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**")

RESPONDING FACTUM OF THE APPLICANTS
(Motion Brought by Domfoam Inc.; Returnable November 29, 2018)

November 28, 2018	**BLANEY MCMURTRY LLP** Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto ON M5C 3G5 **David T. Ullmann** (LSO #42357I) Tel: (416) 596-4289 Fax: (416) 594-2437 Email: dullmann@blaney.com **Alexandra Teodorescu** (LSO # 63889D) Tel: (416) 596-4279 Fax: (416) 594-2437 Email: ateodorescu@blaney.com *Lawyers for the Applicants*
TO:	**Service List**

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FACTUM OF THE APPLICANTS

PART I — OVERVIEW

1. Domfoam Inc. (formerly 4037057 Canada Inc.) ("**Purchaser**") purchased the operating business of the Applicant, Domfoam International Inc. (now known as 4362063 Canada Limited) ("**Domfoam**"), in March 2012.

2. The Purchaser now moves for an order setting aside the Order of The Honourable Justice Wilton-Siegel dated May 29, 2018, wherein the Court authorized Deloitte Restructuring Inc. in its capacity as Court-appointed Monitor of the Applicants ("**Monitor**") to make an interim distribution of $3,470,000 to the creditors of Domfoam, and directing Domfoam to pay the proceeds it recovered from the US Class Action (as defined below) in the amount of $3.6 million USD to the Purchaser.

3. In 2012, in the course of negotiating the sale of the business, the parties considered whether or not to include in the sale, the proceeds payable to Domfoam arising from the US Class Action in which Domfoam was a class participant. The asset was described in an early

draft of the Asset Purchase Agreement by the Purchaser as the "BASF Receivables", as one of the group of defendants to that class action was BASF, and Domfoam considered the amount payable under that lawsuit to be a receivable it would eventually receive.

4. The BASF Receivables was an asset that was well known to Domfoam and the Purchaser. The extent of that knowledge could be further uncovered through further examination. Domfoam ultimately decided not to sell the BASF Receivables. Accordingly, the asset was withdrawn from the list of assets being sold in the second draft of the Asset Purchase Agreement.

5. The Purchaser now purports to stake a claim to this asset (which is worth in excess of $4 million CAD) as part of the broad, catch-all category of "All other Purchased Assets" set out in the Asset Purchase Agreement, for which only $300,000 of the purchase price was allocated. In other words, from a purchase price of $300,000, the Purchaser alleges that it is entitled to now recover over ten times that amount six years later.

6. In the intervening six years, Domfoam has repeatedly confirmed to the Purchaser, and the *CCAA* service list, that the US Class Action proceeds belong to Domfoam and not to the Purchaser. Until June 2018, the Purchaser took no issue with this position, but now brings its claim forward, seeking to deprive Domfoam's deserving creditors with meritorious claims of this money.

7. In the intervening six years, Domfoam has collected various assets in the course of its restructuring, including other amounts owing from the US Class Action, made or advised of its intention to make interim distributions to creditors, entered into a plan of arrangement with its creditors to distribute its assets which has been sanctioned by the court, and made interim distributions to those creditors in accordance with the Plan.

8. The court appointed Monitor served several reports which supported its understanding that the amounts owing from the US Class Action was an asset of Domfoam which was available to be distributed to its creditors. The Plan, which the Monitor supported, specifically contemplated the distribution of these proceeds to the creditors.

9. The Purchaser complains that the Order of Justice Wilton-Siegel dated May 29, 2018 which authorized the distribution of the disputed funds was made without notice, and without full and fair disclosure of all material facts. This is untrue. The Motion Record was served to the Service List in the ordinary *CCAA* process. For reasons that are not known, the Purchaser's counsel who acted on the subject transaction was no longer on the Service List after 2015 and therefore was not served with the motion. But to say that Domfoam moved "without notice", as alleged in the Purchaser's Factum, is a gross exaggeration.

10. The materials served for the May 29, 2018 Order of Justice Wilton-Siegel include a proposal that the recently received proceeds from the US Class Action be distributed. The Monitor also served a Report which recommended the distribution. The service of the Report and the Motion Record was validated by the court order, in the usual way. There was no attempt to hide the proposed distribution from anyone. The proposed distribution was also in accordance with the provision of the Plan and therefore not a surprise to the Purchaser or anyone else.

11. In fact, it is likely that the Purchaser, although not on the Service list, had notice of the motion and/or the intent to distribute the funds prior to the Order being granted. This could be further proven through examination of the parties who would have received that notice.

12. The only evidence put forward by the Purchaser on this motion is the affidavit of its solicitor who worked on the asset purchase transaction, who cannot provide direct evidence of

anything other than what the agreements say. He is not able to provide any information about what the intent of the parties was beyond the terms of the agreement. There is no affidavit from a key employee, John Howard, and no affidavit from the instructing principals of the Purchaser, Terry Pomerantz and Frank Gattinger.

13. It is respectfully submitted that this opportunistic motion by the Purchaser must fail for the following reasons:

a. the Purchaser expressly did not buy the BASF Receivables, which asset was specifically contemplated by the first draft of the Asset Purchase Agreement, but then removed;

b. the Purchasers were repeatedly advised in the intervening years from 2012 until now that the class action distribution remained an asset of Domfoam;

c. even if the Purchasers could have claimed the purchased the asset in question, the Purchaser's right to assert such a claim against Domfoam is now statute-barred, by several years; and

d. the Purchaser is barred by the Claims Procedure Order of this Court and the Plan Sanction Order of this Court from asserting this claim at this time.

14. For all of the above reasons, Domfoam submits that the motion should be dismissed.

PART II – FACTS

a) US Urethane Antitrust Litigation

15. In 2004, a class action lawsuit was commenced alleging that certain companies unlawfully fixed the prices of polyether polyol products sold in the United States between January 1, 1999 and December 31, 2004. This class action was commenced in the United States District Court for the District of Kansas ("**US Court**") under the case name "In Re: Urethane Antitrust Litigation" ("**US Class Action**"). The defendants were Bayer AG, Bayer Corporation, Bayer Material Science LLC (collectively, "**Bayer**"), BASF SE, BASF Corporation (collectively, "**BASF**"), the Dow Chemical Company ("**Dow**"), Huntsman International LLC ("**Huntsman**") and Lyondell Chemical Company (collectively, the "**Defendants**"). As purchasers of polyether polyol products in the relevant time period, the Applicants were class members in the US Class Action, who stood to potentially benefit from any settlement or judgment proceeds.[1]

16. In 2008, the Applicants retained the services of Refund Recovery Services, LLC ("**RRS**") as agent to assist the Applicants with filing a claim in the US Class Action in order to participate in any recoveries from the Defendants. John Howard, the General Manager for the Applicants, executed the agreement with RRS on behalf of the Applicants. Immediately following the closing of the transaction between Domfoam and the Purchaser, Mr. Howard came to be employed by the Purchaser. The Purchaser took no steps to assign the agreement with RRS into its name.[2]

17. The plaintiffs in the US Class Action reached negotiated settlements of the claims against Bayer, BASF, Huntsman and Lyondell, which were approved by the US Court at different times. For example, the final distribution of the Bayer settlement funds was approved by the US Court

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[1] Affidavit of Tony Vallecoccia, sworn October 16, 2018 ("**Vallecoccia Affidavit**"), para. 9, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[2] Vallecoccia Affidavit, *supra*, paras. 11 and 23, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1. See also Transcript of Cross-Examination of Jacques Vincent, p. 39, q. 139.

on August 25, 2011. A settlement was reached with BASF and Huntsman, which was approved by the US Court on December 12, 2011, and distributed to the Applicants in three tranches during the CCAA process.[3]

18. Unlike the other Defendants, the action as against Dow proceeded to a jury trial in 2013. In May 2013, a judgment was entered against Dow in favour of the plaintiff class in the amount of $1.2 billion. Dow appealed from the jury verdict and judgment. The United States Court of Appeals for the Tenth Circuit affirmed the trial court's decision in September 2014, and Dow appealed to the Supreme Court of the United States. Before the Supreme Court appeal could be decided, the parties reached a settlement in February 2016, in which Dow agreed to pay $835 million to the benefit of the class action plaintiffs. This settlement was approved in December 2017, and distributions were made thereafter.[4]

b) Sale of Domfoam

19. On or about December 22, 2011, the Purchaser and Domfoam entered into a first draft of the Asset Purchase Agreement ("**APA #1**"). The purchase price included a value for the US Class Action which the parties referred to as the "BASF Receivables" (as defined in APA #1). It also stated that "If the Vendor does not want to sell the BASF Receivables because it would be used by the Vendor in the negotiation of the settlement out of court of the Canadian class actions instituted against the Vendor, the Purchaser would then agree to withdraw its offer to purchase

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[3] Vallecoccia Affidavit, *supra*, paras. 12-14, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[4] Vallecoccia Affidavit, *supra*, para. 16, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

said BASF Receivables and the Purchase Price would be reduced by the amount attributed to the BASF Receivables."[5]

20. BASF was a supplier to Domfoam of key chemicals required in its manufacturing process. BASF was ordinarily a payable of Domfoam. The "BASF Receivables" was the amount payable under the US Class Action. As noted above, the most recent settlement from the US Class Action actually involved a settlement with not only BASF, but also Huntsman.[6]

21. There were no other amounts owing by BASF to Domfoam. Indeed, that would be unusual, as BASF was a supplier, not a customer. Mr. Jacques Vincent was the counsel acting for the Purchaser on the transaction. Mr. Vincent provided the affidavit in support of the Purchaser's motion. On cross-examination, Mr. Vincent advised that he and his client did not understand the "BASF Receivables" to be a receivable like an outstanding invoice or a debt owed. Rather, he testified that they (he and his client) knew that there was an agreement reached at the time the Purchaser made its offer, but that the payment by BASF had not been completed yet. Mr. Vincent stated: "And we were ready to **take the chance** to purchase that receivable". (**emphasis added**).[7]

22. The total purchase price of $3,554,880 was comprised of the following components in APA #1:

	Item	**Value ($)**
(A)	Purchased Receivables	1,919,385
(B)	Purchased Inventories	1,068,928
(C)	BASF Receivables	385,000

[5] Affidavit of Jacques Vincent, sworn September 13, 2018 ("**Vincent Affidavit**"), Exhibit "A", section 2.9, Motion Record of the Moving Party, dated September 14, 2018, pg. 29.
[6] Vallecoccia Affidavit, *supra*, para, 14, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.
[7] Transcript of Cross-Examination of Jacques Vincent, p. 26, q. 98-100.

(D)	All other Purchased Assets	250,000
(E)	Excess rebates to customers	(68,633)[8]

23. The BASF Receivables was expressly "withdrawn" from the second draft of the Asset Purchase Agreement dated February 22, 2012 ("**APA #2**"). The total purchase price in APA #2 was $3,562,975. The slight increase in price between APA #1 and APA #2 (despite the removal of the BASF Receivables) occurred as a result of the large increase in the value of Purchased Receivables from $5.1 million in APA #1 to $5.9 million in APA #2. The purchase price was calculated as follows:

	Item	**Value ($)**
(A)	Purchased Receivables	2,450,976
(B)	Purchased Inventories	946,586
(C)	*Withdrawn*	
(D)	All other Purchased Assets	200,000
(E)	Excess rebates to customers	(34,587)[9]

24. The BASF Receivables continued to remain "withdrawn" in the final Asset Purchase Agreement, dated March 8, 2012 ("**Final APA**"). The purchase price was adjusted to $3,662,975 due to a $100,000 increase in the value of category (D) "All other Purchased Assets." "All other Purchased Assets" included certain specifically identified assets referred to at Schedule 1.1 (hh),

[8] Vallecoccia Affidavit, *supra*, para, 6, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[9] Vallecoccia Affidavit, *supra*, para. 7, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

such as: contracts, customer contracts, equipment, intellectual property, customer lists, corporate names, etc.[10]

25. On cross-examination, the Purchaser's affiant, Mr. Jacques Vincent, provided evidence that category (D) "All other Purchased Assets" was intended to cover all items not otherwise specifically included in the Final APA:

> Q. Right. Okay, but do I understand correctly, though, that "All other Purchased Assets" for $300,000, that's kind of the broad catch-all, for lack of a better term?
>
> A. It is to cover everything that is not specifically defined in the agreement.
>
> Q. Right, and that included, that ended up to include, things like the corporate name, trademarks, contracts, equipment, customer lists, prepaid items like insurance, and even, like a good Canadian hockey fan, the Canadiens hockey tickets, I saw in the agreement. Right?
>
> A. It covers everything that is not specifically excluded.[11]

26. He also stated that for the $300,000 in consideration paid for "all other assets", this sum ought to include the potential right to recover any sums from outstanding litigation.[12]

27. On cross-examination Mr. Vincent confirmed that the "Purchased Receivables" category for $2,450,976 of the purchase price consisted of receivables owing to Domfoam by its own customers. He also confirmed that at the time of the Final APA, that no portion of the amounts paid for either the "Purchased Receivables" or for the "Purchased Inventories" was for the purchase of any potential settlement or judgment amounts arising from any litigation.[13]

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[10] Vallecoccia Affidavit, *supra*, para. 8, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.
[11] Transcript of Cross-Examination of Jacques Vincent, p. 50, q. 170,
[12] Transcript of Cross-Examination of Jacques Vincent, p. 62, q. 208.
[13] Transcript of Cross-Examination of Jacques Vincent, p. 52-53, q. 178-183, p. 56-57, q. 194-196

28. When Mr. Vincent was asked the critical question: "Okay, and you'll agree with me that you can't show me a single instance in the asset purchase agreement where any potential litigation receivables are referred to specifically in any circumstance. Isn't that right?", counsel for the Purchaser intervened to debate the meaning of the phrase "litigation receivable". This continued notwithstanding that counsel for Domfoam immediately clarified and stated: "Any potential sum to arise from litigation, whether it's a judgment or a settlement being paid". Finally, Mr. Vincent answered the question as follows: "So, no, there was not, as there were a lot of assets that we purchased that were not specifically mentioned in that agreement".[14]

29. Examination of John Howard, who joined the Purchaser full time immediately following the closing of the sale, will demonstrate the extent to which he was instructing or providing information to Mr. Vincent or to Mr. Terry Pomerantz, the principal of the Purchaser.

30. The US Class Action Lawsuit is one indivisible lawsuit with one court file number. The entitlement to funds for the company comes from one indivisible claim filed on its behalf by RSS. The agreement with RSS was executed by Mr. Howard as the General Manager of the Applicants at the time.[15]

31. This is not an asset which would have been transferred by a basket clause. It was the subject of specific negotiations and it was specifically withdrawn.

32. On cross-examination, Mr. Vincent testified that he thought there were two lawsuits, one with Bayer, and one with BASF. However, he advised that he had no pleadings or documents on which to confirm that, and relied only on "the information from the lawyers and parties". Mr.

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[14] Transcript of Cross-Examination of Jacques Vincent, p. 57-59, q. 197-198
[15] Vallecoccia Affidavit, *supra*, paras. 5, 11, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

Vincent admitted that his client performed some due diligence for the transaction, but apparently there was no investigation made whatsoever into the status of the litigation that Mr. Vincent and his client knew existed.[16]

33. It is agreed that the BASF Receivables was not to be purchased, and it is also clear that the BASF Receivables was not listed as an Excluded Asset. It is not accounted for anywhere in the purchase agreement after it was deleted from the first draft. It is not accounted for in the allocation of assets anywhere, as was admitted on cross-examination. It was not accounted for in the financial statements of the Purchaser as a pending asset. It was not an asset in respect of which the purchaser took an assignment, on closing or afterwards.[17]

34. Following the closing of the sale, the parties conducted themselves in a manner which was consistent with the fact that the BASF Receivables had not transferred to the Purchaser.

c) The Parties Actions are Consistent with Understanding that the Asset Remained with Domfoam

35. The Purchaser remained on the Service List with notice of these proceedings until the Fall of 2015. Mr. Howard continues to be served with motion materials until the present day through his counsel.[18]

36. Mr. Vallecoccia's current recollection of the details of the BASF Receivable and the US Class action lawsuit is limited, as demonstrated by his cross-examination in these proceedings where his most common response was that he did not remember. The vast majority of his most

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[16] Transcript of Cross-Examination of Jacques Vincent, p. 38, q. 134-135. Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 2.
[17] Transcript of Cross-Examination of Jacques Vincent, pgs. 39-41, Qs. 139-143.
[18] Vallecoccia Affidavit, *supra*, paras. 18 and 23, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

recent affidavit is a compilation of statements which are supported by the documents attached, previous affidavits, or court reports.

37. Mr. Vallecoccia is an elderly man. No one has challenged his competence but his current recollection of older events is clearly limited. But for assisting with the completion of the Domfoam *CCAA* matter, he has been effectively retired for some time.

38. However, between March 2012 and October 2015, when the events were fresh, Mr. Vallecoccia made numerous references to the anticipated receivables payable to the Applicants from the US Class Action and, in particular, the payments coming from the settlement with Dow. He stated in sworn evidence on more than one occasion that he believed that these receivables were assets of the Applicants and not the Purchaser.

39. The following specific information was made known to the Purchaser confirming the asset remained with Domfoam:

Affidavit of Tony Vallecoccia, Date Sworn	**Sworn Evidence**
June 12, 2012	"There is also a further substantial amount due from a litigation settlement entered into by each of Domfoam and Valle Foam prior to the CCAA process in connection with a class action with BASF where Domfoam and Valle Foam were part of a class of plaintiffs. <u>This receivable was not sold to Domfoam Newco and remains an asset of Domfoam.</u>" [emphasis added]
February 22, 2013	"…I am advised by David Ullmann that one of the defendants, The Dow Chemical Company in the US Polyol litigation has refused to settle. A trial is proceeding with that defendant. It is anticipated that there could either by a substantial settlement, or a substantial award made in respect of that remaining defendant, which could result in further funds being payable to the Applicants." … "The extension sought herein will provide the Applicants with the time

	necessary to…attend to the collection of the further instalments of the US Polyol settlement funds…"
July 11, 2013	"I am advised by David Ullmann that there has now been a trial in respect of one of the defendants, The Dow Chemical Company ("**Dow**"), in which a judgment has been rendered against Dow in the amount of $1.2 Billion. This judgment will be appealed. The Applicants could receive a further significant payment from this judgment, or any related settlements. The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates. The first $200,000.00 of the Polyol claims was assigned to the Class Action Settlement. The Polyol claims were not marketed for sale in the sale process conducted in these proceedings. The Polyol claims were not listed as an asset available for sale in the sale process conducted by the Applicants and the Monitor. The Polyol claims were not included as an asset to be acquired by any purchaser in any of [the] agreements of purchase and sale with the Applicants." [emphasis added]
December 12, 2013	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates. … It is anticipated at this time that, net of fees to RRS, the aggregate of the payments to the Applicants should be approximately $140,000.00 (A-Z - $8,000, Domfoam - $58,000, Valle Foam - $73,000)." [emphasis added]
April 22, 2014	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates." [emphasis added]
October 22, 2014	"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates. … I am advised by our counsel that, in the event the Dow judgment is upheld and payment is made by Dow in the full amount of the claim, the recovery to the Applicants could be significant. On a rough calculation, the gross amount, before attorney fees, payable in respect of the Applicants' claim in the Polyol proceedings, in the event of a one billion dollar judgment, could be as high as: Valle Foam $6,000,000.00. Domfoam $4,900,000.00 and A-Z Foam $690,000.00."[19]

[19] Vallecoccia Affidavit, *supra*, para. 20, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

40. The various Monitor's reports that were prepared during this time and served upon the Purchaser similarly provided updates on the anticipated distributions from the US Class Action.[20] Specifically, the Seventh Report of the Report confirms that the proceeds from the US Class Action was an asset specifically excluded from the Final APA.[21]

41. On cross-examination, Mr. Vincent answered that he "probably" did forward the Monitor's reports he was sent to this client. Through answers to undertakings, Mr. Vincent advised that he forwarded the following documents to his client, the Purchaser: Application Record, First Report of the Monitor, Fourth Report of the Monitor and Motion Record returnable June 15, 2012, Fifth Report of the Monitor and Motion Record returnable October 25, 2012, Sixth Report of the Monitor and Motion Record returnable February 28, 2014, Eighth Report of the Monitor and Motion Record returnable December 17, 2013, Motion Record returnable April 29, 2014, and Eleventh Report of the Monitor and Motion Record returnable April 22, 2015. Mr. Vincent advised that his client did not read these documents.[22]

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

43. In addition, Robert Tanner at Tanner & Guiney represents the former directors and officers of Domfoam, including John Howard. Mr. Tanner has been on the Service List since at least the fall of 2015 to the present, and would have received notice of the Plan (as defined

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[20] Vallecoccia Affidavit, *supra*, para. 21, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[21] Motion Record of the Moving Party, dated September 14, 2018, Tab 4.

[22] Transcript of Cross-Examination of Jacques Vincent, p. 67, q. 227. Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 9.

below) and distributions to be received from Dow. The Plan would have been of particular concern to Mr. Howard as it contained a release for former officers and directors, such as himself.[23]

44. The Monitor's Fourteenth Report, served to explain the Plan to the Court and the creditors specifically highlighted that future proceeds were to be received by Domfoam from Dow and that those proceeds would be distributed to the creditors under the Plan.[24]

45. Correspondingly, Mr. Howard (and therefore the Purchaser) would have received updates from Mr. Tanner of subsequent steps in the CCAA process in his capacity as a former officer, which events were relevant to the claim Domfoam is currently making. Further examination could demonstrate the extent to which Mr. Howard made this information known to the Purchaser during this period.

46. The Purchaser has delivered, through undertakings of Mr. Vincent, certain responses which ideally would be tested for their credibility and explored on cross-examination. Taken at their face, they appear to confirm that the Purchaser paid no attention whatsoever to this asset which they now seek to assert that they own and intended to own at all times.

47. According to Mr. Vincent, the Purchaser never contacted RRS to ensure that payments would be made to them, until May 2018.[25]

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[23] Vallecoccia Affidavit, *supra*, paras. 23-26, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.

[24] Monitor's 14th Report August 26th, 2016 para 46 and 52.

[25] Transcript of Cross-Examination of Jacques Vincent, ps. 38-39, qs. 136-137, 140. Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 6-7.

48. S.P. Holdings Canada Inc. is the 100% shareholder of Domfoam Inc. It was also a creditor of Domfoam as it was the former landlord. It is believed that the principal of S.P. Holdings Canada Inc. is the same as that of Domfoam Inc. (Terry Pomerantz). S.P. Holdings Canada Inc. filed a claim for unpaid rents in the *CCAA* proceeding.[26]

49. Its claim appears on the Monitor's list of creditors, all of whom were to be provided with notice of the Plan and the meeting to vote in respect of same.[27] Further examination of the principal, Mr. Pomerantz, would confirm whether or not this information was received by him and why, if so, he did not object to a Plan which sought to distribute an asset that he believed to be owned by one of his companies to the creditors.

d) Claims Bar and Plan of Arrangement

50. A claims solicitation procedure was approved by the Court on June 15, 2012 and ordered by The Honourable Justice Brown (the "**Claims Solicitation Order**"). The Claims Solicitation Order established a claims bar date of August 31, 2012. The Monitor published a notice of the claims bar date in The Globe and Mail newspaper (national edition) and La Presse. The Purchaser did not submit a claim in accordance with the Claims Solicitation Order, or at any time after the claims bar date.[28]

51. Domfoam put forward a Plan of Compromise and Arrangement ("**Plan**"), which was approved by the creditors at a meeting held in October 2016, pursuant to the Meeting Order of Justice Penny, dated September 6, 2016. The Monitor published notice of the creditors' meeting

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[26] Transcript of Cross-Examination of Jacques Vincent, p. 69, q. 232.
[27] Vallecoccia Affidavit, *supra*, Exhibit "N", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1N.
[28] Vallecoccia Affidavit, *supra*, paras. 24, Exhibit "M", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1M.

in the Globe and Mail (national edition) pursuant to the Meeting Order. The notice also directed that creditors could find and review the Plan on the Monitor's website.[29]

52. The Plan was approved and sanctioned by The Honourable Justice Hainey on January 24, 2017.[30]

53. The purpose of the Plan was to allow Domfoam to distribute proceeds from the liquidation of its assets and the proceeds it received from the settlement with Dow to its proven creditors on a *pro-rata* basis.[31]

54. This Court granted an order distributing the Dow proceeds in accordance with the Plan on May 29 2018 (the "**Distribution Order**").[32]

55. Mr. Vincent swears that Mr. Howard told him that he, Mr. Howard, heard from an unnamed third party at some point in May 2018 through the "industry grapevine" about the Dow proceeds.[33] Further examination would demonstrate when this information was received, from whom and how, but it is likely that Mr. Howard, and therefore the Purchaser, had notice of both the order the Purchaser is seeking to vary, and the Dow settlement, prior to the order being granted and took no steps to appear at that hearing.

56. The statement relayed by Mr. Vincent from Mr. Howard suggests that Mr. Howard only heard in 2018 that there was a claim against Dow by various claimants (including Domfoam).

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[29] Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.
[30] Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.
[31] Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.
[32] Motion Record of the Moving Party, dated September 14, 2018, Tab 3.
[33] Vincent Affidavit, *supra*, para. 35, Motion Record of the Moving Party, dated September 14, 2018.

This is simply not credible, considering that Mr. Howard was, and further examination would confirm, intimately familiar with this receivable since he agreed to hire RRS to manage it in 2008 and in fact signed the Services Agreement to this effect.

PART III – ISSUES

57. The following issues will require determination on this motion:

a. Did the Purchaser acquire the right to receive the pending receivable related to the US Class Actions? **The Applicant's position:** No. The defined term "BASF Receivables" was understood to refer to amounts receivable under the US Class Action, not just those due from BASF. The parties clearly deleted the BASF Receivables from the transaction and made no effort to include or account for the amounts to be received from the US Class Action in the transaction. It is respectfully submitted that the court can draw the inference that this was because they did not intend to buy it and knew they had not bought it.

b. If the Purchaser did acquire rights to receive the proceeds from the US Class Action, can it assert those rights against Domfoam at this time? **The Applicant's position:** No. The Purchaser is barred from asserting a claim against Domfoam for any cause of action which may give rights to these assets as they have had notice of the fact that these assets remained with the company for more than six years at this point, and certainly more than the two year limitation period pursuant to the *Limitations Act, 2002*, S.O. c. 24, Sched. B., which would apply.

PART IV – LAW AND ARGUMENT

ISSUE 1 – DID THE PURCHASER ACQUIRE THE RECEIVABLES?

Purchaser Did Not Purchase BASF Receivables

58. It was originally contemplated prior to the Applicants filing for *CCAA* protection that the Purchaser would acquire the proceeds from the US Class Action in the course of the transaction, which the parties dubbed the "BASF Receivables." It was intended that this definition refer to all proceeds from the US Class Action (i.e.: receivables from all Defendants), and not just those from BASF.[34]

59. However, Domfoam later wanted to use this asset to make payments to class action claimants in Canada and so the BASF Receivable were withdrawn from APA #2 and ultimately the Final APA, and the Purchaser did not purchase this asset.[35]

60. The contemporaneous evidence of Mr. Vallecoccia was that this asset remained an asset of the estate, which had not been acquired by the Purchaser.[36]

Subsequent Actions are Indicative of the Parties' Intentions

61. In the alternative, the Final APA is ambiguous with respect to the meaning of "BASF Receivables." Indeed, there is no definition of "BASF Receivables" in the Final APA; it is simply stated to be "withdrawn."[37] Another ambiguity exists in the fact that, although

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[34] Vallecoccia Affidavit, *supra*, para. 5, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[35] Vincent Affidavit, *supra*, Exhibit "A", section 2.9, Motion Record of the Moving Party, dated September 14, 2018, pg. 29. Vallecoccia Affidavit, *supra*, para. 7, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[36] Vallecoccia Affidavit, *supra*, para. 20, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[37] Vincent Affidavit, *supra*, Exhibit C, s. 2.9, Motion Record of the Moving Party, dated September 14, 2018, pg. 206.

"withdrawn," the "BASF Receivables" was not specifically listed as an excluded asset in the APA.

62. This ambiguity is evident in the conflicting ways in which Domfoam and the Purchaser interpret the scope of "BASF Receivables."

63. Domfoam takes the position that the parties used the term "BASF Receivables" to refer to more than just amounts owing from the BASF defendants; the definition was meant to include all proceeds from the US Class Action. The BASF settlement in the US Class Action was completed in conjunction with a settlement with Huntsman, so at the very least the term refers to monies coming from BASF and also Huntsman. The US Class Action also included Bayer and Dow as defendants under one court file number. It was one lawsuit or proceeding in which the Applicants retained the services of RRS to pursue their class action claims against the Defendants.

64. Domfoam did not want to sell the proceeds from the US Class Action because the funds were intended to be used to settle the Canadian class actions initiated against the Applicants, and specifically against Domfoam. APA #1 expressly contemplates that this asset would be removed from the assets available for sale precisely for this reason.[38]

65. The Purchaser, conversely, asserts that the "BASF Receivables" only refers to proceeds payable to the Applicants from BASF.

66. Mr. Vincent's evidence is inconsistent in this regard. In particular, he swears to the fact that his instructions were to acquire all of Domfoam's assets (which he suggests was to include

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[38] Vincent Affidavit, *supra*, Exhibit "A", section 2.9, Motion Record of the Moving Party, dated September 14, 2018, pg. 29.

the Dow settlement funds). He suggests that anything not included in the excluded assets was purchased by his client. However, he also agrees that the "BASF Receivables" was not purchased by his client, even though it is not listed as an Excluded Asset.[39]

67. Furthermore, the fact that the Purchaser is not pursuing the amounts paid to Domfoam with respect to the claim against Huntsman suggests that the Purchaser knows that it too (along with Dow and Bayer) was an excluded asset from the transaction to which they surrendered their rights when they withdrew this asset from the transaction.

68. Given the ambiguity in the Final APA, it is appropriate to consider the subsequent conduct of the parties. When there are two reasonable interpretations of a contract, subsequent conduct can help determine which one is the correct interpretation, and may help support an inference concerning the intentions of the parties at the time they made the agreement.[40]

69. The subsequent conduct the Purchaser demonstrates that the Purchaser did not conduct itself as an owner of the important asset it alleges to have purchased:

a. the Purchaser did not execute an assignment with respect to the proceeds from the US Class Action;[41]

b. the Purchaser took no steps to investigate the status of the US Class Action at the time the Final APA was entered into or the prior drafts were circulated;[42]

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[39] Transcript of Cross-Examination of Jacques Vincent, p. 40, Q. 141.
[40] *Shewchuk v Blackmont Capital Inc*, 2016 ONCA 912 at paras 41, 46, 47-48, Brief of Authorities of the Applicants, Tab 1.
[41] Transcript of Cross-Examination of Jacques Vincent, pgs. 39-41, Qs. 139-143.
[42] Transcript of Cross-Examination of Jacques Vincent, p. 38, q. 134-135. Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 2.

c. there is no evidence that the Purchaser informed RRS that it had purchased the receivables from the US Class Action or that the Purchaser otherwise engaged with RRS to advance a claim in the US Class Action. Mr. Howard was aware of the engagement of RRS, but there is no evidence that he took steps to monitor the asset or coordinate with RRS after he became employed by the Purchaser;[43]

d. neither Mr. Vincent nor Mr. Pomerantz monitored the progress of the US Class Action;[44]

e. There is no evidence to suggest that Mr. Vincent kept apprised of about developments in the US Class Action;[45] and

f. similarly, Mr. Pomerantz did not keep himself.[46] Even the simplest due diligence would have made it evident that the proceeds from the US Class Action remained a Domfoam asset, and that the Dow action was not a separate action from the US Class Action.

70. The only reasonable inference that can be drawn from the Purchaser's conduct following the close of the asset purchase transaction is that it did not purchase the US Class Action proceeds. The funds the Purchaser now seeks to claim as its own are worth more than it paid under the Final APA, meaning that it would, for practical purposes, have received all the other assets it purchased such as receivables and inventory for free. A reasonable purchaser would

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[43] Transcript of Cross-Examination of Jacques Vincent, ps. 38-39, qs. 136-137, 140. Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 6-7.
[44] Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 8.
[45] Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 9. Affidavit of Jacques Vincent, sworn November 12, 2018, para. c, Supplementary Motion Record.
[46] Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 9.

have taken steps to monitor and ensure the recovery of this allegedly purchased large asset, which the Purchaser did not do in any regard.

Contra Proferendum

71. It is Mr. Vincent's evidence that he drafted the Final APA.[47] Any ambiguities that exist in the Final APA, particularly with respect to the meaning of the "BASF Receivables," should, therefore, be interpreted against the party who drafted it in accordance with the *contra proferendum* rule.[48]

Mr. Vincent's Evidence is not the Best Evidence

72. The Purchaser must discharge its burden of proof to demonstrate that it purchased the proceeds from the US Class Action. It chose to put forward evidence from its lawyer, Mr. Vincent, who was only involved on the "legal side" of the transaction and did not conduct any due diligence with respect to the assets being purchased:

> Q. Yes, I understood that. And so the next question is to really clarify. Are you aware of whether your client made any additional due diligence on its own, that you didn't participate in, such that –
>
> A. I don't know. I don't know.
>
> Q. You don't know?
>
> A. I don't know.
>
> Q. Okay. Did you work on the transaction with them, though, in a business sense? Did you take active steps to do due diligence on the proposed assets, as well?

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[47] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Q. 30, pg. 9.
[48] G.H.L Fridman, Q.C., *The Law of Contract in Canada*, Sixth Edition, (Thomson Reuters Canada Limited, 2011), pg. 455, Brief of Authorities of the Applicants, Tab 2.

A. We did some due diligence at the time, yes. I do remember that.

Q. Okay.

A. It was, we were not doing the due diligence on the accounting side, on the tax side. It was done by external accounting.

Q. I see, but you and your client together did review the assets; you did some due diligence into the assets that were going to be purchased?

A. What do you mean by "review the assets"? I did not walk the shop, no.

Q. Well, review documents, financial statements, lists of inventory, for example, lists of outstanding receivables?

A. Actually, those things were not under my control. It was under my client's control.

Q. Okay, so your client really was the one who received the –

A. I was doing actually the legal side of the due diligence.

Q. Okay. Thanks, and that's my question, really, whether you were strictly doing the legal work or you were also acting in a bit of a business advisory role, as corporate counsel sometimes does, on the transaction.[49]

73. Mr. Vincent could only provide evidence as to *his interpretation* of his client's instructions; he could not provide evidence on the Purchaser's understanding of the "BASF Receivables."

74. The "best evidence rule" states that parties should endeavour to put forth the best evidence "that the nature of the case will allow" for consideration by the triers of fact.[50] Courts have been critical of lawyers providing evidence on behalf of their clients, particularly when the

[49] Transcript from the Cross-Examination of Jacques Vincent, dated November 20, 2018, Qs. 39-45, Qs. 47-54, pgs. 10-14.
[50] *R v. Shayesteh*, 1996 CarswellOnt 4226, para. 91, Brief of Authorities of the Applicants, Tab 3.

client is available to provide evidence, the affidavit contains hearsay, and there was no reason provided as to why the client did not provide direct evidence.[51]

75. With respect to the issue of the interpretation of the "BASF Receivables," Mr. Vincent's evidence is not the best evidence and he has not provided a reason as to why the Purchaser did not provide direct evidence on this issue. Correspondingly, Mr. Vincent's evidence in this regard should be given little weight.

76. While Mr. Valleoccia's current recollection with respect to the BASF Receivables and the US Class Action is limited, this is no reason to discount the evidence he provided in the past. Mr. Vallecoccia has consistently maintained through the course of this *CCAA* proceeding, and, importantly, directly following the sale of the Domfoam assets, that the proceeds from the US Class Action remained an asset of the estate.[52] This was contemporaneous evidence as the time the issues were fresh in Mr. Vallecoccia's mind. His previous evidence should be preferred to that of Mr. Vincent's evidence, which is (at best) not the direct evidence of the Purchaser and (at worst) self-serving, and in some cases is hearsay and even triple hearsay (i.e. paragraph 35 of his affidavit, when he describes the Purchaser learning of the asset in May of 2018 through the "industry grapevine").

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[51] See, for example, *Al Masri v. Baberakubona*, 2010 ONSC 562, paras. 15-17, 19 and 21, Brief of Authorities of the Applicants, Tab 4.

[52] Vallecoccia Affidavit, *supra*, para. 20, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

ISSUE 2 – CAN THE PURCHASER ASSERT ITS CLAIM TO THE PROCEEDS GIVEN THE DELAY?

No Basis to Set Aside Order under Rule 37.14

77. The Purchaser moves under Rule 37.14[53] to vary the Distribution Order on the basis that the motion was without notice and failed to make "full and fair disclosure" of all material facts, which is a gross mischaracterization of the facts.

78. The Monitor was authorized under sections 5.5 and 5.6 of the Plan to distribute to the creditors of Domfoam with proven claims any amounts coming into the Monitor's possession including amounts from the settlement with Dow. The Plan was approved by the creditors and sanctioned by the Court on January 24, 2017.[54]

79. The Applicants did not need to seek authorization from the Court to distribute the Dow settlement funds because this had already been granted pursuant to the Plan Sanction Order of Justice Hainey.

80. In any event, the Applicants reported in Mr. Vallecoccia's May 22nd 2018 affidavit that the funds from the Dow settlement had been received. Furthermore, the Eighteenth Report of the Monitor states: "In accordance with section 5.6 of the Plan, the Monitor will distribute a further $3,470,000 from the net amount of the Dow Settlement Funds received by Domfoam, to Proven Creditors on a *pro rata, pari passu* basis considering the amounts of their respective Proven Claims."[55]

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[53] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 37.14.
[54] Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.
[55] Eighteenth Report of the Monitor, dated May 24, 2018, para. 38.

81. Insufficient or lack of notice is a prerequisite to a party being able to set aside an order under Rule 37.14. However, notice is not construed in the strict sense, as suggested by the Purchaser. Where Rule 37.14 would otherwise be applicable, but the Court finds that the moving party nonetheless had knowledge of the proceedings, the motion to vary or set aside an order will be dismissed.[56]

82. In *Crystallex International Corp (Re)*, a group of shareholders moved to set aside a series of DIP orders. Justice Hainey found that the moving parties were aware of the *CCAA* proceedings since 2012, and aware of the Monitor's website where information concerning the motions and orders was readily available. The Court held that notice under Rule 37.14 had been effected and criticized the shareholders' lack of initiative:

> "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."[57]

83. Similarly, in this case, Mr. Vincent was on the Service List for the Purchaser between 2012 and 2015. During that time, the Purchaser was notified through affidavit evidence and Monitor's Reports that (a) a trial judgment in the amount of $1.2 billion had been obtained

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[56] *Poursina v Manesh*, 177 ACWS (3d) 317 at para 21, 2009 CarswellOnt 2531 aff'd in 2009 ONCA 804, Brief of Authorities of the Applicants, Tab 5.

[57] *Crystallex International Corp. (Re)*, 2018 ONSC 2443, paras. 21, 24-25, leave to appeal denied, Brief of Authorities of the Applicants, Tab 6.

against Dow in the US Class Action; (b) the judgment was upheld on appeal; (c) significant distributions were expected to be made to the Applicants; and (d) these receivables were assets of the Applicants' estates.[58]

84. It is Mr. Vincent's evidence that he simply scanned the Notice of Motion for relevant relief, and otherwise did not read the material. The Purchase also apparently failed to keep itself apprised of developed in the *CCAA* process or in the US Class Action.[59] The Purchaser now has to live with the fact that it did not undertake a modicum of due diligence to pursue a significant multi-million dollar asset it claims to have purchased.

85. Moreover, the Purchaser could have taken steps to keep up-to-date on developments in the *CCAA* by occasionally visiting the Monitor's website, asking to be put back on the Service List after 2015, or visiting the website for the US Class Action. It took none of these steps.

86. There is also evidence to suggest that Mr. Howard, as a former officer of Domfoam and current employee of the Purchaser, would have received notice of the Plan because his counsel, Mr. Tanner, was on the Service List. Since the Purchaser's parent company filed a claim in the *CCAA* as a landlord, it too would have received notice of the Plan because the Monitor was required to provide notice of the Plan to all known prospective creditors. Notice of the Plan was also published in national newspapers, in accordance with the Meeting Order.[60]

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[58] Vallecoccia Affidavit, *supra*, para. 20, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1.

[59] Answers to Undertakings from Cross-Examination of Jacques Vincent, q. 9. Affidavit of Jacques Vincent, sworn November 12, 2018, para. c, Supplementary Motion Record.

[60] Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.

87. In sum, the Purchaser had effective notice of the fact that the proceeds from the US Class Action were an asset of Domfoam, and it cannot now move under Rule 37.14 to assert a claim to those proceeds.

Motion Should Be a Claim and Claim is Statute-Barred

88. The Purchaser's motion to set aside the Distribution Order is a red herring. The Purchaser's ultimate goal is to claim the proceeds from the US Class Action for itself on the basis that it purchased this asset under the Final APA. The proper way the Purchaser should have asserted this claim is through an application under Rule 14.05(3)(d).[61]

89. However, in order to bring such an application, the Purchaser would have required leave to lift the stay of proceedings. In considering whether to lift the stay, the Court would consider the impact of doing so on the estate and the fact that the Purchaser's application would be a collateral attack on the Plan, to the detriment of the creditors.

90. Furthermore, the Purchaser's application would have been met with a limitation period defence. The basic limitation period under the *Limitations Act, 2002* is two years from the day it was discovered. Discoverability takes place when the person with the claim first knew or ought to have known that (i) loss had occurred; (ii) the loss was caused by or contributed by an act or omission; (iii) the act or omission was that of the person against whom the claim is made; and (iv) a proceeding would be an appropriate means to seek to remedy the damage.[62]

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[61] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 14.05(3)(d).
[62] *Limitations Act*, 2002, SO 2002, c. 24, Sched. B, ss. 4 and 5.

91. Mr. Vincent's evidence of discoverability is triple heresay with the original source of the information being the "industry grapevine," which he admits he has no direct knowledge of.[63] His evidence on this issue should be given very little to no weight.

92. The Purchaser knew or should have known in July 2013 (at the very latest) that money from Dow was expected to be received by Domfoam, and that Domfoam viewed this as an asset of the estate. Despite discovering these facts in 2013, the Purchaser waited for more than five years to bring its motion, which is analogous or tantamount to a notice of application on an issue of contractual interpretation.

93. The Purchaser had no choice but to frame its attempt at securing a $3.6 million windfall in this way (as a set aside motion) or else it would have had to bring a motion to lift the stay, and it would not have been able to overcome the fact that its claim is statute-barred. The Court should not condone this type of tactical approach, particularly when the relief being sought is limitations barred.

Purchaser is Barred by Claims Process and the Plan

94. If the Purchaser wanted to make a claim for an asset which it knew or ought to have known was an asset of the estate, it should have filed a claim in the claims solicitation process. Indeed, the Purchaser was on the Service List at the time of the Claims Bar Order in 2012, and would have had notice of this deadline. The Purchaser's parent company filed a claim for amounts owing to it as a landlord, but the Purchaser did not file a claim for the proceeds from the litigation and it cannot now do so.

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[63] Vincent Affidavit, *supra*, para. 35, Motion Record of the Moving Party, dated September 14, 2018.

95. Domfoam developed its Plan to make distributions of its assets, including the Dow settlement funds, to creditors of Domfoam with proven claims. The Plan was approved by the creditors and sanctioned by the Court.[64] The *CCAA* would not have proceeded in this fashion if the funds were not still part of the estate.

96. A Plan sanctioned by the Court is binding on its creditors.[65]

97. The Purchaser is not seeking to set aside the Plan, but the relief it is seeking from this Honourable Court would have the effect of doing just that. It would be manifestly unfair to the creditors of Domfoam to grant such relief.

98. Courts have identified the *CCAA* process as one "of building of blocks." In *Target Canada Co.*, Justice Morawetz stated: "During these proceedings, this court has made a number of orders. It is essential that court orders made during CCAA proceedings be respected…Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset."[66]

99. Domfoam put forward its Plan in good faith. To effectively vary the Plan Sanction Order would run afoul of the entire *CCAA* process, especially because the Purchaser waited on the sidelines until the eleventh hour to advance its claim.

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[64] Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 1O.
[65] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, ss. 6(1).
[66] *Crystallex International Corp. (Re)*, 2018 ONSC 2443, para. 31 citing *Target Canada Co., Re*, 2016 ONSC 316, leave to appeal denied, Brief of Authorities of the Applicants, Tab 6.

PART V - RELIEF REQUESTED

100. The Applicants request an Order dismissing the Purchaser's motion, with costs of the motion payable to the Applicants on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,

David Ullmann
BLANEY MCMURTRY LLP
Lawyers for the Applicants

Schedule "A" – Authorities

1. *Shewchuk v Blackmont Capital Inc*, 2016 ONCA 912
2. G.H.L Fridman, Q.C., *The Law of Contract in Canada*, Sixth Edition, (Thomson Reuters Canada Limited, 2011)
3. *R v. Shayesteh*, 1996 CarswellOnt 4226
4. *Al Masri v. Baberakubona*, 2010 ONSC 562
5. *Poursina v Manesh*, 2009 CarswellOnt 2531
6. *Crystallex International Corp. (Re)*, 2018 ONSC 2443

Schedule "B" – Statutes

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

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.

***Limitations Act*, 2002, SO 2002, c. 24, Sched. B, ss. 4 and 5.**

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

***Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 14.05(3)(d), Rule 37.14**

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3.

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

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

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

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

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

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

Order Made by Judge

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

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

(b) to any other judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (4).

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at **TORONTO**

RESPONDING FACTUM OF THE APPLICANTS
(Motion Brought by Domfoam Inc.; Returnable November 29, 2018)

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