

# COUNSEL SLIP

COURT FILE

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DATE: 29 December 2022

NO. ON LIST 2

TITLE OF  
PROCEEDING

## **DCL CORPORATION**

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- ☐ DEFENDANT(S)  
RESPONDENT(S) - **Marc Wasserman and Martino Calvaruso** (for the Monitor); **Joseph Bellissimo, Ryan Jacobs and Shayne Kukulowicz** (for Term Loan Lenders & Term Loan Agent); **Joe Latham & Erik Axell** (for Wells Fargo Bank, N.A., as Pre-Petition Agent and DIP Agent); **Jeff Dutson** (US Counsel for the DCL US Entities); **Josh Nevsky & Stephen Ferguson** (for the Canadian Monitor); **Michael Klein** (Self-Represented)

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### ENDORSEMENT OF JUSTICE CONWAY:

All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of DCL Corporation dated December 27, 2022.

[1] On December 20, 2022, I granted the Initial Order under the CCAA. Among other things, it imposed a stay of proceedings in favour of the Applicant until December 30, 2022. The application was brought in conjunction with parallel Chapter 11 Proceedings. Several orders have now been granted by the US Bankruptcy Court. The next hearing before that court is scheduled for January 19, 2023.

[2] This is the comeback hearing for the CCAA application. The Applicant seeks various additional relief today, including an extension of the Initial Stay Period to March 17, 2023. Notice of today's hearing and the relief sought was provided to the (broadly-defined) Notice Parties.<sup>1</sup> The hearing is unopposed.

[3] Since the Initial Order was granted, the Applicant has entered into the Stalking Horse APA. It does not seek any relief today with respect to that agreement or the Revised Bidding Procedures – it will return to court for that relief in mid-January.

[4] The Applicant seeks approval of the Intercompany Agreements. Those agreements reflect and formalize the integrated nature of the DCL Group Business. In particular, the Applicant sells most of its inventory to DCL USA LLC, which in turn provides intercompany funding consisting of payment for inventory and shared services, and intercompany advances. The Applicant requests that the Intercompany Charge be granted to secure such advances.

[5] The relief is unopposed and is supported by the Monitor. Intercompany charges have been approved under s. 11 of the CCAA: see, for example, *Re: Performance Sports Group Ltd.*, 2016 ONSC 6800, at para. 34. See also *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, at paras. 62-67.

[6] In this case, the intercompany arrangements and charges will ensure that the Applicant continues to receive funding from DCL USA LLC. It will also preserve the *status quo* of the arrangements within the entities in the DCL Group and preserve the rights of the creditors against each individual entity. The intercompany advances are to be used for the benefit of the Applicant – for working capital and to fund the CCAA process. While the exact amount of the intercompany loans cannot be determined in advance, the Monitor has advised the court that the advanced funds will be used for the benefit of the Applicant and has undertaken to bring to the court's attention any issues or concerns it may have. I am satisfied and approve the Intercompany Agreements and the Intercompany Charge.

[7] The Applicant seeks a sealing order for the unredacted Intercompany Agreements. I had a lengthy discussion with counsel about the need for this sealing order and am now satisfied that it should be granted. The Intercompany Agreements are very lightly redacted, only with respect to the margins that the Applicant uses in its pricing of the inventory to DCL USA LLC. This is commercially sensitive information and its public disclosure (for example, to competitors) could negatively impact the Applicant and its stakeholders. The Applicant has respected the principle of proportionality by redacting the least amount of information in those agreements. There is considerable detail available in the redacted version with respect to the intercompany arrangements and the pricing methodology and there does not appear to be any prejudice in redacting the limited information about pricing margins. I am satisfied that the *Sierra Club/Sherman Estates* test for a sealing order has been met. The redacted version of those agreements will continue to form part of the public record. **Counsel for the Monitor is directed to file a hard copy of the unredacted Intercompany Agreements with the Commercial List office under seal together with a copy of this endorsement and the signed order.**

[8] The Applicant seeks authorization to pay pre-filing arrears to certain Critical Suppliers, many of which are foreign. The caselaw recognizes that the court has the jurisdiction to grant this relief under the CCAA: see *Re Cinram International Inc.*, 2012 ONSC 3767, para 67. The payments will require the express authorization of the Monitor, who has indicated that it will ensure that only appropriate and necessary payments are made. According to Mr. Davido, any loss of these Critical Suppliers will impair the restructuring efforts of the DCL Group. Further, according to the requested order, the Critical Supplier, in exchange for any such payment, must commit to continue to provide payment terms to the Applicant, which will assist with its liquidity issues. I am granting the order re pre-filing payments to Critical Suppliers.

[9] The Applicant seeks approval of the Final DIP ABL Credit Agreement. The maximum borrowing under the DIP facility is \$55 million (increased from \$4 million under the Initial Order), subject to the borrowing base.

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<sup>1</sup> Mr. Rogers advised the court that the materials were couriered to Citibank Europe although he has not received confirmation of service yet. He further advised that no relief is sought against Citibank Europe. I have no issue in this regard.

The amendments reflect the entering into of the Stalking Horse APA and contain revised DIP Milestones. There are no material changes to this financing from the terms that I approved in the Initial Order. The Monitor supports the Final DIP ABL Credit Agreement and says that the revised DIP Milestones are on balance reasonable under the circumstances. Counsel recognized and confirmed that approval of this final agreement does not tie the court's hands in considering whether the Stalking Horse APA should be approved – that will be determined on its own merits.

[10] The Applicant seeks the Related Party DIP Charge, which provides that the DIP Charge extends to the DCL USA LLC Inventory stored at the Applicant's Distribution Centers and sold by the Applicant to DCL US. The Applicant points out that the DIP Lenders already have liens on this inventory under the US Interim DIP Order. The US Bankruptcy Court has requested the assistance of this court in granting this charge and doing so is in the interests of comity. The Monitor supports the charge. I approve the Related Party DIP Charge.

[11] The Applicant seeks approval of the TM Engagement Letter entered into before the filing. TM Capital will be continuing to market the business and assets of the DCL Group. The fees payable to TM Capital will be paid by DCL USA LLC and the allocation to the Applicant will be made in consultation with the Monitor. The Monitor supports the relief. I approve the TM Engagement Letter.

[12] The Applicant seeks an increase in the Directors' Charge to \$1.7 million and the Administration Charge to \$1.1 million, respectively. The amounts were determined with the assistance of the Monitor. The Directors' Charge reflects the exposure of the directors and officers for payroll, vacation pay and HST during the extended stay period. The Administration Charge reflects the extent and quantum of work to be provided by the professionals on this restructuring. I am approving the increased charges.

[13] The Applicant seeks an extension of the stay to March 17, 2023 to permit it to take the steps needed to pursue a going concern sale of the business. I am satisfied that the Applicant has acted in good faith and with due diligence. The Monitor supports the extension to that date. The DIP budget shows that there is sufficient liquidity for the Applicant to continue operations during this extended period. I approve the extension of the Initial Stay Period to March 17, 2023.

[14] I have signed the Amended and Restated Initial Order and attached it to this Endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.

[15] The next hearing on this matter is scheduled for **January 19, 2023 at 2 p.m. before me for one hour (confirmed with the Commercial List office).**

A handwritten signature in blue ink, appearing to read "Conway J.", is located at the bottom left of the page.