

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
RSC 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  
(APPROVAL OF SETTLEMENT AGREEMENT  
RETURNABLE JANUARY 18, 2022)**

January 13, 2022

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## PART I - INTRODUCTION

1. The Applicants seek an order under the CCAA giving effect to and approving the settlement agreement executed by the Applicants on December 10, 2021 and by 0932916 BC Ltd. (the “**Purchaser**”) on December 23, 2021.
2. It is a longstanding principle of insolvency law that a CCAA court has the jurisdiction to approve a settlement reached by a debtor if the settlement is beneficial to the debtor and its stakeholders, is fair and reasonable, and is consistent with the purpose and spirit of the CCAA.<sup>1</sup>
3. The Applicants submit that the settlement should be approved and the proposed approval order granted for the following reasons:
  - (a) The settlement avoids the litigation risk associated with proceeding to adjudication;
  - (b) The settlement reduces the professional costs associated with proceeding to adjudication, which would include the costs of the Monitor, the Monitor’s counsel, the Chief Restructuring Officer, and the Applicants’ counsel; and
  - (c) The Monitor supports the settlement.<sup>2</sup>
4. The Applicants are unaware of any opposition to the settlement.

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<sup>1</sup> *Labourers Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, [2013 ONSC 1078](#) at para 49 [*Sino-Forest*].

<sup>2</sup> Affidavit of Linc Rogers, sworn January 11, 2022 (“**CRO Affidavit**”) at para 14.

## PART II - SUMMARY OF FACTS

### A. Background

5. The applicants 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. (the “**Vendor**”; together with Valle Foam and Domfoam, the “**Applicants**”) were in the business of manufacturing and distributing flexible polyurethane foam product from facilities located in Ontario, Quebec and British Columbia.

6. On January 12, 2012, the Applicants sought and obtained protection under the CCAA pursuant to an order of this Court granted the same day (the “**Initial Order**”).<sup>3</sup>

7. Pursuant to the Initial Order, Deloitte Restructuring Inc. (as it is now called) was appointed as monitor for the Applicants (in such capacity, the “**Monitor**”). During the CCAA proceedings, the Applicants have sold substantially all of their operating assets pursuant to various sale approval and vesting orders issued by this Court. The Monitor is holding any remaining proceeds of such sale.<sup>4</sup>

8. In particular, the Vendor sold substantially all of its assets to the Purchaser on February 21, 2012 (the “**APA**”), which sale was approved by the Court on March 16, 2012.

9. The Court has extended the stay of proceedings provided for in the Initial Order many times, including most recently on October 28, 2021. The stay is set to next expire on January 18, 2022.<sup>5</sup>

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<sup>3</sup> CRO Affidavit at para 6.

<sup>4</sup> CRO Affidavit at para 7.

<sup>5</sup> Stay Extension Order, dated October 28, 2021; CRO Affidavit at para 8.

**B. The Dispute over the US Class Action Proceeds**

10. In 2018, a dispute arose as between the Applicants and certain purchasers of the Applicants' estate assets over entitlement to class action proceeds (the "**US Class Action Proceeds**"), which had been paid as a result of the Applicants' participation in the settlement in a US class action lawsuit (the "**US Class Action**").

11. As part of this dispute, the Purchaser indicated that, pursuant to the APA, it too had an entitlement to the Vendor's portions of the US Class Action Proceeds and sought to have those amounts paid to it. The Vendor took the position that the Purchaser did not purchase the US Class Action Proceeds, and in any event, the Purchaser is estopped from asserting a claim to the US Class Action Proceeds by its conduct (the "**Dispute**").<sup>6</sup>

12. Subsequent to several distribution orders and the settlement of related claims against the US Class Action Proceeds, the Monitor continues to hold the remaining US Class Action Proceeds.<sup>7</sup>

**C. CRO Appointed in June 2020**

13. In the Twenty-Second Report of the Monitor, dated April 22, 2020 (the "**Twenty-Second Report**"), the Monitor reported that Applicants' counsel, Blaney McMurtry LLP ("**Blaneys**") had advised that they were unable to obtain instructions from the sole remaining director of the Vendor, Anthony Vallecoccia, because on April 16, 2020, Mr. Vallecoccia advised that he no longer felt capable of continuing his duties as a director.<sup>8</sup>

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<sup>6</sup> CRO Affidavit at paras 10-11.

<sup>7</sup> CRO Affidavit at para 10.

<sup>8</sup> CRO Affidavit at para 9.



14. On June 8, 2020, Linc Rogers was appointed Chief Restructuring Officer at the Monitor's request to fill the corporate governance void and primarily to resolve the dispute, either by way of consensual resolution or by adjudication.<sup>9</sup>

**D. Settlement Agreement and Release**

15. In November 2021, the Applicants and the Purchaser settled the dispute, with the Applicants principally represented by the CRO (the "**Settlement**"). The CRO consulted with the Monitor and the major creditors in all material respects. The Minutes of Settlement were executed by the Parties on December 10 and 23, 2021.<sup>10</sup>

16. The Settlement involves a single payment by the Monitor, for and on behalf of the Vendor, to the Purchaser, in full and final settlement of the Purchaser's claims against the Applicants arising out of the CCAA proceedings, the APA, or any of the materials filed in connection with the Dispute.<sup>11</sup>

17. The Settlement also provides for a release of the Applicants for all claims made in respect of the Dispute, the APA, and this CCAA proceeding (the "**Release**").

18. The Settlement is conditional on Court approval. A draft Approval Order is included in the Applicants' motion record. The Approval Order would, among other things:

- (a) Approve the Settlement between the Applicants and the Purchaser, including the Release as described in the Settlement;

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<sup>9</sup> *Ibid.*

<sup>10</sup> CRO Affidavit at para 12.

<sup>11</sup> CRO Affidavit at para 13.

- (b) Authorize the Monitor to pay the “Settlement Amount” (as that term is defined in the Settlement); and
- (c) Confirm that the payment of the settlement funds under the Settlement is fair and reasonable in the circumstances, is made in good faith, and does not violate the interest of any person who may claim against the Vendor.

19. The major creditors of the Vendor support the settlement.<sup>12</sup>

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

20. The issue on this motion is whether the Settlement should be approved and the Approval Order granted. The answer is “yes” for the reasons that follow.

#### **A. The Court has jurisdiction to approve the Settlement**

21. Section 11 of the CCAA provides the Court with broad powers to make any order that it considers appropriate.<sup>13</sup> The CCAA is a flexible statute that allows the Court to give effect to the objects of the CCAA beyond merely staying proceedings and adapt to meet contemporary business needs.<sup>14</sup>

#### **B. The Settlement is fair and reasonable and should be approved**

22. In approving a settlement under the CCAA, the Court must be satisfied that:

- (a) the settlement would be beneficial to the debtor and its stakeholders generally;
- (b) the settlement is fair and reasonable; and

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<sup>12</sup> CRO Affidavit at para 14(d).

<sup>13</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.

<sup>14</sup> *Sino-Forest*, *supra* note 1 at [paras 44-47](#).

(c) the settlement is consistent with the purpose and spirit of the CCAA.<sup>15</sup>

23. The Settlement meets these criteria for four reasons. First, the Applicants and their creditors will benefit from resolving the dispute without further litigation because a hearing would cost considerable amounts in lawyers' fees for all parties involved, including the Applicants, the Monitor and the CRO.

24. Second, the Settlement also avoids the uncertainty and risk of litigation.

25. Third, the Monitor and the Vendor's largest creditors support the Settlement.

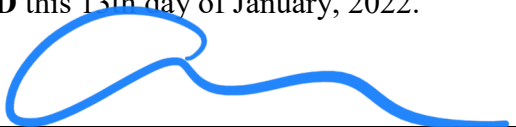
26. Finally, the Settlement is consistent with the purpose and spirit of the CCAA. It resolves the dispute consensually instead of through further litigation and allows the Vendor to finally distribute funds that the Monitor has held for over three years.

27. Overall, the Settlement is fair, reasonable and consistent with the objectives of the CCAA and principles supported by Canadian courts promoting settlement and the efficient pursuit of litigation.

#### **PART IV - ORDER REQUESTED**

28. The Applicants submit that the Court should approve the Settlement and grant the Approval Order substantially in the form included as Schedule "A" to the notice of motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of January, 2022.

  
Matthew P. Gottlieb and Andrew Winton

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<sup>15</sup> *Sino-Forest*, *supra* note 1 at [para 49](#).

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Labourers Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, 2013 ONCA 1078
2. *Re Hollinger Inc.*, 2011 ONCA 579

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY-LAWS**

*Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11

#### **General power of court**

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

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

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PROCEEDING COMMENCED AT  
TORONTO

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