Transtec Canada Ltd* (1994), a creditor in a *CCAA* plan did not receive notice of the meeting of creditors through inadvertence. After the plan was sanctioned, the creditor sued the distressed company for the full amount owing. The Court held that the claimant had other opportunities to object, and emphasized that once a plan is sanctioned, the creditors are entitled to rely on it for finality and certainty:

> Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings… Mr. Lindsay had every bit of knowledge he needed to make a decision about whether or not to participate in them. He chose to remain outside the proceedings… As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.[59]

81. In *677960 Alberta Ltd. v. Petrokazakhstan Inc.*, the Alberta Court of Queens' Bench held that those who pursue claims after a final plan has been established "erode the confidence of those creditors who participated and compromised its financial interests in the proper *CCAA* process."[60] The Court held that while it was unfortunate that the plaintiff was never notified of the *CCAA* proceedings, the *CCAA* company complied with the statutory notice requirements by acting in its "reasonable belief" that the plaintiffs were not creditors.[61] The Alberta Court of Appeal, affirming the decision, held that the plan "cancelled all claims of all creditors forever, and without compensation" and the *CCAA* order was a complete answer to the lawsuit.[62]

82. In *Re Mid-Bowline Group Corp*., the Court found that a secured creditor failed to act in good faith when it asserted a claim against the debtor for breach of an exclusivity agreement just

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[59] *Lindsay v. Transtec Canada Ltd., supra* note 57 at paras 73-74, Tab 20 of BoA, aff'd in *Lindsay v. Transtec Canada Ltd., supra* note 57, Tab 21 of BoA (BCCA).
[60] *677960 Alberta Ltd. v. Petrokazakhstan Inc., supra* note 57 at para 109, Tab 18 of BoA.
[61] *Ibid* at paras 116, 120, Tab 18 of BoA.
[62] *677960 Alberta Ltd. v. Petrokazakhstan Inc., 2014 ABCA 110 at para 32 at para 32 at para 32 at para 32 at para 32 at para 32 at para 32 at para 32 at para 32* at para 32.

as the debtor sought approval of a plan. The creditor had no good reason to have waited to institute proceedings, as it had known about the supposed breach since early 2015:

> **To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith**. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged.[63] [Emphasis added]

83. Justice Hainey held in *Crystallex International Corp (Re)*, that a group of shareholders had been aware of the *CCAA* proceedings since 2012 and knew about the Monitor's website where information concerning the motions and orders was readily available. He held that they had received notice under Rule 37.14 and criticized the shareholders' lack of initiative as they moved to set aside a series of debtor in possession orders:

> The Complaining Shareholders did nothing to be added to the Service List. The motion material for the Final Orders was served upon everyone on the Service List. The Final Orders provide that no further service is required. Accordingly, the Complaining Shareholders were in a position to obtain the necessary information to advance the allegations now asserted had they exercised modest due diligence in response to the Initial Order or following the dates on which any of the Final Orders were made.
>
> I am, therefore, satisfied that the Complaining Shareholders had sufficient notice concerning the Final Orders.[64]

84. The Court can infer that the Purchaser had notice of Domfoam's claims to the proceeds and of the *CCAA* proceeding, even if it was not on the Service List from late 2015 to early 2018. By remaining on the Service List until 2015, the Purchaser had actual notice and knowledge of Domfoam's claim and its intention to make the proceeds of that claim available to its stakeholders. The Purchaser knew about the Monitor's website. The Purchaser did nothing to

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[63] *Mid-Bowline Group Corp., Re*, 2016 ONSC 669 at para 59, Tab 22 of BoA.
[64] *Crystallex International Corp. (Re)*, 2018 ONSC 2443 at paras 21, 24-25, Tab 23 of BoA, leave to appeal denied.

raise an objection and thus allowed Domfoam to pursue the various US and Canadian Class Action proceeds on its own account.

85. Critically, in obtaining sanction of the Plan, Domfoam complied with all notice requirements. The Plan was sanctioned and the releases in favour of Domfoam came into effect. The Purchaser may not, in the face of that, seek payment from Domfoam after the fact.

C. ESTOPPEL

86. Moreover, even if the Purchaser at some point had a valid claim, the Purchaser is now estopped from pursuing its claim by general principles relating to estoppel. Estoppel is an equitable defence that precludes a party from asserting something contrary to what was implied by its previous actions, statements or omissions. Estoppel by representation, by conduct and by acquiescence are closely related concepts that Canadian courts often apply concurrently because they have similar criteria.

87. Estoppel by representation or by conduct is based on three essential factors:

(a) a representation, or conduct amounting to a representation, intended to induce a course of conduct on the part of the person to whom the representation is made;

(b) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and

(c) detriment to such person as a consequence of the act or omission.[65]

88. On the first branch of the test, estoppel by representation requires a positive representation made by one party, with the intention that the counterparty will act on it. By contrast, estoppel by conduct does not require the representation to be overt or a positive

[65] *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201 at para 134 [*Fram*], Tab 24 of BoA, citing *Canadian Superior Oil Ltd. v. Hambly*, [1970] SCR 932 at para 19, Tab 25 of BoA with approval.

representation in nature; the party's conduct—whether express or implied—amounts to a representation intended to induce the counterparty to pursue a course of conduct.[66]

89. The party making the representation need not do so knowingly, with intent to deceive or without mistake.[67] The representing party's intention need only be to induce a course of conduct in the other party with the positive representation it made.[68]

90. As recently stated by the Ontario Court of Appeal in *Feather v Bradford*:

> "[A] person who makes an unambiguous representation, by words, or by conduct, *or by silence*, of an existing fact, and causes another party to act to his determent in reliance on the representation will not be permitted subsequently to act inconsistently with that representation.[69] [Emphasis in original]

91. By virtue of the counterparty's reliance on that representation and taking action based on it, it is inequitable for the representing party to dispute its truth, or act inconsistently with it.[70]

92. Silence or inaction will be considered a representation if a duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel.[71] The duty to make a statement arises when, in all of the circumstances, the party's failure to communicate the actual state of affairs to the other party is dishonest.[72]

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[66] *Canacemal Investment Inc. v. PCI Realty Corp.*, 90 ACWS (3d) 964 at para 43, Tab 26 of BoA, cited with approval in *PBM Realty Holdings Inc. v. Little*, 206 ACWS (3d) 819 at para 15, Tab 27 of BoA and in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 SCR 53 at para 59 [*Ryan*], Tab 28 of BoA; *Shore Gold Inc. v. De Beers Canada Inc.*, 2011 SKQB 95 at paras 21-25, Tab 29 of BoA, aff'd *Shore Gold Inc. v. De Beers Canada Inc.*, 2012 SKCA 16, Tab 30 of BoA.
[67] *Morgan v. Boles*, [1946] 1 WWR 1 at para 22, Tab 31 of BoA.
[68] *Fram*, *supra* note 65 at para 139, Tab 24 of BoA.
[69] *Feather v. Bradford West Gwillimbury (Town)*, 2010 ONCA 440 at para 56, Tab 32 of BoA.
[70] *Fram*, *supra* note 65 at paras 134-135, Tab 24 of BoA, citing *Ryan*, *supra* note 66 at para 5, Tab 28 of BoA with approval.
[71] *Ryan*, *supra* note 66 at para 76, Tab 28 of BoA.
[72] *Feather v. Bradford West Gwillimbury (Town)*, *supra* note 69 at paras 56-57, Tab 32 of BoA.

93. Alternatively, a party will be estopped from asserting its rights when it knew about and acquiesced in the counterparty's conduct and reliance. The opposing party only needs to have knowledge of a situation where the counterparty is moving to exercise a proprietary right in error and declines to do anything about it. "A plaintiff cannot stand by, watch the deprivation of his rights and do nothing," or else the court will infer that they acquiesced in their infringement.[73]

94. In *Clarke v Johnson*, the Ontario Court of Appeal applied both the original acquiescence test from the UK case *Willmott v Barber*, 1880 and the "modern" approach,[74] and found that, using either analysis, the appellants had acquiesced in the respondent's claim to an ownership interest in a camp property. They had induced and encouraged the respondent to expend his personal and financial resources in constructing and maintaining the camp under the belief that he would gain an ownership interest.[75]

95. All three types of estoppel apply the second and third parts of the test. On the second branch, the court must consider whether the representor's representation or conduct induced the representee to change its course of conduct or legal position from that which it would have ordinarily undertaken.[76]

96. On the third branch of the test, the court must consider the detriment sustained if the representor is permitted to resile from their representation. Detrimental reliance is "at the heart of true estoppel," and requires a two-step analysis: first, in demonstrating how the counterparty

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[73] *Kochar v. Gadhri Holdings Ltd.*, 2019 BCSC 1704 at para 44, Tab 33 of BoA, citing *M. (K.) v. M. (H.)*, [1992] 3 SCR 6 (SCC) at para 34; *57134 Manitoba Ltd. v. Palmer*, 65 BCLR 355 (BCSC) at para 43, Tab 34 of BoA, aff'd in *57134 Manitoba Ltd. v. Palmer*, 37 BCLR (2d) 50 (BCCA), Tab 35 of BoA.
[74] *Clarke v. Johnson*, 2014 ONCA 237 at paras 49-52, Tab 36 of BoA.
[75] *Ibid* at paras 55-57, Tab 36 of BoA.
[76] *Ryan*, *supra* note 66 at paras 62, 69, Tab 28 of BoA; *Canadian Superior Oil Ltd. v. Hambly*, *supra* note 65 at para 19, Tab 25 of BoA; *Fram*, *supra* note 65 at para 139, Tab 24 of BoA.

relied on the representor's representations in changing its conduct or legal position.[77] Second, the acting party must show that it will suffer detriment if the representor is allowed to abandon its previous position.[78]

97. The Purchaser made several active representations to Domfoam after the Transaction closed to indicate that Domfoam did not assign the US Class Action to the Purchaser and therefore should pursue the Dow Proceeds for itself:

(a) In December 2012, the Purchaser's general manager, John Howard instructed the US Agent to transfer carriage of the claim to Domfoam's counsel by way of executing a Services Agreement and Limited Power of Attorney;

(b) On August 14, 2013, Howard, emailed Domfoam's counsel and specifically told him: "I believe there has been a settlement with Dow re the class action against the chemical companies. Domfoam, Valle and A-Z got some good $ [*sic*] from the Bayer, Huntsman etc settlements. You should probably look into the Dow one;" and,

(c) On August 22, 2013, Howard emailed the Monitor and Domfoam's counsel and provided the contact information because "There should be money due to Domfoam, Valle Foam and AZ from the Dow settlement."

98. Also, by its conduct, the Purchaser, with knowledge of Domfoam's position, failed to take any steps to obtain an assignment of the contract with the US Agent (which was the way

[77] *Ryan*, *supra* note 66 at paras 68-69, Tab 28 of BoA.
[78] *Ibid* at paras 69, 73-74, Tab 28 of BoA, cited with approval in *Fram*, *supra* note 65 at paras 144, 187, Tab 24 of BoA.

funds from Dow could be obtained) and did not take any steps to put itself in the place of Domfoam as the party entitled to the US Class Action.

99. Further, despite receiving *CCAA* materials that disclosed on at least **twelve** occasions that Domfoam asserted its rights to the Dow proceeds and explained its plans to distribute the proceeds to the estate creditors, the Purchaser was silent and did not communicate that it—and not Domfoam—was entitled to the proceeds. It did not ever suggest that Domfoam would be handing those proceeds over to the Purchaser if successful.

100. The Purchaser led Domfoam to rely on its representations and induced it to pursue the Dow proceeds at its own expense, in reliance of receiving those funds. The Purchaser's representations caused a knock-on effect that led Domfoam to represent to its creditors for over **five years** that it had retained the right to the remaining proceeds, and that it was pursuing them for the creditors' benefits. The creditors were then induced to settle their actions and pursue their claims in the *CCAA* because of these representations. In the case of the Class Action Against Domfoam, the class plaintiffs made a compromise in the tens of millions of dollars.

101. By taking no steps to take an assignment of the benefit of the US Class Action, or to claim ownership of it, and by encouraging Domfoam to continue pursuing the US Class Action and Dow proceeds, the Purchaser made representations and/or conducted itself in such a way as to cause Domfoam to rely on its representations and expend time and money to its detriment. It would be inequitable to allow the Purchaser to resile from its representations and conduct and now claim the Dow proceeds.

102. The *CCAA* estate creditors also reasonably relied on Domfoam's and the Monitor's representations to arrange their affairs to their detriment. As Brasil has sworn, there was no

reason not to believe that the estate was going to receive the Dow proceeds for distribution, as their settlement agreement specifically contemplated receiving US Class Action funds. If the Purchaser is allowed to depart from its representations and course of conduct, the creditors will suffer prejudice, in that they will have waited **over five years** to pursue a different legal course of action; they may have even lost rights to pursue additional or other claims.

103. It is inequitable for the Purchaser to "lie in the weeds" and wait to assert its purported right or correct Domfoam's alleged misunderstanding for **six years**. Domfoam and the estate creditors have arranged their affairs in reliance on these proceeds, proceeded to obtain approval of the Plan and issuance of the Sanction Order, and have now expended significant resources to defend against the Purchaser's motion. They will have done so to their detriment if the Purchaser is allowed to confiscate the considerable fruits of these efforts. The funds remaining, if any, should be distributed to the estate creditors as is just.

PART IV - ORDER REQUESTED

104. The Applicants request that the Purchaser's motion be dismissed, with costs payable to the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of May, 2021.

May 7, 2021 **Matthew P. Gottlieb/Jasmine K. Landau**

SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Title	Pinpoints
1	*Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 SCR 633	47, 49
2	*Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] OJ 4368	27
3	*Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60	143-144, 155
4	*Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374	60
5	*Unique Broadband Systems Inc., Re*, 2014 ONCA 538	88
6	*RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648	26, 55
7	*Carras v. Altus Group Limited*, 2020 ONSC 2936	12-15
8	*Consolidated Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 SCR 888	27
9	*Old Navy (Canada) Inc. v. The Eglinton Town Centre Inc.*, 2019 ONSC 3740	157
10	*Cathay Hing Kee Investment Co. v. Chung*, [1993] OJ 514	113
11	*Ontario v. Imperial Tobacco Canada Ltd.*, 2012 ONSC 6027	28
12	*Ontario v. Imperial Tobacco Canada Ltd.*, 2013 ONCA 481	
13	*Modugno v. Cira*, 2011 ONSC 3275	24, 35
14	*Target Canada Co. (Re)*, 2016 ONSC 316	81
15	*Noma Co., Re*, [2004] OJ 4914	52-53
16	*Algoma Steel Corp. v. Royal Bank*, 8 OR (3d) 449	8
17	*Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*, 2005 ABQB 324	21
18	*677960 Alberta Ltd. v. Petrokazakhstan Inc.*, 2013 ABQB 47	109, 115-116, 120
19	*BCS Technology Inc., Re*, 12 CBR (4th) 23	5, 8, 11
20	*Lindsay v. Transtec Canada Ltd.*, 99 BCLR (2d) 73	61-62, 72-74
21	*Lindsay v. Transtec Canada Ltd.*, 2 BCLR (3d) 304	
22	*Mid-Bowline Group Corp., Re*, 2016 ONSC 669	59
23	*Crystallex International Corp. (Re)*, 2018 ONSC 2443	21, 24-25
24	*Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201	134-135, 139, 144, 187
25	*Canadian Superior Oil Ltd. v. Hambly*, [1970] SCR 932	19

Tab	Title	Pinpoints
26	*Canacemal Investment Inc. v. PCI Realty Corp.*, 90 ACWS (3d) 964	43
27	*PBM Realty Holdings Inc. v. Little*, 206 ACWS (3d) 819	15
28	*Ryan v. Moore*, 2005 SCC 38, [2005] 2 SCR 53	5, 59, 62, 68-69, 73-74, 76
29	*Shore Gold Inc. v. De Beers Canada Inc.*, 2011 SKQB 95	21-25
30	*Shore Gold Inc. v. De Beers Canada Inc.*, 2012 SKCA 16	
31	*Morgan v. Boles*, [1946] 1 WWR 1	22
32	*Feather v. Bradford West Gwillimbury (Town)*, 2010 ONCA 440	56-57
33	*Kochar v. Gadhri Holdings Ltd.*, 2019 BCSC 1704	44
34	*57134 Manitoba Ltd. v. Palmer*, 65 BCLR 355 (BCSC)	43
35	*57134 Manitoba Ltd. v. Palmer*, 37 BCLR (2d) 50 (BCCA)	
36	*Clarke v. Johnson*, 2014 ONCA 237	49-52, 55-57

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Companies' Creditors Arrangement Act*. RSC 1985, c C-36, s 6

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

SCHEDULE "C"

EXCERPTS OF AFFIDAVIT EVIDENCE AND DISCLOSURE

Date	Evidence (emphasis added where underlined)
January 25, 2012 First Monitor's Report	[41] Although the [Applicants] are not required to contribute to a settlement fund, the [Applicants] have agreed to assign certain proceeds of an unrelated class action proceeding known as the [US Class Action] in an amount up to $200,000, subject to any order of this Court. Under the terms of the settlement, the [Class Action Against Domfoam] Plaintiffs have agreed to bear any risk relating to the validity or enforceability of the assignment. The proposed settlement also provides for the payment of $1.2 million y certain individuals who are parties to the settlement agreement….
June 12, 2012 Affidavit of Tony Vallecoccia	"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. <u>This receivable was not sold to Domfoam Newco and remains an asset of Domfoam</u>."
February 22, 2013 Affidavit of Tony Vallecoccia	"…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…"
February 25, 2013 Sixth Monitor's Report	[30] Pursuant to section 4.2 of the [Class Action Against Domfoam] Settlement Agreement, the [Applicants] agreed to assign to the [Plaintiffs]… the right to receive any proceeds from the [US Class Action]… [36] …it may be possible to resolve the competing claims to such funds as part of the overall resolution of the value of the [Class Action Against Domfoam] Plaintiffs' claims against the [Applicants]." [39] The Monitor is not aware of any additional assets which may be realized upon for the benefit of the [Applicants'] creditors, other than certain accounts receivable of Valle Foam (book value approximately $2.0 million) of which the Applicants and the Applicants' legal counsel are pursuing collection, and any future payments which may be received in the [US Class Action] Proceedings."
July 11, 2013 Affidavit of Tony Vallecoccia	"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 judgment, or any related settlements. <u>The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u> The first $200,000.00 of the Polyol claims was assigned to the Class Action Settlement. <u>The Polyol claims were not marketed for sale in the sale process</u>

	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."
July 12, 2013 Seventh Monitor's Report	[32] …The Monitor understands that judgment has been rendered against The Dow Chemical Company in the [US Class Action] and that further payments may be received by the [Applicants] pursuant to this judgment or a settlement thereof, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action]. [34] …the Domfoam the [US Class Action] Claim was specifically excluded from the Domfoam assets purchased by 4037057 Canada Inc… As far as the Monitor is aware… 4037057 Canada Inc… has not asserted any claim to the [US Class Action]. Accordingly, the net proceeds of the Domfoam [US Class Action] Claim… should be available for distribution to the creditors of Domfoam…
December 12, 2013 Affidavit of Tony Vallecoccia	"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)."
April 22, 2014 Affidavit of Tony Vallecoccia	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates."
April 24, 2014 Ninth Monitor's Report	[52] In January 2014, the Applicants' legal counsel also received… cheques in the amount of US$58,640.29 and US$8,440.11 payable to Domfoam and A-Z Foam respectively, in respect of the [US Class Action], net of the 25% collection fees payable… the Applicants' legal counsel sent the cheques to the Monitor…
October 22, 2014 Affidavit of Tony Vallecoccia	"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."
April 16, 2015 Affidavit of Tony Vallecoccia	12. There has been a trial in respect of one of the defendants in the [US Class Action], The Dow Chemical Company ("Dow"), in which a judgment has been rendered against Dow in the amount of $1.06 billion. The judgment was upheld on appeal. Dow has filed an application for leave to appeal to the US Supreme Court.
September 24, 2015 Twelfth Monitor's Report	FUTURE RECEIPTS [56] …The Monitor understands that judgment has been rendered against The Dow Chemical Company in the [US Class Action] and that further payments may be received by the [Applicants] pursuant to this judgment or a settlement thereof, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action].

February 22, 2016 Thirteenth Monitor's Report	FUTURE RECEIPTS [39] …The Monitor understands that judgment has been rendered against The Dow Chemical Company in the [US Class Action] and that further payments may be received by the [Applicants] pursuant to this judgment or a settlement thereof, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action].
August 23, 2016 Affidavit of Tony Vallecoccia	33(f) [The Plan] allows for the distribution of future funds realized from the [Dow Settlement] without further order of the court, as and when such funds are received…
August 26, 2016 Fourteenth Monitor's Report	FUTURE RECEIPTS FROM THE [US CLASS ACTION] [47] The Monitor understands that a settlement has been reached with The Dow Chemical Company in the [US Class Action] (the "**Dow Settlement**") and that further payments may be received by the [Applicants] pursuant to this settlement, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action]… Domfoam may be entitled to receive its share of the Dow Settlement in the amount of approximately $4,900,000, prior to deduction [of fees]. MATERIAL TERMS OF THE PLAN [53] (d) any future Domfoam Proceeds, including pursuant to the Dow Settlement, will also be distributed to Domfoam's Proven Creditors on a *pro rata*, *pari passu* basis if and when such funds are received by the Monitor…
January 17, 2017 Fifteenth Monitor's Report	FUTURE RECEIPTS FROM THE [US CLASS ACTION] [45] The Monitor understands that a settlement has been reached with The Dow Chemical Company in the [US Class Action] (the "**Dow Settlement**") and that further payments may be received by the [Applicants] pursuant to this settlement, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action]… Domfoam may be entitled to receive its share of the Dow Settlement in the amount of approximately $4,900,000, prior to deduction [of fees].
June 27, 2017 Sixteenth Monitor's Report	FUTURE RECEIPTS FROM THE [US CLASS ACTION] [43] On May 27, 2017, the Monitor received additional settlement proceeds under the [US CLASS ACTION]… Domfoam had received its share of the settlement proceeds in the amount of $20,849.33 on January 3, 2017. [44] The Monitor understands that a settlement has been reached with The Dow Chemical Company in the [US Class Action] (the "**Dow Settlement**") and that further payments may be received by the [Applicants] pursuant to this settlement, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action]… Domfoam may be entitled to receive its share of the Dow Settlement in the amount of approximately $4,900,000, prior to deduction [of fees].
November 20, 2017 Seventeenth Monitor's Report	FUTURE RECEIPTS FROM THE [US CLASS ACTION] [32] The Monitor understands that a settlement has been reached with The Dow Chemical Company in the [US Class Action] (the "**Dow Settlement**") and that further payments may be received by the [Applicants] pursuant to this settlement, as well as in relation to any additional judgments obtained or settlements reached in the [US Class Action]. Although the amount which will be payable to the [Applicants] pursuant to the [US Class Action] has yet to be finally determined, the Monitor understands that… the [Applicants] may be entitled to receive up to $10 million from the Dow Settlement, prior to deduction [of fees] referred to above.
May 24, 2018	[31] By letter dated March 21, 2018, class counsel delivered to the [Applicants] their share of the initial distribution of the USD$835 million settlement reached

Eighteenth Monitor's Report	with The Dow Chemical Company in the [US Class Action] (the "**Dow Settlement**") as follows… USD$3,741,639.62 to Domfoam… [38] … Pursuant to section 5.5 of the Plan, the Monitor is authorized to distribute to the Proven Creditors of Domfoam any amounts coming into the possession of the Monitor including the amounts pursuant to the Dow Settlement…

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 31133736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.
Applicants

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

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TORONTO

FACTUM OF THE APPLICANT, 4362063 CANADA LTD. (MOTION RE: CLASS ACTION PROCEEDS)

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