

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**MOTION RECORD
(Returnable August 18, 2020)**

July 27, 2020

**FRED TAYAR & ASSOCIATES
Professional Corporation**
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5

**FRED TAYAR – LSO No. 23909N
COLBY LINTHWAITE – LSO No. 49599K**
T: 416-363-1800
F: 416-363-3356

Lawyers for Domfoam Inc.

TO: David Ullmann and Varoujan Aman
Blaney McMurtry LLP
2 Queen Street East | Suite 1500
Toronto, ON M5C 3G5
E: dullmann@blaney.com | vaman@blaney.com

Lawyers for the Applicants

AND TO: Grant B. Moffat
Thornton Grout Finnigan LLP
100 Wellington St. W. | Suite 3200
Toronto, ON M5K 1K7
E: gmoffat@tgf.ca

Lawyers for the Monitor
Deloitte Restructuring Inc.

INDEX

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

I N D E X

TAB	DOCUMENT
1	Notice of Motion returnable August 18, 2020
2	Affidavit of Mindy Tayar affirmed July 27, 2020
	<u>Exhibits</u>
A	Endorsement of Justice Wilton-Siegel dated July 24, 2018
B	Endorsement of Justice Hainey dated August 27, 2018
C	Notice of Motion of Domfoam dated September 14, 2018
D	Letter from Fred Tayar (" Tayar ") to David Ullmann (" Ullmann ") dated October 10, 2018
E	Cover page of Vendor's Responding Record dated October 16, 2018
F	Vendor's notice of motion dated November 27, 2018
G	Vendor's factum dated November 28, 2018
H	Reasons for Decision of Justice Wilton-Siegel dated February 13, 2019
I	Cover page of transcript of examination of Terry Pomerantz held April 22, 2019
J	Letter from Ullmann to Justice Conway dated September 10, 2019
K	Endorsement of Justice Conway dated September 11, 2019

TAB	DOCUMENT
L	Costs Outline of Domfoam Inc. for motion to set aside May 29, 2019 Order of Wilton-Siegel J.
M	Endorsement of Justice Conway dated October 7, 2019
N	Letter from Tayar to Ullmann dated November 1, 2019
O	Email from Tayar to Ullmann dated November 1, 2019
P	Email from Ullmann to Tayar dated November 1, 2019
Q	Letter and Domfoam's affidavit of documents served on counsel on November 27, 2019
R	Email from Colby Linthwaite (" Linthwaite ") to Ullmann dated January 15, 2020
S	Email exchange between Tayar and Ullmann dated January 20, 2020
T	Letter from Ullmann to Tayar dated January 20, 2020
U	Draft affidavit of documents of the applicants
V	Twenty-First Report of the Monitor dated October 18, 2019
W	Twenty-Second Report of the Monitor dated April 22, 2020
X	Projected Bill of Costs of Domfoam
3	Order of Justice Wilton-Siegel dated May 29, 2018
4	Vendor's notice of motion returnable May 29, 2018 and Vendor's draft Order
5	Affidavit of Jacques Vincent sworn September 13, 2108 (without exhibits)
6	Affidavit of Jacques Vincent sworn November 12, 2018 (without exhibits)
7	Affidavit of Tony Vallecoccia sworn October 16, 2018 (without exhibits)
8	Transcript of the cross-examination of Tony Vallecoccia held November 16, 2018
9	Chronology of Events

Tab 1

**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.**

**NOTICE OF MOTION
(Returnable August 18, 2020)**

DOMFÒAM INC. ("Domfoam") will make a motion in person at 330 University Avenue, Toronto, or *via* videoconference to the Honourable Justice Conway on August 18, 2020 at 10:00 am, as this court directs.

PROPOSED METHOD OF HEARING: This motion is to be heard orally.

THE MOTION IS FOR:

1. an order striking the affidavit of Tony Vallecoccia sworn October 16, 2018 (the "**Vallecoccia Affidavit**");
2. an order enjoining the applicant 4362063 Canada Limited (the "**Vendor**") from filing further evidence in response to Domfoam's motion for an order requiring the Vendor to pay the proceeds it recovered from the US

Urethane Claim (defined in the supporting affidavit) to Domfoam, and for a declaration that all further proceeds to be received by the Vendor from the US Urethane Claim are to be paid to Domfoam as and when received by the Vendor or the Monitor herein ("**Domfoam's Motion**");

3. an order that the Vendor pay Domfoam's costs of its motion to set aside the order of Justice Wilton-Siegel dated May 29, 2018 (the "**2018 Order**") in the amount of \$54,888.73;
4. in the alternative to the relief sought in 2, above, an order that the Vendor pay security for Domfoam's costs of this proceeding into Court, as follows:
 - (a) \$213,132.90 for Domfoam's costs to the conclusion of the hearing;
5. costs of this motion; and
6. such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. In 2012, the Vendor sought and received protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the "**CCAA**").

2. Domfoam bought all the Vendor's assets, but for certain limited exceptions, later in 2012.

3. In 2018, approximately \$4 million owned by Domfoam, (the "**Funds**"), which were proceeds of a US class action were erroneously sent to the Vendor.

4. Without giving notice to Domfoam or anyone on the service list, the Vendor obtained an order which directed the distribution of the Funds to the Vendor's creditors. (This order was part of the 2018 Order).

3. When Domfoam learned of the 2018 Order, it brought the Domfoam Motion to set aside that Order and for the payment of the Funds, and any other proceeds of the relevant litigation, to Domfoam.

4. The Vendor filed the Vallecoccia Affidavit in response to the Domfoam Motion.

5. The issue of the Vendor's entitlement to the Funds is one which the Vendor now seeks to have determined at a trial.

6. On October 7, 2019, at the Vendor's request, Justice Conway ordered that the parties (a) exchange affidavits of documents within 45 days, and (b) attend a mediation, as preliminaries to the adjudication of the Vendor's claim to the

Funds.

7. Domfoam served its affidavit of documents within the 45-day period.
8. More than nine months later, the Vendor has not served an affidavit of documents.
9. Rule 60.12 of the *Rules of Civil Procedure*.
10. The Vendor is an insolvent corporation, and there is good reason to believe that it has insufficient assets in Ontario to pay Domfoam's costs through the end of this proceeding.
11. The Monitor has reported to this Court that fees and disbursements of the Monitor related to the Vendor are being paid from the estate of the applicant 3113736 Canada Ltd., as the funds currently being held to the credit of the Vendor's estate consist only of (the Vendor's alleged claim to) the Funds.
12. Rule 56.01(d) of the *Rules of Civil Procedure*.
13. After stubbornly resisting the granting of the order sought by Domfoam for a year, (the motion was brought, affidavits exchanged, cross-examinations conducted, a related motion brought by the Vendor and a witness examined by

that Vendor), the Vendor consented to the setting aside of the 2018 Order respecting the distribution of the Funds to the Vendor's creditors.

14. The Vendor should therefore be directed to pay Domfoam's costs of the Vendor's motion.

15. Rule 57.01, and Rule 131 of the *Courts of Justice Act*.

16. Section 11 of the CCAA.

17. Paragraph 41 of the Initial Order of Justice Newbould dated January 12, 2012.

18. And such further and other grounds as counsel may advise and this Honourable Court deems just.

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

- (a) the 2018 Order;
- (b) the Vendor's notice of motion returnable May 29, 2018 and the Vendor's draft order served therewith;
- (c) the affidavits of Jacques Vincent sworn September 13, 2018 and November 12, 2018;

- (d) the affidavit of Mindy Tayar, affirmed July 27, 2020;
- (e) the affidavit of Tony Vallecoccia sworn October 16, 2018;
- (f) the transcript of the Cross-Examination of Tony Vallecoccia on his affidavit sworn October 16, 2018 taken November 16, 2018;
- (g) the Twenty-First and Twenty-Second Reports to the Court of the Monitor;
- (h) the chronology of relevant events; and
- (i) such further and other material that counsel may advise and this Honourable Court may permit.

July 27, 2020

FRED TAYAR & ASSOCIATES
Professional Corporation
Barristers and Solicitors
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5

FRED TAYAR – LSO No. 23909N
COLBY LINTHWAITE – LSO No. 49599K
T.: 416-363-1800
F: 416-363-3356

Lawyers for Domfoam Inc.

TO THE SERVICE LIST

Tab 2

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**AFFIDAVIT OF MINDY TAYAR
(Affirmed July 27, 2020)**

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

AFFIRM AND SAY AS FOLLOWS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Security for Costs

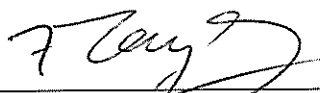
21. For the following reasons, I believe that the Vendor has insufficient assets in Ontario to pay Domfoam's costs of the adjudication of the entitlement to the Funds.

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

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

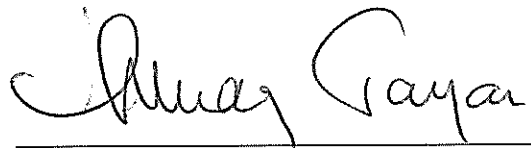
23. I have estimated Domfoam’s costs of this proceeding to the end of a trial at \$213,132.90, as set out in the projected Bill of Costs attached hereto as **Exhibit “X”**. Included in this projected Bill of Costs are the costs sought above (Exhibit L). If costs for the motion consented-to are granted,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

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



A Commissioner, etc.

Fred Tayar



MINDY TAYAR

Tab A

THIS IS EXHIBIT "A"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

Court File Number: CV-12-9545-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re 3113735 Canada Ltd.; 4362063 Canada Ltd. and
Plaintiff(s)

A-Z Sponge & Foam Products Ltd.
AND
Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Facsimile No:

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

Adjourned to: _____
 Time Table approved (as follows): _____

The parties should schedule a 9:30 am conference with Mr. Justice Hainey to schedule the hearing of the motion and to address any other matters between them, including matters pertaining to the proposed motion of the Debtor Corporation.

July 24, 2019
Date

[Signature]
Judge's Signature

Additional Pages _____

Tab B

THIS IS EXHIBIT "B"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

9:30 A.M.
COUNSEL SLIP

H/
17

COURT FILE NO CV-12-9545-00CL DATE AUG 27, 2018

3113736 CANADA LTD. et al. ^{NO ON LIST} 3B
A-Z SPONGE & FOAM PRODUCTS LTD)

TITLE OF
PROCEEDING

COUNSEL FOR:

PHONE & FAX NOS

PLAINTIFF(S)

APPLICANT(S) *moving party*

FRED TAYAR

tel (416) 363-1800

PETITIONER(S)

fax (416) 363-3356

COUNSEL FOR:

PHONE & FAX NOS

DEFENDANT(S)

RESPONDENT(S)

Alexandra Teodorescu for
3113736 Canada Ltd., 4362063
Canada Ltd. and A-Z Sponge +
Foam Products Ltd.

(T.) 416-596-4279

(F.) 416-594-2506

ateodorescu@blarney.com

August 27/18

The parties shall
comply with the attached
schedule. Counsel shall
schedule a hearing before
Justice - Siegel J. with
the commercial list

Office for a date when
he is sitting in
November or December

Fairley J

Schedule

Moving Party's record - September 14th

Responding Party's record - October 5th

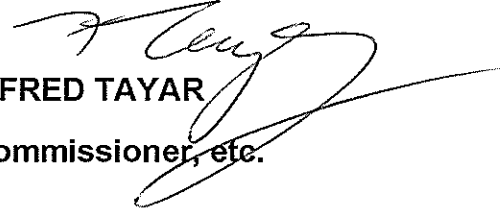
Reply materials - October 15th

Examinations to be completed by November 9th

Harry V
August 27, 2018

Tab C

THIS IS EXHIBIT "C"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written over the printed name and title.

FRED TAYAR

A Commissioner, etc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

(the "**Applicants**")

NOTICE OF MOTION

DOMFOAM INC. (formerly 4037057 Canada Inc.) ("Domfoam"), will make a motion to the Honourable Mr. Justice Wilton-Siegel, or alternatively to a Judge presiding over the commercial list, on a date and time to be scheduled by the Court at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: This motion is to be heard orally.

THE MOTION IS FOR AN ORDER:

1. setting aside the order of Justice Wilton-Siegel dated May 29, 2018;
2. directing the Applicants, and specifically 4362063 Canada Ltd. ("4362063"), to pay the proceeds it recovered from the US Urethane Claim (defined in the supporting

affidavit) derived from the US Antitrust Litigation in the amount of approximately (U.S.) \$3,600,000 to Domfoam;

3. declaring that all further proceeds to be received by 4362063 from the US Antitrust Litigation are to be paid to Domfoam as and when received by the Applicants or the Monitor herein;

4. for costs of this motion; and

5. such further and other order as may seem just.

THE GROUNDS FOR THE MOTION ARE:

1. The moving party Domfoam is the purchaser of the assets of 4362063 under an agreement of purchase and sale ("APS"), which APS was approved by this Honourable Court pursuant to a Sale Approval and Vesting Order of the Honourable Mr. Justice Brown dated March 16, 2012;

2. Domfoam purchased all of the "assets, undertakings, and properties of [4362063] of every nature and kind whatsoever ..." with the exception of specific Excluded Assets defined in the APS at Schedule 2.2;

3. The Urethane Antitrust Litigation claim against Dow Chemical (the "Dow Action") in the US was not an Excluded Asset under the APS;

4. 4362063 has received at least US \$3,741,639.62 from the Dow Action;
5. The Applicants proposed to Mr. Justice Wilton-Siegel that these funds be distributed by the Monitor to creditors with proven claims against the Applicants, which creditors include, *inter alia*, the Applicants' President, the affiant Tony Vallecoccia ("Vallecoccia") whose affidavit was sworn May 22, 2018, or parties related to him;
6. According to the Monitor's Seventh Report dated July 12, 2013, Vallecoccia swore an Affidavit wrongfully stating that the Domfoam US Urethane Claim was "specifically excluded from the [Domfoam International Inc. assets] purchased by Domfoam";
7. Domfoam was originally served with motions in this proceeding until 2015. Thereafter, Domfoam was not given notice of any motions including the May 29, 2018 motion;
8. The motion record returnable before the Honourable Mr. Justice Wilton-Siegel on May 29, 2018 contained a draft order at Tab 3 which was fundamentally different than the order sought and granted by the court in that the draft did not propose any distribution of funds to creditors of the Applicants;
9. Once it learned of the making of the order of May 29, 2018, Domfoam put the Applicants and the Monitor on notice requiring that funds derived from the Dow Action be paid to Domfoam as the owner of that asset;

10. The Applicants and the Monitor have declined or neglected to cause the funds to be paid to Domfoam, or to take steps to set aside the order of Justice Wilton-Siegel;
11. Rules 37.14(1), (4) and 3.02(1) of the *Rules of Civil Procedure*;
12. Paragraphs 40 and 46 of the initial order staying proceedings herein dated January 12, 2012; and
13. such further and other grounds as counsel may advise and this Honourable Court permits.

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

1. the Order of the Honourable Justice Wilton-Siegel dated May 29, 2018;
2. the Applicants' Motion Record before Wilton-Siegel J. on May 29, 2018;
3. the affidavit of Jacques Vincent, of the City of Montreal;
4. excerpts of Reports of the Monitor including the Monitor's Seventh Report; and
5. such further and other material as counsel may advise and this Honourable Court permit.

DATE: September 14, 2018

FRED TAYAR & ASSOCIATES
Professional Corporation
Barristers and Solicitors
65 Queen Street West, Suite 1200
Toronto, Ontario M5H 2M5

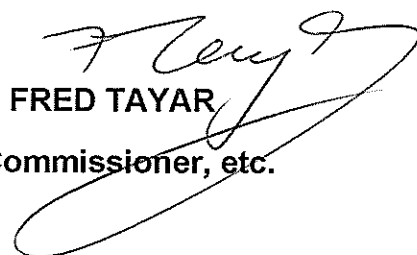
Fred Tayar (23909N)
Tel.: (416) 363-1800
Fax: (416) 363-3356

Lawyers for Domfoam Inc.

TO: THE SERVICE LIST

Tab D

THIS IS EXHIBIT "D"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written over the printed name and title.

FRED TAYAR
A Commissioner, etc.

FRED TAYAR & ASSOCIATES
 PROFESSIONAL CORPORATION
 BARRISTERS & SOLICITORS

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

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

FILE No. 18-2985

WRITER'S EXTENSION: 200

October 10, 2018

VIA EMAIL

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

Dear Sirs:

Re: Domfoam Inc. and 4362063 Canada Ltd.

I was disappointed that you did not see fit to respond to any of my overtures to you, including my voice message left last Friday, nor my letter to you of the same date.

In addition there has been no follow-up to your colleague, Alexa's, email to me of September 13, 2018 respecting the scheduling of the hearing before Mr. Justice Wilton-Siegel.

In the circumstances:

- a) Your client is precluded from delivering any responding material, since the Order of Justice Hainey required such material to be served by October 5, 2018; and
- b) I am enclosing herewith a request form to return before Justice Hainey to schedule the hearing of my client's motion.

Would you please review the request form, and if the dates are satisfactory, please sign the request form and return it to me. Inasmuch as you did not respond with your availability for a Chambers appointment before Justice Hainey during the course of this week, as I had requested on October 5, I ask that you please do so by Friday October 12 at 4:00 p.m., failing which I will simply select a date unilaterally, indicating on the form that you were not cooperative in the selection of a date.

By a copy of this letter to Grant Moffatt, I ask that if he is intending to appear on the return of the motion he also sign it back, if the dates are satisfactory. If he does not intend to attend, would he please let me know.

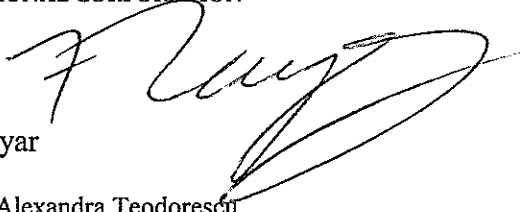
Would Mr. Moffatt also please confirm the amount of monies that the Monitor is holding in this matter that my client claims, and confirm that those monies are in an interest-bearing account, and advise of the current interest rate that those monies are returning.

Many thanks.

Yours very truly,

FRED TAYAR & ASSOCIATES
PROFESSIONAL CORPORATION

Per:



Fred Tayar

/ajs

c.c. Alexandra Teodorescu
Grant Moffat (Thornton)
Client

Tab E

THIS IS EXHIBIT "E"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020


FRED TAYAR
A Commissioner, etc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

(the "Applicants")

RESPONDING MOTION RECORD OF THE APPLICANTS

October 16, 2018	<p>BLANEY MCMURTRY LLP Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto ON M5C 3G5</p> <p>David T. Ullmann (LSO #42357D) Tel: (416) 596-4289 Fax: (416) 594-2437 Email: dullmann@blaney.com</p> <p>Alexandra Teodorescu (LSO # 63889D) Tel: (416) 596-4279 Fax: (416) 594-2437 Email: ateodorescu@blaney.com</p> <p><i>Lawyers for the Applicants</i></p>
TO:	Service List

Tab F

THIS IS EXHIBIT "F"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(the "**Applicants**")

NOTICE OF MOTION
(Re: Leave to Examine Witnesses and Adjournment,
Returnable November 29, 2018)

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

PROPOSED METHOD OF HEARING:

This motion is to be heard orally.

THE MOTION IS FOR:

1. an Order granting the Applicants leave to examine Terry Pomerantz and John Howard as witnesses to the pending motion brought by Domfoam Inc. (formerly 4037057 Canada Inc.) (the “**Purchaser**”) currently returnable November 29, 2018;
2. an Order adjourning the Purchaser’s motion returnable November 29, 2018;
3. costs of the within motion if the motion is opposed; and
4. such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

a) Background

5. on January 12, 2012, the Applicants sought and were granted protection under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”), as amended pursuant to the Order of The Honourable Justice Newbould;
6. Deloitte & Touche Inc., now known as Deloitte Restructuring Inc., was appointed to act as monitor (the “**Monitor**”);
7. a claims solicitation procedure was approved by the Court on June 15, 2012 and ordered by The Honourable Justice Brown. The Claims Solicitation Order established a claims bar date of August 31, 2012 (the “**Claims Bar**”);
8. as a result of the sale of assets of the Applicants, Valle Foam changed its name to 3113736 Canada Ltd., and Domfoam changed its name to 4362063 Canada Ltd. The style of cause of these proceedings was changed by the Order of The Honourable Justice Brown dated June 15, 2012 to reflect the change of names;

9. each of the Applicants are claimants in a U.S. class action proceeding relating to price fixing for a product known as “Polyether Polyol” (the “**US Urethane Proceeding**”). A settlement was entered into with one of the defendants in the US Urethane Proceeding, The Dow Chemical Company (“**Dow**”), in which Dow agreed to pay \$834 million USD for distribution to the class members, including the Applicants (the “**Polyols Settlement**”);

10. on or about March 21, 2018, an initial distribution representing 85% of the total recovery from the Polyols Settlement was made to the class members, including \$3,470,000 to the Applicants. The final distribution from the Polyols Settlement authorizing the distribution of the holdback was approved by the US Court on November 5, 2018. Per this final distribution Order, the funds will be disbursed once the appeal period with respect to the order expires;
 - b) **The Purchaser’s Motion**

11. the company that purchased the assets of Domfoam in March 2012, the Purchaser (as defined above), has brought a motion directing the Applicants to pay the proceeds recovered from the Polyols Settlement to the Purchaser. Domfoam takes the position that the Purchaser’s motion is without merit. The motion is currently returnable on November 29, 2018;

12. the crux of the Purchaser’s position on its motion is that through the Asset Purchase Agreement it entered into with Domfoam, it bought all of Domfoam’s assets except for those that were specifically excluded from the sale. It refers to the category of “All other Purchased Assets” set out in the purchase price provisions of the subject Asset Purchase

Agreement, as evidence that it purchased any proceeds from the Polyols Settlement. This portion of the purchase price was \$300,000 (of a total purchase price of over \$3.6 million). From this \$300,000 expenditure, the Purchaser now purports to be entitled to over ten times that amount, thereby depriving deserving creditors of the Applicants with meritorious claims of this money;

13. Domfoam's response to the Purchaser's motion is that any proceeds of the Polyols Settlement were not purchased, and in fact, were specifically contemplated to be purchased in the first draft of the Asset Purchase Agreement, but were then specifically withdrawn in the second draft and the final executed version (referred to as the "BASF Receivables" in the Asset Purchase Agreement and drafts thereof). Domfoam also asserts that the Purchaser is now estopped and barred in a variety of ways from attempting to pursue any funds from the Polyols Settlement now, six years after the asset purchase;

c) Limitations of Evidence Offered by Purchaser in Support of Motion

14. the only affidavits submitted in support of the Purchaser's motion are from Jacques Vincent, the Quebec solicitor who represented the Purchaser on the asset purchase transaction;
15. on his cross-examination, Mr. Vincent was unable to give evidence as to the intentions and understanding of the Purchaser, given that he was only the solicitor. He was also unable to give evidence as to what investigations or due diligence the Purchaser performed into the BASF Receivables or any potential litigation assets or benefits from the US Urethane Proceeding. In fact, Mr. Vincent testified that the due diligence he performed was limited to due diligence of a legal variety;

16. the motion is complicated by the fact that the Purchaser's solicitor (who acted on the asset purchase transaction) claims to have been ignorant of the fact that there was only one piece of litigation in which Dow was a defendant along with many other defendants. He claims to have been of the understanding (at the time of the asset purchase) that there were two separate actions, one against BASF, and one against Bayer. Inherent in this is the suggestion that he had no idea there was a lawsuit against Dow. In actuality, it was all one lawsuit against many defendants including BASF, Bayer, Dow, and many other corporations;
17. the motion is complicated further still by the fact that a former employee of Domfoam, John Howard, is likely to have key information, and following the closing of the asset sale in March 2012, came to be employed by the Purchaser;
18. Mr. Howard was the former General Manager for the Applicants up until the time of the closing of the Asset Purchase Agreement in March 2012. In 2008, on the Applicants' behalf, Mr. Howard signed a Services Agreement with Refund Recovery Services, LLC, an agent retained by the Applicants to assist them with filing a claim in the US Urethane Proceeding;
19. Mr. Howard is also represented by counsel of his own in the *CCAA* proceeding, as a former director and officer of Domfoam. Mr. Howard's counsel has been on the *CCAA* Service List in the within proceeding since the fall of 2015 to present, and would have received notice of the plan of arrangement and anticipated distributions from the Polyols Settlement. Under the plan of arrangement, Mr. Howard was granted a release as a former officer;

20. finally, a further part of Domfoam's response to the Purchaser's motion is that the Purchaser is estopped, statute-barred, and barred by the *CCAA* Claims Bar and plan of arrangement from pursuing any funds from the Polyols Settlement now, years after it has been provided with numerous and repeated notice that Domfoam was a beneficiary to the Polyols Settlement funds and expected to receive substantial funds from the settlement with Dow. S.P. Holdings, the parent company of the Purchaser, filed a claim for unpaid rents in the *CCAA* proceeding. Mr. Pomerantz is presumably the principal and guiding mind of both S.P. Holdings Canada Inc. and the Purchaser and therefore likely had awareness of participation in the *CCAA* process;
21. Domfoam therefore seeks an adjournment of this motion and leave to conduct examinations of Mr. Pomerantz (the principal and guiding mind of the Purchaser) and Mr. Howard as witnesses to a pending motion pursuant to Rule 39.03;
22. key questions for determination on this motion therefore include, but are not limited to:
 - a) what the Purchaser knew (as opposed to what its counsel knew) about the US Urethane Proceeding, including how many actions there were and against which defendants;
 - b) what the Purchaser understood the "BASF Receivables" to refer to in the Asset Purchase Agreement and drafts thereof;
 - c) when the Purchaser first learned that Dow was a defendant in the US Urethane Proceeding to which Domfoam may be entitled to any settlement or judgment distributions;

- d) when the Purchaser first learned that an asset that it was of the view that it had purchased was not going to be provided to it;
 - e) what steps the Purchaser took to investigate and monitor the US Urethane Proceeding;
 - f) what the Purchaser understood it had bargained for, and in particular, what it understood when the "BASF Receivables" was specifically withdrawn from the Asset Purchase Agreement;
 - g) what the Purchaser understood it was purchasing for the \$300,000 of the purchase price allocated to "All other Purchased Assets";
 - h) what Mr. Howard told to Mr. Pomerantz about the BASF Receivables and the US Urethane Proceeding, including the Services Agreement he previously executed on behalf of the Applicants; and
 - i) what information and documents the Purchaser received and reviewed that would have given it notice, or reasonably ought to have given it notice, of the anticipated Dow settlement and subsequent payout;
23. the extent of Mr. Vincent's limited knowledge was not known until his cross-examination was conducted on November 20, 2018. The request for an adjournment in order to examine Mr. Pomerantz and Mr. Howard was then made promptly, that same day, following the cross-examination;

24. all of the foregoing areas of inquiry cannot be answered by the solicitor for the Purchaser, whose role was limited to drafting and revising the Asset Purchase Agreement over six years ago;
25. accordingly, the evidence of Mr. Pomerantz and Mr. Howard is of critical importance and may significantly improve Domfoam's ability to defend the Purchaser's motion. The Purchaser's resistance to make Mr. Pomerantz and Mr. Howard available for examination is telling. It appears that the Purchaser seeks to conceal what the Purchaser's true intentions and understanding of the asset purchase transaction were at the material time;

d) Interests of Justice, Balancing of Interests, and Prejudice

26. it is in the interests of justice that the Applicants be entitled to conduct examinations of Mr. Pomerantz and Mr. Howard, in order that the motion may proceed on a full and proper evidentiary record;
27. Mr. Pomerantz and Mr. Howard hold the knowledge and information that is critical to unlocking the truth about what the Purchaser thought it was buying (particularly in light of the removal of the BASF Receivables from the transaction). They also hold the critical knowledge regarding the Purchaser's likely notice of steps being taken in the CCAA proceeding, including the anticipated settlement proceeds from Dow, and why the Purchaser took no steps to bring a claim against Domfoam;
28. if the Applicants are forced to proceed without the opportunity to examine Mr. Pomerantz and Mr. Howard, they will suffer actual prejudice as they will be unable make full and fair answer and defence to the Purchaser's motion;

29. although the Purchaser's motion has been cleverly brought as a set aside motion, it is tantamount to commencing a claim. In bringing the claim as a motion, the Purchaser has bypassed the ordinary discovery process (both documentary and oral) and insisted on an unduly accelerated schedule for the hearing of the motion;
30. there is no urgency to this matter whatsoever. The funds in dispute are being held by the Monitor, an officer of the court;
31. there will be no prejudice to the Purchaser if a brief adjournment is granted and leave granted to the Applicants to examine Mr. Pomerantz and Mr. Howard. The prejudice to Domfoam if forced to proceed to a hearing of the motion hamstrung, without a proper evidentiary record, will far outweigh any prejudice that may exist to the Purchaser if a brief adjournment is granted;
32. the provisions of the *CCAA* and the inherent and equitable jurisdiction of this Honourable Court;
33. Rules 1.04, 2.03, 37, 37.13, 39.02, 39.03 and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194, as amended; and
34. such further and other grounds as counsel may advise.

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

35. the Affidavit of Tony Vallecoccia sworn October 16, 2018;
36. the Affidavit of Jacques Vincent sworn September 13, 2018;

37. the Supplementary Affidavit of Jacques Vincent sworn November 12, 2018;
38. the transcript of the cross-examination of Jacques Vincent held November 20, 2018;
39. the pleadings and proceedings herein including past Motion Records and Monitor's Reports filed in the *CCAA* proceeding; and
40. such further and other material as counsel may advise and this Court may permit.

November 27, 2018

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

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

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

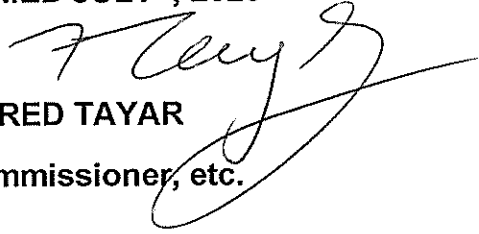
Lawyers for the Applicants

TO: SERVICE LIST

Tab G

THIS IS EXHIBIT "G"
TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", with a long, sweeping underline that extends to the right and loops back under the text below.

FRED TAYAR

A Commissioner, etc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

(the "Applicants")

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

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

INDEX

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")

INDEX

Section	Title	Page No.
PART I	Overview	1
PART II	Facts	4
	US Urethane Antitrust Litigation	4
	Sale of Domfoam	6
	The Parties Actions are Consistent with Understanding that the Asset Remained with Domfoam	11
	Claims Bar and Plan of Arrangement	16
PART III	Issues	18
PART IV	Law and Argument	18
	Issue 1 – Did The Purchaser Acquire the Receivables	19
	Purchaser Did Not Purchase BASF Receivables	19
	Subsequent Actions are Indicative of the Parties' Intentions	19
	<i>Contra Proferendum</i>	23
	Mr. Vincent's Evidence is not the Best Evidence	23

	Issue 2 – Can the Purchaser Assert its Claim to the Proceeds Given the Delay?	26
	No Basis to Set Aside Order under Rule 37.14	26
	Motion Should Be a Claim and Claim is Statute-Barred	29
	Purchaser is Barred by Claims Process and the Plan	30
PART V	Relief Requested	32
Schedule A	Case Law	33
Schedule B	Statutes	34

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 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

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

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)	<i>Withdrawn</i>	
(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

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.

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

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 be 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	<p>"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.</p> <p><u>The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u></p> <p>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 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.</u></p> <p><u>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.</u>" [emphasis added]</p>
December 12, 2013	<p><u>"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u></p> <p>...</p> <p>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]</p>
April 22, 2014	<p><u>"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates."</u> [emphasis added]</p>
October 22, 2014	<p><u>"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u></p> <p>...</p> <p>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.</p> <p>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</p>

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

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

²³ Vallecoccia Affidavit, *supra*, paras. 23-26, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 10.

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

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).

²⁹ Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 10.

³⁰ Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 10.

³¹ Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit "O", Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 10.

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

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

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

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

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?

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. Vallecoccia’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”).

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 37.14⁵³ 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

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

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 Purchaser also apparently failed to keep itself apprised of developments 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

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 10.

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

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 hearsay 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.

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.

⁶⁴ Vallecoccia Affidavit, *supra*, paras. 25-27, Exhibit “O”, Responding Motion Record of the Applicants, dated October 16, 2018, Tab 1 and Tab 10.

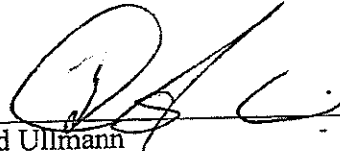
⁶⁵ *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36, ss. 6(1).

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).

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)

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

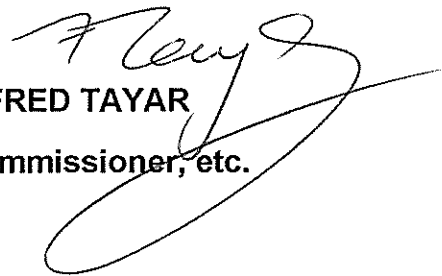
David T. Ullmann (LSO #423571)
Tel: (416) 596-4289
Fax: (416) 594-2437
Email: dullmann@blaney.com

Alexandra Teodorescu (LSO # 63889D)
Tel: (416) 596-4279
Fax: (416) 594-2437
Email: ateodorescu@blaney.com

Lawyers for the Applicants

Tab H

THIS IS EXHIBIT "H"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written over the printed name and title.

FRED TAYAR
A Commissioner, etc.

CITATION: 3113736 Canada Ltd. (Re), 2019 ONSC 1050
 COURT FILE NO.: CV-12-9545-00CL
 DATE: 20190213

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1984, 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.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Ullmann, Varoujan Arman and Alexandra Teodorescu*, for the Applicant, Domfoam International Inc.

Fred Tayar, for the Respondent, Domfoam Inc.

Grant Moffat, for the Monitor, Deloitte Restructuring Inc.

HEARD: November 29, 2018

ENDORSEMENT

[1] On this motion, Domfoam International Inc. (now 4362063 Canada Limited) (“Domfoam” or the “applicant”), an applicant in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1984, c. C-36 (the “*CCAA*”), seeks leave of the Court under Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to conduct examinations of two individuals who are respectively the president and an employee of Domfoam Inc. (the “Purchaser”).

Factual Background

The Lawsuit

[2] Domfoam was a class member of an anti-trust class action that had been commenced in the United States District Court for the District of Kansas (the “U.S. Court”) in 2004 (the “Lawsuit”). The defendants in the Lawsuit were Bayer AG, Bayer Corporation and Bayer MaterialScience LLC (collectively, “Bayer”), BASF SE and BASF Corporation (collectively, “BASF”), the Dow Chemical Company (“Dow”), Huntsman International LLC (“Huntsman”) and Lyondell Chemical Company (“Lyondell”) (collectively, the “Defendants”).

[3] In 2008, Domfoam retained Refund Recovery Services, LLC (“RRS”) to assist it in filing its claim in the Lawsuit. John Howard (“Howard”) was the general manager of Domfoam at the

time. Howard signed the agreement with RRS and was therefore aware of Domfoam's claim in the Lawsuit.

[4] The plaintiffs in the Lawsuit negotiated settlements with Bayer, BASF, Hunstman and Lyondell which were approved by the U.S. Court at different times. In particular, a settlement was reached with BASF and Huntsman that was approved by the U.S. Court on December 12, 2011. The amount payable in respect of the settlement with BASF was distributed to Domfoam in three tranches.

These CCAA Proceedings

[5] As a result of declining sales, fines imposed by the Competition Bureau of Canada and class action lawsuits against the applicants in Canada and the United States, Domfoam, Valle Foam Industries (1995) Inc. (now 3113736 Canada Ltd.) and A-Z Sponge & Foam Products Ltd. sought protection under the *CCAA* on January 12, 2012.

The Transaction

[6] Pursuant to an agreement of purchase and sale dated March 8, 2012 between Domfoam and 4037057 Canada Inc. ("4037057") (the "APA"), 4037057 agreed to purchase the operating business of Domfoam (the "Transaction"). The APA was subsequently assigned to the Purchaser who completed the Transaction on March 26, 2012 after court approval of the Transaction was received on March 16, 2012.

[7] The APA provided in Section 2.1 that Domfoam would sell the "Purchased Assets" to the Purchaser. "Purchased Assets" was defined to mean "the right, title and interest of [Domfoam] in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets." Schedule 1.1(hh) provided that the "Purchased Assets" were "[a]ll assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated", including without limitation a list of assets that included "Purchased Receivables". "Purchased Receivables" was defined in section 2.9 of the APA to be "all of the Vendor's accounts receivable", the total amount of which was stated to be \$5,996,692. It is not disputed that the term "Excluded Assets" does not include any settlement proceeds from any party to the Lawsuit.

[8] The Purchaser says that the plain meaning of "Purchased Assets" includes any monies to be received in respect of the Lawsuit. It denies that there was any agreement to exclude any such monies, relying in part on the "entire agreement" provision of the APA. Domfoam says that there was an agreement to exclude any proceeds from the Lawsuit from the "Purchased Assets". It relies in part on the evolution of the treatment of an asset category of Domfoam referred to as the "BASF Receivables" in the Transaction documentation.

[9] In both an earlier draft of the APA, in December 2011, and in the APA, "BASF Receivables" is defined to have the meaning of the term set out in Section 2.9. Section 2.9 is a provision that allocates the purchase price of the "Purchased Assets" among a number of asset categories.

[10] The earlier draft of the APA did not contain a definition of “BASF Receivables” in Section 2.9. However, the following was set out in that provision under the heading “BASF Receivables”:

As of December 16, 2011, the Purchaser has been informed that the Vendor 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 six thousand and two hundred dollars (\$385,200) calculated at a discount rate of 60%.

The purchase price of the BASF Receivables is conditional upon production by the Vendor of all the supporting documents related to said BASF Receivables and the completion of its assignment from the Vendor to the Purchaser as of the Closing Date.

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 said BASF Receivables and the Purchase Price would be reduced by the amount attributed to the BASF Receivables.

[11] The APA also did not contain a definition of “BASF Receivables” in Section 2.9. In that provision, however, the narrative set out above was deleted and the word “Withdrawn” was placed under the heading “BASF Receivables”. It is understood that this means that the BASF Receivables, although originally to be included in the Transaction, were removed from the Transaction and were not sold by Domfoam.

[12] Domfoam submits that, in the initial draft and the APA, “BASF Receivables” referred to all monies to be received in respect of the Lawsuit, not merely to the proceeds of the settlement with BASF. Alternatively, Domfoam says that, regardless of the meaning of “BASF Receivables”, the treatment of the “BASF Receivables” in the Transaction reflects an intention of the parties to exclude any monies to be received in respect of the Lawsuit from the “Purchased Assets”.

The Dow Settlement

[13] The Lawsuit in respect of Dow proceeded to a jury trial in 2013. In May 2013, a judgment was entered against Dow in the amount of \$1.3 billion. Appeals of the judgment were ultimately settled in February 2016. Under the settlement, Dow agreed to pay U.S. \$835 million to the benefit of the plaintiffs in the Lawsuit. The settlement was approved in December 2017.

[14] An initial distribution representing 85% of the total recovery from the Dow settlement was made to the class members, including Domfoam, in March 2018.

[15] Domfoam has structured a plan of compromise and arrangement (the “Plan”) based on the proceeds to be received by Domfoam from the Dow settlement (the “Dow Proceeds”). The Plan was approved by the requisite majorities at a creditors’ meeting held in October 2016 and received court approval on January 24, 2017.

[16] On May 29, 2018, the Court ordered an interim distribution to the creditors of Domfoam in the amount of U.S. \$3.47 million (the “Distribution Order”).

The Purchaser’s Motion

[17] By notice of motion dated September 24, 2018, the Purchaser moved to set aside the Distribution Order on the ground that it is entitled to the Dow Proceeds based on the terms of the APA (the “Purchaser’s Motion”). The Purchaser also says that the Distribution Motion was brought without notice to the Purchaser and that Domfoam failed to make proper disclosure to the Court regarding the Purchaser’s entitlement to the Dow Proceeds when it provided an affidavit to the court stating that Domfoam’s claim in the Lawsuit “was specifically excluded from the [Domfoam assets] purchased by the Purchaser”.

[18] Jacques Vincent (“Vincent”) was the Purchaser’s lawyer in the Transaction in 2012. He negotiated the Transaction documentation with counsel for Domfoam. The motion materials for the Purchaser’s Motion contained an affidavit of Vincent sworn September 13, 2018 (the “First Vincent Affidavit”). The relevant portion of the First Vincent Affidavit for present purposes are paragraphs 32-35, which read as follows:

The Urethane Antitrust lawsuit against BASF was the only lawsuit from the Urethane Antitrust lawsuits that has been discussed prior to the execution of the APA #1 and, as mentioned above, was specifically “withdrawn” from the APA #2 and the Final APA.

The Dow Action was never discussed.

The Dow Action was not, and has never been, an “Excluded Asset”, it being understood that the drafting of the APA was purposely broad to reach and encompass all disclosed and undisclosed assets of any nature.

At the end of May 2018, I was advised by Terry Pomerantz (“Pomerantz”), President of [the Purchaser], that he was informed by John Howard, an employee of [the Purchaser] who heard through the industry’s grapevine that a) a lawsuit involving [Domfoam] as one of the claimants against Dow had been instituted some time prior to the CCAA proceedings, b) a judgment had been rendered against Dow in the United States which was subsequently settled out of Court, and c) that a payment was to be made by Dow to the class action claimants, which may include [Domfoam].

This Motion

[19] Following the cross-examination of Vincent in November 2018, Domfoam brought this motion under Rule 39.02(2) of the *Rules of Civil Procedure* seeking leave of the Court to conduct examinations of Pomerantz and Howard under r. 39.03 as witnesses in respect of the Purchaser's Motion.

Applicable Law

[20] The applicable provision of the *Rules of Civil Procedure* is r. 39.02(2), which reads as follows:

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

[21] It is not disputed that r. 39.02(2) sets up a four-part test:

- (1) Is the evidence from the party sought to be examined relevant?
- (2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- (3) Would granting leave result in a non-compensable prejudice that could not be addressed by imposing costs, terms or an adjournment?; and
- (4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.), at para. 13 [*First Capital*].

[22] Further, a flexible, contextual approach is to be taken in assessing the criteria relevant to r. 39.02(2), having regard to the overriding principle outlined in r. 1.04 of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute: see *First Capital*, at para. 14. In this regard, a court should also consider proportionality in determining whether to grant leave for further examinations: see *Elgner v. The Estate of Harvey Freedman*, 2013 ONSC 2176, at para. 6.

The Background to this Motion

[23] The principal issue between the parties is whether the Dow Proceeds were conveyed to the Purchaser in the Transaction. In this context, the Purchaser's understanding at the time of the Transaction of the potential for future settlement proceeds in the Lawsuit, and the Purchaser's understanding of the treatment of the proceeds in respect of the settlement with BASF at that time, could well be relevant.

[24] In addition, Domfoam says that the timing of the Purchaser's first knowledge of the Lawsuit and, in particular, of the Dow Proceeds, subsequent to the completion of the Transaction, is relevant to various defences it asserts against the Purchaser's claim to the Dow Proceeds. In this regard, it makes two principal arguments.

[25] First, Domfoam suggests that the Purchaser lost any entitlement to the Dow Proceeds that it might otherwise have had under the APA by failing to assert its claim within the two year period provided under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B or otherwise. Second, Domfoam suggests that the Purchaser's failure to assert its entitlement after learning of the claim against Dow and/or the settlement with Dow is evidence of the Purchaser's understanding that Domfoam did not convey the Dow Proceeds under the APA. For the purposes of each argument, the date on which the Purchaser first learned of the claim against Dow in the Lawsuit, including the settlement with Dow and the Dow Proceeds, is material.

[26] Further, Domfoam disputes the Purchaser's claim that it had no prior notice of Domfoam's motion regarding the Distribution Order. In this context, the Purchaser's knowledge of, and any acquiescence to, the Plan is relevant. It is not disputed that Vincent was dropped from the service list in these *CCAA* proceedings after the fall of 2015. However, Howard was separately represented in these *CCAA* proceedings by counsel who continued on the service list after that date. Domfoam says that, therefore, Howard's knowledge of the Plan is relevant to this issue, at least to the extent he communicated that knowledge to Terry Pomerantz, the president and shareholder of the Purchaser ("Pomerantz").

[27] Vincent was cross-examined on the First Vincent Affidavit and a second affidavit on November 20, 2018. In the course of the cross-examination, Domfoam learned for the first time that Vincent received his instructions regarding the Transaction from Terry Pomerantz and another party.

[28] The cross-examination of Vincent also revealed that Vincent had little knowledge of when, and to what extent, the Purchaser learned of the Lawsuit, whether before or after the Transaction, or learned of the Dow Proceeds and the Plan subsequent to the completion of the Transaction. The party whose knowledge is relevant is Pomerantz. Further, Domfoam says that the nature and timing of any communication by Howard to Pomerantz of the existence of the Lawsuit, as well as of the Dow settlement beyond what was set out in the Vincent Affidavit, could also be relevant to the issues described above.

[29] As a result of Vincent's lack of direct knowledge, his cross-examination resulted in eleven undertakings of the Purchaser to obtain the answers from Pomerantz and Howard to

various questions which addressed these issues. The Purchaser provided the answers to these questions. Accordingly, the result of the cross-examination was that, on a large number of the issues, the Purchaser's position was, in effect, put forward by answers to written interrogatories rather than was the subject of actual cross-examination. Domfoam now seeks to cross-examine Pomerantz and Howard directly rather than to rely entirely on these answers.

The Positions of the Parties on This Motion

[30] The Purchaser says that Vincent was the appropriate representative of the Purchaser because Vincent "negotiated" the Transaction on its behalf. I will address this assertion below. The Purchaser also says that it should have been evident to Domfoam from the First Vincent Affidavit that Vincent would be unable to answer a number of questions that Domfoam intended to put to him, in particular relating to the extent of the Purchaser's knowledge after completion of the Transaction. The Purchaser says that Domfoam should therefore have raised any concerns regarding the need to examine Pomerantz and Howard before the cross-examination of Vincent. It suggests that it is too late to do so now after having received the answers to the undertakings. The Purchaser suggests that the real reason for this motion is that Domfoam does not like the answers to the undertakings that it received and seeks to have "another kick at the can" through this motion.

[31] In response, Domfoam makes two principal arguments regarding the need to examine Pomerantz. First, it says that the facts pertaining to Vincent's role in the negotiation of the Transaction, and the fact that Pomerantz was the controlling mind and will of the Purchaser, only became clear in the cross-examination. Second, it says, in effect, that it should not be penalized for having gone forward with the cross-examination of Vincent regardless of any apparent deficiencies in his knowledge of relevant events. Further, it says that it would have raised a number of additional questions for answers by way of undertakings but felt constrained by the position of the Purchaser's counsel as to the number of questions that were appropriate in the circumstances.

[32] Domfoam also says Howard is the person best able to testify as to when the Purchaser first had knowledge of the claim against Dow in the Lawsuit, as well as the judgment against Dow, the settlement with Dow, and the availability of the Dow Proceeds. Further, Domfoam says Howard's evidence regarding the Purchaser's knowledge of the Plan is relevant because, given that Vincent was no longer on the service list after the fall of 2015, Howard would have been the Purchaser's source of such knowledge.

Analysis and Conclusions

[33] The issue for the Court on this motion is whether Domfoam can satisfy the four-part test for leave under r. 39.02(2) given that it has already received written answers to most of the matters upon which it seeks to examine Pomerantz and Howard. I will address each of the four parts of the test for granting leave separately, dealing in turn with the request to examine Pomerantz and Howard.

Relevance

[34] The first requirement of the test is demonstration that the evidence from the party sought to be examined is relevant.

[35] I conclude that the evidence of Pomerantz is relevant to the issue of the Purchaser's claim to the Dow Proceeds and to the defences asserted by Domfoam for the following reason.

[36] As discussed above, the Purchaser's knowledge of the Lawsuit, and the BASF Receivables, is relevant contextual background to the treatment of the BASF Receivables in the Transaction which, in turn, could have implications for the interpretation of that term and, more generally, for the intention of the parties regarding any future proceeds from the Lawsuit. For this purpose, the relevant knowledge is that of the controlling mind and will of the Purchaser at the time. The cross-examination revealed that this was Pomerantz. Vincent may have "negotiated" the Transaction documentation and conducted certain legal due diligence. However, he did so on behalf of, and on the instructions of, his client which came from Pomerantz. Put simply, Vincent "negotiated" the Transaction documentation but Pomerantz "negotiated" the business transaction. While any knowledge of Vincent is imputed to Pomerantz, it remains possible that Pomerantz had knowledge that he did not communicate to Vincent. There is, therefore, no certainty that Vincent had a complete understanding of the Purchaser's knowledge of the relevant matters at the time of the Transaction.

[37] With respect to Howard, the application of the test is somewhat more complicated. Before addressing this requirement of the test, it is necessary to clarify Howard's role and the nature of his evidence, as these observations inform the conclusions below regarding the request to examine him.

[38] Howard was an employee of Domfoam at the time of the Transaction. Any knowledge of the Lawsuit that he may have had at that time is attributable to Domfoam rather than to the Purchaser. More importantly, it is not suggested that, after Howard became an employee of the Purchaser, Howard held a position in the Purchaser such that any knowledge on his part was attributable to the Purchaser. Accordingly, any knowledge on his part of the Lawsuit, the Dow Proceeds, or the Plan is of relevance only to the extent that he communicated that knowledge to Pomerantz.

[39] Turning to the first requirement of the test, given that the matters on which Domfoam seeks to examine Howard pertain to his communications to Pomerantz of knowledge of matters that are relevant to the extent Pomerantz was aware of them, I think it necessarily follows that such evidence would be relevant to the issues described above. Put another way, to the extent that Pomerantz's knowledge of these matters is relevant, Howard's communication to him of such matters would also satisfy the test of relevance. To be clear, however, in reaching this conclusion I have proceeded on a narrow view of relevance. Considerations of the necessity for such evidence will be addressed later.

[40] I therefore conclude that Domfoam has satisfied the first part of the test for leave in respect of Pomerantz and Howard.

Response to a Matter Raised on the Cross-Examination

[41] The second requirement of the test requires demonstration that the evidence sought responds to a matter raised on the cross-examination.

[42] The Purchaser submits that the evidence sought from Pomerantz and Howard does not respond to a matter raised on the cross-examination of Vincent for the first time. It suggests that the evidence sought from Pomerantz and Howard was set out in the Vincent Affidavit or, alternatively, that any limitation on Vincent's ability to give such evidence should have been clear from the First Vincent Affidavit. This argument engages the Purchaser's submission that it is too late to seek leave of the Court to examine Pomerantz and Howard.

[43] In my view, the evidence that Domfoam seeks from Pomerantz is directly responsive to a matter raised on the cross-examination. The Purchaser put forward Vincent as the party who "negotiated" the Transaction. On cross-examination, it became clear that it was Pomerantz who "negotiated" the Transaction in the more fundamental sense described above. I do not think that Domfoam can, or should, be prejudiced for failing to recognize this difference, given that the Vincent Affidavit was silent on Pomerantz's involvement. The Purchaser has, in effect, acknowledged that the relevant knowledge rested with the person who negotiated the Transaction. It cannot now object to an examination of Pomerantz after it was revealed on Vincent's cross-examination that Pomerantz was the actual negotiator of the business transaction.

[44] With respect to Howard, however, the issues pertaining to him were directly raised in the Vincent Affidavit in paragraph 35. That paragraph sets out the specific matters that were the subject of the communications between Howard and Pomerantz but without any specific timeframe for such communications. Domfoam therefore had ample notice that Howard was the source of the Purchaser's information regarding the Lawsuit, the Dow settlement, and the Dow Proceeds. If Domfoam intended to address any matters pertaining to Howard's knowledge, and the timing and substance of any communications with Pomerantz regarding such knowledge, it should have acted prior to cross-examining Vincent.

[45] I therefore conclude that Domfoam has satisfied the second part of the test for leave in respect of Pomerantz but not in respect of Howard.

Would Granting Leave Result in Non-Compensable Prejudice?

[46] The third requirement of the test requires consideration of whether granting leave would result in a prejudice that could not be addressed by imposing costs, terms or an adjournment.

[47] In this case, I am satisfied that granting leave would not result in non-compensable prejudice to the Purchaser. The only effect of granting leave would be to delay the hearing of the Purchaser's Motion for a relatively short period of time with some potential attendant cost in the form of a delayed receipt of the Dow Proceeds if it were to succeed on that Motion.

The Existence of a Reasonable or Adequate Explanation

[48] The fourth part of the test requires consideration of whether the applicant has provided a reasonable or adequate explanation for why the evidence was not included at the outset. In this case, this requires consideration of whether Domfoam has provided a reasonable or adequate explanation for its decision not to examine Pomerantz or Howard on the matters of relevance to its position on the Purchaser's Motion until after the cross-examination of Vincent.

[49] For the reasons set out above, I am of the view that Domfoam has provided a reasonable explanation for not seeking to examine Pomerantz under r. 39.03 prior to cross-examining Vincent. In short, Pomerantz's involvement as the controlling mind and will of the Purchaser and, in that capacity, as the party who negotiated the Transaction, did not become apparent until the cross-examination of Vincent.

[50] However, I am not persuaded that Domfoam has provided an adequate explanation for its failure to examine Howard prior to the cross-examination of Vincent. The extent of his communications with Pomerantz were set out in the First Vincent Affidavit and were known to Domfoam prior to the cross-examination of Vincent. Insofar as Howard's knowledge of the Plan is relevant, it was known that Vincent had been dropped from the service list after the fall of 2015 and that Howard's counsel remained on the list. The First Vincent Affidavit was entirely silent on this matter. Moreover, there was nothing new that arose out of the cross-examination of Vincent with regard to these matters. Accordingly, if Domfoam had wished to address these matters, it should have done so before cross-examining Vincent.

[51] Accordingly, I find that Domfoam has satisfied the fourth part of the test for leave in respect of Pomerantz but not in respect of Howard.

Remaining Considerations

[52] As noted above, in reaching its decision herein, the Court should also have regard to the context in which Domfoam's Motion is brought as well as any considerations of proportionality.

[53] The principal issue of context, namely the identity of the controlling mind and will of the Purchaser in the negotiation of the Transaction, has been set out above and need not be repeated here.

[54] More generally, Domfoam urges the Court to have regard to the fact that these proceedings take place in the larger context of the CCAA proceedings of the applicant. The Monitor has joined Domfoam in urging appropriate attention to this consideration. In effect, each says that, because the viability of the Plan effectively turns on a ruling favourable to Domfoam in the Purchaser's Motion and that an unfavourable ruling will have adverse financial consequences to the large number of creditors of Domfoam, the Court should permit an exhaustive review of all matters of potential relevance to Domfoam's position on that Motion. While I am sympathetic to the position of the creditors, particularly given the timing of the Purchaser's Motion relative to the creditors' approval of the Plan, I am not persuaded that these

considerations have any relevance for the present motion. In particular, any issue of timing is more properly considered, if relevant, on the determination of the Purchaser's Motion.

[55] More significantly, however, I am of the view that proportionality weighs strongly in favour of denying leave to examine Howard for the following reasons. As mentioned, the issue in respect of the matters raised by Domfoam on the Purchaser's Motion is the state of Pomerantz's knowledge. The questions of significance that Domfoam wishes to put to Howard are the mirror image of the questions that it wishes to put to Pomerantz. The only purpose in asking the same questions of Howard and Pomerantz would be to seek to establish a lack of correspondence between the answers of the two parties. There is, however, no evidence in the record that would warrant such a concern regarding Pomerantz's evidence.

Conclusion

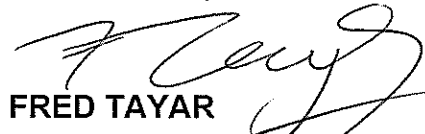
[56] Based on the foregoing, Domfoam's motion for leave under r. 39.02(2) to examine Pomerantz is granted but its motion for leave to examine Howard is denied.

Wilton-Siegel J.

Date: February 13, 2019

Tab I

THIS IS EXHIBIT "I"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written in a cursive style.

FRED TAYAR

A Commissioner, etc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(the "Applicants")

EXAMINATION UNDER RULE 39.03 OF TERRY POMERANTZ,
held at the offices of ASAP Reporting Services Inc.,
333 Bay Street, Suite 900, Toronto, Ontario,
on Monday, April 22, 2019, at 1:04 p.m.

CONDENSED TRANSCRIPT WITH INDEX

APPEARANCES:

Varoujan C. Arman on behalf of the Applicants
David Ullmann

Fred Tayar on behalf of Domfoam Inc.

Adam Driedger on behalf of the Monitor,
(Student-at-law) Deloitte Restructuring Inc.

A.S.A.P. Reporting Services Inc.© 2019

940-100 Queen Street	900-333 Bay Street
Ottawa, Ontario K1P 1J9	Toronto, Ontario M5H 2R2
(613) 564-2727	(416) 861-8720

Tab J

THIS IS EXHIBIT "J"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020


FRED TAYAR
A Commissioner, etc.

David T. Ullmann

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

September 10, 2019

BY EMAIL

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

Dear Justice Conway:

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

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

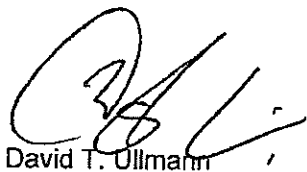
Mr. Tayar's client has a pending motion for the setting aside of the Order of Justice Wilton-Siegel dated May 29, 2018, and for payment of nearly \$4 million USD. Our clients wish to bring a motion to convert Domfoam Inc.'s motion to a trial of an issue. The primary reason for our clients' motion is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

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

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

Yours very truly,

Blaney McMurtry LLP

A handwritten signature in black ink, appearing to read "D. Ollmann", is written over the printed name.

David T. Ollmann

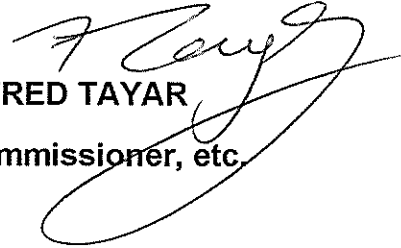
DTU/va

cc: Fred Tayar, Grant Moffat

Encl.

Tab K

THIS IS EXHIBIT "K"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written over the printed name and title.

FRED TAYAR

A Commissioner, etc.

COUNSEL SLIP

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

NO ON LIST 2.

Valle Foam Industries (1985) Inc. et al
VS.
631400 Ontario Limited et al.

TITLE OF
PROCEEDING

COUNSEL FOR:			PHONE & FAX NOS
PLAINTIFF(S)	D. Ullmann	for	432063 Canada Ltd. 416-596-2882 (H)
APPLICANT(S)	V. Arman	for	" (old Domfoam) 416-593-2960 (F)
PETITIONER(S)			" " " "

FRED TAYAR

COUNSEL FOR:			PHONE & FAX NOS
DEFENDANT(S)	new purchaser Domfoam Inc	-m/vigarty tel (416)	563-1800
RESPONDENT(S)			fax (416) 333-3356
	GRANT MORRAT	for Deloitte & Touche	416-304-0599
		Montreal	304-1313

Sept 11/19

I have decided to schedule a CC to determine whether Mr Tayar's motion to obtain the \$4 million should best proceed as a motion or some form of trial procedure. There appears to be no issue that Justice W-S's order re distribution of these funds be set aside & the entitlement to those funds be adjudicated. CC set for ~~the~~ Oct 7/19 - 1 Hr before me - confirmed. Mr Tayar may file his facts for the CC. Mr Ullmann may file his n of motion to comment and up to 5 pages in submissions.

[Handwritten Signature]

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

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

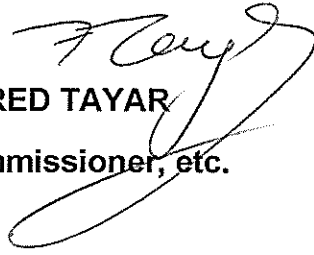
Endorsement of Justice Conway
(September 11, 2019)

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

"Conway, J."

Tab L

THIS IS EXHIBIT "L"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR
A Commissioner, etc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**COSTS OUTLINE OF DOMFOAM INC.
(PARTIAL INDEMNITY)**

The Respondent, Domfoam Inc., provides the following outline of the submissions to be made at the hearing in support of the costs it will seek if successful:

Fees (as detailed below)	\$45,830.50
Disbursements (see attached Schedule "A")	\$2,743.60
HST	<u>\$6,314.63</u>
TOTAL	<u>\$54,888.73</u>

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- **the amount claimed and the amount recovered in the proceeding**

The applicant 4362063 Canada Ltd. ("**the Vendor**") had, without notice, obtained an order for the distribution to its creditors of approximately \$4 million belonging to Domfoam Inc. ("**Domfoam**"). After Domfoam brought a motion for an order setting aside the distribution order, and for other relief, the Vendor (after resisting the motion for almost a year), consented to the setting aside of the distribution. Domfoam therefore preserved that \$4 million.

- **the complexity of the proceeding**

The proceeding was of moderate complexity. That the distribution order should be set aside so that entitlement to the funds could be adjudicated was obvious at the outset, but the Vendor resisted doing so for as long as it possibly could, including by causing the adjournment of the hearing of Domfoam’s motion. The Vendor did so by bringing a preliminary motion (respecting the examination of witnesses on Domfoam’s motion) *two days* before the hearing of the Domfoam motion.

- **the importance of the issues**

The issue was hugely important: if the distribution order was not set aside, the fund at the centre of the litigation would have been dissipated.

- **the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding**

The Vendor resisted Domfoam’s motion for a year before consenting to the setting-aside of the distribution order.

- **whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution**

As above.

- **a party’s denial of or refusal to admit anything that should have been admitted**

The Vendor should have admitted immediately (and not a year and much expense later) that the distribution order should be set aside.

- **the experience of the party’s lawyer**

<u>Name of Lawyer</u>	<u>Years of Experience</u>
Fred Tayar	36 years (Year of Call: 1984)
Mindy Tayar	35 years (Year of Call: 1985)
Colby Linthwaite	16 years (Year of Call: 2004)
Joshua Tayar	(Year of Call: 2020)

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS <i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)</i>	PERSONS <i>(identify the lawyers, students, and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	HOURS <i>(specify the hours claimed for each person identified in column 2)</i>	PARTIAL INDEMNITY RATE <i>(specify the rate being sought for each person identified in column 2)</i>	ACTUAL RATE*
Preparation of motion material, affidavit and supplementary affidavit of Jacques Vincent including all meetings and correspondence with clients, witnesses and counsel; receiving and reviewing materials from applicants	Fred Tayar Fred Tayar Colby Linthwaite Mindy Tayar	36.7 2.1 2.3 3.5	\$350 \$375 \$300 \$320	\$535 \$565 \$455 \$490
Preparation for and attendance at Scheduling Court and Chambers Appointments on July 24, 2018, August 27, 2018, October 30, 2018, April 24, 2019, July 24, 2019, and September 11, 2019	Fred Tayar Fred Tayar Colby Linthwaite Mindy Tayar	7.4 4.8 3.3 1.0	\$350 \$375 \$300 \$320	\$535 \$565 \$455 \$490
Preparation of factum for motion (ultimately adjourned at applicants' request) and all related legal research and review of applicants' responding factum	Fred Tayar Mindy Tayar Mindy Tayar Colby Linthwaite	4.1 0.6 10.1 24.5	\$350 \$345 \$320 \$300	\$535 \$525 \$490 \$455

FEE ITEMS <i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)</i>	PERSONS <i>(identify the lawyers, students, and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	HOURS <i>(specify the hours claimed for each person identified in column 2)</i>	PARTIAL INDEMNITY RATE <i>(specify the rate being sought for each person identified in column 2)</i>	ACTUAL RATE*
Preparation for and cross-examination of T. Vallecoccia, J. Vincent, T. Pomerantz including review and summary of transcripts and answers to undertakings	Fred Tayar Fred Tayar Mindy Tayar Colby Linthwaite	17.2 11.2 4.2 3.0	\$350 \$375 \$320 \$300	\$535 \$565 \$490 \$455

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- any other matter relevant to the question of costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: July 27, 2020

Signature of lawyer

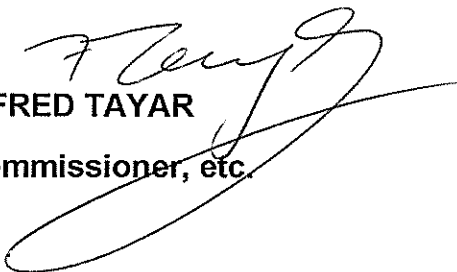
SCHEDULE "A"

DISBURSEMENTS

Computerized Legal Research	\$135.21
Photocopies	\$1,195.30
Court Filing Fees	\$165.00
Transcripts (Court Reporters)	<u>\$1,248.09</u>
TOTAL	<u>\$2,743.60</u>

Tab M

THIS IS EXHIBIT "M"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

COUNSEL SLIP

111

COURT FILE

NO.: CV-12-00009545-00CL

DATE: Monday October 7 2019

NO. ON LIST (4)

TITLE OF PROCEEDING

Valle Foam Industries 1985 Inc et al v 631400 Ontario Limited et al

COUNSEL FOR:

PLAINTIFF(S) David Ullmann
 APPLICANT(S) Varujan Arman
 PETITIONER(S)

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

COUNSEL FOR:

DEFENDANT(S) FRED TAYLOR
 RESPONDENT(S) CO-BY LIMITED
FOR PURCHASER DOMFOAM INC.

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

JUDICIAL NOTES:

GRANT MOTTAT for
Deloitte as Auditor

416-304-0549
304 1213
gmottat@tjg.com

October 7/19

The following procedure has been worked out w counsel today:

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

② The parties will proceed to mediation thereafter.

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

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

Conway J.

Endorsement of Justice Conway

October 7, 2019

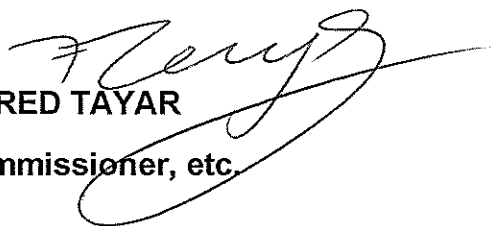
The following procedure has been worked out with counsel today:

1. The parties will be exchanging affs of docs within 45 days, relating only to the issues of surrounding circumstances (what the parties knew about the class action litigation at the time – not re what their subjective intentions were or prior drafts – all as per Sattva) and re the “estoppel issue” re Domfoam’s claim to \$4 million.
2. The parties will proceed to mediation thereafter;
3. If the matter does not resolve at mediation, they shall return to a 1 hr CC [case conference] before me (to be scheduled thorough the CL [Commercial List] office) for directions on how this motion will proceed and what evidence (written and VV [*viva voce*]) will be put before the court.

“Conway, J.”

Tab N

THIS IS EXHIBIT "N"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

FRED TAYAR & ASSOCIATES
PROFESSIONAL CORPORATION
BARRISTERS & SOLICITORS

115

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

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

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

November 1, 2019

VIA EMAIL

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

Dear Mr. Ullman:

Re: Domfoam Inc. and 4362063 Canada Ltd.

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

Yours very truly,

FRED TAYAR & ASSOCIATES
PROFESSIONAL CORPORATION

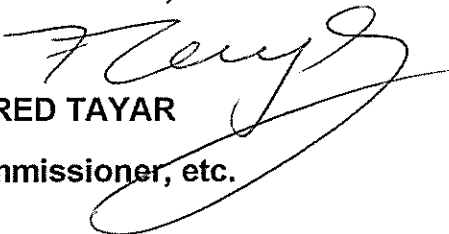
Per:

Fred Tayar

cc: Varoujan Arman
Grant Moffat, Thornton Grout
Client

Tab 0

THIS IS EXHIBIT "O"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020


FRED TAYAR
A Commissioner, etc.

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

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

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

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

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

118

000002

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

Holder Account Number

C0000000647 BIQQ_DSB

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



Re: Polyether Polyol Products Class Action

Dear Claimant:

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

Here is a summary of your Claim as approved:

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

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

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

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

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

Very truly yours,

Polyether Polyol Products Class Action Claims Administrator

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

003CD70008 01JFFA

PLEASE CASH/DEPOSIT THIS CHEQUE PROMPTLY.

BIQQ.FDX.H.pullsr/000002/000002/i

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

VOID AFTER April 08, 2020

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

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

\$ ***1,399,002.24

Canadian Dollars

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

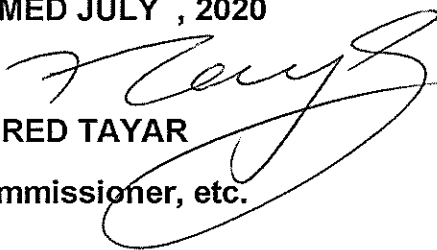
The Bank of Nova Scotia
Toronto Branch
Toronto, Ontario

Authorized Signature(s)

000002 02100062 05674 118

Tab P

THIS IS EXHIBIT "P"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020


FRED TAYAR
A Commissioner, etc.

Fred Tayar

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

Fred,

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

David

Get [Outlook for Android](#)

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

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

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

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

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

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

Tab Q

THIS IS EXHIBIT "Q"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020


FRED TAYAR
A Commissioner, etc.

FRED TAYAR & ASSOCIATESPROFESSIONAL CORPORATION
BARRISTERS & SOLICITORS65 QUEEN STREET W, SUITE 1200
TORONTO, CANADA M5H 2M5TELEPHONE (416) 363-1800
FACSIMILE (416) 363-3356
colby@fredtayar.comFILE NO. 18-2985
WRITER'S EXTENSION: 300

November 27, 2019

VIA EMAIL

**Messrs. David Ullmann
Blaney McMurtry LLP**
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5**Mr. Grant B. Moffat
Thornton Grout Finnigan LLP**
100 Wellington St. W., Suite 3200
TD Centre, Box 329
Toronto, ON M5K 1K7

Dear Sirs:

Re: Domfoam Inc. "Domfoam" and 4362063 Canada Ltd.

Further to the endorsement of Madam Justice Conway, enclosed please find the affidavit of documents of Domfoam served upon you pursuant to the Rules of Civil Procedure and in accordance with the E-Service Protocol of the Commercial List. Should your client wish to have copies of Domfoam's Schedule "A" documents, these will be produced upon your undertaking to pay the reasonable costs associated with photocopying same.

Please deliver your clients' affidavit of documents and Schedule "A" productions as soon as possible. My client will pay the reasonable photocopying costs associated with the Schedule "A" productions.

Yours very truly,

FRED TAYAR & ASSOCIATES
PROFESSIONAL CORPORATIONPer: Colby Linthwaite
/mp
Encl.

**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.**

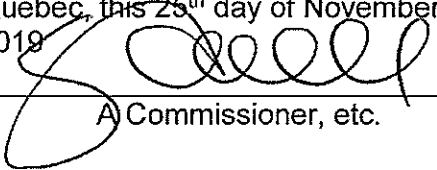
AFFIDAVIT OF DOCUMENTS

I, **TERRY POMERANTZ**, of the City of Montreal, in the Province of Quebec, the principal of 8032858 Canada Inc. (now known as Domfoam Inc.) (the "**Corporation**"),
MAKE OATH AND SAY AS FOLLOWS:

1. I have conducted a diligent search of the Corporation's records and made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relevant to Justice Conway's endorsement dated October 7, 2019 that are or have been in the possession, control or power of the Corporation.
2. I have listed in Schedule A those documents that are in the possession, control or power of the Corporation and that it does not object to producing for inspection.
3. I have listed in Schedule B those documents that are or were in the possession, control or power of the Corporation and that it objects to producing because it claims they are privileged, and I have stated in Schedule B the grounds for each such claim.

4. I have listed in Schedule C those documents that were formerly in the possession, control or power of the Corporation but are no longer in its possession, control or power and I have stated in Schedule C when and how it lost possession or control of or power over them and their present location.

5. The Corporation has never had in its possession, control or power any relevant document other than those listed in Schedules A, B and C.

SWORN before me at the City
of Montreal, in the Province of
Quebec, this 25th day of November
2019


A Commissioner, etc.



TERRY POMERANTZ




CERTIFICATE OF SOLICITOR

I CERTIFY that I have explained to the deponent:

- (a) the necessity of making full disclosure of all documents relating to any matter in issue in the action; and
- (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

November 25, 2019



Jacques Vincent

SCHEDULE "A"

Documents in the possession, control or power of the Corporation that it does not object to producing for inspection.

NO.	DATE	DESCRIPTION OF DOCUMENT
1	September 21, 2011	Audited Non-Consolidated Financial Statements of Domfoam International Inc. for year-end April 30, 2011
2	November 21, 2011	Justia search results matching "Domfoam International, Inc."
3	November 25, 2011	Email from Jacques Vincent (" Vincent ") to Raymond Slattery (" Slattery ")
4	November 28, 2011	Email from Slattery to Vincent
5	November 29, 2011	Email from Victoria Stewart to Vincent, with attached letter from Slattery to Vincent with attached i) Valle Foam/Domfoam List of Lawsuits (as at April 15, 2011), ii) <i>Hil Neighbour Floor Covering Co.</i> statement of claim, and iii) <i>Piazza's Carpet & Tile Shop, Inc.</i> statement of claim
6	November 29, 2011	Email from Slattery to Vincent
7	November 30, 2011	Email exchange among Adam Brunet (" Brunet "), John Howard (" Howard ") and Frank Gattinger, (" Gattinger ") with attached i) BASF settlement agreement, ii) Huntsman settlement agreement, and iii) cheques 2052, 2057, and 2123, payable to A-Z Sponge & Foam Ltd c/o Lex Group LLC
8	January 6, 2012	Email from Timothy R. Dunn (" Dunn ") to Vincent, with attached revised asset purchase agreement
9	January 25, 2012	First Report of the Monitor
10	March 2, 2012	Email exchange between Vincent and David Ullman, (" Ullman ") with attached letter to Vincent from Ullman
11	March 4, 2012	Email from Ullmann to Vincent
12	March 26, 2012	Consent to the use of the corporate name "Domfoam Inc.", executed by Domfoam International Inc., per Tony

NO.	DATE	DESCRIPTION OF DOCUMENT
13	March 26, 2012	Vallecoccia ("Vallecoccia") Goods and Services Tax/Harmonized Sales Tax/Quebec Sales Tax Election Respecting the Acquisition of a Business or Part of a Business, executed by 8032858 Canada Inc., per Terry Pomerantz, ("Pomerantz") and by Domfoam International Inc., per Vallecoccia
14	October 17, 2012	Email from Ullman to Vincent with attached i) Full and Complete Mutual Release, executed by Domfoam Inc., per Pomerantz, 4362063 Canada Ltd., per Vallecoccia, and acknowledged by Deloitte & Touche Inc. in its capacity as Monitor of 4362063 Canada Ltd. and ii) Election in Respect of the Sale of Debts Receivable executed by Domfoam Inc., per Pomerantz, 4362063 Canada Ltd., per Vallecoccia

SCHEDULE "B"

Documents that are or were in the possession, control or power of the Corporation that it objects to producing on the grounds of privilege.

The Corporation objects to producing documents that are subject to litigation privilege, having been created or acquired in contemplation or after commencement of this litigation and for the sole or dominant purpose of the litigation. The documents consist of correspondence, memoranda and other communications passing between principals and employees of the Corporation and their legal advisors or the Corporation's legal advisors and third parties, as well as all documents created or assembled and information acquired by or for the use of the Corporation's counsel in this litigation.

SCHEDULE "C"

Documents that were formerly in the possession, control or power of the Corporation but are no longer in its possession, control or power.

Not Applicable.

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
COMMERCIAL LIST

Proceeding Commenced at Toronto

AFFIDAVIT OF DOCUMENTS

FRED TAYAR & ASSOCIATES
Professional Corporation
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5

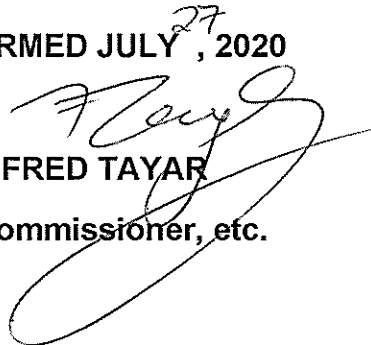
FRED TAYAR – LSO No. 23909N
T: 416-363-1800
F: 416-363-3356

Lawyers for Domfoam Inc.

Tab R

THIS IS EXHIBIT "R"
TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written over the printed name and title.

FRED TAYAR

A Commissioner, etc.

Colby Linthwaite

From: Colby Linthwaite
Sent: Wednesday, January 15, 2020 3:33 PM
To: DULLmann@blaney.com; varman@blaney.com; ateodorescu@blaney.com
Cc: gmoffat@tgf.ca
Subject: Domfoam

Counsel,

Your client's affidavit of documents is significantly overdue. Please provide me a range of dates for a Chambers appointment so that the matter can be spoken to.

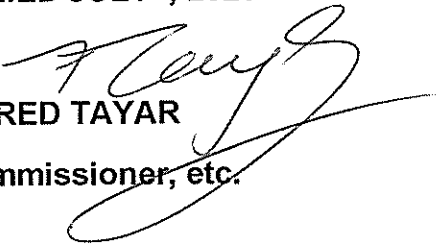
Regards,

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

This communication may contain solicitor/client privileged or confidential information and is intended for the sole use of the party/parties to whom or which it is addressed. Any other distribution, copying or disclosure is strictly prohibited and review by anyone other than the intended recipient shall not constitute a waiver of privilege. If you received this message in error, please notify us immediately by telephone or reply email and delete this message from your computer without reading or copying it.

Tab S

THIS IS EXHIBIT "S"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

Fred' /ar

From: David T. Ullmann <DUllmann@blaney.com>
Sent: January 20, 2020 9:45 AM
To: Fred Tayar; Varoujan Arman
Cc: 'Grant Moffat'
Subject: RE: Domfoam

Fred,

My apologies. I will have something for you this afternoon which will likely address your issue. I am just having trouble connecting with the Monitor on this (I called again this morning). I hope to be able to call you this aft. Please hold off on scheduling anything for today.

Regards,

David

David T. Ullmann

Partner

dullmann@blaney.com

☎ 416-596-4289 | ☎ 416-594-2437

From: Fred Tayar [mailto:fred@fredtayar.com]
Sent: January 20, 2020 8:49 AM
To: Varoujan Arman <VArman@blaney.com>; David T. Ullmann <DUllmann@blaney.com>
Cc: 'Grant Moffat' <GMoffat@tgf.ca>
Subject: Domfoam

David,

Your client's affidavit of documents which you sought to exchange with ours by seeking a court order, remains in default of that order. I would like to arrange a 9:30 am appointment with Justice Conway to schedule a motion to strike, or in the alternative, for enforcement of her own order. Are there any dates this week or next in which you are unavailable?

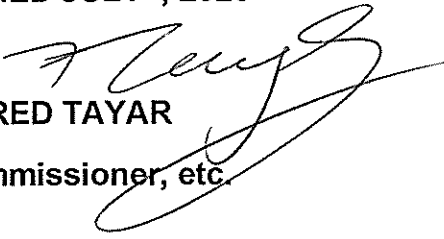
Fred

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

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

Tab T

THIS IS EXHIBIT "T"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020


FRED TAYAR
A Commissioner, etc.

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

January 20, 2020

**BY COURIER & COURTESY COPY
OF LETTER BY EMAIL**

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

Dear Mr. Tayar:

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

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

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

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

Yours very truly,
Blaney McMurtry LLP




David T. Ullmann
DTU/ab

Encl.: *Sent by courier only*
cc: Grant Moffat – *letter only*
Varoujan Arman
Alex Fernet Brochu

Tab U

THIS IS EXHIBIT "U"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

**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")

AFFIDAVIT OF DOCUMENTS OF THE APPLICANTS

I, _____, of the _____, in the _____, Ontario,

MAKE OATH AND SAY:

1. I am the _____ of 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc., and of 4362063 Canada Ltd. formerly known as Domfoam International Inc. and of A-Z Sponge & Foam Products Ltd.

2. I have caused a diligent search of the corporation's records to be conducted and made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relevant to any matter in issue in this action that are or have been in the possession, control or power of the corporation.

3. I have listed in Schedule A those documents that are in the possession, control or power of the corporation and that it does not object to producing for inspection.

4. I have listed in Schedule B those documents that are or were in the possession, control or power of the corporation and that it objects to producing because it claims they are privileged, and I have stated in Schedule B the grounds for each such claim.

5. I have listed in Schedule C those documents that were formerly in the possession, control or power of the corporation but are no longer in its possession, control or power and I have stated in Schedule C when and how it lost possession or control of or power over them and their present location.

6. The corporation has never had in its possession, control or power any documents relevant to any matter in issue in this action other than those listed in Schedules A, B and C.

SWORN BEFORE ME)

at the City of Toronto ,)

in the Province of Ontario,)

on the ____ day of _____, 2020.)

A Commissioner for Taking Affidavits)

LAWYER'S CERTIFICATE

I CERTIFY that I have explained to the deponent,

- (a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action;
- (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings; and
- (c) if the action is brought under the simplified procedure, the necessity of providing the list required under rule 76.03.

Date: _____, 2020

Varoujan Arman

SCHEDULE A

Documents in the corporation's possession, control or power that it does not object to producing for inspection.

Production No.	Doc Date	Doc Type	Doc Title	Author	Recipient
1. Surrounding Circumstances Issue					
D001	2011-11-29	Letter	Re: Domfoam International Inc. et al. attaching Valle Foam/Dom List of Lawsuits (Updated as @ April 15, 2011), Fresh as Amended Statement of Claim and Class Action Complaint - Piazza's Carpet & Tile Shop, Inc. dated October 21, 2011 and United States District Court for the Western Division of North Carolina Statement of Claim issued August 13, 2010	Raymond M. Slattery [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D002	2011-12-13	Email	RE: Proceeds from US Class Action with forwarding email among John Howard [Domfoam], Chris Naudie [Osler] and David Ullmann [Minden Gross] dated December 13, 2011	David Ullmann [Minden Gross]	John Howard [Domfoam]
D003	2011-12-22	Email	Offer to purchase some of the assets of Domfoam International Inc.	Jacques Vincent [Lamarre Perron Lambert Vincent]	Tony Vallecoccia; B. Robb
D004	2011-12-22	Email	Offer to purchase some of the assets of Domfoam International Inc. with forwarding email from Jacques Vincent to Raymond M. Slattery dated December 22, 2011	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D005	2012-02-22	Table	Summary of Offers (In the Matter of the CCAA Administration of Valle Foam Industries (1995) Inc., Domfoam International Inc., and A-Z Sponge & Foam Products Ltd.)		
D006	2012-03-02	Email	FW: Domfoam AR Listing attaching Domfoam International Accounts Receivable Listing as of February 28, 2012 (Customer claimed Rebates Left Outstanding on the Account)	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D007	2012-03-04	Email	Re: Word version of the APA	Jacques Vincent [Lamarre Perron Lambert Vincent]	David Ullmann [Minden Gross]

Production No.	Doc Date	Doc Type	Doc Title	Author	Recipient
D008	2012-03-05	Email	Re: Word version of the APA	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D009	2012-03-08	Email	RE: Revised Agreement	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0010	2012-03-08	Email	Re: Revised Agreement with forwarding email between David Ullmann and Jacques Vincent	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0011	2012-03-08	Email	Re: Revised Agreement	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0012	2012-04-18	Letter	Subject: Domfoam International Inc. ("the Vendor") RE: Settlement of the Purchase Price attaching Canada Customs and Revenue Agency Election in Respect of the Sale of Debts Receivable dated March 26, 2012	Jacques Vincent [Lamarre Perron Lambert Vincent]	David Ullmann [Minden Gross]
D0013	2012-04-18	Email	RE: Domfoam - Statement as to Purchased Working Capital enclosing PDF and Excel copies of draft analysis with respect to the Domfoam working capital closing adjustments	Jacques Vincent [Lamarre Perron Lambert Vincent]	David Ullmann [Minden Gross]
D0014	2012-05-04	Letter	Re: 8032858 Canada Inc.	Sepideh K. Nassabi [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0015	2012-05-04	Letter	Re: Domfoam - Statement as to Purchased Working Capital attaching Spreadsheet - Summary of Working Capital Closing Adjustments as at March 23, 2012 as prepared by the Monitor	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0016	2012-05-08	Letter	Subject: Domfoam International Inc. Royal & Sun Alliance Insurance Company of Canada ("the "Insurer") Insurance policies COM030771502 and EB1021965308	Jacques Vincent [Lamarre Perron Lambert Vincent]	KRG Insurance Brokers

Production No.	Doc Date	Doc Type	Doc Title	Author	Recipient
D0017	2012-06-12	Email	Wire Transfer Issue attaching 4362063 Canada Ltd. (f/k/a Domfoam International Inc.) and Domfoam Inc. (f/k/a 8032858 Canada Inc.) List of direct deposits after March 25, 2017	David Ullmann [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0018	2012-08-02	Email	Domfoam International Inc. re: PWC adjustment attaching Letter with Authorization and Direction from Jacques Vincent to David Ullmann dated August 2, 2012	Jacques Vincent [Lamarre Perron Lambert Vincent]	David Ullmann [Minden Gross]
D0019	2012-10-09	Email	Forwarding attaching Form T2022 "ELECTION IN RESPECT OF THE SALE OF DEBTS RECEIVABLE" - Domfoam	Sepideh K. Nassabi [Minden Gross]	Jacques Vincent [Lamarre Perron Lambert Vincent]
D0020	2012-10-15	Letter	Subject: 4362063 Canada Ltd. (FIKIA Domfoam International Inc.) (the Vendor) RE: Settlement of the Purchase Price	Jacques Vincent [Lamarre Perron Lambert Vincent]	David Ullmann [Minden Gross]
D0021	2012-10-18	Letter	Re: 4362063 Canada Ltd. (Vk/a. Domfoam International Inc.) attaching Full and Complete Mutual Release between DomFoam Inc. and 4362063 Canada Ltd. dated October 16, 2012 and Bank Draft in the amount of \$345,371.87 dated October 12, 2012	David Ullmann [Minden Gross]	Catherine Hristow [Deloitte]

2. Estoppel Issue

Production No.	Doc Date	Doc Type	Doc Title	Author	Recipient
D0022	2010-10-06	Affidavit	Affidavit of John Howard sworn October 6, 2010 attaching samples of documentation memorializing purchases of qualifying products		
D0023	2012-06-12	Motion Record	Motion Record of the Applicants (Returnable June 15, 2012)		
D0024	2013-02-22	Motion Record	Motion Record of the Applicants (Returnable February 28, 2013) (Re Extension of Stay Period)		
D0025	2013-02-25	Report	Sixth Report of the Monitor		
D0026	2013-07-11	Motion Record	Motion Record of the Applicants (Returnable July 17, 2013) (Re Extension of Stay Period)		
D0027	2013-07-12	Report	Seventh Report of the Monitor		
D0028	2013-12-12	Motion Record	Motion Record of the Applicants (Returnable December 17, 2013) (Re Extension of Stay Period)		
D0029	2013-12-13	Report	Eighth Report of the Monitor		
D0030	2014-04-24	Report	Ninth Report of the Monitor		
D0031	2015-09-24	Report	Twelfth Report of the Monitor		
D0032	2016-02-22	Report	Thirteenth Report of the Monitor		
D0033	2016-08-26	Report	Fourteenth Report of the Monitor		
D0034	2017-01-17	Report	Fifteenth Report of the Monitor		
D00035	2017-06-27	Report	Sixteenth Report of the Monitor		
D0036	2017-11-20	Report	Seventeenth Report of the Monitor		
D0037	2018-05-24	Report	Eighteenth Report of the Monitor		

SCHEDULE B

Documents that are or were in the corporation's possession, control or power that they object to producing on the grounds of privilege.

1. **Solicitor-Client Privilege** - Documents containing or reflecting confidential professional communications passing between the defendants and their legal advisors directly related to the seeking or receiving of legal advice or legal assistance.
2. **Without Prejudice Communications Privilege** - Documents containing or reflecting communications of without prejudice nature concerning the matters in issue in this litigation.
3. **Litigation Privilege** - Documents comprised of notes, memoranda, confidential correspondence and copies thereof, prepared for the purposes of obtaining and providing information and evidence to be used in this litigation and for defending this litigation.

SCHEDULE C

Documents that were formerly in the corporation's possession, control or power but are no longer in its possession, control or power.

Nil

Tab V

THIS IS EXHIBIT "V"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020

A handwritten signature in black ink, appearing to read "Fred Tayar", written over the printed name and title.

FRED TAYAR
A Commissioner, etc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

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

APPLICANTS

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

TABLE OF CONTENTS

INTRODUCTION.....	1
PURPOSE OF REPORT.....	3
TERMS OF REFERENCE.....	4
BACKGROUND.....	4
CLAIMS SOLICITATION PROCEDURE.....	5
RECEIPTS FROM THE US URETHANE PROCEEDINGS.....	5
SECOND INTERIM DISTRIBUTION TO CREDITORS OF VALLE FOAM AND A-Z FOAM....	7
SECOND INTERIM DISTRIBUTION TO DOMFOAM CREDITORS.....	8
A-Z FOAM PURCHASER’S CLAIM TO RESIDUAL DOW SETTLEMENT FUNDS.....	10
STATUS OF VALLE FOAM’S SHARE OF THE RESIDUAL DOW SETTLEMENT FUNDS.....	11
COURT ORDERED CHARGES.....	12
ACTIVITIES OF THE MONITOR.....	13
STATEMENTS OF CASH RECEIPTS AND DISBURSEMENTS.....	13
PROFESSIONAL FEES.....	15
ALLOCATION OF PROFESSIONAL FEES.....	16
EXTENSION OF THE STAY PERIOD.....	17
MONITOR’S RECOMMENDATIONS.....	17

EXHIBITS

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

INTRODUCTION

1. By Order of the Court dated January 12, 2012 (the “**Initial Order**”), Valle Foam Industries (1995) Inc. (“**Valle Foam**”), Domfoam International Inc. (“**Domfoam**”) and A-Z Sponge & Foam Products Ltd. (“**A-Z Foam**”) (collectively, the “**Applicants**” or the “**Companies**”), obtained protection from their creditors pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The CCAA proceeding with respect to the Applicants is referred to herein as the “**CCAA Proceeding**”.
2. Pursuant to the Initial Order, Deloitte & Touche Inc. was appointed monitor of the Applicants as part of the CCAA Proceeding (the “**Monitor**”). Pursuant to the Initial Order, all proceedings against the Applicants were stayed until February 10, 2012, or until such later date as this Court would order (the “**Stay Period**”). A copy of the Initial Order is attached hereto as Exhibit “**A**”.
3. On July 1, 2013, Deloitte & Touche Inc. changed its name to Deloitte Restructuring Inc. (hereafter, “**Deloitte**”).
4. All of the assets utilized by the Companies in connection with operation of their businesses have been sold. As described below, certain of the proceeds of the Companies’ assets (collectively, the “**Proceeds**”) have been distributed to the Companies’ creditors. Following the sale of its assets, Valle Foam changed its name to 3113736 Canada Ltd. and Domfoam changed its name to 4362063 Canada Ltd. Throughout this Report, references to Valle Foam mean 3113736 Canada Ltd. and references to Domfoam mean 4362063 Canada Ltd.
5. By Order of the United States Bankruptcy Court, Northern District of Ohio (Western Division) (the “**U.S. Bankruptcy Court**”) dated February 24, 2012 (the “**U.S. Recognition Order**”), the CCAA Proceeding was recognized as a foreign main proceeding. A copy of the U.S. Recognition Order is attached hereto as Exhibit “**B**”.

6. The Court has periodically extended the Stay Period, most recently by order dated April 24, 2019. Unless extended, the Stay Period will expire on October 31, 2019.
7. Pursuant to the Order of the Court dated June 15, 2012 (the “**Claims Solicitation Procedure Order**”), the Monitor conducted and completed a claims process with respect to the Companies (the “**Claims Solicitation Procedure**”). The claims bar date under the Claims Solicitation Procedure was August 31, 2012 (the “**Claims Bar Date**”). A copy of the Claims Solicitation Procedure Order is attached as Exhibit “**C**”.
8. By Order of the Court dated September 29, 2015 (the “**Distribution Order**”), the Monitor was authorized and directed to make an interim distribution of the Valle Foam Proceeds and A-Z Foam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors and A-Z Foam Creditors holding Proven Claims (the “**First Distribution**”), subject to the holdbacks described in the Distribution Order in respect of amounts secured by the Administration Charge and Directors’ Charge. A copy of the Distribution Order is attached as Exhibit “**D**”.
9. By Order dated September 6, 2016 (the “**Meeting Order**”), the Court authorized Domfoam to file a Plan of Compromise and Arrangement pursuant to the CCAA dated August 23, 2016 (as amended, varied or supplemented from time to time in accordance with the terms thereof, the “**Plan**”) and authorized Domfoam to call, hold and conduct a meeting of one class of unsecured creditors for the purpose of considering and voting on a resolution to approve the Plan (the “**Meeting**”).
10. The Meeting was held on October 19, 2016 in Toronto, Ontario. The Plan was approved by the requisite majorities of creditors present in person or by proxy at the Meeting. By Order dated January 24, 2017 (the “**Sanction Order**”), the Court approved and sanctioned the Plan and authorized the Monitor, Domfoam and its directors and officers to take all steps necessary to implement the Plan. A copy of the Sanction Order is attached as Exhibit “**E**”.

11. The conditions precedent to implementation of the Plan were satisfied and the Monitor filed its Plan Implementation Certificate with the Court on June 23, 2017. As described in more detail below, the Monitor carried out the distribution to the Creditors of Domfoam (the “**First Domfoam Distribution**”) within 30 days of the June 23, 2017 Plan Implementation Date as required by the Plan.
12. By Order of the Court dated May 29, 2018 (the “**Second Distribution Order**”), the Monitor was authorized and directed to make a second interim distribution of the Valle Foam Proceeds, A-Z Foam Proceeds and Domfoam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors, A-Z Foam Creditors and Domfoam Creditors respectively holding Proven Claims. A copy of the Second Distribution Order is attached as Exhibit “F”.
13. As described below, the Monitor has not carried out the second interim distribution of the Domfoam Proceeds pending resolution of the claim to the Dow Settlement Funds (as defined below) asserted by Domfoam Inc. (formerly 4037057 Canada Inc.) (the “**Domfoam Purchaser**”).
14. The Initial Order together with related Court documents, the Notice to Creditors dated January 17, 2012 and the Monitor’s First through Twentieth Reports to the Court (collectively, the “**Prior Reports**”) have been posted on the Monitor’s website at www.deloitte.com/ca/vallefoam (the “**Monitor’s Website**”). The Monitor has also established a dedicated e-mail address at vallefoam@deloitte.ca for creditors and other interested parties to contact the Monitor with questions or concerns regarding the CCAA Proceeding.

PURPOSE OF REPORT

15. The purpose of this report (the “**Twenty-First Report**”) is to provide the Court with information on the following:
 - (a) the Monitor’s activities since the filing of the Twentieth Report;

- (b) the status of the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser; and
- (c) the Companies' request for an extension of the Stay Period from October 31, 2019 to April 30, 2020.

TERMS OF REFERENCE

- 16. In preparing the Twenty-First Report, the Monitor has relied upon unaudited financial information, the Companies' books and records, the financial information prepared by the Companies, and discussions with management ("**Management**") and legal counsel for the Companies.
- 17. Unless otherwise stated, all dollar amounts contained in this Twenty-First Report are expressed in Canadian dollars.
- 18. Capitalized terms not otherwise defined in this Twenty-First Report are as defined in the Initial Order, the Claims Solicitation Procedure Order or the Plan.

BACKGROUND

- 19. The Companies operated together as one of Canada's leading and largest manufacturers and distributors of flexible polyurethane foam products from facilities located in Ontario, Quebec and British Columbia. The operations of Valle Foam and Domfoam historically comprised substantially all of the Companies' operations. A-Z Foam and Valle Foam are wholly owned subsidiaries of Domfoam.
- 20. Mr. Anthony Vallecoccia is the President and Chief Executive Officer of Domfoam, President of Valle Foam, and the sole officer and director of A-Z Foam.
- 21. Other than security interests which may have been claimed by certain equipment lessors, the Monitor is not aware of any secured creditors of the Companies.

CLAIMS SOLICITATION PROCEDURE

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

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

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

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

RECEIPTS FROM THE US URETHANE PROCEEDINGS

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

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

26. The initial distributions received by the Companies with respect to their claims in the US Urethane Proceedings related to two separate settlements with BASF Corporation and Huntsman International LLC. In January 2013, the Companies’ legal counsel received correspondence from ELG including a cheque in the amount of US\$331,928.29 for Valle Foam in respect of the US Urethane Proceedings, which was delivered to the Monitor. No deduction was made from these funds in respect of the 25% fee payable pursuant to the Services Agreement. As noted in the Seventh Report, the Monitor paid from these funds the 25% fee to ELG in accordance with the terms of the Services Agreement. The net amount of these funds were distributed to Valle Foam’s creditors as part of the First Distribution.
27. Also in January 2013, the Companies’ legal counsel received correspondence from Lex Group enclosing cheques in the amount of US\$196,802.78 and US\$28,325.87 for Domfoam and A-Z Foam respectively, net of the 25% fee payable to RRS. These funds were delivered to the Monitor and were distributed to Domfoam’s and A-Z

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

28. A further settlement was reached in the US Urethane Proceedings with The Dow Chemical Company ("**Dow**"). By letter dated March 21, 2018, class counsel delivered to the Companies their share of the initial distribution of 85% of the USD\$835 million settlement reached with Dow in the US Urethane Proceedings (the "**Dow Settlement**") as follows: USD\$732,651.37 to A-Z Foam, USD\$5,542,999.25 to Valle Foam and USD\$3,741,639.62 to Domfoam (collectively, the "**Initial Dow Settlement Funds**"). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies. In accordance with the terms of the Services Agreement, the Monitor paid to Lex Acquisition its agreed fee equal to 25% of the Initial Dow Settlement Funds received by Valle Foam, Domfoam and A-Z Foam.
29. In December 2018, the Monitor received from class counsel the Companies' remaining 15% share of the Dow Settlement as follows: USD\$130,519.67 to A-Z Foam, USD\$987,486.91 to Valle Foam and USD\$666,562.02 to Domfoam (collectively, the "**Residual Dow Settlement Funds**" and together with the Initial Dow Settlement Funds, the "**Dow Settlement Funds**"). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies. In accordance with the terms of the Services Agreement, the Monitor paid to Lex Acquisition its agreed fee equal to 25% of the Residual Dow Settlement Funds received by Valle Foam, Domfoam and A-Z Foam.

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

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

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

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

SECOND INTERIM DISTRIBUTION TO DOMFOAM CREDITORS

32. Pursuant to the Second Distribution Order, the Monitor was authorized to distribute Domfoam's share of the Initial Dow Settlement Funds in the amount of \$3,470,000 on a *pro rata, pari passu* basis to the Domfoam Creditors holding Proven Claims (the "**Second Domfoam Distribution**"). This would have resulted in each Creditor holding a Prefiling Claim against Domfoam receiving approximately \$0.13 for each dollar of its Proven Claim.
33. However, prior to the Monitor carrying out the Second Domfoam Distribution, the Domfoam Purchaser asserted a proprietary claim to Domfoam's share of the Initial Dow Settlement Funds. The Domfoam Purchaser claims that Domfoam's interest in the Dow Settlement Funds is included in the "Purchased Assets" conveyed to the Domfoam Purchaser pursuant to the Asset Purchase Agreement dated March 8, 2012 between Domfoam as vendor and the Domfoam Purchaser as purchaser (the "**Domfoam APA**").
34. As noted in the Seventh Report, the affidavit of Mr. Vallecoccia sworn July 11, 2013 provides that each of Domfoam, Valle Foam and A-Z Foam did not intend to sell to the purchaser of its assets its claim in the US Urethane Proceedings (the "**Domfoam US Urethane Claim**", the "**Valle Foam US Urethane Claim**", the "**A-Z Foam US Urethane Claim**" respectively and, collectively, the "**US Urethane Claims**"), and

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

35. Pursuant to a notice of motion dated September 14, 2018, the Domfoam Purchaser sought an order setting aside the Second Distribution Order and directing Domfoam and the Monitor to pay to the Domfoam Purchaser the Dow Settlement Funds attributable to Domfoam. The foregoing motion was returnable on November 29, 2018. However, at the hearing of the motion, Domfoam sought leave to examine the President and an employee of the Domfoam Purchaser.
36. By reasons dated February 13, 2019, Justice Wilton-Siegel granted Domfoam's motion to examine the President of the Domfoam Purchaser (which examination has been conducted), but denied its motion to examine the employee of the Domfoam Purchaser.
37. Following the date of the Twentieth Report, Domfoam consented to the Second Distribution Order being set aside with respect to the second interim distribution of the Domfoam Proceeds. However, it is Domfoam's position that the Domfoam Purchaser's proprietary claim to Domfoam's share of the Dow Settlement Funds should proceed as a trial rather than as a motion.
38. A case conference was held before Justice Conway on October 7, 2019 to address the manner in which the Domfoam Purchaser's claim to Domfoam's share of the Dow Settlement Funds shall be determined. Following submissions by the parties, the Court ordered that: (i) the parties shall exchange affidavits of documents within 45 days, relating only to the issues of surrounding circumstances (i.e., what each party knew about the US Urethane Proceedings at the time – not what their subjective intentions were or prior drafts of the Domfoam APA) and the "estoppel issue" (i.e., Domfoam's position that the Domfoam Purchaser's claim may be subject to an estoppel argument or the expiry of an applicable limitation period); (ii) thereafter, the parties will proceed to mediation; and (iii) if the dispute regarding

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

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

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

40. 0932916 BC Ltd. (the "A-Z Purchaser") purchased certain of A-Z Foam's assets pursuant to the Asset Purchase Agreement between A-Z Foam as vendor and the A-Z Purchaser as purchaser dated February 21, 2012 (the "A-Z Foam APA"). Mr. Vallecoccia's affidavit sworn July 11, 2013 indicates that A-Z Foam did not intend to sell the A-Z Foam US Urethane Claim to the A-Z Purchaser. In the Monitor's Seventh Report, which was served upon the A-Z Purchaser, the Monitor noted that, barring any claim to the A-Z Foam US Urethane Claim by the A-Z Purchaser, it appears that the net proceeds thereof should be available for distribution to the creditors of A-Z Foam.
41. On November 5, 2018, subsequent to the Second A-Z Foam Distribution (but prior to receipt of the Residual Dow Settlement Funds), the A-Z Purchaser contacted the Monitor to advise of its position that the A-Z Foam US Urethane Claim was conveyed to the A-Z Purchaser pursuant to the A-Z APA. The A-Z Purchaser remains on the Service List in this proceeding and was served with the Monitor's Eighteenth Report in connection with the Companies' motion for the Second Distribution Order. The A-Z Purchaser has retained new legal counsel who confirmed with the Monitor on November 22, 2018 the above noted position of the A-Z Purchaser. The Monitor will continue to review this issue with the A-Z Purchaser and will update the Court as appropriate. In the meantime, the Monitor

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

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

42. Fybon Industries Limited ("Fybon") purchased certain of Valle Foam's assets pursuant to the Asset Purchase Agreement between Valle Foam as vendor and Fybon as purchaser dated February 22, 2012 (the "Valle Foam APA"). As noted in the Seventh Report, which was served upon Fybon, it appears that the Valle Foam assets purchased by Fybon did not include the Valle Foam US Urethane Claim since Valle Foam's accounts receivable were not included as purchased assets under that transaction. As far as the Monitor is aware, Fybon has not asserted any claim to the Valle Foam US Urethane Claim. Fybon was removed from the Service List following the Applicants' motion for the Distribution Order.
43. As noted in the Twentieth Report, by email dated March 5, 2019, a copy of which is attached as Exhibit "G", the Monitor advised Fybon of (i) the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser; and (ii) the claim to the Residual Dow Settlement Funds asserted by the A-Z Purchaser. Fybon has advised the Monitor that it has sold the assets it purchased from Valle Foam and confirmed that it does not have any concerns at this time. Accordingly, it appears that Valle Foam's share of the Residual Dow Settlement Funds and any future proceeds of the Valle Foam US Urethane Claim should be available for distribution to the creditors of Valle Foam.

COURT ORDERED CHARGES

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

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

45. In accordance with the Sanction Order, the Domfoam Directors' Charge was permanently discharged as a charge against the Domfoam Property on the Plan Implementation Date.
46. Pursuant to the Distribution Order, the Monitor was authorized to hold back from the Valle Foam Interim Distribution \$225,000 as security for the Administration Charge (the "**Valle Foam Administration Charge Holdback**") and \$200,000 as security for the Valle Foam Directors' Charge (the "**Valle Foam Directors' Charge Holdback**"). As of October 11, 2019, the balances of the Valle Foam Administration Charge Holdback and Valle Foam Directors' Charge Holdback were nil and \$115,281.34, respectively, after payment of certain professional fees secured by such charges.
47. Pursuant to the Distribution Order, the Monitor was authorized and directed to hold back A-Z Foam Proceeds in the amount of \$50,000 (the "**A-Z Foam Holdback**") from the First Distribution as security for the Administration Charge. The balance of the A-Z Foam Holdback as at October 11, 2019 after payment of certain professional fees is \$6,179.75.

ACTIVITIES OF THE MONITOR

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

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

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

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

STATEMENTS OF CASH RECEIPTS AND DISBURSEMENTS

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

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

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

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

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

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

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

PROFESSIONAL FEES

55. The Monitor and its independent legal counsel, Thornton Grout Finnigan LLP ("TGF"), have maintained detailed records of their professional time and costs since the issuance of the Initial Order. Pursuant to paragraph 29 of the Initial Order, the Monitor and TGF were directed to pass their accounts from time to time before this Court.
56. The total fees of the Monitor during the period from April 1, 2019 to September 30, 2019 amount to \$14,965.00, together with disbursements of nil and harmonized sales tax ("HST") in the amount of \$1,945.46, totalling \$16,910.46 (the "Monitor Fees"). The time spent by the Monitor is more particularly described in the Affidavit of Catherine A. Hristow of Deloitte sworn on October 17, 2019 in support hereof and attached hereto as Exhibit "K".
57. The total legal fees incurred by the Monitor during the period March 1, 2019 to September 30, 2019 for services provided by TGF as the Monitor's independent legal counsel amount to \$26,722.50, together with disbursements in the amount of \$158.32 and HST in the amount of \$3,494.51, totalling \$30,375.33. The time spent

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

ALLOCATION OF PROFESSIONAL FEES

58. As noted in the Monitor's Eleventh Report to the Court, the Applicants, with the concurrence of the Monitor, determined that the appropriate *pro rata* allocation of professional fees to Valle Foam, Domfoam and A-Z Foam should be 45%, 45% and 10%, respectively. In its Sixteenth Report to the Court, the Monitor recommended that since the great majority of the professional fees and disbursements incurred by the Monitor, its counsel and counsel to the Applicants for the periods referenced in the Sixteenth Report related to the Plan alone, that all such fees and disbursements should be paid entirely from the Domfoam Proceeds. As noted in the Monitor's Seventeenth Report to the Court, the 45%/45%/10% professional fee allocation was reinstated following implementation of the Plan.
59. Given the claims advanced by the Domfoam Purchaser and the A-Z Purchaser described above, the Monitor has suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor attributable to Domfoam and the Residual Dow Settlement Funds attributable to A-Z Foam pending determination by the Court of entitlement to those funds. In the meantime, all such fees will be paid from the Valle Foam estate and reimbursed by Domfoam and A-Z Foam if appropriate.

EXTENSION OF THE STAY PERIOD

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

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

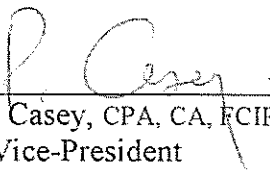
61. The Monitor believes that the Companies are acting in good faith and with due diligence and the Monitor therefore supports the extension of the Stay Period to April 30, 2020.

MONITOR'S RECOMMENDATIONS

62. For the reasons set out above, the Monitor recommends that:
- (a) the Stay Period be extended until April 30, 2020;
 - (b) the Twenty-First Report and the activities of the Monitor as described in the Twenty-First Report be approved; and
 - (c) the professional fees and disbursements of the Monitor and TGF be approved and the Monitor be authorized to pay all such fees and disbursements in the manner described above.

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

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



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

Tab W

THIS IS EXHIBIT "W"
TO THE AFFIDAVIT OF MINDY TAYAR
AFFIRMED JULY ²⁷, 2020



FRED TAYAR

A Commissioner, etc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

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

TABLE OF CONTENTS

INTRODUCTION.....	1
PURPOSE OF REPORT.....	3
TERMS OF REFERENCE.....	4
BACKGROUND.....	4
CLAIMS SOLICITATION PROCEDURE.....	5
RECEIPTS FROM THE US URETHANE PROCEEDINGS.....	6
SECOND INTERIM DISTRIBUTION TO CREDITORS OF VALLE FOAM AND A-Z FOAM....	7
SECOND INTERIM DISTRIBUTION TO DOMFOAM CREDITORS.....	8
A-Z FOAM PURCHASER’S CLAIM TO RESIDUAL DOW SETTLEMENT FUNDS	10
STATUS OF VALLE FOAM’S SHARE OF THE RESIDUAL DOW SETTLEMENT FUNDS.....	11
RECEIPTS FROM CANADIAN POLYOLS CLASS PROCEEDING.....	12
APPOINTMENT OF CRO.....	15
ALLOCATION OF CRO FEES.....	17
STATEMENTS OF CASH RECEIPTS AND DISBURSEMENTS.....	18
PROFESSIONAL FEES	19
ALLOCATION OF PROFESSIONAL FEES.....	20
EXTENSION OF THE STAY PERIOD.....	21
MONITOR’S RECOMMENDATIONS	21

EXHIBITS

- EXHIBIT A: Initial Order dated January 12, 2012
- EXHIBIT B: U.S. Recognition Order dated February 24, 2012
- EXHIBIT C: Claims Solicitation Procedure Order dated June 15, 2012
- EXHIBIT D: Distribution Order dated September 29, 2015
- EXHIBIT E: Sanction Order dated January 24, 2017
- EXHIBIT F: Second Distribution Order dated May 29, 2018
- EXHIBIT G: Copy of Email dated March 5, 2019 from the Monitor to Fybon
- EXHIBIT H: Affidavit of Mr. Vallecoccia sworn on November 16, 2018
- EXHIBIT I: CV of CRO Candidate
- EXHIBIT J: Statement of Receipts and Disbursements for Valle Foam for the period March 29, 2012 to April 17, 2020
- EXHIBIT K: Statement of Receipts and Disbursements for Domfoam for the period March 29, 2012 to April 17, 2020
- EXHIBIT L: Statement of Receipts and Disbursements for A-Z Foam for the period March 29, 2012 to April 17, 2020
- EXHIBIT M: Affidavit of Catherine A. Hristow of Deloitte Restructuring Inc., sworn on April 16, 2020
- EXHIBIT N: Affidavit of Grant Moffat of Thornton Grout Finnigan LLP, sworn on April 16, 2020

INTRODUCTION

1. By Order of the Court dated January 12, 2012 (the “**Initial Order**”), Valle Foam Industries (1995) Inc. (“**Valle Foam**”), Domfoam International Inc. (“**Domfoam**”) and A-Z Sponge & Foam Products Ltd. (“**A-Z Foam**”) (collectively, the “**Applicants**” or the “**Companies**”), obtained protection from their creditors pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The CCAA proceeding with respect to the Applicants is referred to herein as the “**CCAA Proceeding**”.
2. Pursuant to the Initial Order, Deloitte & Touche Inc. was appointed monitor of the Applicants as part of the CCAA Proceeding (the “**Monitor**”). Pursuant to the Initial Order, all proceedings against the Applicants were stayed until February 10, 2012, or until such later date as this Court would order (the “**Stay Period**”). A copy of the Initial Order is attached hereto as Exhibit “**A**”.
3. On July 1, 2013, Deloitte & Touche Inc. changed its name to Deloitte Restructuring Inc. (hereafter, “**Deloitte**”).
4. All of the assets utilized by the Companies in connection with operation of their businesses have been sold. As described below, certain of the proceeds of the Companies’ assets (collectively, the “**Proceeds**”) have been distributed to the Companies’ creditors. Following the sale of its assets, Valle Foam changed its name to 3113736 Canada Ltd. and Domfoam changed its name to 4362063 Canada Ltd. Throughout this Report, references to Valle Foam mean 3113736 Canada Ltd. and references to Domfoam mean 4362063 Canada Ltd.
5. By Order of the United States Bankruptcy Court, Northern District of Ohio (Western Division) (the “**U.S. Bankruptcy Court**”) dated February 24, 2012 (the “**U.S. Recognition Order**”), the CCAA Proceeding was recognized as a foreign main proceeding. A copy of the U.S. Recognition Order is attached hereto as Exhibit “**B**”.

6. The Court has periodically extended the Stay Period, most recently by order dated October 23, 2019. Unless extended, the Stay Period will expire on April 30, 2020.
7. Pursuant to the Order of the Court dated June 15, 2012 (the “**Claims Solicitation Procedure Order**”), the Monitor conducted and completed a claims process with respect to the Companies (the “**Claims Solicitation Procedure**”). The claims bar date under the Claims Solicitation Procedure was August 31, 2012 (the “**Claims Bar Date**”). A copy of the Claims Solicitation Procedure Order is attached hereto as Exhibit “C”.
8. By Order of the Court dated September 29, 2015 (the “**Distribution Order**”), the Monitor was authorized and directed to make an interim distribution of the Valle Foam Proceeds and A-Z Foam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors and A-Z Foam Creditors holding Proven Claims (the “**First Distribution**”), subject to the holdbacks described in the Distribution Order in respect of amounts secured by the Administration Charge and Directors’ Charge. A copy of the Distribution Order is attached hereto as Exhibit “D”.
9. By Order dated September 6, 2016 (the “**Meeting Order**”), the Court authorized Domfoam to file a Plan of Compromise and Arrangement pursuant to the CCAA dated August 23, 2016 (as amended, varied or supplemented from time to time in accordance with the terms thereof, the “**Plan**”) and authorized Domfoam to call, hold and conduct a meeting of one class of unsecured creditors for the purpose of considering and voting on a resolution to approve the Plan (the “**Meeting**”).
10. The Meeting was held on October 19, 2016 in Toronto, Ontario. The Plan was approved by the requisite majorities of creditors present in person or by proxy at the Meeting. By Order dated January 24, 2017 (the “**Sanction Order**”), the Court approved and sanctioned the Plan and authorized the Monitor, Domfoam and its directors and officers to take all steps necessary to implement the Plan. A copy of the Sanction Order is attached hereto as Exhibit “E”.

11. The conditions precedent to implementation of the Plan were satisfied and the Monitor filed its Plan Implementation Certificate with the Court on June 23, 2017. As described in more detail below, the Monitor carried out the distribution to the Creditors of Domfoam (the “**First Domfoam Distribution**”) within 30 days of the June 23, 2017 Plan Implementation Date as required by the Plan.
12. By Order of the Court dated May 29, 2018 (the “**Second Distribution Order**”), the Monitor was authorized and directed to make a second interim distribution of the Valle Foam Proceeds, A-Z Foam Proceeds and Domfoam Proceeds on a *pro rata, pari passu* basis to the Valle Foam Creditors, A-Z Foam Creditors and Domfoam Creditors respectively holding Proven Claims. A copy of the Second Distribution Order is attached hereto as Exhibit “F”.
13. As described below, the Monitor has not carried out the second interim distribution of the Domfoam Proceeds pending resolution of the claim to the Dow Settlement Funds (as defined below) asserted by Domfoam Inc. (formerly 4037057 Canada Inc.) (the “**Domfoam Purchaser**”).
14. The Initial Order together with related Court documents, the Notice to Creditors dated January 17, 2012 and the Monitor’s First through Twenty-First Reports to the Court (collectively, the “**Prior Reports**”) have been posted on the Monitor’s website at www.deloitte.com/ca/vallefoam (the “**Monitor’s Website**”). The Monitor has also established a dedicated e-mail address at vallefoam@deloitte.ca for creditors and other interested parties to contact the Monitor with questions or concerns regarding the CCAA Proceeding.

PURPOSE OF REPORT

15. The purpose of this report (the “**Twenty-Second Report**”) is to provide the Court with information on the following:
 - (a) the Monitor’s activities since the filing of the Twenty-First Report;

- (b) the status of the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser;
- (c) the need for the appointment of a chief restructuring officer (“CRO”) of the Companies;
- (d) the status of the Companies’ claims to certain additional settlement funds described below; and
- (e) the need for an extension of the Stay Period from April 30, 2020 to October 30, 2020.

TERMS OF REFERENCE

- 16. In preparing the Twenty-Second Report, the Monitor has relied upon unaudited financial information, the Companies’ books and records, the financial information prepared by the Companies and discussions with legal counsel for the Companies. As described below, in preparing the Twenty-Second Report, the Monitor has been unable to discuss the contents hereof with management of the Companies (“Management”).
- 17. Unless otherwise stated, all dollar amounts contained in the Twenty-Second Report are expressed in Canadian dollars.
- 18. Capitalized terms not otherwise defined in the Twenty-Second Report are as defined in the Initial Order, the Claims Solicitation Procedure Order or the Plan.

BACKGROUND

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

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

CLAIMS SOLICITATION PROCEDURE

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

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

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

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

RECEIPTS FROM THE US URETHANE PROCEEDINGS

24. The Companies had previously advised the Monitor that they each were claimants in a class action proceeding before the United States District Court for the District of Kansas under the caption In Re Urethane AntiTrust Litigation (the “**US Urethane Proceedings**”).
25. As previously reported in the Monitor’s Seventh Report to the Court dated July 12, 2013 (the “**Seventh Report**”), pursuant to a 2008 services agreement (the “**Services Agreement**”) between the Companies and Refund Recovery Services, LLC (“**RRS**”), the Companies retained RRS to assist in asserting and recovering their claims in the US Urethane Proceedings in consideration of a fee equal to 25% of all funds paid to the Companies. Thereafter, Enterprise Law Group (“**ELG**”) was retained by RRS to assist in recovering the Valle Foam claim only in the US Urethane Proceedings. Subsequently, Lex Group, LLC (“**Lex Group**”), the successor to RRS, assigned to ELG its rights under the Services Agreement to receive the 25% commission in respect of any funds paid to Valle Foam only pursuant to the US Urethane Proceedings. The Monitor has been advised by Lex Group that it assigned its rights under the Services Agreement to Lex Acquisition Group, LLC (“**Lex Acquisition**”) on January 7, 2015.
26. In 2013, the Companies received initial distributions with respect to their claims in the US Urethane Proceedings related to two separate settlements with BASF Corporation and Huntsman International LLC. The net amount of these settlement funds, after deduction of the 25% fee payable to ELG and Lex Group (the “**Agent**”

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

27. A further settlement was reached in the US Urethane Proceedings with The Dow Chemical Company (“**Dow**”). By letter dated March 21, 2018, class counsel delivered to the Companies their share of the initial distribution of 85% of the USD\$835 million settlement reached with Dow in the US Urethane Proceedings (the “**Dow Settlement**”) as follows: USD\$732,651.37 to A-Z Foam, USD\$5,542,999.25 to Valle Foam and USD\$3,741,639.62 to Domfoam (collectively, the “**Initial Dow Settlement Funds**”). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies, following which the Monitor paid the Agent Fee from such funds.
28. In December 2018, the Monitor received from class counsel the Companies’ remaining 15% share of the Dow Settlement as follows: USD\$130,519.67 to A-Z Foam, USD\$987,486.91 to Valle Foam and USD\$666,562.02 to Domfoam (collectively, the “**Residual Dow Settlement Funds**” and together with the Initial Dow Settlement Funds, the “**Dow Settlement Funds**”). Each of these cheques was deposited to the applicable account maintained by the Monitor for each of the Companies, following which the Monitor paid the Agent Fee from such funds.

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

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

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

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

SECOND INTERIM DISTRIBUTION TO DOMFOAM CREDITORS

31. Pursuant to the Second Distribution Order, the Monitor was authorized to distribute Domfoam's share of the Initial Dow Settlement Funds in the amount of \$3,470,000 on a *pro rata, pari passu* basis to the Domfoam Creditors holding Proven Claims (the "**Second Domfoam Distribution**"). This would have resulted in each Creditor holding a Prefiling Claim against Domfoam receiving approximately \$0.13 for each dollar of its Proven Claim.
32. However, prior to the Monitor carrying out the Second Domfoam Distribution, the Domfoam Purchaser asserted a proprietary claim to Domfoam's share of the Initial Dow Settlement Funds. The Domfoam Purchaser claims that Domfoam's interest in the Dow Settlement Funds is included in the "Purchased Assets" conveyed to the Domfoam Purchaser pursuant to the Asset Purchase Agreement dated March 8, 2012 between Domfoam as vendor and the Domfoam Purchaser as purchaser (the "**Domfoam APA**").
33. As noted in the Monitor's Seventh Report, the affidavit of Mr. Vallecoccia sworn July 11, 2013 provides that each of Domfoam, Valle Foam and A-Z Foam did not intend to sell to the purchaser of its assets its claim in the US Urethane Proceedings

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

34. Pursuant to a notice of motion dated September 14, 2018, the Domfoam Purchaser sought an order setting aside the Second Distribution Order and directing Domfoam and the Monitor to pay to the Domfoam Purchaser the Dow Settlement Funds attributable to Domfoam. The foregoing motion was returnable on November 29, 2018. However, at the hearing of the motion, Domfoam sought leave to examine the President and an employee of the Domfoam Purchaser.
35. By reasons dated February 13, 2019, Justice Wilton-Siegel granted Domfoam’s motion to examine the President of the Domfoam Purchaser (which examination has been conducted), but denied its motion to examine the employee of the Domfoam Purchaser.
36. Domfoam later consented to the Second Distribution Order being set aside with respect to the second interim distribution of the Domfoam Proceeds. However, it is Domfoam’s position that the Domfoam Purchaser’s proprietary claim to Domfoam’s share of the Dow Settlement Funds should proceed as a trial rather than as a motion.
37. A case conference was held before Justice Conway on October 7, 2019 to address the manner in which the Domfoam Purchaser’s claim to Domfoam’s share of the Dow Settlement Funds shall be determined. Following submissions by the parties, the Court ordered that: (i) the parties shall exchange affidavits of documents within 45 days, relating only to the issues of surrounding circumstances (i.e., what each party knew about the US Urethane Proceedings at the time – not what their subjective intentions were or prior drafts of the Domfoam APA) and the “estoppel issue” (i.e., Domfoam’s position that the Domfoam Purchaser’s claim may be subject to an estoppel argument or the expiry of an applicable limitation period); (ii)

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

38. The Monitor has agreed that it will not distribute any further amount from Domfoam's share of the Dow Settlement Funds pending disposition of the Domfoam Purchaser's motion.
39. The mediation was originally scheduled for April 17, 2020. Given the effects of the COVID-19 pandemic, it has been rescheduled for May 25, 2020.

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

40. 0932916 BC Ltd. (the "**A-Z Purchaser**") purchased certain of A-Z Foam's assets pursuant to the Asset Purchase Agreement between A-Z Foam as vendor and the A-Z Purchaser as purchaser dated February 21, 2012 (the "**A-Z Foam APA**"). Mr. Vallecoccia's affidavit sworn July 11, 2013 indicates that A-Z Foam did not intend to sell the A-Z Foam US Urethane Claim to the A-Z Purchaser. In the Monitor's Seventh Report, which was served upon the A-Z Purchaser, the Monitor noted that, barring any claim to the A-Z Foam US Urethane Claim by the A-Z Purchaser, it appears that the net proceeds thereof should be available for distribution to the creditors of A-Z Foam.
41. On November 5, 2018, subsequent to the Second A-Z Foam Distribution (but prior to receipt of the Residual Dow Settlement Funds), the A-Z Purchaser contacted the Monitor to advise of its position that the A-Z Foam US Urethane Claim was conveyed to the A-Z Purchaser pursuant to the A-Z APA. The A-Z Purchaser remains on the Service List in this proceeding and was served with the Monitor's Eighteenth Report in connection with the Companies' motion for the Second Distribution Order. The A-Z Purchaser has retained new legal counsel who

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

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

42. Fybon Industries Limited ("**Fybon**") purchased certain of Valle Foam's assets pursuant to the Asset Purchase Agreement between Valle Foam as vendor and Fybon as purchaser dated February 22, 2012 (the "**Valle Foam APA**"). As noted in the Seventh Report, which was served upon Fybon, it appeared that the Valle Foam assets purchased by Fybon did not include the Valle Foam US Urethane Claim since Valle Foam's accounts receivable were not included as purchased assets under that transaction. As far as the Monitor is aware, Fybon has not asserted any claim to the Valle Foam US Urethane Claim. Fybon was removed from the Service List following the Applicants' motion for the Distribution Order.
43. By email dated March 5, 2019, a copy of which is attached hereto as Exhibit "**G**", the Monitor advised Fybon of (i) the claim to the Dow Settlement Funds asserted by the Domfoam Purchaser; and (ii) the claim to the Residual Dow Settlement Funds asserted by the A-Z Purchaser. Fybon advised the Monitor that it sold the assets it purchased from Valle Foam and confirmed that it did not have any concerns at that time. The Monitor has not yet distributed to Valle Foam's creditors Valle Foam's share of the Residual Dow Settlement Funds.

RECEIPTS FROM CANADIAN POLYOLS CLASS PROCEEDING

44. As described in the Affidavit of Mr. Vallecoccia sworn on November 16, 2018 (“**November 2018 Affidavit**”) in connection with the Companies’ motion for an extension of the Stay Period, a class proceeding was commenced before the Ontario Superior Court of Justice under the style of cause *Crosslink Technology Inc. v BASF Canada et al*, Ontario Superior Court of Justice, London (Court File No. 50305CP) (the “**Canadian Polyols Proceeding**”), seeking similar relief to that sought in the US Urethane Proceedings. A copy of the November 2018 Affidavit (with only Exhibit E included) is attached hereto as Exhibit “**H**”.
45. Exhibit E to the November 18 Affidavit is a summary of the Canadian Polyols Proceeding extracted from the website maintained by class counsel, Siskinds LLP (the “**Siskinds Polyols Site**”). As described on the Siskinds Polyols Site, the Canadian Polyols Proceeding alleges that the defendants unlawfully conspired to fix, increase, and/or maintain prices in the market for Polyether Polyols, defined as polyether polyols, monomeric or polymeric diphenylmethane diisocyanate (MDI), toluene diisocyanate (TDI), and polyether polyol systems.
46. As disclosed on the Siskinds Polyols Site, settlements were reached in the Canadian Polyols Proceeding with Bayer Inc. and certain related entities, Lyondell Chemical Company, Huntsman International LLC, BASF Corporation, BASF Canada Inc. and most recently with the Dow Chemical Company and Dow Chemical Canada Inc.
47. As described in paragraph 32 of the November 2018 Affidavit, Mr. Vallecoccia advised that the Applicants, with the assistance of Lex Acquisition, were in the process of determining whether or not they are class members in the Canadian Polyols Proceeding.
48. Counsel to the Companies advised the Monitor that it was retained by Lex Acquisition to file the Companies’ claims in the Canadian Polyols Proceeding. As set out in Mr. Vallecoccia’s affidavit sworn April 18, 2019, counsel to the

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

49. By letter dated November 1, 2019, counsel for the Domfoam Purchaser advised that the Domfoam Purchaser had received a cheque in the amount of \$1,399,002.24 (the “**Domfoam Canadian Polyols Funds**”) from the Claims Administrator. Counsel to Domfoam has advised counsel to the Domfoam Purchaser that Domfoam asserts an interest in the foregoing funds and requested that such funds be held by counsel to the Domfoam Purchaser pending resolution of the competing claims to such funds. The Monitor understands that counsel to the Domfoam Purchaser has not yet confirmed if it is holding the Domfoam Canadian Polyols Funds in trust, or if the Domfoam Purchaser is in receipt of same.
50. Prior to receipt of the foregoing correspondence from counsel to the Domfoam Purchaser, the Monitor was not aware that the Domfoam Canadian Polyols Funds had been paid to Domfoam. Thereafter, the Monitor contacted the Claims Administrator on multiple occasions to determine the status of payments that may have been issued to Valle Foam and A-Z Foam.
51. In December 2019, the Monitor received from the Claims Administrator copies of two cheques dated October 11, 2019, the first payable to “Valle Foam Industries 1995 Inc.” in the amount of \$1,892,110.59 (the “**Valle Foam Canadian Polyols Funds**”) and the second payable to “A-Z Sponge & Foam Ltd.” in the amount of \$239,277.74 (the “**A-Z Canadian Polyols Funds**”). Based on the address details included on each cheque, it appears that the cheques were delivered to the premises occupied by each of Valle Foam and A-Z Foam prior to the sale of their assets.
52. The information on each of the cheques references the Polyether Polyol Price Fixing Settlement and *Crosslink Technology v BASF Canada et al.* Each cheque face includes a statement that, “Based on the value of your Aggregate Purchases and

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

53. The Monitor immediately contacted VPC Group Inc., which the Monitor was advised is the party to whom Fybon sold the assets it had purchased from Valle Foam (the "**New Valle Foam Purchaser**"), as well as counsel to the A-Z Foam Purchaser, in each case requiring the immediate delivery of such funds to the Monitor.
54. Counsel to the A-Z Purchaser advised that the A-Z Purchaser had not received the cheque for the A-Z Canadian Polyols Funds. The Monitor was then advised by the Claims Administrator that the cheque had been negotiated. The Monitor again followed up with counsel to the A-Z Purchaser, who again confirmed that the A-Z Purchaser did not receive that cheque. The Monitor has requested a copy of the negotiated cheque from the Claims Administrator on three occasions and will continue its efforts to determine the status of these funds. Upon the appointment of a CRO as discussed in paragraphs 61 to 66 in this Report, the Monitor will work with the CRO to investigate commencing legal proceedings against the Claims Administrator and/or any party in possession of the A-Z Canadian Polyols Funds.
55. The New Valle Foam Purchaser requested that the Monitor provide a copy of the agreement of purchase and sale between Valle Foam and the Valle Foam Purchaser to verify that the Valle Foam Canadian Polyols Funds were excluded from that transaction. The Monitor directed the New Valle Foam Purchaser to the copy of the APA posted on the Monitor's website. However, despite several follow up emails, the New Valle Foam Purchaser did not deliver the Valle Foam Canadian Polyols Funds to the Monitor.
56. By letter dated February 13, 2020, counsel to Valle Foam demanded the return of the Valle Foam Canadian Polyols Funds by no later than February 26, 2020, failing

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

57. On March 19, 2020, counsel to the New Valle Foam Purchaser advised counsel to Valle Foam that the Valle Foam Canadian Polyols Funds would be sent to the Monitor.
58. On March 26, 2020, the Monitor received a wire transfer in the amount of the Valle Foam Canadian Polyols Funds.
59. Thereafter, Lex Acquisition delivered to the Monitor its invoice for the 25% Agent Fee payable by Valle Foam in connection with collection of the Valle Foam Canadian Polyols Funds, which counsel to the Companies has confirmed is payable to Lex Acquisition in accordance with the retainer of Lex Acquisition by Valle Foam. The Monitor paid the Agent Fee of \$473,027.65 to Lex Acquisition on April 17, 2020.
60. Lex Acquisition has also issued an invoice to Domfoam in the amount of \$349,750.56 for the applicable 25% Agent Fee in connection with the claims filed on behalf of Domfoam in the Canadian Polyols Proceeding. As noted above, the Monitor is not in possession of the Domfoam Canadian Polyols Funds or the A-Z Canadian Polyols Funds. Lex Acquisition will issue the invoice for the A-Z Foam Agent Fee once it has been determined who is in possession of the A-Z Canadian Polyols Funds.

APPOINTMENT OF CRO

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

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

62. Mr. Vallecoccia's affidavit sworn January 11, 2012 in support of the application for the Initial Order in this proceeding provides that Valle Foam and A-Z Foam are subsidiaries of Domfoam and that Mr. Vallecoccia is one of the shareholders of Domfoam. The other shareholders of Domfoam are not identified and the Monitor is not aware of who the other shareholders of Domfoam may be.
63. The substantive issues that remain to be addressed in the within proceeding are the entitlement of the Domfoam Purchaser to the Dow Settlement Funds and the Domfoam Canadian Polyols Funds and the entitlement of the A-Z Purchaser to A-Z Foam's share of the Residual Dow Settlement Funds and the A-Z Canadian Polyols Funds. These issues will either be addressed through litigation or possibly settlement with these parties. Given that counsel to the Companies is unable to obtain instructions from Mr. Vallecoccia, the Monitor recommends that an independent third party be appointed by the Court as the Chief Restructuring Officer ("CRO") of the Companies with the mandate and powers necessary to resolve the foregoing issues and take any other steps necessary to complete the administration of the Companies' estates in this proceeding.
64. The Monitor has identified Linc Rogers, a partner with Blake, Cassels & Graydon LLP in Toronto, as a recommended candidate for this role. Mr. Rogers is recognized as a leading insolvency lawyer and appears regularly before the Court. A copy of Mr. Rogers' website bio is attached hereto as Exhibit "I".
65. As with the Monitor and counsel to the Monitor, the Monitor recommends that the fees of the CRO be based on the amount of professional time required multiplied by the CRO's hourly rate, plus applicable taxes and disbursements. If appointed as CRO, Mr. Rogers has requested a retainer and the Monitor has agreed to same in the amount of \$25,000. The hourly fee chargeable by Mr. Rogers will be \$875.00. As

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

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

ALLOCATION OF CRO FEES

67. As noted in the Monitor's Eleventh Report to the Court, the Applicants, with the concurrence of the Monitor, determined that the appropriate *pro rata* allocation of professional fees to Valle Foam, Domfoam and A-Z Foam should be 45%, 45% and 10%, respectively. In its Sixteenth Report to the Court, the Monitor recommended that since the great majority of the professional fees and disbursements incurred by the Monitor, its counsel and counsel to the Applicants for the periods referenced in the Sixteenth Report related to the Plan alone, that all such fees and disbursements should be paid entirely from the Domfoam Proceeds. As noted in the Monitor's Seventeenth Report to the Court, the 45%/45%/10% professional fee allocation was reinstated following implementation of the Plan.
68. As reported in the Monitor's Twenty-First Report, given the claims advanced by the Domfoam Purchaser and the A-Z Purchaser described above, the Monitor has suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor attributable to Domfoam and the Residual Dow Settlement Funds attributable to A-Z Foam pending determination by the Court of entitlement to those funds. In the meantime, professional fees will continue to be paid from Valle Foam's share of the Residual Dow Settlement Funds held by the Monitor and will be reimbursed by Domfoam and A-Z Foam if appropriate.

STATEMENTS OF CASH RECEIPTS AND DISBURSEMENTS

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

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

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

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

72. Attached hereto as Exhibit “L” is the Statement of Receipts and Disbursements for A-Z Foam for the period March 29, 2012 to April 17, 2020. Total cash receipts from the sale of assets, the collection of accounts receivable, settlement funds and other receipts are \$2,342,276.50. Total disbursements are \$2,203,640.10 which includes the First Distribution payment of \$624,054.25, the Second A-Z Foam Distribution of \$707,950.00 and the accrual for the Administration Charge in the amount of \$50,000.00, of which \$6,179.75 remains. Net cash on hand as at April 17, 2020 is \$138,636.40, which excludes any possible recovery for funds that may not be required for the Administration Charge.
73. The Monitor anticipates that the only meaningful disbursements during an extension of the Stay Period will be on account of professional fees in connection with (i) the claims advanced by the Domfoam Purchaser to Domfoam’s share of the Dow Settlement Funds and the Domfoam Canadian Polyols Funds, and by the A-Z Purchaser to A-Z Foam’s share of the Residual Dow Settlement Funds and the entitlement to the A-Z Canadian Polyols Funds; and (ii) once those claims are resolved, a final distribution to be carried out by the Monitor to the Companies’ Proven Creditors.

PROFESSIONAL FEES

74. The Monitor and its independent legal counsel, Thornton Grout Finnigan LLP (“TGF”), have maintained detailed records of their professional time and costs since the issuance of the Initial Order. Pursuant to paragraph 29 of the Initial Order, the Monitor and TGF were directed to pass their accounts from time to time before this Court.
75. The total fees of the Monitor during the period from October 1, 2019 to March 31, 2020 amount to \$16,557.50, together with disbursements of nil and harmonized sales tax (“HST”) in the amount of \$2,152.49, totalling \$18,709.99 (the “Monitor Fees”). The time spent by the Monitor is more particularly described in the Affidavit of

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

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

ALLOCATION OF PROFESSIONAL FEES

77. As noted in the Monitor's Eleventh Report to the Court, the Applicants, with the concurrence of the Monitor, determined that the appropriate *pro rata* allocation of professional fees to Valle Foam, Domfoam and A-Z Foam should be 45%, 45% and 10%, respectively. In its Sixteenth Report to the Court, the Monitor recommended that since the great majority of the professional fees and disbursements incurred by the Monitor, its counsel and counsel to the Applicants for the periods referenced in the Sixteenth Report related to the Plan alone, that all such fees and disbursements should be paid entirely from the Domfoam Proceeds. As noted in the Monitor's Seventeenth Report to the Court, the 45%/45%/10% professional fee allocation was reinstated following implementation of the Plan.
78. Given the claims advanced by the Domfoam Purchaser and the A-Z Purchaser described above, the Monitor has suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor attributable to Domfoam and the Residual Dow Settlement Funds attributable to A-Z Foam pending determination by the Court of entitlement to those funds. In the meantime, all such fees will be paid from the Valle Foam estate and reimbursed by Domfoam and A-Z Foam if appropriate.

EXTENSION OF THE STAY PERIOD

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

MONITOR'S RECOMMENDATIONS

81. For the reasons set out above, the Monitor recommends that:
- (a) the Twenty-Second Report and the activities of the Monitor as described in the Twenty-Second Report be approved;
 - (b) the CRO be appointed on the terms set out in the draft appointment order;
 - (c) the Stay Period be extended until October 30, 2020;
 - (d) the professional fees and disbursements of the Monitor and TGF be approved and the Monitor be authorized to pay all such fees and disbursements in the manner described above.

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

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

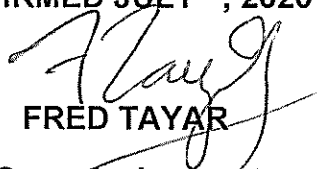


Paul M. Casey, CPA, CA, FCIRP, LIT
Senior Vice-President

Tab X

THIS IS EXHIBIT "X"
TO THE AFFIDAVIT OF MINDY TAYAR

AFFIRMED JULY , 2020



FRED TAYAR

A Commissioner, etc.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

PROJECTED BILL OF COSTS OF DOMFOAM INC.

PART I - FEES

A. – FEES INCURRED TO DATE

FEE ITEMS	PERSONS	HOURS	PARTIAL INDEMNITY RATE	FULL INDEMNITY RATE
Included in the costs outline of Domfoam Inc. dated July 27, 2020				
Preparation of motion material, affidavit and supplementary affidavit of Jacques Vincent including all meetings and correspondence with clients, witnesses and counsel; receiving and reviewing materials from applicants	Fred Tayar	36.7	\$350	\$535
	Fred Tayar	2.1	\$375	\$565
	Colby Linthwaite	2.3	\$300	\$455
	Mindy Tayar	3.5	\$320	\$490
Preparation for and attendance at Scheduling Court and Chambers Appointments on July 24, 2018, August 27, 2018, October 30, 2018, April 24, 2019, July 24, 2019, and September 11, 2019	Fred Tayar	7.4	\$350	\$535
	Fred Tayar	4.8	\$375	\$565
	Colby Linthwaite	3.3	\$300	\$455
	Mindy Tayar	1.0	\$320	\$490

FEE ITEMS	PERSONS	HOURS	PARTIAL INDEMNITY RATE	FULL INDEMNITY RATE
Preparation of factum for motion (ultimately adjourned at applicants' request) and all related legal research and review of applicants' responding factum	Fred Tayar	4.1	\$350	\$535
	Mindy Tayar	0.6	\$345	\$525
	Mindy Tayar	10.1	\$320	\$490
	Colby Linthwaite	24.5	\$300	\$455
Preparation for and cross-examination of T. Vallecocchia, J. Vincent, T. Pomerantz including review and summary of transcripts and answers to undertakings	Fred Tayar	17.2	\$350	\$535
	Fred Tayar	11.2	\$375	\$565
	Mindy Tayar	4.2	\$320	\$490
	Colby Linthwaite	3.0	\$300	\$455
Not included in the costs outline of Domfoam Inc. dated July 27, 2020				
Prepare affidavit of documents; review applicants' affidavit of documents and documents	Fred Tayar	2.2	\$375	\$565
	Colby Linthwaite	5.8	\$300	\$455
	Student-at-Law	3.9	\$125	\$190
Motion for security for costs; preparation of motion material	Fred Tayar	0.7	\$375	\$565
	Mindy Tayar	3.9	\$350	\$525
	Colby Linthwaite	4.7	\$315	\$475
Prepare and attend case conference before Conway, J.	Fred Tayar	2.3	\$375	\$565
	Mindy Tayar	2.5	\$350	\$525
	Colby Linthwaite	2.9	\$300	\$455
Prepare and attend mediation before Justice Cumming	Fred Tayar	14.6	\$375	\$565
	Colby Linthwaite	9.8	\$300	\$455
	Colby Linthwaite	35.2	\$315	\$475
	Mindy Tayar	4.2	\$350	\$525
	Student-at-Law	5.6	\$190	\$190
Communications between counsel, clients, witnesses, court and others	Fred Tayar	4.2	\$375	\$565
	Colby Linthwaite	2.8	\$315	\$475
Motion to appoint CRO and dealing with other corporate matters relating to applicants	Fred Tayar	6.8	\$375	\$565
	Colby Linthwaite	23.6	\$315	\$475
	Mindy Tayar	0.7	\$350	\$525
	Student-at-Law	11.1	\$125	\$190
SUB-TOTAL FEES:				\$90,709.00
HST ON FEES:				\$11,792.17

B. ANTICIPATED FEES

FEE ITEMS	PERSONS	HOURS	PARTIAL INDEMNITY RATE	FULL INDEMNITY RATE
Motion for security of costs: preparation of factum and authorities, preparation and attendance at motion	Fred Tayar	8	\$375	\$565
	Colby Linthwaite	10	\$315	\$475
Communication with the clients, counsel for the applicants, and this Honourable Court	Fred Tayar	15	\$375	\$565
	Colby Linthwaite	15	\$315	\$475
The factum: legal research and preparation of the respondents' factum on the application/trial	Fred Tayar	15	\$375	\$565
	Colby Linthwaite	25	\$315	\$475
Trial of the issue of Domfoam's entitlement to funds: preparation and review of material, and review of affidavits of documents, legal research, preparation of witnesses, preparation of examinations, cross-examinations, and argument, and attendance at trial	Fred Tayar	90	\$375	\$565
	Colby Linthwaite	90	\$315	\$475
SUB-TOTAL FEES:				\$92,100.00
HST ON FEES:				\$11,973.00
TOTAL FEES AND HST (INCURRED AND ANTICIPATED):				<u>\$206,574.17</u>

PART II – DISBURSEMENTS

A. DISBURSEMENTS MADE TO DATE

DESCRIPTION	AMOUNT
Paid for couriers	\$28.60
Paid for computerized legal research	\$341.62
Paid for photocopies	\$1,670.75
Paid for clerk to file material with Court	\$205.00
Transcripts	\$1,248.09
Teleconferencing	\$10.13
SUB-TOTAL DISBURSEMENTS:	\$3,504.19
HST ON DISBURSEMENTS:	\$455.54

B. ANTICIPATED DISBURSEMENTS

DESCRIPTION	AMOUNT
Paid for facsimiles	\$150.00
Paid for photocopies	\$1,000.00
Paid for clerk to file material with Court	\$400.00
Paid for couriers	\$100.00
Paid to Minister of Finance (court filing)	\$500.00
Paid for Computerised Legal Research	\$150.00
SUB-TOTAL DISBURSEMENTS:	\$2,300.00
HST ON DISBURSEMENTS:	\$299.00
TOTAL DISBURSEMENTS AND HST:	<u>\$6,558.73</u>

PART III- SUMMARY AND TOTAL

Fees incurred to date including HST:	\$102,501.17
Anticipated fees including HST:	\$104,073.00
Disbursements to date including HST:	\$3,959.73
Anticipated disbursements and HST:	\$2,599.00
TOTAL FEES, DISBURSEMENTS AND HST:	\$213,132.90
TOTAL QUANTUM OF SECURITY SOUGHT:	<u>\$213,132.90</u>

PART IV- STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

Name of Lawyer

Years of Experience

Fred Tayar	36 years (Year of Call: 1984)
Mindy Tayar	35 years (Year of Call: 1985)
Colby Linthwaite	16 years (Year of Call: 2004)
Joshua Tayar	(Year of Call: 2020)

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
COMMERCIAL LIST

Proceeding Commenced at Toronto

AFFIDAVIT OF MINDY TAYAR
(Affirmed July 27 2020)

FRED TAYAR & ASSOCIATES
Professional Corporation
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5
FRED TAYAR – LSO No. 23909N
COLBY LINTHWAITE – LSO No. 49599K
T: 416-363-1800
F: 416-363-3356

Lawyers for Domfoam Inc.

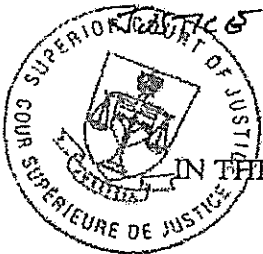
Tab 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.

TUESDAY, THE 29TH DAY



H. J. WILTON - 50202

OF MAY, 2018

Handwritten initials

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

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

(the "Applicants")

ORDER

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

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

SERVICE

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

DEFINITIONS

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

STAY EXTENSION

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

INTERIM DISTRIBUTIONS

4. **THIS COURT ORDERS** that the Monitor is hereby authorized to make an interim Distribution of the Valle Foam Proceeds in the amount of \$5,600,000 to the Valle Foam Creditors holding Proven Claims on a *pro rata pari parssu* basis.
5. **THIS COURT ORDERS** that the Monitor is hereby authorized to make an interim Distribution of the Domfoam Proceeds in the amount of \$3,470,000 to the Domfoam

- 2 -

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

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

MONITOR'S REPORT, ACTIONS AND FEES

7. **THIS COURT ORDERS** that the Eighteenth Report and the actions, decisions and conduct of the Monitor as set out in the Eighteenth Report are hereby authorized and approved.
8. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Eighteenth Report, the Affidavit of Paul Casey sworn on May 24, 2018 and the Affidavit of Grant B. Moffat sworn on May 23, 2018, and the exhibits attached thereto, are hereby authorized and approved.
9. **THIS COURT HEREBY** requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.
10. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty

- 3 -

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

W. Don-M.J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 29 2018

PER / PAR:

nl

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at TORONTO

ORDER

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

David T. Ullmann LSUC #423571
Tel: (416) 596-4289
Fax: (416) 594-2437

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

Lawyers for the Applicants

Tab 4

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

(the "Applicants")

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

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

PROPOSED METHOD OF HEARING:

This motion is to be heard orally.

THE MOTION IS FOR:

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

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

THE GROUNDS FOR THE MOTION ARE:

3. On January 12, 2012, the Applicants sought and were granted protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA"), as amended pursuant to the Order of the Honourable Mr. Justice Newbould (the "**Initial Order**");
4. Deloitte & Touche Inc., now known as Deloitte Restructuring Inc., was appointed in the Initial Order to act as monitor in these CCAA proceedings ("**Monitor**");
5. As a result of the sale of assets of the Applicants, Valle Foam changed its name to 3113736 Canada Ltd., and Domfoam changed its name to 4362063 Canada Ltd. The style of cause of these proceedings was changed by the Order of Justice Brown, dated June 15, 2012 to reflect the change of names;
6. The Order of the Honourable Mr. Justice Brown, dated June 15, 2012 established a process to identify pre- and post-filing claims against the Applicants and/or their officers and directors ("**Claims Process Order**")
7. The Meeting Order was approved by the Honourable Mr. Justice Penny on September 6, 2016, accepting Domfoam's Plan of Compromise and Arrangement ("**Plan**") for filing with the Court and authorizing Domfoam to seek approval of the Plan at the meeting of the creditors ("**Creditors' Meeting**");
8. The Creditors Meeting was held on October 19, 2016;

9. The Applicants achieved the required statutory “double majority” needed to approve the Plan. Proven Creditors holding 92% in number and 99% in value voted to approve the Resolution in favour of the Plan;
10. The Plan was sanctioned by way of Order from the Honourable Mr. Justice Haaney, dated January 24, 2017;
11. The conditions precedent to Plan implementation have been satisfied or waived, and the Plan has been implemented;
12. Each of the Applicants are claimants in a U.S. class action proceeding relating to price fixing for a product known as “Polyether Polyol” (the “**US Urethane Proceeding**”). A settlement was entered into with one of the defendants in the US Urethane Proceeding, in which the defendant agreed to pay \$834 million USD for distribution to the class members, including the Applicants (“**Polyols Settlement**”);
13. On or about March 21, 2018, an initial distribution representing 85% of the total recovery from the Polyols Settlement was made to the class members, including the Applicants. A second and final tranche of money representing up to 15% is payable to the Applicants from the Polyols Settlement;
14. The Applicants may also be class members in a certified class action in Ontario relating to the price fixing of polyether polyols products purchased in Canada (“**Canadian Urethane Proceeding**”). Settlement funds are being held in trust for the benefit of the class members in the Canadian Urethane Proceeding, and a claims process will be initiated to determine distribution to the class;

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

Extension of Stay Period

16. The Initial Order granted a Stay Period until February 10, 2012;
17. The Stay Period granted under the Initial Order was subsequently extended for all of the Applicants from time to time by orders of this Honourable Court;
18. Most recently, the Stay Period was extended to May 31, 2018, by the Order of the Honourable Mr. Justice Myers, dated November 24, 2017;
19. The Applicants have been acting and continue to act in good faith and with due diligence in these CCAA proceedings;
20. It is just and convenient and in the interests of the Applicants and their stakeholders that the requested Order be granted and the Stay Period extended;
21. Although the Plan has been approved, the continuation of the stay of proceedings in the Domfoam estate is required to ensure the orderly collection and distribution of the remaining assets and settlement funds from the various class actions;
22. The proposed extension of the Stay Period is supported by the Monitor and there is no known opposition;

Approval of Monitor's fees, conduct and report

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

24. the provisions of the CCAA and the inherent and equitable jurisdiction of this Honourable Court;
25. Rule 1.04, 1.05, 2.03, 3.02, 16 and 37 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended, and section 106 of the Ontario *Courts of Justice Act*, RSO 1990, c C 43, as amended; and
26. Such further and other grounds as counsel may advise.

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

27. The Affidavit of Tony Vallecoccia, sworn May 22, 2018;
28. The Eighteenth Report of the Monitor, to be filed; and
29. Such further and other material as counsel may advise and this Court may permit.

May 22, 2018

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

David T. Ullmann LSUC #423571
Tel: (416) 596-4289
Fax: (416) 594-2437

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

Lawyers for the Applicants

TO: SERVICE LIST

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

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

(the "Applicants")

ORDER

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

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

SERVICE

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

DEFINITIONS

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

STAY EXTENSION

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

MONITOR’S REPORT, ACTIONS AND FEES

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

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

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

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

<p>ONTARIO SUPERIOR COURT OF JUSTICE</p> <p>COMMERCIAL LIST</p> <p>Proceeding commenced at TORONTO</p>	
<p>ORDER</p>	
<p>BLANEY McMURTRY LLP Barristers and Solicitors Suite 1500 - 2 Queen Street East Toronto, ON M5C 3G5</p> <p>David T. Ullmann LSUC #423571 Tel: (416) 596-4289 Fax: (416) 594-2437</p> <p>Alexandra Teodorescu LSUC #63899D Tel: (416) 596-4279 Fax: (416) 593-5437</p> <p>Lawyers for the Applicants</p>	

Tab 5

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

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

(the "Applicants")

AFFIDAVIT OF JACQUES VINCENT

(Sworn September 13, 2018)

I, JACQUES VINCENT, of the City of Westmount, in the Province of Quebec,
Lawyer, MAKE OATH AND SAY AS FOLLOWS:

1. I am the lawyer who represented 8032858 Canada Inc. (now known as Domfoam Inc.) ("Domfoam"), the purchaser of the assets of the Applicant Domfoam International Inc. (now known as 4362063 Canada Limited) ("4362063").
2. Domfoam purchased "all assets, undertakings and properties of the Vendor of every nature and kind whatsoever,..." except for specific Excluded Assets defined in the Asset Purchase Agreement which was approved by this Honourable Court on March 16, 2012.

3. Since the benefit of the class-action legal proceedings issued in the United States against The Dow Chemical Company ("Dow") was not one of the Excluded Assets, therefore the benefit of the proceeds from such legal proceedings (the "Dow Action") was purchased by Domfoam pursuant to the Vesting Order dated March 16, 2012.

4. The Dow Action has also been referred to from time to time as the Urethane Antitrust Litigation.

5. The Dow Action has recently generated gross proceeds of approximately (U.S.) \$3.74 million which has been paid to 4362063.

6. Out of these proceeds, 4362063 paid an American agent, LEX Group LLC, its fee of 25% of the gross proceeds.

7. 4362063 announced that it intends to distribute to its creditors the remaining amount from such proceeds of approximately CAD\$4.8 million.

8. By an order dated May 29, 2018, the Honourable Mr. Justice Wilton-Siegel of this court authorized the distribution of the Dow Action proceeds to creditors of 4362063. He did so

(a) on a motion service which was not effected on my firm, nor my client;

(b) in reliance upon, *inter alia*, evidence of the President of the Applicant who swore that the Dow Action proceeds were "specifically excluded from the assets purchased by [Domfoam] from 4362063; and

- (c) in circumstances where the Applicants' Motion Record sought "an Order substantially in the form contained at Tab 3..." which Order did not seek a distribution of the Dow Action proceeds.

Background

9. Domfoam is a wholly owned subsidiary of S.P. Holdings Canada Inc. (the "Landlord").
10. The Landlord and a related company were the landlords of the Applicant 4362063 which had leased two very substantial plants comprising approximately 336,800 square feet from which it operated in the City of Montreal.
11. During the fall of 2011, my services were retained by 4037057 Canada Inc. ("4037057"), a related company to the Landlord, to prepare and present an asset purchase agreement to 4362063.
12. On December 22, 2011, an asset purchase agreement was presented by 4037057 to 4362063 at such date (the "APA #1") for acceptance by December 29, 2011. Attached hereto and marked as **Exhibit "A"** is a true copy of the APA #1.
13. The discussions on such APA #1 ended on January 9, 2012 since no agreement had been reached between the parties.

14. From my review of the material that was assembled and served at the outset of this CCAA proceeding, I learned that the Applicants pled guilty to offences under the *Competition Act* arising from collusion with other manufacturers of foam and related products within Canada to lessen competition in the sale and supply of such products and by conspiring with other manufacturers to fix or control the price for these products.

15. The Competition Tribunal imposed fines upon the Applicants totalling in excess of \$12,000,000.

16. As a result of, *inter alia*, those substantial fines, they became insolvent and sought protection under the CCAA.

17. By an order of the Honourable Justice Newbould dated January 12, 2012, an initial stay order was granted.

18. Further to the Initial Order being rendered, discussions were reinstated between 4037057 and 4362063 to purchase the assets of 4362063, this time within the CCAA proceedings.

19. A second Asset Purchase Agreement dated February 22, 2012 (the "APA #2") was presented that day to Mrs. Catherine Hristow of Deloitte & Touche Inc, acting as Monitor to 4362063. Attached hereto and marked as **Exhibit "B"** is a true copy of APA #2.

20. Negotiations were held between 4362063 and 4037057 during the following weeks.

21. On or about March 8, 2012 an asset purchase agreement (the "Final APA") was entered into by 4037057 with the Applicant 4362063 pursuant to which the purchaser purchased "All assets, undertakings and properties of [4362063] of every nature and kind whatsoever ..." with the exception of certain Excluded Assets which are defined in Schedule 2.2 of the Final APA. Attached hereto and marked as Exhibit "C" is a true copy of the Final APA.

22. To be clear, my client's instructions throughout the negotiations were to purchase all of the assets of 4362063 with the exception only of the assets specifically excluded in Schedule 2.2 of the Final APA and defined therein as Excluded Assets.

23. The definition of "Excluded Assets" (Schedule 2.2 of the Final APA) was the same as in Schedule 2.2 to the APA #2 and as in Schedule 2.2 to the APA #1.

24. The purchase price was approximately \$3.7 million.

25. The Final APA contained the following provisions:

7.9 Entire Agreement

This Agreement and the attached Schedules constitute the entire agreement between the parties with respect to the subject matter and supersede all prior negotiations and understandings. This Agreement may not be amended or modified in any respect except by written instrument executed by the parties.

[...]

7.11 Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Province of Quebec and the laws of Canada applicable therein and each of the parties irrevocably attorns to the non-exclusive jurisdiction of the courts of the Province of Quebec. Notwithstanding the foregoing, the parties acknowledge that the Approval and Vesting Order will be sought before the Ontario Superior Court in Toronto and that any disputes related thereto as it relates to court approval or the

current *Companies' Creditors Arrangement Act* proceedings of the Vendor shall be determined by the said Ontario Court. The parties acknowledge that any disputes related to the interpretation of this Agreement (including but not limited to its interpretation or its execution) shall be sought before the Quebec Superior Court in Montreal.

26. The Final APA was later assigned by 4037057 to Domfoam, a related company.

27. The Final APA was approved pursuant to a Sale Approval and Vesting Order by the Honourable Mr. Justice Brown of this Court dated March 16, 2012. Attached hereto and marked as **Exhibit "D"** is a true copy of the Sale Approval and Vesting Order.

U.S. Antitrust Litigation

28. There were numerous class action lawsuits that had been commenced against the Applicants in Canada as a result of the conspiracy to which the Applicants pled guilty, hence the insolvency and the CCAA proceedings that followed.

29. About the same time, Urethane Antitrust lawsuits were instituted in the United States in which the Applicants were claimants concerning a price fixing claim for a product known as polyether polyol. Unbeknownst to myself and to Domfoam at the time of the negotiation of the above mentioned sale, one of these lawsuits was the Dow Action.

30. Prior to the execution of the APA #1, a settlement was reached in one of the Urethane Antitrust lawsuits. This settlement involved, inter alia, 4362063 as one of the claimants and BASF Corporation ("BASF") as one of the defendants. Under this settlement

agreement, it was agreed that BASF would make payments (the "BASF Receivables") to, *inter alia*, 4362063 as a claimant.

31. Although my client engaged in some negotiations with respect to the possible purchase of the BASF Receivables from 4362063 (see Section 2.9(C) of the APA #1) which had been brought to its attention, 4362063 decided ultimately not to sell the BASF Receivables because, according to 4362063's lawyers, 4362063 would use the expected proceeds to negotiate a settlement out of court of the Canadian class actions instituted against 4362063. Accordingly, Section 2.9(C) of the APA #2 referencing the BASF Receivables was then marked "*Withdrawn*", as was Section 2.9(C) of the Final APA.

32. The Urethane Antitrust lawsuit against BASF was the only lawsuit from the Urethane Antitrust lawsuits that has been discussed prior to the execution of the APA #1 and, as mentioned above, was specifically "*withdrawn*" from the APA #2 and the Final APA.

33. The Dow Action was never discussed.

34. The Dow Action was not, and has never been, an "Excluded Asset", it being understood that the drafting of the APA was purposely made broad to reach and encompass all disclosed and undisclosed assets of any nature.

35. At the end of May 2018, I was advised by Terry Pomerantz ("Pomerantz"), President of Domfoam, that he was informed by John Howard, an employee of Domfoam who heard through the industry's grapevine that a) a lawsuit involving 4362063 as one of the claimants against Dow had been instituted some time prior to CCAA proceedings, b) a

judgment had been rendered against Dow in the United States which was subsequently settled out of Court , and c) that a payment was to be made by Dow to the class action claimants, which may include 4362063.

36. I received instructions to look into these facts immediately.

37. After communication between my firm and Don Perelman, a lawyer at the law firm of Fine Kaplan and Black R.P.C., in Philadelphia, Pennsylvania, who I understood were counsel to the plaintiffs in the US class action proceedings, my firm obtained verbal confirmation from Mr. Perelman that a payment had been made to 4362063 in March 2018 for an amount of approximately US\$3,000,000.

38. Consequently, I wrote a letter to David Ullmann, counsel to the Applicants, on June 22, 2018 demanding payment of the monies generated as a result of the Dow Action since such monies were part of the purchased assets. Attached hereto and marked as **Exhibit "E"** is a true copy of my letter of June 22, 2018 to David Ullmann.

39. On the same day, I sent to the law firm of Fine Kaplan and Black R.P.C., in Philadelphia, Pennsylvania, who I understood were counsel to the plaintiffs in the US class action proceeding, an assignment of claims putting that firm on notice of Domfoam's claim. Attached hereto and marked as **Exhibit "F"** is the assignment of claims to Fine Kaplan and Black R.P.C. dated June 22, 2018. Copies of such assignment of claims were also subsequently sent to Mrs. Stephanie Amin-Giwner and Mrs. Michelle Smith, from GCG who I understand are acting as administrators of the Urethane Antitrust Litigation.

40. After putting Mr. Ullmann on notice, I searched online and read reports in this matter that had been filed by the Monitor Deloitte & Touche Inc. (now known as Deloitte Restructuring Inc.).

41. In reviewing such Monitor's reports, I noted that in the Seventh Report, dated July 12, 2013, at paragraph 34, the Monitor refers to an Affidavit dated July 11, 2013 of Tony Vallecoccia, the President of the Applicants, who swore that the [4362063] US Urethane Claim was "*specifically excluded from the [4362063] assets purchased by [Domfoam]*". That is not true.

42. The Seventh Report referred to paragraph 44 of Tony Vallecoccia's affidavit in which he testified as follows:

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. [...]

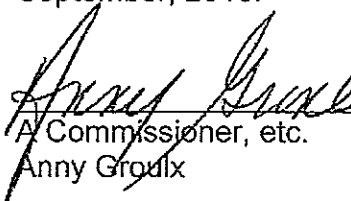
43. I also noted that in the Seventh Report, at paragraph 34, the Monitor says that insofar as it is aware, Domfoam has not asserted any claim to the Dow Action. That report relies on an affidavit of Mr. Vallecoccia, but the Monitor did not comment on the accuracy of the allegation made to the effect that my client did not purchase the cause of action against Dow and therefore would not be entitled to receive the proceeds from the Dow Action.

44. Attached hereto and marked as **Exhibit "G"** is a copy of a cheque dated March 21, 2018 payable to the Applicant Domfoam International Inc. [now 4362063 Canada Limited] in the amount of U.S. \$3,741,639.62 representing one instalment of the proceeds from the Dow Action.

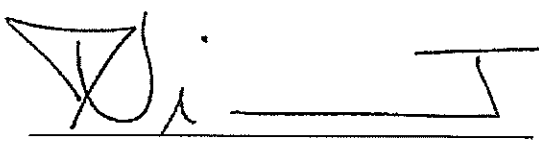
45. That cheque and the proceeds of the Dow Action are the property of my client, Domfoam, under the final APA (**Exhibit "C"**).

46. Once I obtained a copy of the Motion Record that was returned before Justice Wilton-Siegel on May 29, 2018, I noted that the Notice of Motion seeks "an Order substantially in the form contained at Tab 3 ..." which Order did not seek a distribution of the Dow Action proceeds. Attached hereto as **Exhibit "H"** is the draft Order.

SWORN BEFORE ME at the)
City of Westmount, in the Province)
of Quebec, this 13th day of)
September, 2018.)


A Commissioner, etc.
Anny Groulx





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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JACQUES VINCENT
(Sworn September 13, 2018)

FRED TAYAR & ASSOCIATES
Professional Corporation
Barristers and Solicitors
65 Queen Street W, Suite 1200
Toronto, ON M5H 2M5

Fred Tayar (23909N)
Tel.: (416) 363-1800
Fax: (416) 363-3356

Lawyers for Domfoam Inc.

223
016

Tab 6

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

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.

AFFIDAVIT OF JACQUES VINCENT
(Sworn November 12, 2018)

I, JACQUES VINCENT, of the City of Westmount, in the Province of Quebec,
Lawyer, MAKE OATH AND SAY AS FOLLOWS:

1. I make this affidavit in response to the affidavit of Tony Vallecoccia sworn on October 16, 2018.
2. In his affidavit, Tony Vallecoccia ("**Vallecoccia**") references contents of certain affidavits that he swore in this CCAA proceeding, and which he says put forward his allegation that the causes of action and the proceeds that have been recovered from the US Class Action were not sold to or acquired by my client Domfoam Inc. ("**Domfoam**") (formerly known as *8032858 Canada Inc.*).

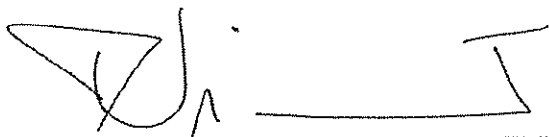
3. My response is the following:

- a. firstly, it is clear from the agreement of purchase and sale that all of the assets of 4362063 Canada Limited ("4362063") were purchased by Domfoam, with the exception of certain named Excluded Assets defined in the Asset Purchase Agreement approved by this court (already attached to my sworn affidavit dated September 13, 2018 as Exhibit "C");
- b. secondly, Vallecoccia deposing that the US Class Action or proceeds thereof were not sold to Domfoam, does not divest Domfoam of those assets which had vested in Domfoam by this court's Approval and Vesting Order dated March 16, 2012;
- c. thirdly, I was on the Service List in this CCAA proceeding until I was removed therefrom in 2015. When I was served with material electronically after completion of the sale to Domfoam, I would scan the relief sought in the notices of motion to ascertain whether any relief was sought against my client. Since no relief was sought, there was no need to read further and I did not do so.

SWORN before me at the City
of Westmount, in the Province of
Quebec, this 12th day of November 2018


A Commissioner, etc.





JACQUES VINCENT

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
COMMERCIAL LIST**

Proceeding Commenced at Toronto

**AFFIDAVIT OF JACQUES VINCENT
(Sworn November 12, 2018)**

**FRED TAYAR & ASSOCIATES
Professional Corporation
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5**

**FRED TAYAR – LSO No. 23909N
T: 416-363-1800
F: 416-363-3356**

Lawyers for Domfoam

Re: 18-2985

Tab 7

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**")

AFFIDAVIT OF TONY VALLECOCCIA
(Sworn October 16, 2018)

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

1. I am the President and Chief Executive Officer of 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc., and of 4362063 Canada Ltd., formerly known as Domfoam International Inc. ("**436**"), and a director of Valle Foam, Domfoam and A-Z Sponge & Foam Products Ltd. (collectively, the "**Applicants**"), and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.
2. To the extent that the matters deposed to in this affidavit are based on my review of documents or information and belief, I have stated the source of my information and belief and do verily believe the information to be true.
3. I swear this affidavit in response to a motion brought by Domfoam Inc., the entity that purchased 436 ("**Domfoam**" or the "**Purchaser**"), for an Order, *inter alia*, setting aside the Order of Justice Wilton-Siegel, dated May 29, 2018, and directing the Applicants to pay the

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

APA with Domfoam

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

5. The APAs refer to something called the “BASF Receivables.” I am reminded by counsel for the Applicants, David Ullmann, who was counsel at the time and continues to be, that it was intended for the “BASF Receivables” to refer and encompass all receivables payable to 436 from the US Class Action (as defined below).

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

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

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

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

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

US Urethane Antitrust Litigation

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

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

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

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

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

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

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

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

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

Notice Provided to Domfoam

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

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

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

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

Affidavit of Tony Vallecoccia, Date Sworn	Sworn Evidence	Exhibit No.
June 12, 2012	<p>“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]</p>	G
February 22, 2013	<p>“...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.”</p> <p style="text-align: center;">...</p> <p>“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...”</p>	H
July 11, 2013	<p>“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</p>	I

	<p>judgment, or any related settlements.</p> <p><u>The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u></p> <p>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 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.</u></p> <p><u>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.</u>" [emphasis added]</p>	
December 12, 2013	<p><u>"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u></p> <p>...</p> <p>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]</p>	J
April 22, 2014	<p><u>"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates."</u> [emphasis added]</p>	K
October 22, 2014	<p><u>"The right to receive the amounts due with respect to the Polyol claims remains an asset of the Applicants' estates.</u></p> <p>...</p> <p>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.</p> <p>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."</p>	L

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

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

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

Claims Bar and Plan of Arrangement

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

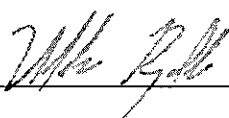
did not submit a claim in accordance with the Claims Solicitation Order, or at any time after the claims bar date.

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

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

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

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

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


(A commissioner for taking affidavits))
)



TONY VALLECOCCIA

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

Tab 8

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

2
3 ONTARIO

4 SUPERIOR COURT OF JUSTICE

5 COMMERCIAL LIST

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

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

11 CROSS-EXAMINATION OF TONY VALLECOCCIA
12 on his Affidavit sworn October 16, 2018
13 held at the offices of ASAP Reporting Services Inc.,
14 333 Bay Street, Suite 900, Toronto, Ontario
15 on Friday, November 16, 2018, at 2:11 p.m.

16 APPEARANCES:

17 Fred Tayar

18 Colby Linthwaite on behalf of Domfoam Inc.

19 Varoujan C. Arman

20 Alexandra Teodorescu on behalf of the 3113736
21 CANADA LTD. 4362063 CANADA LTD.,
22 and A-Z SPONGE &FOAM PRODUCTS LTD.

23 Robert Tanner on behalf of Mr. Vallecoccia

24 Adam Driedger on behalf of the Monitor

25 A.S.A.P. Reporting Services Inc.© 2018

940 - 100 Queen Street 900-333 Bay Street

Ottawa, Ontario K1P 1J9 Toronto, Ontario M5H 2R2

(613) 564-2727 (416) 861-8720

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

SWORN: TONY VALLECOCCIA	4
CROSS-EXAMINATION BY MR. TAYAR:	4

LIST OF UNDERTAKINGS

Undertakings (U/T) found at pages: 9

Toronto, Ontario

--- Upon commencing on Friday, November 16, 2018

at 2:11 p.m.

SWORN: TONY VALLECOCCIA

CROSS-EXAMINATION BY MR. TAYAR:

1 Q. Good afternoon, Mr.

2 Vallecoccia. Did you swear to tell the truth, the
3 whole truth today, sir?

4 A. I do.

5 2 Q. Do you understand the
6 consequences of giving such an oath?

7 A. Yes. Whatever they are,
8 it's wrong.

9 3 Q. You understand that you
10 must tell the truth or else there could be penal
11 sanctions that could be effected if you do not.
12 You understand that?

13 A. Yes.

14 4 Q. Where do you live, sir?
15 Where do you reside?

16 A. Milton, Ontario.

17 5 Q. Now, you were, I gather,
18 sir, or perhaps you still are the principal of a
19 company called 4362063 Canada Limited. Is that
20 correct?
21
22
23
24
25

1 A. I guess that's the new
2 name, yeah, the new number.

3 6 Q. And what's your position
4 in that company?

5 A. Director, I guess.

6 7 Q. Director you guess or are
7 you sure?

8 A. Director.

9 8 Q. Director. Were you the
10 CEO of the company?

11 A. The previous company.

12 9 Q. Well, the name -- it's
13 the same company, just the name has changed. The
14 previous company you're referring to is what,
15 Domfoam International Inc.? Is that what you're
16 thinking of?

17 A. Yes.

18 10 Q. Well, I'm going to call
19 it 436 so as not to confuse it with my client,
20 Domfoam Inc. Okay? You are the CEO. Were you a
21 shareholder of 436?

22 A. Yes.

23 11 Q. Did you control the
24 shares of that company?

25 A. We had 40 percent

1 principal shares of Valle Foam, anyway, and then
2 other people had the balance.

3 12 Q. You say of Valle Foam.
4 What about of Domfoam International or this number
5 4362063?

6 A. I would assume it's the
7 same thing at the time, till the company was sold,
8 I guess. I don't know.

9 13 Q. How many members of the
10 board were there before the CCAA filing?

11 MR. ARMAN: For which
12 corporation?

13 MR. TAYAR: The numbered
14 company.

15 THE WITNESS: The numbered
16 company's always been one.

17 MR. TAYAR:

18 14 Q. You're the sole director?

19 A. Yeah.

20 15 Q. Are you also a creditor
21 of that numbered company, sir?

22 A. They don't owe me any
23 money so I don't know about being a creditor.

24 16 Q. That's what I mean. They
25 don't owe you any money? You are shaking your

1 head. You have to verbalize your answer.

2 A. No. I don't think so.

3 17 Q. You don't think so. So
4 you didn't file a claim through the claims process
5 in the CCAA?

6 A. No.

7 18 Q. Did anyone related to you
8 file any claims?

9 A. I am not aware if they
10 did.

11 19 Q. So you don't have a
12 spouse who's a creditor or some corporation that
13 might be a creditor that you control?

14 A. I don't think anybody
15 from Montreal was a director so nobody put a claim
16 in.

17 20 Q. Well, you can put a claim
18 in without being a director. You might have had,
19 for example, shareholder advances to the company
20 that weren't repaid?

21 A. No. There was none of
22 that. We never done that.

23 21 Q. So you tell me you did
24 not file a claim in the CCAA, the creditor. Is
25 that your evidence?

1 A. We did not file a claim
2 that I'm aware of.

3 MR. ARMAN: He's asking you
4 personally though.

5 THE WITNESS: No.

6 MR. TAYAR: Counsel, maybe you
7 can help on this. Do you have a copy of the
8 claims register or anything recent?

9 MR. ARMAN: Do we have that
10 with us?

11 MS: TEODORESCU: No.

12 MR. ARMAN: I don't think so,
13 no.

14 MR. TAYAR: Is that something
15 that you can send to me, please?

16 MR. ARMAN: A copy of the
17 claims register?

18 MR. TAYAR: Yes.

19 MR. ARMAN: Would that be
20 public, on Deloitte's website?

21 MS. TEODORESCU: Yeah, that's
22 a question for the monitor, I think. I think we
23 can try to find it.

24 MR. TAYAR: Either find it --

25 MR. ARMAN: Or point you to

1 it.

2 MR. TAYAR: Or just tell me
3 where I can find it if it's online. Either one
4 will work for me.

5 U/T MR. ARMAN: Sure.

6 MR. TAYAR: Thanks very much.

7 22 Q. Now, sir, the numbered
8 company, as I understand it, pled guilty to
9 conspiracy under the Competition Act. Is that
10 correct?

11 A. Yeah.

12 23 Q. Were you charged
13 personally as well as a conspirator?

14 A. Yeah. It cost me
15 \$900,000.

16 24 Q. As I understand it from
17 the material I read, it was a conspiracy to fix
18 prices in your industry?

19 A. That's what they call it.

20 25 Q. When you say that you
21 pled guilty to that, was that on behalf of the
22 corporation or did you personally also plead
23 guilty to the conspiracy?

24 A. On behalf of the
25 corporation, I guess.

1 26 Q. What happened to the
2 charges against you personally?

3 A. Then I would assume that
4 the \$900,000 that I paid personally, yeah.

5 27 Q. Oh, I see, so you were
6 fined 900,000 personally?

7 A. Yeah, and other people
8 were involved, not directors, but John Howard, for
9 instance, was number one guy in Montreal and
10 number one guy working for me there.

11 28 Q. Yes?

12 A. He was charged about
13 \$100,000 only but that was an error. He wasn't a
14 director so shouldn't be charged.

15 29 Q. But personally, you got
16 this fine of 900,000 after you pled guilty
17 personally. Is that correct?

18 A. I had to pled guilty.

19 30 Q. Why do you say you had
20 to?

21 A. Well, we talked to the
22 competitors but keeping the prices up. We're all
23 bleeding so.

24 31 Q. And the company was fined
25 \$12 million. Is that correct?

1 A. I'm not sure of the
2 number.

3 MR. ARMAN: Counsel, I've
4 given a bit of latitude here but I'm just kind of
5 struggling to see the relevance for the issues on
6 this motion as to what the fines were and who pled
7 guilty and who was charged personally or not.

8 MR. TAYAR: I think it's
9 relevant. It's in the material.

10 MR. ARMAN: What is the
11 connection to the alleged entitlement of the Dow
12 proceeds?

13 MR. TAYAR: It's in the
14 affidavit of material. I'm entitled to examine on
15 the affidavits. Am I not?

16 MR. ARMAN: Can you show me in
17 the material where he's been or discusses what the
18 charges and fines against him were personally? I
19 haven't seen that. I could be mistaken but I
20 haven't seen that.

21 MR. TAYAR: I'll show you
22 where it is but I don't propose to take you to
23 answer each one of your questions every time I
24 pose a question. I'm sure you're not trying to
25 obstruct the examination so I'll give you the

1 answer this time around.

2 If you turn to my client's
3 affidavit starting with paragraphs 14, 15, 16.

4 MR. ARMAN: Right, the
5 applicant. It refers to the applicants pled
6 guilty, not Mr. Vallecoccia personally.

7 MR. TAYAR: I see, so you want
8 to make that distinction. Well, that's why I'm
9 asking the question whether he personally pled
10 guilty. Anyway, look, let me move on.

11 MR. ARMAN: Sure.

12 MR. TAYAR: I don't want to
13 get into a debate with you. We're here under
14 short time constraints. This was a date that was
15 a little late given that the motion is returnable
16 on November 29th and we couldn't start before two
17 o'clock and I have to get out of here before four
18 so bear with me, please.

19 32 Q. I understand we don't
20 have the claims registry here unfortunately but is
21 the largest creditor in the CCAA the Competition
22 Tribunal?

23 A. I don't know.

24 33 Q. I want to take you back,
25 sir, to the summer of 2011, and as I understand

1 it, you retained Deloitte as an advisor for the
2 company. Is that correct?

3 A. Yeah.

4 34 Q. Later on I guess the
5 following year, they became the monitor under the
6 CCAA application?

7 A. Correct.

8 35 Q. But between June of 2011
9 and the date of the CCAA order, you worked closely
10 with Deloitte. Correct?

11 A. Well, we were talking to
12 them, yeah.

13 36 Q. They understood your
14 business well?

15 A. They had to be aware of
16 it. If they are good at what they are doing, they
17 had to understand it.

18 37 Q. Did they understand it?

19 MR. ARMAN: He can't testify
20 as to what some other company understood. He gave
21 you his position.

22 MR. TAYAR: Why can't he?

23 MR. ARMAN: Because he's not
24 them.

25 MR. TAYAR: He's not them but

1 he's dealing with them.

2 MR. ARMAN: Right. Do you
3 want his opinion as to what he thinks they
4 understood?

5 MR. TAYAR: I want his opinion
6 as to what they understood.

7 38 Q. Did they understand your
8 business, sir, or not?

9 A. I'm trying to think of
10 the lady's name that come in from Deloitte and
11 spent time with us but I'm not -- I can't think of
12 her name.

13 MR. ARMAN: His question is
14 what was your opinion as to how well Deloitte
15 understood Domfoam's business at the time. Do you
16 have a view on that that you can offer him?

17 THE WITNESS: I wouldn't hire
18 'em.

19 MR. TAYAR:

20 39 Q. Pardon me? You wouldn't
21 hire them?

22 A. No.

23 40 Q. But you did hire them.

24 A. That wasn't my choice.

25 41 Q. Whose choice was it?

1 A. To be honest with you, I
2 really don't know. That I made the choice, then
3 we were told to get her because we were having
4 problems. I think they come in because we were
5 trying to go -- not bankruptcy. What's the other
6 term?

7 42 Q. I'm showing you, Mr.
8 Vallecoccia, an affidavit that you swore on
9 January 25, 2012 in this matter. Just take a
10 moment, please, look at that and tell me if indeed
11 that bears your signature and whether you swore
12 the contents of that affidavit to be true?

13 MR. ARMAN: I'm showing the
14 witness the end of the affidavit with the
15 signature lines.

16 Do you recognize your
17 signature there, Tony?

18 THE WITNESS: Oh yeah.

19 MR. TAYAR:

20 43 Q. Did you swear that
21 affidavit to be true, sir?

22 A. Yes.

23 44 Q. And was it true when you
24 swore it?

25 A. At the time, yes.

1 45 Q. It was true at the time.

2 Turn to paragraph 121 on page 47 of that
3 affidavit, please?

4 MR. ARMAN: Sorry, which page?
5 41?

6 MR. TAYAR:

7 46 Q. Page 47, paragraph 121.
8 You're saying in that paragraph that in the course
9 of its mandate, Deloitte had become intimately
10 familiar with your business and --

11 A. They were there every
12 day.

13 47 Q. That was true at the time
14 you swore it, and I gather it remains true.
15 Correct?

16 A. Yeah.

17 48 Q. So you agree with me that
18 they were intimately familiar with the business
19 affairs of the numbered company. Correct?

20 A. They were familiar, but
21 did they understand the business? I don't know
22 that.

23 49 Q. Well, they're more than
24 familiar. They're intimately familiar is what you
25 swore to. Correct?

1 A. Right. They should have
2 been, yeah.

3 50 Q. They should have been.
4 Were they or they should have been? Which is it?

5 A. I would say they were.

6 51 Q. They were. And you
7 repose trust in Deloitte as your advisors?
8 Talking about back in 2011, sir?

9 A. Yeah. I can trust them,
10 but the company was finished by then anyway.

11 52 Q. You trusted them. You
12 relied upon them to give you advice during the
13 relevant period of the insolvency?

14 A. Yes.

15 53 Q. And they prepared or they
16 did a study of the company. Is that fair?

17 A. Supposedly done, yeah.

18 54 Q. Supposedly. Did you see
19 any reports that they did at any time?

20 A. I don't remember seeing
21 reports because I would have no choice whether
22 they were good or not. It was already out of my
23 hands.

24 55 Q. During the course of the
25 CCAA after the original order was made in 2012,

1 there were a series of reports that were filed
2 with the court by the monitor. Do you recall
3 that?

4 A. I don't remember seeing
5 reports sent to me. It was a routine thing to do
6 that. They wouldn't ask my permission to do that.
7 I wouldn't know they were doing it.

8 56 Q. I didn't ask you if they
9 asked your permission but I'm asking whether you
10 reviewed any of their reports?

11 A. No.

12 57 Q. Let's take a look,
13 please, right behind that document, the affidavit,
14 there is something called Exhibit B. If you look
15 at the top right-hand corner, there is a reference
16 to page 81. I think your counsel has it there for
17 you. Can you identify, sir, this document that's
18 headed Sale Process as being a document that was
19 prepared by your company with or without the
20 assistance of Deloitte to deal with the efforts
21 made to sell the business?

22 A. I can't remember one way
23 or the other.

24 58 Q. Well, who prepared this?
25 Was it your lawyers?

1 A. I don't know.

2 59 Q. Your lawyers at the time
3 were Minden Gross. Correct?

4 A. Yes.

5 60 Q. And that would be Mr.
6 Slattery and Mr. Ullman?

7 A. Ullman was involved
8 probably at the time, yeah, but I don't know when
9 Ullman came in in the group there.

10 61 Q. Fair enough, but Mr.
11 Slattery was involved, acting for you. Yes?

12 MR. ARMAN: Do you have the
13 first name? Maybe it will jog his memory.

14 MR. TAYAR:

15 62 Q. Ray Slattery. Raymond
16 Slattery.

17 A. No. Then it's gotta be
18 Ullman.

19 63 Q. Must be Ullman, okay.

20 A. I don't know.

21 64 Q. Can you tell me from this
22 affidavit of yours who prepared this sale process
23 document?

24 MR. ARMAN: He's said he
25 didn't know. Is there a specific passage in the

1 affidavit that --

2 MR. TAYAR: Is there a
3 specific passage? Well, there's a passage that
4 addresses this Exhibit B and you'll find it at
5 page 17.

6 MR. ARMAN: Okay. Let's go to
7 page 17.

8 MR. TAYAR: Starting at
9 paragraph 13.

10 MR. ARMAN: Sorry. Page 17
11 you said?

12 MR. TAYAR: Page 17, yeah.
13 The first sentence at paragraph 14 attaches the
14 proposed --

15 MR. ARMAN: Sorry. Page 17,
16 I've got -- paragraph are in the 60s.

17 MR. TAYAR: Page 17 at the top
18 right-hand corner of the record.

19 MR. ARMAN: Sorry. All right.
20 There we go.

21 MR. TAYAR: Perfect.
22 Paragraph 14 says: "The proposed marketing process
23 will be set out in Exhibit B to this affidavit.
24 This process has been designed in consultation
25 with the monitor." Do you see that?

1 MR. ARMAN: That's what it
2 says.

3 MR. TAYAR:

4 65 Q. That's what it says. And
5 you swore this to be true at the time. Correct?

6 A. Definitely.

7 66 Q. All right. Do you agree
8 with me, sir, that this exhibit that you've
9 attached to your affidavit is the sales process
10 that you undertook and prepared in conjunction
11 with Deloitte?

12 A. I didn't prepare
13 anything. I don't know who else at the company
14 will do that.

15 67 Q. Well, I'm not saying you
16 did the drafting yourself, but I'm saying your
17 lawyers or the company's lawyers together with
18 Deloitte prepared this sale process document.
19 Correct?

20 A. I don't know.

21 68 Q. All right. Let's go back
22 to the sale process document, Exhibit B, please.
23 It's page 81 at the top.

24 MR. ARMAN: We've got it.

25 MR. TAYAR: Perfect.

1 69 Q. Could you read paragraph
2 1 to yourself, please, Mr. Vallecoccia.

3 A. "Immediately following
4 court --"

5 70 Q. Well, yes. Start at the
6 very top, the recital at the top and then
7 paragraph 1. You don't have to read out loud,
8 just to yourself.

9 A. I don't know. I got a
10 big memory but I can't put my hand on it.

11 MR. ARMAN: He'll ask you some
12 questions about it. He just wants you to read it
13 first.

14 MR. TAYAR:

15 71 Q. The preamble --

16 A. The whole page?

17 72 Q. Page 81.

18 A. Okay.

19 MR. ARMAN: The whole page or

20 --

21 MR. TAYAR:

22 73 Q. Just, let's start with
23 the preamble, the first four lines on the top. If
24 you want to read that, please, to yourself.

25 A. I read that.

1 MR. ARMAN: He's read that.

2 MR. TAYAR:

3 74 Q. Perfect. Do you remember
4 preparing the language in that preamble before
5 paragraph one?

6 A. Unless somebody in our
7 office was delegated to do that. I didn't do it.

8 75 Q. Okay.

9 A. Not that I remember of.

10 76 Q. Do you recall your
11 lawyers preparing that paragraph?

12 A. I don't know.

13 77 Q. Do you recall that you
14 wanted to invite offers to purchase all the
15 assets, property and undertaking of the three
16 companies mentioned there? Sorry, the two
17 companies mentioned there, rather, not three.

18 MR. ARMAN: Three. Yeah. You
19 had it right.

20 MR. TAYAR: Thank you. Valle
21 Foam, Domfoam International Inc., which is our
22 numbered company, and A-Z.

23 78 Q. Do you recall that?

24 A. I don't know. I just
25 can't say yes, it's happened like this.

1 79 Q. So let me try to help
2 your memory a bit. We do know that there were
3 sale agreements that were entered into to sell the
4 assets of these companies. Correct? At some
5 stage. Yes?

6 A. I just wonder if we had
7 people in Montreal, our division and all that,
8 helping us do most of that. I just can't put my
9 -- I can't remember that.

10 80 Q. Who was the person who
11 was giving instructions to Minden Gross, to the
12 lawyers on behalf of Domfoam International Inc.?

13 A. As far as I know, it
14 would be me.

15 81 Q. Right. That's what I
16 would have thought.

17 A. But I just can't put my
18 finger on it that that's what I had done.

19 82 Q. You mean you just don't
20 recall this document?

21 A. I don't recall.

22 83 Q. But do you recall
23 inviting offers to purchase the assets of these
24 companies?

25 A. By that time, Minden

1 Gross was already -- Minden Gross, is that the
2 accountants or they are the lawyers?

3 84 Q. The lawyers.

4 A. Who were the accountant,
5 the accounting part that come in to run the
6 company? The receiver.

7 85 Q. You don't mean Deloitte?

8 A. Yeah, Deloitte.

9 86 Q. Deloitte, yeah.

10 A. That's who prepared most
11 of the stuff.

12 87 Q. So do you think Deloitte
13 prepared the sale process documents?

14 A. It was up to them to sell
15 the company. They were in charge and all that,
16 and I wouldn't be aware everyday exactly what they
17 are doing.

18 88 Q. When they prepared the
19 sale process document, did they not send it to you
20 to prove it?

21 A. They were in our office
22 every day of the week just about.

23 89 Q. Normally, monitors will
24 -- since this is your document, the company is not
25 in receivership. It's the monitor. You're in

1 CCAA.

2 A. CCAA, yeah.

3 90 Q. They may assist you in
4 preparing documents to sell the assets but your
5 company is the one selling the assets, so
6 presumably, they may have drafted something and
7 then shown it to you and you would provide your
8 comments or your approval. Do you recall any of
9 that?

10 A. I can't remember saying
11 yes or no, why did you do this or why did you do
12 that. I just can't remember.

13 91 Q. Do you have any basis
14 today to tell me that you did not instruct either
15 your lawyers or the monitor to prepare the sale
16 process document at page 81 of this affidavit?

17 A. I cannot say one way or
18 the other. I'm sure it was done but I can't put
19 my finger on it. Does this say what price or if
20 it's guaranteed or whatever? There's no
21 discussion of that.

22 92 Q. There's no price. It's
23 an invitation to put in offers to the public.

24 A. I don't remember that. I
25 don't say it's not. I just don't remember.

1 93 Q. All right. If you turn
2 the page a couple of times, you're going to see
3 something called conditions of sale.

4 MR. ARMAN: Page 84.

5 MR. TAYAR: Yes.

6 94 Q. Take a moment and tell me
7 whether you've seen this document, the conditions
8 of sale that were imposed upon prospective
9 purchasers.

10 A. I didn't know at the time
11 when Deloitte & Touche come in and all that, we
12 figure they're in charge now and it wasn't me in
13 charge anymore.

14 95 Q. One thing we do know, Mr.
15 Vallecoccia, was that you swore this affidavit
16 back in January 2012. You've attached --

17 A. That's a long time ago.

18 96 Q. It is a long time ago. I
19 understand that. You've attached conditions of
20 sale and a sale process document and I'm asking
21 you, sir, whether you can confirm that you
22 instructed the lawyers or Deloitte to prepare
23 these documents on behalf of the company.

24 A. I don't know. I guess I
25 did. I just don't remember.

1 97 Q. You have no basis today
2 for saying that anything in these documents is
3 just simply wrong or not in accordance with your
4 instructions?

5 A. I didn't say that.

6 98 Q. I know you didn't say
7 that. I'm asking you that. Is there anything in
8 these documents we are looking at, these two
9 documents, that were not in accordance with your
10 instructions?

11 A. I don't.

12 99 Q. Sorry?

13 A. I don't know what to tell
14 you.

15 100 Q. You don't know. All
16 right. Let's mark this as the first exhibit
17 today, this affidavit of Tony Vallecoccia sworn
18 January 25, 2012.

19 EXHIBIT NO. 1: Affidavit
20 of Tony Vallecoccia sworn
21 January 25, 2012.

22 MR. ARMAN: Do you want this
23 copy back?

24 MR. TAYAR: You can keep that.
25 It's an extra copy. Thank you.

1 MR. ARMAN: We made that
2 Exhibit A, right, or 1?

3 MR. TAYAR: Exhibit 1.

4 MR. ARMAN: Exhibit 1. Thank
5 you.

6 MR. TAYAR:

7 101 Q. Now, when you -- when I
8 say you, I mean the corporation, the numbered
9 company. When you've put its assets up for sale,
10 were there any assets that you can recall that
11 were not put up for sale, any of the assets of the
12 company?

13 A. I don't know what -- I
14 can't think of any assets that wouldn't be sold.
15 The company didn't own the real estate, so
16 equipment and receivables.

17 102 Q. Let's go through that
18 right now. Would you pull up my client's
19 affidavit, please, or the affidavit of Mr.
20 Vincent?

21 MR. ARMAN: Yes.

22 MR. TAYAR:

23 103 Q. If you open up that
24 motion record at tab 2, you'll find the affidavit
25 of Mr. Vincent sworn September 13, 2018.

1 At tab A starting at page 19
2 is an asset purchase agreement that has been
3 referred to in the material as APA number one.
4 This is an offer to purchase the assets of Domfoam
5 International Inc. dated December 22, 2011. This
6 is before the CCAA order. Correct? Do you
7 remember that, that they made an offer to you
8 before you went into CCAA?

9 A. I don't know whether
10 there's an offer. I don't remember that we had an
11 offer to sell the company before that.

12 104 Q. Why don't you open this
13 offer. Let's go to page 29 of the record.

14 You'll see right at the top of
15 the page, Mr. Vallecoccia, it says:

16 "For more clarity, the
17 purchase price has been
18 established on the
19 following method of
20 calculation as for the
21 purchase receivables and
22 the purchase inventories,
23 and the same method of
24 calculation shall be used
25 to establish the final

1 amount of the purchase
2 price as at the closing
3 date." (As read.)

4 Then you'll see if you skip
5 down a paragraph that it makes reference to the
6 fact -- sorry, on the next paragraph rather, it
7 says that the vendor's accounts receivable is
8 \$5.11 million. Do you see that, sir?

9 A. Yeah.

10 105 Q. And I take it that that
11 was a number that the company gave to the
12 prospective purchaser who made this offer? They
13 must have gotten that number from you, sir. You
14 or someone on behalf of Domfoam International
15 Inc.? Yes?

16 A. I don't know if it came
17 from our office or not or the accountant over
18 there, they prepare the stuff. We don't have
19 anybody in our office who would be able to prepare
20 all that.

21 106 Q. Do you recall some
22 offeror coming in and counting the receivables or
23 the inventory? Surely no offeror does that sort
24 of thing.

25 All I'm suggesting to you, if

1 they have a number that is specific to the dollar,
2 \$5,110,048, that is a number that would have been
3 given to them by your numbered company.

4 MR. ARMAN: I think he
5 answered. He said it could have been the
6 accountant. He doesn't say he denies that it was
7 the company but he said it could have been the
8 accountant too.

9 MR. TAYAR:

10 107 Q. When you say the
11 accountant, do you mean Deloitte?

12 A. Yeah.

13 108 Q. So it was either the
14 company or Deloitte?

15 A. Yeah.

16 109 Q. Okay. Fair enough.

17 A. They were there full
18 time, anyway.

19 110 Q. Exactly. I'm sorry. I
20 didn't hear the word "accountant" and that's why I
21 lost you.

22 Then it says, if you skip down
23 to purchased inventories, paragraph B, it says
24 that the total amount of all the vendor's
25 inventory, the purchase inventory is \$3,570,891.

1 Do you see that, sir?

2 A. Yeah.

3 111 Q. And I take it that's a
4 number that would have been given to the
5 prospective offeror, either by the company, your
6 company, or by the monitor, Deloitte.

7 A. Maybe the monitor because
8 that includes the Montreal reports. They got
9 access to all of that. They would have prepared
10 it.

11 112 Q. Right. Then the next
12 paragraph, BAF receivables. Do you see that, sir?
13 Paragraph C?

14 A. Yeah.

15 113 Q. It says there: "As of
16 December 16, 2011, the purchaser has been informed
17 that the vendor was entitled to payments from BASF
18 in lieu of a settlement out of court by BASF of
19 class actions in the amount of approximately
20 \$642,000." I take it, sir, that the prospective
21 offeror or purchaser was informed of that either
22 by your company or by the monitor? In other
23 words, by Deloitte?

24 A. I wasn't aware that BSF
25 at that time owed us money.

1 114 Q. You weren't aware that
2 they owed the money?

3 A. No.

4 115 Q. I see. Do you know now
5 with the benefit of hindsight that they in fact
6 had settled litigation and agreed to pay \$642,000?

7 A. I wasn't aware of that.
8 We know we pay the bills to BSF. Why they owe us
9 money? Did they charge us too much? I don't
10 know. We have no rebate program.

11 116 Q. This relates to a
12 settlement out of court, is what it says, by BASF.
13 BASF was involved in a class action in the U.S.
14 They were sued. Do you know that?

15 A. I found out after I saw
16 this. I didn't know at the time.

17 117 Q. You found out after?

18 A. I read this report. I
19 wasn't aware of it.

20 118 Q. When did you learn about
21 it?

22 A. I don't know how far back
23 it is but when did we first present this? A year
24 ago?

25 119 Q. Well, you got this

1 affidavit in September, October of this year. Are
2 you saying you did not know about that until 2018?

3 A. No. I saw that but
4 nothing I can do about it.

5 MR. ARMAN: Do you remember
6 when, Tony? His question is when did you first
7 find out about it.

8 THE WITNESS: When I see this
9 report. I didn't ask any questions to anybody
10 because --

11 MR. TAYAR:

12 120 Q. Which year was that?
13 When did you see the report? Which year?

14 A. Last year, probably. I
15 don't remember, just whenever the report was
16 issued. It doesn't mean anything to me. I just
17 sign it.

18 121 Q. Last year, you mean 2017?

19 A. It could be. Could be
20 18. I really don't know.

21 122 Q. Could be 2018?

22 A. I don't know.

23 123 Q. This number, 642,000. I
24 understand that is the amount that BASF was to pay
25 to Domfoam International Inc. as a term of the

1 settlement of a class action in the U.S. Are you
2 aware of that?

3 A. What year was the class
4 action in the U.S.?

5 124 Q. Pardon me?

6 A. It wasn't when I was
7 still working there so I wouldn't be aware of it.

8 125 Q. Well, let me show you a
9 settlement agreement, sir. This is a document
10 called Settlement Agreement. It's entered into,
11 according to the first line, on the 21st day of
12 September 2011. It's between BASF Corporation and
13 Seegott, S-E-E-G-O-T-T, Holdings Inc., and two
14 other companies as plaintiffs. Have you seen this
15 document before today, sir?

16 A. I don't remember.

17 126 Q. Under the terms of this
18 document, if you look further down that page, it
19 says: "Whereas the plaintiffs are prosecuting the
20 above-captioned actions, the class actions, on
21 their own behalf and on behalf of the class
22 against BASF corporation, BASFSE and other
23 defendants." Do you see that, sir?

24 A. I don't remember any of
25 that.

1 127 Q. Do you remember that
2 there was a class action that Domfoam
3 International Inc. had the benefit of? Sir?

4 A. No. I just can't put my
5 finger on it.

6 128 Q. All right. Within that
7 document, sir, if you go to paragraph 26 where it
8 talks about a payment, and it says on the second
9 line: "BASF Corporation agrees to pay the
10 plaintiffs on behalf of the class members the
11 settlement amount of \$51 million." Do you see
12 that, sir, in paragraph 26?

13 A. I see the number 51
14 million.

15 129 Q. Yeah, and some of that
16 money was payable to Domfoam International Inc.
17 Yes?

18 A. I don't remember that at
19 all.

20 130 Q. Do you know if any money
21 was payable out of that 51 million to Domfoam
22 International Inc.? Sir?

23 A. I don't know.

24 131 Q. You don't know.

25 A. BASF wasn't a big

1 supplier to us so I really don't know.

2 132 Q. Understood. Let's mark,
3 please, as Exhibit 2 to this examination the
4 settlement agreement dated -- well, it's entered
5 into on September 21, 2011, Exhibit 2.

6 EXHIBIT NO. 2:
7 Settlement agreement
8 entered into on September
9 21, 2011.

10 MR. TAYAR:

11 133 Q. You still have in front
12 of you page 29 of the motion record, volume one.
13 Under the heading See BASF Receivables, the very
14 last paragraph there says:

15 "If the vendor does not
16 want to sell the BASF
17 receivables because it
18 would be used by the
19 vendor in the negotiation
20 of the settlement out of
21 court of the Canadian
22 class actions instituted
23 against the vendor, the
24 purchaser would then
25 agree to withdraw its

1 offer to purchase the
2 said BASF receivables."

3 (As read.)

4 Do you remember that you were
5 considering settling a lawsuit against Domfoam
6 International Inc., a class action lawsuit, and
7 you were thinking about using monies from the
8 settlement in the U.S. with BASF?

9 A. I don't think so, no.

10 134 Q. Sorry, you don't?

11 A. I don't remember. I
12 don't know.

13 135 Q. You don't remember. You
14 don't know. All right. Do you recall that there
15 was an obligation, a settlement of some kind
16 whereby \$200,000 was to be paid by your company to
17 settle class actions in Canada? Do you remember
18 that?

19 A. There was some class
20 action in Canada but I don't remember the details.

21 136 Q. You don't remember any
22 details?

23 A. No.

24 137 Q. Do you remember that you
25 used \$200,000 to settle that claim?

1 A. I remember doing
2 something like that, so if it's \$200,000, that's
3 what it's gotta be, I think, but for me to put a
4 thing and say yes, it's 200,000, I'm not sure
5 today.

6 138 Q. You don't know, but you
7 remember that there was some payment?

8 A. Yes.

9 139 Q. I want you to put before
10 you your affidavit, if you would please, Mr.
11 Vallecoccia, and take a moment to read paragraph
12 nine of your affidavit, if you would, sir.

13 A. I don't remember much. I
14 can't put my finger on the details.

15 140 Q. Right. Just wait for my
16 question. Does this refresh your memory, sir,
17 that there was a class action lawsuit against BASF
18 in the U.S.?

19 A. I guess it does. I don't
20 know.

21 141 Q. I don't want you to
22 guess. Do you remember anything about a lawsuit
23 against BASF in the United States?

24 A. No. I don't remember.

25 142 Q. Do you remember that

1 there was something called a polyol lawsuit,
2 P-O-L-Y-O-L, a class action suit in the U.S.?

3 A. I don't remember that.

4 143 Q. Can you tell me, sir,
5 whether any money was received by Domfoam
6 International Inc. from BASF through the auspices
7 of this lawsuit? In other words, that there was a
8 settlement and that money came into Domfoam
9 International Inc. from BASF? Do you know one way
10 or another?

11 A. If it came in after 2012,
12 I wouldn't know. I wasn't working there anymore.

13 144 Q. Well, let's say it may
14 have come in late 2011.

15 A. I don't remember.

16 145 Q. Do you know if any money
17 came in from BASF to Domfoam International Inc.?

18 A. I don't remember. They
19 should have given it to us according to that. I
20 don't remember.

21 146 Q. I take it then if you
22 don't remember if the money came in, you wouldn't
23 remember how much money would have come in.

24 A. No.

25 147 Q. Let me ask you, if I may,

1 to take a look at -- I'm going to show you a
2 report, the sixth report of the monitor, a segment
3 of the sixth report of the monitor, Deloitte, in
4 the CCAA proceeding.

5 MR. ARMAN: This just starts
6 from page 4.

7 MR. TAYAR: Right, because
8 we're not going to look at -- we don't need
9 anything until we get to page 39, the heading Sale
10 of Company's Assets. That's what's relevant to
11 this proceeding.

12 MR. ARMAN: Paragraph 39?

13 MR. TAYAR: Yes. There's a
14 heading there, Sale of Company's Assets.

15 MR. ARMAN: It's just we can't
16 confirm the document is -- I have no problem with
17 you examining on it.

18 MR. TAYAR: You can go back.
19 We got this off the internet so you can go back
20 and confirm that.

21 MR. ARMAN: That's fair.

22 MR. TAYAR: All right. And
23 indeed, we have a representative of Deloitte here.
24 I don't think there's going to be any issue, but
25 this is the monitor's report or part of it.

1 148 Q. This is an example of a
2 report that was done by Deloitte when they were
3 the monitor that they would have filed in court.
4 This is now the sixth report, and there's a
5 heading on this document called Sale of Company's
6 Assets. My question to you, sir, is do you recall
7 reviewing the sixth report of the monitor?

8 A. I know it was going on
9 but I didn't review the report.

10 149 Q. Did you read the report
11 ever?

12 A. I doubt it.

13 150 Q. Take a moment to read
14 paragraph 39 and tell me whether that is, to the
15 best of your knowledge, accurate.

16 A. I remember that the
17 assets were being sold.

18 151 Q. Yes.

19 A. Don't ask me how much
20 money was there and all that. That part I don't
21 remember.

22 152 Q. But is it fair to say
23 that the first sentence, you agree that it's
24 correct?

25 A. At the time, the first

1 sentence.

2 153 Q. The first sentence where
3 it says that: "All the company's assets have been
4 sold pursuant to separate transactions."

5 A. Right.

6 154 Q. Do you agree with that?

7 A. Yeah.

8 155 Q. All of the assets of
9 Domfoam International Inc. were sold. Correct?

10 A. Yes.

11 156 Q. All right. Let's mark as
12 the next exhibit this excerpt from the sixth
13 report, please, of the monitor.

14 EXHIBIT NO. 3: Excerpt
15 from the sixth report of
16 the monitor.

17 MR. ARMAN: Exhibit 3.

18 MR. TAYAR: Exhibit 3, please.

19 Thank you. And counsel, feel free if you want to
20 examine the original. I don't even mind if you
21 want to mark the entire report. It's just that
22 there's a lot of paper here and we're trying to
23 get to the meat and not the stuff that's
24 irrelevant.

25 MR. ARMAN: That's fine.

1 MR. TAYAR:

2 157 Q. I'm also showing you
3 something headed Voluntary Dismissal and
4 Settlement Agreement, Mr. Vallecoccia. This is
5 from the United States District Court for the
6 Northern District of Ohio, and it talks about the
7 fact that there is a lawsuit. In fact, on page 2
8 of this document at the very top, if you read it
9 to yourself, you will see that this is an
10 agreement that involves Tony Vallecoccia, John
11 Howard and some other individuals together with
12 Domfoam International Inc., Valle Foam, and A-Z
13 Sponge & Foam Products Ltd., so this was a
14 document that reflects upon the fact that there
15 was an agreement to settle some proceedings in the
16 United States that were brought against you and
17 the company. Do you remember that lawsuit in the
18 United States, in Ohio?

19 A. I don't have any details.
20 I knew something was going on like that.

21 158 Q. But do you remember there
22 was a lawsuit?

23 A. Yeah.

24 159 Q. If you look at paragraph
25 8, it says that: "Under no circumstances will the

1 --"

2 A. Paragraph 8, where is
3 that?

4 160 Q. Page 21. The effect of
5 paragraph 8 is to say that the individuals -- that
6 will be you personally, sir -- were not to be
7 required to pay any money towards this settlement
8 agreement. Do you remember that you settled
9 whereby some money was to be paid by the companies
10 but the claim against you personally was to be
11 dismissed without you paying anything in
12 consideration for the dismissal?

13 A. I remember that I was
14 being absolved of anything or paying any money to
15 anybody. That part I remember.

16 161 Q. Right. You didn't have
17 to pay anything personally.

18 A. That's right.

19 162 Q. Right, but the companies
20 had to pay something.

21 A. Right.

22 163 Q. Great. Let's mark as
23 Exhibit 4, please, this voluntary dismissal and
24 settlement agreement dated -- it's happily
25 undated. No, sorry, it's dated January 3, 2012.

1 EXHIBIT NO. 4: Voluntary
2 Dismissal and Settlement
3 agreement dated January
4 3, 2012.

5 MR. ARMAN: Exhibit 4.

6 MR. TAYAR: Exhibit 4. Thank
7 you so much.

8 MR. ARMAN: We can keep all
9 these. Right?

10 MR. TAYAR: Yes. Those are
11 copies for you.

12 MR. ARMAN: Thanks.

13 MR. TAYAR:

14 164 Q. I don't want to ask a
15 question that I've asked before so I'm going to
16 refrain from doing that but I just want to make
17 one thing clear. You don't have any recollection,
18 sir, about a lawsuit against Dow?

19 A. I don't recollect. Maybe
20 I wasn't involved with much the last one or two
21 years there but I just don't remember.

22 165 Q. That's fair enough. If I
23 were to suggest to you that there was a lawsuit, a
24 class action in the United States against Dow
25 Chemical, you don't recall one way or the another?

1 upheld on appeals."

2 171 Q. Yes.

3 A. "Be expected to be met to
4 the applicants. These receivables were sent to
5 the applicant's estates."

6 172 Q. That is what it says,
7 yes. Now, do you know what you just read is
8 correct?

9 A. I don't know.

10 173 Q. Take a moment to read the
11 next paragraph, 23, sir.

12 A. Okay.

13 174 Q. Can you tell me, sir,
14 whether Mr. Howard was aware of what assets were
15 purchased by the purchaser of the Domfoam
16 International Inc. assets?

17 A. Talking about assets or
18 are you talking about the chemicals?

19 175 Q. No, the assets, all the
20 assets of the company, not specific assets like
21 chemicals. Do you know whether Mr. Howard knew
22 about what was being purchased?

23 A. I don't know if Mr.
24 Howard was fully aware of it. I don't know.

25 176 Q. Do you know whether Mr.

1 Howard had any discussions with Mr. Tanner about
2 the plan of arrangement under the CCAA?

3 A. I don't know.

4 177 Q. Do you know whether Mr.
5 Howard knew anything about the distributions
6 received from Dow?

7 A. I didn't talk to Mr.
8 Howard since I left the company back in 2012.

9 178 Q. Can you take a look at
10 paragraph 24 in your affidavit. You talk about
11 the claims solicitation order and that the monitor
12 had published a notice of the claim's bar date in
13 The Globe and Mail newspaper and in La Presse.

14 A. That's in Montreal.

15 179 Q. In Montreal. That's
16 right. Did you ever see those notices in the
17 papers?

18 A. No.

19 180 Q. No. Did you file any
20 proofs of claim yourself?

21 A. Me personally? No.

22 181 Q. It says here: "I'm
23 advised by the monitor that Domfoam did not submit
24 a claim in accordance with the claim's
25 solicitation order." Who at the monitor advised

1 you of that?

2 A. I don't remember the name
3 of the monitor it was at the time.

4 182 Q. Well, when did the person
5 -- that's my next question. When did the person
6 advise you that there was no claim submitted by
7 Domfoam Inc., the new company, the purchaser. Do
8 you know,

9 A. <Nonaudible response>

10 183 Q. Do you know whether the
11 new purchaser had any claim in the CCAA process?

12 A. I think the purchaser
13 only bought the assets.

14 184 Q. Right. Okay.

15 A. But Valle Foam in
16 Montreal down in Domfoam, they didn't buy the
17 receivables.

18 185 Q. They didn't buy the
19 receivables?

20 A. Not on Valle Foam.

21 186 Q. Not on Valle Foam.

22 A. No.

23 187 Q. That's right.

24 A. In Valle Foam, they
25 didn't.

1 188 Q. But with respect to
2 Domfoam International Inc., they bought the
3 receivables?

4 A. I'm not aware of it. I
5 guess they did. I don't know.

6 189 Q. Would you happen to know
7 with respect to Valle Foam, the purchaser did not
8 buy the receivables?

9 A. No.

10 190 Q. You agree with me they
11 did not?

12 A. They didn't buy it
13 because when the new guy come in --

14 191 Q. And with the other two
15 companies, you don't know one way or another? You
16 have to verbalize your answer. Sorry.

17 A. No.

18 192 Q. You agree with me you
19 don't know?

20 A. No. I agree with you.

21 193 Q. All right.

22 A. They are still trying to
23 collect receivables from there.

24 194 Q. Are they really? They
25 didn't do a good purchase then. Did they?

1 All right. Exhibit F of your
2 affidavit, sir, is an affidavit. Let's open that
3 up, please. Do you remember this affidavit that
4 you swore on March 13, 2012?

5 A. Which one?

6 195 Q. Tab F starting at page 50
7 of your motion record, or respondent's record,
8 rather.

9 A. It's my signature.

10 196 Q. Do you remember swearing
11 this affidavit?

12 A. If I signed it, I had to,
13 yes.

14 197 Q. If you signed it, you
15 would have sworn that it was true. Correct? Yes?

16 A. Yes.

17 198 Q. Let's go to page 58 at
18 the top of the record, paragraph 37. You'll see
19 at the top of the page, this is about Domfoam.
20 You see that?

21 A. Yeah.

22 199 Q. In paragraph 37, you
23 swear in the affidavit: "The transaction is for
24 all of the assets of the company, the transactions
25 subject to working capital adjustment." Do you

1 remember swearing, sir, that the transaction
2 concerning Domfoam was for all the assets of the
3 company?

4 A. I don't remember, but I
5 signed this so I don't know what to tell you. I
6 just don't remember.

7 200 Q. You have no basis today
8 of saying that's incorrect?

9 A. No.

10 201 Q. All right. Take a look
11 at paragraph -- sorry, let's go to the next tab.
12 This is yet another affidavit of yours, June 12,
13 2012, sir. I gather this bears your signature at
14 the back of the affidavit?

15 A. Yes.

16 202 Q. You swore that to be true
17 at the time?

18 A. Yes.

19 203 Q. And you can confirm that
20 if you swore an affidavit at the time that it was
21 true at the time?

22 A. At the time.

23 204 Q. I take it you haven't
24 read this affidavit since then. Have you?

25 A. No.

1 205 Q. All right. Now, take a
2 look at paragraph 41 of that affidavit. It talks
3 about a litigation settlement. It says there is:
4 "Also a further substantial amount due from a
5 litigation settlement entered into by each of
6 Domfoam, Valle Foam, prior to the CCAA process in
7 connection with the class action with BASF." Do
8 you see that, sir?

9 A. Yes.

10 206 Q. Do you know when that
11 litigation settlement happened?

12 A. No.

13 207 Q. Do you remember whether
14 it indeed happened before the CCAA proceedings
15 were started by you?

16 A. I don't know. I don't
17 think it would be before that.

18 208 Q. Well, actually, it did
19 happen before that because that's this document we
20 marked as an exhibit earlier today. It's the
21 settlement agreement of September 21, 2011 which
22 is before the CCAA process. Do you have any
23 recollection of that, sir?

24 A. No.

25 209 Q. At the end of that

1 paragraph 41, you say: "This receivable was not
2 sold to Domfoam New Co and remains an asset of
3 Domfoam." Do you remember that?

4 A. No.

5 210 Q. Do you remember that the
6 money that was coming in from BASF was actually
7 not a receivable that was purchased by my client?

8 A. I don't remember.

9 211 Q. Let's go back to the
10 start of your affidavit at paragraph six for a
11 moment. You say there that in the APA No. 1,
12 Exhibit A to the Vincent affidavit, the purchase
13 price included a value for the BASF receivables as
14 defined in the APA. Now, what did you understand
15 that definition to be? Do you have any
16 understanding of what BASF receivables consisted
17 of?

18 A. No.

19 212 Q. Do you have any
20 understanding today of what they consisted of?

21 A. 2011, I can only think of
22 BASF payables. I can never think of receivables.
23 We purchase it from BASF. How can we get
24 receivables? So I don't know what it means.

25 213 Q. If I asked you anything

1 about a settlement with Bayer concerning this U.S.
2 polyol class action litigation, are you even aware
3 that there was a lawsuit with Bayer?

4 A. I wasn't aware in 2011
5 or '12 whether it wasn't there. I'm aware now
6 because I see it written here. I wasn't aware at
7 the time.

8 214 Q. You weren't aware at the
9 time. Have you since learned, sir, whether there
10 was a settlement with Bayer?

11 A. I don't know.

12 215 Q. Do you know whether there
13 was a settlement with Huntsman, like a Huntsman
14 settlement? Are you aware of that?

15 A. No, with Huntsman. I
16 didn't owe Huntsman any money.

17 216 Q. Are you aware whether
18 there was a settlement with Lyondell? L-Y-O-N --

19 A. Lyondell, yeah.

20 217 Q. Are you aware that there
21 was a settlement?

22 A. No. I'm not aware that
23 there's any settlement with anybody.

24 218 Q. Were you aware there was
25 a settlement with BASF?

1 A. <Nonaudible response>

2 219 Q. Mr. Vallecoccia, thanks

3 for coming down. I have no further questions.

4 Thank you.

5 --- Whereupon the cross-examination concluded

6 at 3:12 p.m.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I HEREBY CERTIFY THAT I have, to the best of my skill
and ability, accurately recorded
by shorthand, and transcribed therefrom,
the foregoing proceeding.

Miriam Claerhout, Court Reporter

Tab 9

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

CHRONOLOGY OF EVENTS

DATE	EVENT
2004	4362063 Canada Ltd. (" the Vendor ") becomes a class member in an anti-trust class-action pending in the United States District Court for the District of Kansas (the " US Class Action "). Among the defendants is the Dow Chemical Company (" Dow ").
January 12, 2012	Justice Newbould makes the Initial Order in this CCAA proceeding. The Vendor is one of the applicants.
March 8, 2012	4037057 Canada Inc. and the Vendor execute the relevant agreement of purchase and sale (the " APA "). The chose-in-action against Dow is purchased by 403. The APA is later assigned by 403 to 8032858 Canada Inc. (now Domfoam Inc.) (" Domfoam ").
March 16, 2012	The APA is approved by this Court pursuant to a Sale Approval and Vesting Order
2015	Domfoam is removed from the service list in this proceeding.
February 25, 2016	Dow settles the US Class Action.
March 21, 2018	The Vendor receives a cheque from the US Class Action fund in the amount of US \$3,741,639.62 (the

CHRONOLOGY OF EVENTS

DATE	EVENT
	"Funds"). This represents one instalment of the distribution due (in the aggregate, the "Dow Settlement")
May 29, 2018	Justice Wilton Seigel grants the order sought by the Vendor (the "2018 Order") on its motion to the Court. Among the relief granted is an order for the distribution of the Funds to the Vendor's creditors. Domfoam had not received any notice of the motion, and the notice of motion served on the service list and filed with the Court did not seek a distribution of any funds to the creditors of the applicants, with the result that no one on the service list received notice of the applicants' intent to obtain that relief.
June 22, 2018	Jacques Vincent (" Vincent "), corporate counsel for Domfoam, writes David Ullmann (" Ullmann "), counsel for the Vendor, to demand payment of the money resulting from the US Class Action.
July 24, 2018	Lawyers for Domfoam and for the Vendor appear before Justice Wilton-Siegel to schedule Domfoam's motion to set aside the 2018 Order.
August 27, 2018	Lawyers for Domfoam and for the Vendor appear at a Chambers appointment before Justice Hainey in order to set a schedule for the delivery of material in advance of the hearing of the Domfoam motion by Justice Wilton-Siegel. A hearing date of November 29, 2018 is eventually set.
September 14, 2018	Domfoam serves its motion record.
October 5, 2018	Justice Hainey's deadline for service of the Vendor's responding record passes
October 16, 2018	Vendor serves its responding motion record on the Domfoam motion.
November 16, 2018	Cross-examination by Domfoam of Tony Vallecoccia on his affidavit sworn November 16, 2018.

CHRONOLOGY OF EVENTS

DATE	EVENT
November 20, 2018	Cross-examination of Jacques Vincent by the Vendor on his affidavits sworn September 13, 2018 and November 12, 2018.
November 26, 2018	Domfoam serves its factum.
November 27, 2018	The Vendor serves a notice of motion for an order granting it leave to examine two witnesses and for an adjournment of the Domfoam motion. The motion is to be returnable November 29, 2019.
November 28, 2018	The Vendor serves its factum on the Domfoam motion.
November 29, 2018	Justice Wilton-Siegel hears the Vendor's motion.
February 13, 2019	Justice Wilton-Siegel issues reasons for decision granting the Vendor's motion in part and dismissing it in part.
April 22, 2019	The Vendor conducts an examination under Rule 39.03 of Terry Pomerantz pursuant to Justice Wilton-Siegel's order.
September 10, 2019	Counsel for the Vendor writes Justice Conway to assert that "in our view, the motion brought by Domfoam Inc. is a significant claim and as such is more properly the subject of a trial with discoveries, mandatory production obligations, and mediation."
September 11, 2019	Lawyers for Domfoam and for the Vendor appear at a Chambers appointment before Justice Conway. Ullmann, on behalf of the Vendor, consents to the setting aside of the 2018 Order for the distribution of the funds, and agrees that the issue of the entitlement to those funds be adjudicated.

CHRONOLOGY OF EVENTS

DATE	EVENT
October 7, 2019	Lawyers for Domfoam and for the Vendor appear at a Chambers appointment before Justice Conway. The Vendors request an order requiring the exchange of affidavits of documents, a mediation, and a trial of the issue relating to the entitlement of funds. Justice Conway orders the exchange of affidavits of documents within 45 days and the mediation. She does not decide the issue of the trial.
November 1, 2019	Counsel to Domfoam writes Ullmann to advise that Domfoam "has recently received a cheque, in the amount of \$1,399,002.24, from the administrator of the settlement of the Canadian Polyether Polyol Price Fixing Settlement". Tayar provides Ullmann with a copy of the cheque.
November 27, 2019	Domfoam serves its affidavit of documents. Justice Conway's deadline for service of affidavits of documents passes.
January 15, 2020	Counsel to Domfoam writes to Ullmann reminding him that the vendor's affidavit of documents is significantly overdue and requesting dates for a Chambers appointment
January 20, 2020	Counsel to Domfoam writes to Ullmann to say that Ullmann's client was in default of Justice Conway's Order, and asking for dates for a 9:30 appointment with Justice Conway.
January 20, 2020	Ullmann sends what he refers to in his covering letter as a " <i>draft affidavit of documents</i> ". Ullmann states that the " <i>affidavit may change when we are able to get complete instructions</i> ". The Vendor never serves an affidavit of documents.
June 8, 2020	Justice Conway appointed Linc Rogers as the Certified Restructuring Officer in the Estate of the Vendor.
June 24, 2020	The mediation before Justice Peter Cumming is held.

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
COMMERCIAL LIST**

Proceeding Commenced at Toronto

CHRONOLOGY OF EVENTS

FRED TAYAR & ASSOCIATES
Professional Corporation
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5

FRED TAYAR – LSO No. 23909N
COLBY LINTHWAITE – LSO No. 49599K
T: 416-363-1800
F: 416-363-3356

Lawyers for Domfoam Inc.

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
COMMERCIAL LIST

Proceeding Commenced at Toronto

MOTION RECORD
(Returnable August 18, 2020)

FRED TAYAR & ASSOCIATES
Professional Corporation
65 Queen Street West | Suite 1200
Toronto, ON M5H 2M5

FRED TAYAR – LSO No. 23909N
COLBY LINTHWAITE – LSO No. 49599K
T: 416-363-1800
F: 416-363-3356

Lawyers for Domfoam Inc.