

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")

MOTION RECORD OF THE APPLICANTS
(Re: Stay Extension, Returnable October 26, 2020)

Date: October 21, 2020

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OF 3113736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE &
FOAM PRODUCTS LTD.

(the "Applicants")

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(the “**Applicants**”)

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TAB 1

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

ONTARIO
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(the "**Applicants**")

NOTICE OF MOTION
(Re: Stay Extension Returnable October 26, 2020)

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 The Honourable Justice Conway at 10:00 a.m. on Monday, October 26, 2020, or as soon thereafter as the motion can be heard, by Zoom video conference at 330 University Avenue, Toronto, Ontario, pursuant to the Supplementary Notice to the Profession of Justice Morawetz dated September 2, 2020, which is hereby submitted electronically through the Civil Submissions Online portal of the Justice Services Online website in accordance with the aforementioned guidelines due to the COVID-19 pandemic.

PROPOSED METHOD OF HEARING:

This motion is to be heard orally by way of Zoom.

THE MOTION IS FOR:

1. An Order substantially in the form contained at **Tab 3** hereto 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 April 30, 2021 and approving the Monitor's report, conduct, and fees; and
2. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

3. On January 12, 2012, the Applicants sought and were granted protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**"), as amended pursuant to the Order of the Honourable Mr. Justice Newbould (the "**Initial Order**");
4. Deloitte & Touche Inc., now known as Deloitte Restructuring Inc., was appointed in the Initial Order to act as monitor in these CCAA proceedings ("**Monitor**");
5. As a result of the sale of assets of the Applicants, Valle Foam changed its name to 3113736 Canada Ltd., and Domfoam changed its name to 4362063 Canada Ltd. The style of cause of these proceedings was changed by the Order of Justice Brown, dated June 15, 2012 to reflect the change of names;

6. The Order of the Honourable Mr. Justice Brown, dated June 15, 2012 established a process to identify pre- and post-filing claims against the Applicants and/or their officers and directors (“**Claims Process Order**”);
7. The Meeting Order was approved by the Honourable Mr. Justice Penny on September 6, 2016, accepting Domfoam’s Plan of Compromise and Arrangement (“**Plan**”) for filing with the Court and authorizing Domfoam to seek approval of the Plan at the meeting of the creditors (“**Creditors’ Meeting**”);
8. The Creditors Meeting was held on October 19, 2016;
9. The Applicants achieved the required statutory “double majority” needed to approve the Plan. Proven Creditors holding 92% in number and 99% in value voted to approve the Resolution in favour of the Plan;
10. The Plan was sanctioned by way of Order from the Honourable Mr. Justice Hainey dated January 24, 2017;
11. 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;
12. The conditions precedent to Plan implementation have been satisfied or waived, and the Plan has been implemented;
13. 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**”);

14. 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. The final distribution from the Polyols Settlement authorizing the distribution of the holdback was approved by the US Court on November 5, 2018 (“**Final Distribution Order**”). Per the Final Distribution Order, the funds will be disbursed once the appeal period with respect to the order expires;

15. The company that purchased the assets of Domfoam, Domfoam Inc. (formerly known as 4037047 Canada Inc.) (“**Purchaser**”), has brought a motion directing the Applicants to pay the proceeds recovered from the Polyols Settlement to the Purchaser. The Company takes the position that the Purchaser’s motion is without merit. This motion has not yet been heard and remains to be scheduled. A case conference is scheduled to proceed on November 3, 2020, at which the Court will determine how the hearing will be conducted (i.e. what types of evidence will be permitted and whether the dispute will be heard as a motion, as a trial of an issue, or some hybrid form of hearing);

16. The Applicants are also class members in a certified class action in Ontario relating to the same price fixing scheme which is the subject of the US Urethane Proceeding, related to 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.

17. One of the Applicants recently received settlement funds, and another one of the Applicants is in the process of determining if it has any entitlement to receive any funds from the Canadian Urethane Proceeding. The Purchaser also received funds from the Canadian class action which, by way of Court order, are being held in trust by counsel for the Purchaser pending the adjudication of the Purchaser's motion, which the Applicants assert should properly have been paid to the Applicant, Domfoam. The Purchaser and Domfoam are disputing the entitlement to these additional funds.

18. Valle Foam continues its collection and enforcement efforts to pursue outstanding receivables and is involved in one remaining piece of litigation against a former customer. The mediation of that action is scheduled to proceed on November 25, 2020;

Extension of Stay Period

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

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

21. Most recently, the Stay Period was extended to October 30, 2020, by the Order of the Honourable Justice Conway dated April 28, 2020;

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

23. 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;

24. 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 outstanding accounts receivable and settlement funds from the various class actions;

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

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

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

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

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

29. The Affidavit of the Chief Restructuring Officer, Linc Rogers, sworn October 20, 2020;

30. The Twenty-Third Report of the Monitor, dated October 21, 2020 to be separately filed; and

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

Date: October 21, 2020

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TO: SERVICE LIST

TAB 2

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

**ONTARIO
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**AFFIDAVIT OF LINC ROGERS
CHIEF RESTRUCTURING OFFICER**

I, **LINC ROGERS**, of the City of Toronto in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am a lawyer and partner in the Restructuring and Insolvency Group in the Toronto office of Blake, Cassels & Graydon LLP. Pursuant to the Order of the Honourable Justice Conway dated June 8, 2020 (the “**Appointment Order**”), I was appointed as the Chief Restructuring Officer (“**CRO**”) of 3113736 Canada Ltd., formerly known as Valle Foam Industries (1995) Inc. (“**Valle Foam**”), 4362063 Canada Ltd., formerly known as Domfoam International Inc. (“**Domfoam**”), and A-Z Sponge & Foam Products Ltd. (“**A-Z Foam**” and together with Valle Foam and Domfoam, the “**Applicants**”), and as such have knowledge of the matters to which I hereinafter depose.

2. Where the information in this affidavit is based upon information and belief, I have indicated the source of my information and belief, and do verily believe it to be true.

3. To the extent that any of the information set out in this affidavit is based on my review of documents, I verily believe the information in such documents to be true.

4. I swear this affidavit in support of the Applicants' motion for an order extending the stay of proceedings for all of the Applicants to and including April 30, 2021, and approving the Twenty-Third Report of the Monitor, to be filed separately.

Background

5. The Applicants were in the business of manufacturing and distributing flexible polyurethane foam product from facilities located in Ontario, Quebec and British Columbia. The Applicants sought and obtained protection under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA") on January 12, 2020 pursuant to an Order of the Court granted the same day (the "**Initial Order**"). Pursuant to the Initial Order, Deloitte Restructuring Inc. was appointed as monitor in respect of the Applicants (in such capacity, the "**Monitor**"). During these proceedings, the Applicants have sold substantially all of their operating assets pursuant to various sale approval and vesting orders issued by this Court. Any remaining proceeds of such sale are being held by Monitor.

6. The stay of proceedings provided for in the Initial Order has been extended many times by this Court, most recently on April 28, 2020 by Order of Justice Conway, and is currently set to expire on October 30, 2020. A copy of Justice Conway's Order is attached hereto and marked as **Exhibit "A"**.

7. The principal developments in these proceedings since the last stay extension hearing are:

- a) my appointment as CRO on June 8, 2020, which was for the principal purpose of resolving a dispute (the “**Dispute**”) between Domfoam and the purchaser of the assets and business of Domfoam (the “**Domfoam Purchaser**”) over certain funds to which both Domfoam and the Domfoam Purchaser both claim entitlement;
- b) the mediation between the Applicants and Domfoam in respect of the Dispute; and
- c) the contested motions heard on October 7, 2020 filed by the Applicants and the Domfoam Purchaser.

(a) CRO Appointment and the Dispute

8. As noted in the Twenty-Second Report of the Monitor dated April 22, 2020 (the “**Twenty-Second Report**”) filed in support of my appointment as CRO, the Monitor was advised by Applicants’ counsel that counsel was unable to obtain instructions from the sole remaining director of Domfoam, Anthony Vallecoccia. On April 16, 2020, Mr. Vallecoccia advised that he no longer felt capable of continuing his duties as a director. At the request of the Monitor, I was appointed by this Court as CRO to fill the corporate governance void, primarily to resolve the Dispute, either by way of consensual resolution or by adjudication. As noted above, the Appointment Order was issued on June 8, 2020.

9. The Dispute arises because the Domfoam Purchaser served a motion on September 14, 2018, for an order setting aside an Order (the “**Distribution Order**”) of Justice Wilton-Siegel dated May 19, 2018, providing for the distribution to proven creditors of the Applicants of certain proceeds (the “**Disputed Funds**”) which were paid to Domfoam as a result of a litigation settlement in a class action lawsuit in the United States in which Domfoam was a claimant (the “**US Class Action**”). In the same motion, the Domfoam Purchaser also sought to have the

Disputed Funds paid to it. The Distribution Order was ultimately set aside on consent and the Disputed Funds continue to be held by the Monitor. Domfoam, however, continues to dispute the Domfoam Purchaser's entitlement to the Disputed Funds and maintains that such funds are an asset of Domfoam and should be made available to proven creditors of Domfoam.

10. In short, the Domfoam Purchaser takes the position that the Disputed Funds were purchased by the Domfoam Purchaser pursuant to the express terms of the Asset Purchase Agreement entered into between Domfoam and the Domfoam Purchaser (the "APA"). Domfoam takes the position that the Disputed Funds were not purchased by the Domfoam Purchaser, and that evidence of surrounding circumstances is relevant and admissible in the circumstances. Further, Domfoam is of the view that even if there was a genuine "failure of a meeting of the minds", given the steps taken on notice to the Domfoam Purchaser and the passage of time, the Domfoam Purchaser should now be estopped from asserting an after the fact claim to the Disputed Funds.

11. The Applicants do not seek the Court's comment on Domfoam's position at this time, which is fully contested by the Domfoam Purchaser. The Applicants, however, consider it constructive to communicate its high level views to assist the Court, as the requested stay extension is, in large part, to allow Domfoam sufficient time to fully advance and advocate this position, among others.

(b) Mediation

12. On June 28, 2020, I along with counsel to the Applicants, the Monitor, Monitor's counsel, the principal of the Domfoam Purchaser and counsel to the Domfoam Purchaser attended a confidential mediation mediated by The Honourable Mr. Peter Cumming. The mediation did not

result of a resolution of the Dispute and given its confidential nature, I am not in a position to provide further comment.

(c) Interim Motions

13. Motions brought by the Domfoam Purchaser and a cross-motion by Domfoam (within the context of the greater Dispute) were heard by Mr. Justice Koehnen on October 7, 2020.

14. In its motion the Domfoam Purchaser sought to:

- a) strike an affidavit sworn by Mr. Vallecoccia. This motion was dismissed;
- b) enjoin Domfoam from delivering further evidence in connection with the Dispute. This motion was dismissed;
- c) require that Domfoam post security for costs in connection with the Dispute. In the Court's view the security for cost motion was a "red herring" as the Monitor had been disbursing funds held on behalf of Valle Foam to cover the professional fees of Domfoam (subject to reconciliation at a later date) and the Monitor holds sufficient funds to cover any cost award. The Court ordered that the Monitor should set aside \$215,000 to cover a cost award in favour of the Domfoam Purchaser should the Domfoam Purchaser ultimately be successful in the Dispute and should a cost award be issued. This finding by the Court was consistent with the position taken by Domfoam and the Monitor; and
- d) pay the Domfoam Purchaser's cost in connection with its motion to set aside the Distribution Order and have payment of the Disputed Funds made to it. This motion was granted. I understand the Monitor is dealing directly with counsel for the

Domfoam Purchaser to pay the prescribed amount from funds it holds on behalf of Valle Foam.

15. The Domfoam Purchaser was holding approximately \$1.4 million (the “**Additional Disputed Funds**”) of litigation settlement proceeds from a Canadian class action proceeding involving substantially the same facts as the US Class Action. In Domfoam’s cross-motion, it sought to have the Domfoam Purchaser pay the Additional Disputed Funds approximate \$1.4 million in Canadian class action settlement proceeds to the Monitor to be held in trust pending the determination of the dispute, in light of Domfoam’s prior refusal to do so despite request. The Court ordered that the Domfoam Purchaser pay the Additional Disputed Funds to the trust account of its counsel. On October 19, 2020, the Domfoam Purchaser’s counsel confirmed receipt of the Additional Disputed Funds. Attached hereto and marked as **Exhibit “B”** to this affidavit is a copy of Justice Koehnen’s Reasons for Decision dated October 8, 2020 together with a supplemental e-mail direction provided on October 14, 2020.

16. A case conference is currently scheduled for November 3, 2020, before Justice Koehnen, for the purpose of the Court determining the mechanics of how the Dispute shall be adjudicated (i.e. what type of evidence will be required, whether there will be written affidavit evidence, *viva voce* evidence, etc.).

Valle Foam Collection Efforts

17. I am advised by Varoujan Arman, a lawyer with Blaney McMurtry LLP, that Valle Foam did not sell its accounts receivable as part of the asset sales process that was approved in this proceeding. I am further advised that, as a result, Valle Foam pursued a number of collection actions against its former customers that did not pay their accounts in full, and that the progress of

these actions has been reported to the Court from time to time. I am advised by Mr. Arman, and do verily believe, that he has had carriage of these litigation claims, and all of them are now resolved with one exception.

18. I am advised that Valle Foam is currently still pursuing an action against Cozy Corner Bedding Inc. (“**Cozy Corner**”) and that a mediation of that action is scheduled to proceed on November 25, 2020.

A-Z Foam

19. Although the business of A-Z Foam has been ceased for several years at this point in time, it is an affiliated entity of the Applicants, and there remains inter-company accounting to be resolved, as described in the Twenty-Second Report of the Monitor.

Request for Stay Extension

20. The Applicants request a further extension of the stay until April 30, 2021, on the basis that:

- a) the stay extension will provide sufficient time to allow the Applicants to attend the case conference before Justice Koehnen to establish the procedural rules and the forum for the resolution of the Dispute;
- b) once established, the stay extension should provide sufficient time to attend the Dispute resolution forum, if the Dispute is not resolved consensually;

- c) the stay extension should provide Valle Foam with the time required to complete a settlement with Cozy Corner during or following the scheduled mediation on November 25, 2020, or schedule and complete a trial if that becomes necessary;
- d) the stay extension will allow sufficient time to reconcile intercompany accounts between A-Z Foam and the other Applicants;
- e) I have spoken with counsel to the largest creditors of Domfoam, being Her Majesty the Queen, in right of the Government of Canada, and counsel to class action plaintiffs that reached a court-approved settlement with the Applicants and have a significant proven claim as a result thereof, and such creditors are supportive of Domfoam's position in connection with the Dispute;
- f) the Monitor supports the relief requested, and counsel to the Monitor, Grant Moffat, has advised me that that the Monitor is of the view that the Applicants have access to sufficient funds to cover anticipated post-filing expenses during the extended stay period; and
- g) no creditor will be materially prejudiced by the requested relief and the Applicants are acting in good faith and with due diligence.

21. I swear this affidavit in support of the Applicants' motion for an Order, *inter alia*, extending the Stay Period to and including April 30, 2021, and for no improper purpose.

SWORN BEFORE ME at
the City of Toronto in the Province of
Ontario by Zoom video conference due to the
COVID-19 pandemic, on October 20, 2020

V. Arman

Commissioner for Taking Affidavits

}

Linc Rogers

LINC ROGERS

This is Exhibit "A" referred to in the Affidavit of Linc Rogers
sworn this 20th day of October, 2020.



Commissioner for Taking Affidavits (or as may be)

Varoujan Arman



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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) TUESDAY, THE 28TH DAY
JUSTICE CONWAY) OF APRIL, 2020

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 October 30, 2020, was heard this day by teleconference due to the COVID-19 crisis.

ON READING the Twenty-Second Report of Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) (the "**Twenty-Second Report**") in its capacity as the Court-appointed monitor (the "**Monitor**") of the Applicants, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for Tony Vallecoccia, and counsel for Domfoam Inc., no one appearing for any other person on the service list, although properly served as appears from the Affidavits of Service of Ariyana Botejue sworn April 16 and April 23, 2020, filed;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Twenty-Second 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 Twenty-Second 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 Justice Pattillo, dated October 23, 2019, is hereby extended from April 30, 2020 to and including October 30, 2020.

MONITOR’S REPORT, ACTIONS AND FEES

4. **THIS COURT ORDERS** that the Twenty-Second Report and the actions, decisions and conduct of the Monitor as set out in the Twenty-Second Report are hereby authorized and approved, however, the approval of the Twenty-Second Report of the Monitor does not adjudicate on the relief sought by the Monitor through its separate motion to appoint a Chief Restructuring Officer for the Applicants, and the Monitor’s motion in that regard is hereby adjourned to a 9:30 appointment to be scheduled by counsel.

5. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its legal counsel as set out in the Twenty-Second Report, the Affidavit of Catherine A. Hristow, sworn

April 16, 2020, and the Affidavit of Grant Moffat, sworn April 16, 2020, are hereby authorized and approved.

SUPERIOR COURT OF JUSTICE
ENTERED
MAY 06 2020
JG
COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

Conroy J.

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

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

Applicants

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

Proceeding commenced at Toronto

ORDER

BLANEY McMURTRY LLP
Barristers and Solicitors
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Varoujan Arman LSO #60025K
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Lawyers for the Applicants

This is Exhibit "B" referred to in the Affidavit of Linc Rogers
sworn this 20th day of October, 2020.



Commissioner for Taking Affidavits (or as may be)

Varoujan Arman

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

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.

Case Management Yes No by Judge: Koehnen J.

Counsel	Telephone No:	Email/Facsimile No:
Colby Linthwaite, Fred Tayar – counsel for the purchaser, Domfoam Inc.		
David Ullman, Varoujan Arman – counsel for the Applicants		
Grant Moffat – counsel for the Monitor, Deloitte Restructuring		
Linc Rogers – Chief Restructuring Officer of the vendor		

Jacqueline Dais-Visca – Department of Justice Canada		
Reidar Mogerman - B.C. Class Plaintiffs		

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): _____

Date Heard: October 7, 2020

1. This motion involves a series of 5 requests for relief by various parties.

Costs of the motion before Wilton-Siegel J.

2. In 2012 Domfoam Inc. purchased the assets, rights and undertakings of the debtor 4362063 Canada Ltd. (the “Debtor”), during the course of the Debtor’s CCAA proceeding.
3. There was some discussion during the negotiations leading the sale about the extent to which the purchaser would be entitled to any proceeds of a class action in which the Debtor was a plaintiff.
4. In March 2018, the Debtor received a cheque in the amount of U.S. \$3,741,639.62 representing one instalment of the proceeds from the class action. The debtor then obtained an order without notice from Wilton-Siegel J. on May 29, 2018 allowing the proceeds of the class action settlement to be distributed to creditors.

5. The materials filed on the motion before Justice Wilton-Siegel indicated that there was at least an issue about the extent to which the proceeds of the class action settlement were excluded from the Debtor's sale to Domfoam. Despite this issue, the Debtor did not give Domfoam notice of the motion.
6. Shortly after the order was granted, Domfoam learned of the settlement and demanded payment of the settlement proceeds to itself on the basis that the class action was included in the assets rights and undertakings that Domfoam had purchased in the CCAA proceedings.
7. Domfoam brought a motion to set aside the order of Wilton-Siegel J. After one year of litigating the set-aside motion, the Debtor consented to it.
8. On today's motion, Domfoam seeks costs of the set-aside motion in the amount of \$54,888.73
9. The Debtor resists arguing that it consented to the set aside order and that the request for costs demonstrates that "no good deed goes unpunished." In addition, the Debtor argues that much of the work on the set-aside motion is work that would be necessary to argue the underlying issue of whether proceeds of the class action were included in what Domfoam purchased.
10. I cannot agree that either of those arguments should relieve the Debtor of the cost obligation arising out of the set-aside motion.
11. First, with respect to the no good deed goes unpunished argument, the better deed on the part of the Debtor would have been to have consented to the set-aside order immediately rather than forcing Domfoam through one year of litigation before

consenting. Still better would have been to have given Domfoam notice of the motion before Wilton-Siegel J.

12. In support of its motion before Wilton-Siegel J., the Debtor relied on the Seventh Report of the Monitor which stated at paragraph 34:

Mr. Vallecoccia's affidavit sworn July 11, 2013 provides that the Domfoam [i.e. the Vendor's] US Urethane Claim was specifically excluded from the Domfoam assets purchased by 4037057 Canada Inc...Accordingly, the net proceeds of the Domfoam US Urethane Claim...should be available for distribution to the creditors of Domfoam..

13. On cross-examination, Mr. Vallecoccia admitted that he did not know about the lawsuit or about what was excluded from the Domfoam purchase.

14. The agreement under which Domfoam purchased the assets at one point spoke of "BASF receivables" being retained for the Debtor. The BASF receivables was a defined term that spoke about the sum of approximately \$642,000 that was about to be paid to the Debtor and was in fact paid before closing. The sum of U.S. \$3,741,639.62 came not from BASF but from Dow chemicals.

15. After litigating the set-aside motion for one year, the Debtor advised on September 11, 2019 that it would consent to it.

16. That history does not fall into the category of no good deed going unpunished.

17. Courts have made it clear that even where a party consents to an order, the litigation costs incurred in getting the opposing party to the point of consent are costs for which

a consenting party is liable: *Markle v. Toronto (City)*, (2004) C.C.P.B. 69 (Ont. Sup. Ct.) at paragraph 4.

18. Nor does the Debtor's submission that the work on the set-aside motion would need to be done in the proceeding to adjudicate the underlying issue, relieve it of costs. In *Ledore Investments Ltd. v. Murray*, (2002), 58 O.R. (3d) 627 (Ont. Sup. Ct.), Justice Stinson addressed a similar argument when dealing with costs of an abandoned motion for summary judgment. The moving party argued that the work the respondent did would have to be done in any event for trial as a result of which it should not be awarded costs. Stinson J. rejected the argument at para 19.

19. I appreciate that Stinson J. was dealing with the issue in the context of summary judgment where a specific rule provides for cost consequences on unsuccessful motions. That should have no bearing on the issue here. As a practical matter, the work Domfoam did on the set-aside motion may have some overlap with what is required on the adjudication of the underlying issue but that should not prevent Domfoam from being awarded costs. There will be a considerable time lag between the work done on the set-aside motion and the adjudication the final issues. Whatever work was done in 2018-2019 will have to be substantially re-done for the final adjudication. Moreover, the set-aside motion was not even completed, making duplication even more necessary.

20. In my view Domfoam is entitled to costs of the set-aside motion which I fix at \$54,888.73.

Domfoam's Evidentiary Motions

21. Domfoam seeks orders striking the affidavit of Mr. Vallecoccia and prohibiting the Debtor from introducing any further evidence on adjudication of the underlying issue. It bases those motions on the allegation that the Debtor has not complied with the direction of Conway J. that compelled the parties to produce affidavits of documents by a particular date. Domfoam submits that the Debtor did not comply with that direction because it delivered only an unsworn affidavit of documents.

22. I dismiss Domfoam's motion in this regard.

23. The Debtor offered to deliver a sworn affidavit from Mr. Lincoln Rogers the Chief Restructuring Officer of the Debtor. Domfoam rejected that request.

24. It strikes me that if Domfoam was not satisfied with the Debtor's compliance with the direction of Conway J., a more proportionate first step would be to re-attend before her or another judge of the Commercial List for further directions or relief. It is somewhat draconian to strike a party's evidence and preclude them from introducing any further evidence in the circumstances here.

Security for Costs

25. Domfoam seeks security for costs in the amount of \$213,132.90. The Debtor objects noting that Domfoam is a plaintiff and that security for costs is not generally available plaintiffs.

26. In my view the issue is a bit of a red herring.

27. The Debtor's monitor has already agreed to set aside an amount equal to the security requested from the estate of Vallefoam, a company related to the Debtor which is also under CCAA protection and shares the same monitor as the Debtor does.
28. The creditors of the Debtor and Vallefoam are largely similar. Two creditors of Vallefoam who make up 86% of the claims against Vallefoam were present at the motion and did not object to the Monitor's proposal. Given the overlapping creditors in Domfoam and Vallefoam, the work done to adjudicate the underlying issue will benefit the creditors of Vallefoam, at least insofar as they are also creditors of Domfoam.
29. I therefore order the Monitor of the Debtor to set aside \$215,000 from the estate of Vallefoam to stand as security for costs Domfoam in this proceeding.

Canadian Settlement Funds

30. Since the set-aside motion was brought, Domfoam has received \$1,300,000 in settlement of a Canadian class action in which the Debtor was a plaintiff. That class action arises out of issues similar to the ones raised in the American class action. The debtor asserts that the settlement funds Domfoam received do not belong to Domfoam but belong to the Debtor because that action was not transferred as part of the purchase of the assets, interest and undertaking of the Debtor in the CCAA proceeding.
31. The Debtor asks that those funds be transferred to the Monitor for safekeeping until the underlying issues are disposed of.
32. It strikes me that if there is an issue with respect to the entitlement to the settlement funds, both sides should be treated similarly.

33. I therefore order Domfoam to pay the funds it has received the Canadian class action to Mr. Tayar's and Mr. Linthwaite's firm which is directed to hold those funds in trust until the underlying issue entitlement to the funds has been disposed of. Mr. Tayar and Mr. Linthwaite are directed to advise the Debtor and the Monitor when he has received those funds.

Next Steps

34. The overriding issue remains. To whom do settlement funds from the class actions belong: The Debtor or Domfoam. All parties require a resolution to that issue on an expedited basis.

35. There is disagreement about the appropriate manner in which to resolve that issue.

36. Domfoam submits it can be determined on a paper record. The Debtor submits it requires a trial or the trial of an issue. The debtor also submits that Conway J. has already implicitly determined that the matter requires at least the trial of an issue because she ordered that affidavits of documents be produced.

37. I read Justice Conway's endorsement differently. The affidavit of documents that she directed was a limited one. It did not relate to all matters relevant to the proceeding but was limited to the surrounding circumstances; that is to say what the parties knew about the class action at the time and not what the parties' subjective intentions were.

38. She then ordered the parties to attend a mediation. If the mediation did not resolve the matter, she ordered the parties to return for a one hour case conference before

her “for directions on how this motion will proceed and what evidence (written and viva voce) will be put before the court.”

39. That does not strike me as indicating that Justice Conway had decided that this matter should proceed to a trial or the trial of an issue. She clearly left the issue open to decide a later stage.

40. The parties are clearly at a stage where they need a case conference to move the matter forward. I have conferred with Justice Conway to determine whether it would be more efficient for me or her to conduct that case conference and to deal with the matter going forward. I have concluded that it is more appropriate for the case conference to be held before me. Although Justice Conway recalls the high level issues, her total involvement with the matter is now less than my involvement as a result of having reviewed materials for the motion before me and listened to 3 hours of argument.


41. The parties are to confer amongst themselves to agree on a time at which they would be available for one hour case conference with me. The case conference will have to occur at 8:30 a.m. or after 4:30 p.m. Mr. Linthwaite should provide me with 3 or 4 dates between October 26, 2020 and November 9, 2020 that work for all parties.

42. The object of the case conference will be to design a procedure that will allow this matter to be adjudicated on a real-time, expedited timetable. There has been enough uncertainty about who is entitled to the settlement funds. All parties are entitled to a decision on that issue.

43. If the parties have not agreed to an adjudicative process before the case conference, all parties should be prepared to make full, detailed arguments about why the procedures they advocate are appropriate or required.

Costs

44. the parties have agreed that costs for this motion are appropriate to set at \$17,000. Given that success has been divided, each side shall bear its own costs.



Koehnen J.

October 8, 2020

Ariyana Botejue

From: Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>
Sent: Wednesday, October 14, 2020 6:21 PM
To: Grant Moffat; Colby Linthwaite; David T. Ullmann; Varoujan Arman; Fred Tayar; Linc Rogers
Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Subject: RE: 3113736 Canada Ltd., et al - Court File No. CV-12-9545-00CL

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Counsel,

Further to Mr. Moffat's email below, this email constitutes my direction for the Monitor to pay the costs award of \$54,888.73 out of the Vallefoam estate to Domfoam. The reasons for doing so are the same as the reasons set out in my endorsement for having the monitor set aside the sum for security for costs out of the Vallefoam estate.

Justice Markus Koehnen

Ontario Superior Court of Justice
 361 University Ave.
 Toronto, Ont.
 M5G 1T3
 416-327-5284

From: Grant Moffat
Sent: October 14, 2020 2:30 PM
To: Koehnen, Mr. Justice Markus (SCJ) ; Colby Linthwaite ; David T. Ullmann (DUllmann@blaney.com) ; Varoujan Arman ; Fred Tayar ; Linc Rogers
Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Subject: RE: 3113736 Canada Ltd., et al - Court File No. CV-12-9545-00CL

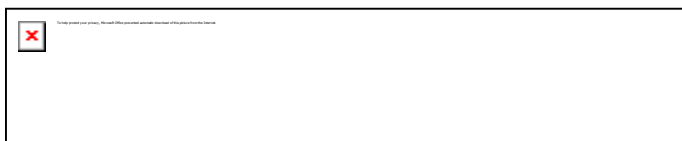
Your Honour,

As you will recall, there are no uncontested funds held by the Monitor in the estate of 4362063 Canada Ltd. (formerly Domfoam International Inc.) to satisfy the costs award in favour of Domfoam Inc. in the amount of \$54,888.73 (the "**Costs Award**"). Given your direction to the Monitor to set aside \$215,000 from funds in the Valle Foam estate to stand as security for the costs of Domfoam Inc. in this proceeding, the Monitor asks that you confirm the same direction to pay the Costs Award from funds in the Valle Foam estate.

Although the Monitor had intended to obtain the Court's approval to make this payment at the stay extension motion returnable on October 26, 2020, we would prefer to avoid any delay in 4362063 Canada Ltd. satisfying the Costs Award. Counsel to the Applicants consents to the requested direction.

Yours truly,

Grant



PLEASE NOTE:
TGF's office is undergoing renovations
and is not accepting personal deliveries.
Please forward all couriers to:
1 Yonge St. Suite 1801, Toronto, ON M5E 1W7

Grant B. Moffat | | GMoffat@tgf.ca | Direct Line +1 [416 304-0599](tel:4163040599) | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

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From: Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>

Sent: Thursday, October 8, 2020 7:26 PM

To: Colby Linthwaite <colby@fredtayar.com>; David T. Ullmann (DUllmann@blaney.com) <DUllmann@blaney.com>; Varoujan Arman <VArman@blaney.com>; Grant Moffat <GMoffat@tgf.ca>; Fred Tayar <fred@fredtayar.com>; Linc Rogers <linc.rogers@blakes.com>

Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>

Subject: Re: 3113736 Canada Ltd., et al - Court File No. CV-12-9545-00CL

Dear Counsel,

I attach my endorsement arising from yesterday's motion.

Yours truly

Justice Markus Koehnen

Ontario Superior Court of Justice

361 University Ave.

Toronto, Ont.

M5G 1T3

416-327-5284

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

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

Applicants

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

Proceeding commenced at Toronto

**AFFIDAVIT OF LINC ROGERS
(Re: Stay Extension, Returnable October 26, 2020)**

BLANEY McMURTRY LLP
Barristers and Solicitors
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Lawyers for the Applicants

TAB 3

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	MONDAY, THE 26 th DAY
)	
JUSTICE CONWAY)	OF OCTOBER, 2020

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
(Stay Extension)**

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 April 30, 2021, was heard this day by Zoom and is hereby submitted electronically through the Civil Submissions Online portal of the Justice Services Online website pursuant to the Supplementary Notice to the Profession of Justice Morawetz dated September 2, 2020, due to the COVID-19 pandemic.

ON READING the Notice of Motion, the Affidavit of Linc Rogers sworn October 20, 2020 and exhibits thereto, the Twenty-Third Report of Deloitte Restructuring Inc. (formerly Deloitte & Touche Inc.) (the “**Twenty-Third Report**”) in its capacity as the Court-appointed monitor (the “**Monitor**”) of the Applicants, and on hearing the submissions of counsel for the

Applicants and the Monitor, 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 October 21, 2020, filed;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Twenty-Third 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 Twenty-Third 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 Justice Pattillo, dated October 23, 2019, is hereby extended from October 30, 2020 to and including April 30, 2021.

MONITOR’S REPORT, ACTIONS AND FEES

4. **THIS COURT ORDERS** that the Twenty-Third Report and the actions, decisions and conduct of the Monitor as set out in the Twenty-Third 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 Twenty-Third Report, the Affidavit of Catherine A. Hristow, sworn

- 3 -

October 21, 2020, and the Affidavit of Grant Moffat, sworn October 21, 2020, are hereby authorized and approved.

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

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

Applicants

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

Proceeding commenced at **Toronto**

**ORDER
(Stay Extension)**

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Lawyers for the Applicants

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

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

Applicants

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

Proceeding commenced at Toronto

**MOTION RECORD OF THE APPLICANTS
(Re: Stay Extension, Returnable October 26, 2020)**

BLANEY McMURTRY LLP

Barristers and Solicitors
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Toronto, ON M5C 3G5

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Lawyers for the Applicants