Court File No. CV-22-00691990-00CL

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 DCL CORPORATION (the "**Applicant**")

FACTUM OF THE APPLICANT
(Returnable December 29, 2022)

December 27, 2022

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. On December 20, 2022, the Applicant sought and obtained an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**"), which, among other things, provided for a stay of proceedings in favour of the Applicant until December 30, 2022 (the "**Initial Stay Period**").[1]

2. The Initial Order was tailored to provide the Applicant with the relief reasonably necessary to maintain the status quo and continue its business operations during an Initial Stay Period.

3. Upon the expiration of the Initial Stay Period, the Applicant will require additional relief to facilitate and advance its restructuring efforts and these CCAA proceedings. To this end, the Applicant now seeks an amended and restated initial order (the "**Amended and Restated Initial Order**") pursuant to the CCAA, among other things:

(a) approving the Intercompany Agreements and granting an Intercompany Charge over the Applicant's property (excluding the HSBC Cash Collateral) to secure

[1] *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 [*CCAA*]; Affidavit of Scott Davido sworn December 23, 2022 at para 9 [*Second Davido Affidavit*].

intercompany loan balances from time to time owing by the Applicant to DCL USA LLC;

(b) sealing the unredacted copies of the Intercompany Agreements attached as Confidential Exhibits "**1**" and "**2**" to the affidavit of Scott Davido sworn December 23, 2022, in these proceedings (the "**Second Davido Affidavit**");

(c) authorizing the Applicant to make certain pre-filing payments to Critical Suppliers;

(d) approving the Final DIP ABL Credit Agreement which was the subject of the US Interim DIP Order;

(e) extending the DIP Charge over the DCL USA LLC Inventory to secure the obligations of DCL USA LLC under the Final DIP ABL Credit Agreement and related documents (the "**Related Party DIP Charge**");

(f) approving, *nunc pro tunc*, the retention of TM Capital as investment banker and sale advisor, pursuant to the TM Engagement Letter; and

(g) extending the Initial Stay Period until March 17, 2023.

4. The relief proposed under the Amended and Restated Initial Order will enable the Applicant to continue its business operations and pursue its restructuring objectives for the benefit of the broad cross-section of the Applicant's stakeholders.

5. All currency references contained herein are to USD, unless otherwise indicated.

6. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the affidavit of Scott Davido sworn December 20, 2022 (the "**Initial Affidavit**")[2] and the Second Davido Affidavit.

7. The relevant facts since the swearing of the Initial Affidavit are set out in the Second Davido Affidavit and are summarized below.

PART II – FACTS

A. The Chapter 11 Proceedings

8. These CCAA proceedings were commenced in parallel with proceedings commenced pursuant to chapter 11 of the United States Bankruptcy Code (the "**Chapter 11 Proceedings**"), by way of voluntary petitions filed on December 20, 2022, in the United States Bankruptcy Court for the District of Delaware (the "**US Bankruptcy Court**") by the Applicant's US-based related parties (collectively, "**DCL US**" and together with the Applicant and the Applicant's other subsidiaries, the "**DCL Group**").[3]

9. On December 22, 2022, the Honourable Judge Stickles of the US Bankruptcy Court entered several orders, including the US Interim DIP Order which, among other things, grants super-priority liens in favour of the DIP Agent and DIP Lenders against the assets of DCL US.[4]

10. The US Bankruptcy Court also granted the US Interim Critical Supplier Order, which among other things, authorized DCL US to make payments of "prepetition amounts" to US-based critical vendors, foreign vendors and shippers and warehousemen, in the ordinary course, in amounts not to exceed prescribed caps.[5] DCL US is authorized, but not directed, to condition

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[2] Affidavit of Scott Davido sworn December 20, 2022.

[3] Second Davido Affidavit at para 10.

[4] *Ibid* at para 11; Exhibit "C" to the Second Davido Affidavit.

[5] *Ibid* at para 12; Exhibit "D" to the Second Davido Affidavit.

payment to the applicable vendors upon agreement by the vendor to (i) accept payment in all or part of the prepetition claim, and (ii) continue to provide supplies or services to DCL US on trade terms.[6]

11. The Second Day Hearing in the Chapter 11 Proceedings is scheduled for January 19, 2023.[7] At such hearing, DCL US will request certain additional relief, including the granting of the US Bidding Procedures Order, and the granting of final orders in respect of the interim orders that were granted on December 22, 2022.[8]

B. The Applicant's activities since the granting of the Initial Order

(i) Stalking Horse APA

12. Since the granting of the Initial Order, the Applicant and DCL US have selected a Stalking Horse Bidder and intend to return to this Court for additional relief including approving the Revised Bidding Procedures and seeking the approval of the Stalking Horse APA, as a stalking horse agreement, in mid-January 2023.[9] The Applicant does not seek any relief in respect of the Stalking Horse APA or the Revised Bidding Procedures in connection with the Comeback Hearing or the Amended and Restated Initial Order.

(ii) Final DIP ABL Credit Agreement

13. In addition to entering into the Stalking Horse APA, the Applicant and DCL US finalized and executed the Final DIP ABL Credit Agreement, which required entry into the Stalking Horse APA as a condition to its effectiveness.[10] Pursuant to the Initial Order, the Applicant was authorized to enter into a DIP credit agreement substantially in the form attached to the Initial

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[6] Second Davido Affidavit at para 12; Exhibit "D" to the Second Davido Affidavit.
[7] *Ibid* at para 13.
[8] *Ibid*.
[9] *Ibid* at paras 14-15.
[10] *Ibid* at para 16.

Affidavit (the "**Draft DIP ABL Credit Agreement**"). However, the Draft DIP ABL Credit Agreement was drafted prior to the execution of the Stalking Horse APA. The material commercial details of the DIP ABL Credit Agreement are discussed in greater detail in the Initial Affidavit and the Pre-Filing Report.

14. The key changes between the Draft DIP ABL Credit Agreement (attached to the Initial Affidavit) and the Final DIP ABL Credit Agreement (attached to the Second Davido Affidavit) are as follows: (i) the representations, warranties and covenants in the Stalking Horse APA are incorporated into the Final DIP ABL Credit Agreement; (ii) the termination of the Stalking Horse APA constitutes an Event of Default under the Final DIP ABL Credit Agreement; and (iii) new "DIP Milestones" have been provided for.[11] The Applicant seeks approval of the Final DIP ABL Credit Agreement pursuant to the proposed Amended and Restated Initial Order.

(iii) Communications with Monitor and Others

15. The Applicant has worked with the Monitor regarding the management of its cash[12] and has communicated with its key stakeholders to inform them of the commencement of these proceedings.[13]

(iv) Notice of Comeback Hearing

16. Through counsel, the Applicant has served the Notice Parties with the Application to provide notice of the Comeback Hearing, including with respect to the Applicant's intention to seek certain relief in connection with the Intercompany Agreements, the Related Party DIP Charge, Critical Suppliers, the Final DIP ABL Credit Agreement, the retention of TM Capital, the

[11] Second Davido Affidavit at para 17.

[12] First Report of the Monitor dated December 28, 2022 at paras 4.1-4.2, 7.1 [*First Report*]**.**

[13] Second Davido Affidavit at para 29.

extension of the Initial Stay Period and certain other relief more particularly set out in the Application and the proposed Amended and Restated Initial Order.[14]

C. Intercompany Agreements

17. As a result of a series of intercompany transactions, substantially all of the Applicant's working capital assets were sold to its US-based affiliate, DCL USA LLC, with the effective dates for the principal transactions being August 1, 2021, and July 1, 2022.[15]

18. As a result of the sale of its working capital assets to DCL USA LLC, the Applicant only has a small number of third-party customers, and the majority of the inventory it produces is sold to DCL USA LLC, which then on sells the inventory to its own third-party customers.[16] DCL USA LLC in turn provides funding to the Applicant.[17] Historically, these intercompany transactions were reflected primarily by way of intercompany entries in the books and records of the parties.[18] The value attributed to the finished goods inventory sales and the provision of shared services is determined in consultation with the DCL Group Tax Advisor and is consistent with the DCL Group's transfer pricing policy.[19] The intercompany book entries are subject to ongoing review and adjustment.[20]

19. In preparation for the commencement of these proceedings, the Applicant and members of the DCL Group formalized intercompany arrangements related to finished goods inventory sales to DCL USA LLC, shared services, flow through payments by DCL USA LLC to a European Subsidiary, and intercompany loans by DCL USA LLC, through two intercompany agreements:

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[14] Second Davido Affidavit at para 19.
[15] Initial Affidavit at paras 37, 40.
[16] *Ibid* at paras 40, 46.
[17] *Ibid* at para 44.
[18] *Ibid*.
[19] *Ibid* at paras 47, 49(f).
[20] *Ibid* at para 47.

(i) the US/Canada Intercompany Agreement between the Applicant and DCL USA LLC, and (ii) the European Intercompany Agreement between the Applicant, DCL USA LLC, and the European Subsidiaries, DCL UK and DCL NL (collectively, the "**Intercompany Agreements**").[21] The Intercompany Agreements govern arrangements from and after the Filing Date.[22]

20. The US/Canada Intercompany Agreement provides that DCL USA LLC will make monetary "intercompany transfers" to the Applicant.[23] In addition to the payment of obligations owing by DCL USA LLC to the Applicant, the intercompany transfers by DCL USA LLC could include intercompany loans for the benefit of the Applicant.[24]

21. It is requested that such intercompany loans to the Applicant be secured by a court-ordered charge in the CCAA proceedings over the property of the Applicant (other than the HSBC Cash Collateral) (the "**Intercompany Charge**").[25] To the extent there is a receivable owing by DCL USA LLC to the Applicant, such receivable will be afforded the priority of an administrative claim in the Chapter 11 Proceedings.[26] Completion of the Intercompany Agreements was a precondition to securing the required DIP Financing.[27]

D. <u>Sealing of Intercompany Agreements</u>

22. Copies of the Intercompany Agreements attached to the Initial Affidavit were very lightly redacted to remove pricing information related to margins charged on inventory sold by the Applicant to DCL USA LLC, which inventory is then on-sold by DCL USA LLC to third parties.[28]

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[21] Initial Affidavit at paras 35, 51. The Applicant does not have material obligations under the European Intercompany Agreement.

[22] *Ibid* at para 36.

[23] *Ibid* at paras 50, 159.

[24] *Ibid* at para 50.

[25] *Ibid* at para 166; Exhibit "C" to the Initial Affidavit at section 4.6.

[26] *Ibid* at para 167.

[27] *Ibid* at para 83.

[28] Second Davido Affidavit at para 23.

This pricing information was redacted because, in the Applicant's view, it is commercially sensitive and could potentially be used by customers and competitors in commercial negotiations to the detriment of the Applicant and its stakeholders.[29] All other information relating to the nature of the transactions between the companies is fully detailed and disclosed, including (i) a history of the key intercompany transactions prior to the Filing Date; (ii) the timing of transfer of title of the inventory following the Filing Date; (iii) where such inventory is be stored; (iv) which party is responsible for which obligations in connection with such inventory; (v) the nature of shared services provided and which party has the responsibility for such services; and (vi) how monetary intercompany transfers are to be accounted for.[30] The Monitor, the Pre-Filing ABL Agent, and the DIP Agent have received disclosure of the pricing information.[31]

E. Critical Suppliers

23. The Applicant uses a variety of vendors to provide services and source raw materials and finished goods that are critical to operating its business ("**Critical Suppliers**").[32] The Applicant is dependent upon the Critical Suppliers to facilitate ongoing operations and preserve value during the proceedings.[33] The Applicant is seeking the Court's authorization to pay pre-filing arrears or to honour cheques that were issued to these Critical Suppliers prior to the Filing Date, subject to the Monitor's approval, if, in the opinion of the Applicant, following consultation with the Monitor, such payment is necessary to maintain the uninterrupted operations of the Applicant's business on trade terms that are satisfactory to the Applicant.[34]

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[29] Initial Affidavit at para 35.

[30] Second Davido Affidavit at para 23.

[31] Initial Affidavit at para 35.

[32] *Ibid* at para 177.

[33] *Ibid*.

[34] Draft Amended and Restated Initial Order at para 7(e).

24. In many instances, these Critical Suppliers are the only vendors able to provide the services and goods required to meet the Applicant's operational needs given the unique chemicals used by the Applicant in its manufacturing process.[35] The Applicant, together with other members of the DCL Group and their collective advisors, determined that the loss of the Critical Suppliers could materially harm the Applicant and the broader DCL Group's businesses or impair going-concern viability.[36]

25. A significant number of the Applicant's Critical Suppliers are foreign (*i.e.*, outside the United States and Canada) and may not recognize the jurisdiction of this Court or believe that they are subject to orders granted by this Court.[37] Accordingly, to preserve the value of the Applicant's business as a going concern through the DCL Group's sale process, the Applicant requires the ability to assuage the concerns of Critical Suppliers by funding them without interruption.[38] DCL US was granted similar relief pursuant to the US Interim Critical Supplier Order.[39]

F. <u>Related Party DIP Charge</u>

26. On December 20, 2022, the DIP ABL Facility was approved by this Court and the corresponding DIP Charge was granted pursuant to the Initial Order.[40]

27. As stated above, on December 22, 2022, analogous relief was granted in the Chapter 11 Proceedings with respect to DCL US, pursuant to the US Interim DIP Order.[41]

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[35] Initial Affidavit at para 178.
[36] *Ibid* at paras 178-179.
[37] *Ibid* at para 179.
[38] *Ibid*.
[39] Second Davido Affidavit at para 12; Exhibit "D" to the Second Davido Affidavit.
[40] Second Davido Affidavit at para 10.
[41] Exhibit "C" to the Second Davido Affidavit.

28. The US/Canada Intercompany Agreement contemplates that the DCL USA LLC Inventory will be stored for a period of time in the Distribution Centres.[42] The Applicant requests that this Court extend the requested DIP Charge over the DCL USA LLC Inventory, in order to secure the obligations of DCL USA LLC under the Final DIP ABL Credit Agreement and related documents.[43] Such relief has been requested by the DIP Agent, is supported by the Monitor,[44] is consented to by DCL USA LLC,[45] and was requested pursuant to the US Interim DIP Order at paragraph 5.17.[46]

29. Paragraph 5.17 of the US Interim DIP Order reads as follows:

> The Court hereby requests the aid and assistance of the Canadian Court administering the Canadian Proceedings to (i) grant a stay of proceedings in the Canadian Proceedings restricting and prohibiting any further actions or steps being taken in Canada against any of the Collateral of the Debtors which may be located in Canada, and (ii) in creating any charge in favor of the DIP Agent to secure any Obligations of the Non-Debtor Borrower under the DIP Loan Documents, to extend such charge to cover any Collateral of the Debtors which may be located in Canada in furtherance of the liens and security interests of DIP Agent and DIP Lenders granted under the DIP Loan Documents and this Interim Order.[47] [emphasis added]

G. TM Capital Engagement Letter

30. The DCL Group retained TM Capital as its exclusive investment banker in connection with the proposed sale of the DCL Group. The terms of this arrangement are set out in the TM Engagement Letter.[48]

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[42] Initial Affidavit at para 183.

[43] *Ibid*.

[44] First Report at para 6.12.

[45] Initial Affidavit at para 183.

[46] Exhibit "C" to the Second Davido Affidavit at para 5.17.

[47] *Ibid*.

[48] Initial Affidavit at para 168; Exhibit "M" to the Initial Affidavit.

31. Pursuant to the TM Engagement Letter, TM Capital agreed to assist with (a) preparing descriptive materials, (b) identifying and contacting prospective acquirers, and (c) structuring, negotiating, and closing a proposed "Transaction". TM Capital is compensated for its services through the TM Monthly Fees and the TM Transaction Fees.[49]

32. The TM Monthly Fees contemplate the payment of cash retainers of $50,000 per month to TM Capital. The TM Monthly Fees will be reduced to $15,000 following the first three payments of $50,000.[50] All TM Monthly Fees after the third month of the engagement shall be credited, without duplication, against any TM Transaction Fees payable under the TM Engagement Letter.[51]

33. The TM Transaction Fee is payable in cash at the closing of a Transaction (as defined in the TM Engagement Letter) and is calculated to be an amount equal to the greater of: (a) $1,500,000; and (b) the sum of: (i) 2% of any Consideration (as defined in the TM Engagement Letter) paid pursuant to a Transaction up to $100 million, plus; (ii) 3.5% of any Consideration paid in excess of $100 million but less than $140 million, plus; (iii) 5% of any Consideration paid in excess of $140 million.[52]

34. The terms and fees contemplated under the TM Engagement Letter were supported by the Term Loan Lenders as confirmed in a letter issued by the Term Loan Lenders to TM Capital.[53]

35. TM Capital's fees are to be paid by DCL USA LLC, with an appropriate allocation of such fees to be made to the Applicant, in consultation with the Monitor.[54]

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[49] Initial Affidavit. at para 169.
[50] *Ibid* at para 170.
[51] *Ibid*.
[52] *Ibid*. at para 172.
[53] *Ibid*. at para 174
[54] *Ibid* at para 175.

36. The Applicant seeks to have the TM Engagement Letter approved by this Court, *nunc pro tunc*, at the Comeback Hearing and seeks approval to be responsible for its proportionate share of the fees contemplated thereunder.

PART III - ISSUES

37. The issue before this Court is whether the relief requested in the Amended and Restated Initial Order should be granted. The requested relief includes:

(a) approving the Intercompany Agreements and the proposed Intercompany Charge;

(b) granting the proposed sealing order in respect of the Intercompany Agreements;

(c) authorizing the Applicant to pay pre-filing arrears owing to Critical Suppliers, subject to the approval of the Monitor;

(d) granting the Related Party DIP Charge;

(e) approving the Final DIP ABL Credit Agreement;

(f) approving the retention of TM Capital pursuant to the TM Engagement Letter; and

(g) extending the Initial Stay Period until March 17, 2023.

PART IV - THE LAW AND DISCUSSION

A. <u>The Intercompany Agreements should be approved, and the Intercompany Charge should be granted</u>

38. The Applicant is part of an integrated business within the DCL Group, and the Applicant sells substantially all of its manufactured finished goods inventory to DCL USA LLC.[55] DCL USA LLC, in turn, supports the Applicant through the provision of intercompany funding, on a post-filing basis.[56] The intercompany funding obligations may be satisfied by paying or discharging certain obligations of the Applicant.

[55] Initial Affidavit at paras 46, 131.

[56] *Ibid* at paras 36, 50, 159.

39. Where the operations and expenses of debtor companies are funded in the ordinary course through intercompany advances, it is appropriate for the CCAA court to approve the continuation of those arrangements during the CCAA proceedings and to grant an intercompany charge over the assets of the borrowers to secure such intercompany advances.

40. Intercompany charges to protect intercompany advances have been approved in CCAA proceedings under the general power in section 11 of the CCAA to make such orders as the court considers appropriate.[57]

41. The Intercompany Charge is required and reasonable in the circumstances as it will serve to ensure that the Applicant is able to receive sufficient funding from DCL USA LLC and that the stakeholders of DCL USA LLC, which itself is subject to insolvency proceedings, will not be unduly prejudiced as its intercompany financing to the Applicant will be provided on a secured basis.[58]

42. In *Re Performance Sports Group Ltd*, an analogous situation where this Court approved an intercompany charge, this Court noted the following considerations as germane:

> The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.[59]

43. Similarly, in approving the intercompany charge requested in *Re Walter Energy*, the Supreme Court of British Columbia noted:

> Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other

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[57] *Re Performance Sports Group Ltd*, 2016 ONSC 6800 at para 34 [*PSG*].

[58] Initial Affidavit at para 167.

[59] *PSG* at paras 33-35; *Re Walter Energy Canada Holdings Inc*, 2016 BCSC 107 [*Walter Energy*] at paras 62-67; *Arrangement Relatif à BioAmber Canada Inc*, 2018 QCCS 3170 at paras 20-22.

> member of the Walter Canada Group in respect of obligations under the letters of credit.[60]

44. The requested Intercompany Charge provides comfort to stakeholders of DCL USA LLC that the rights and interests of DCL USA LLC will be appropriately protected by this Court and is entirely consistent with existing precedent. In *Re Clover Holdings Company*, this Court held:

> I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.[61]

45. The Monitor supports the relief sought.[62]

B. Sealing Order Should be Granted

46. In *Sierra Club of Canada v. Canada (Minister of Finance)* ("***Sierra Club***"), the Supreme Court of Canada (the "**SCC**") held that courts should exercise their discretion to grant sealing orders where (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.[63]

47. In *Sherman Estate v. Donovan* ("***Sherman Estate***"), the SCC applied the test from *Sierra Club* differently, without altering its essence.[64] As provided in *Sherman Estate*, an applicant requesting a court to exercise discretion in a way that limits the open court presumption must establish that: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably

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[60] *Walter Energy* at para 65.

[61] *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at para 31 [*Clover Leaf*].

[62] Pre-Filing Report at para 13.1; First Report at para 6.12.

[63] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53.

[64] *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*].

alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[65]

48. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it noted in citing *Sierra Club* that the term "important interest" can capture a broad array of public objectives including commercial interests.[66]

49. A sealing order applied to the unredacted Intercompany Agreements is appropriate due to the commercially sensitive nature of the pricing information contained therein. The disclosure of such margins could potentially impair the Applicant's ability to negotiate pricing matters with customers and could place it at a disadvantage relative to competitors.

50. In the circumstances, the sealing of the unredacted Intercompany Agreements respects the principle of proportionality and is the least restrictive means available to maintain the confidentiality of this commercially sensitive information. Given the extensive details disclosed in the lightly redacted version, which is publicly available, it is unlikely that any stakeholder will be prejudiced as a result of the sealing order.[67] Interested parties can gain a complete and thorough understanding of the nature of the intercompany arrangements memorialized in the Intercompany Agreements, other than the specific margins being charged by the Applicant on the inventory it sells to DCL USA LLC.

51. Further, the Initial Affidavit and the Intercompany Agreements themselves disclose that the intention of the parties is to sell the DCL USA LLC Inventory at an arm's length price and that the price is determined in consultation with the DCL Group Tax Advisor, is consistent with transfer pricing policy and is subject to further adjustment as may be required to ensure arm's length

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[65] *Sherman Estate* at para 38.

[66] *Ibid* at para 41.

[67] Initial Affidavit at para 35.

pricing.[68] The Monitor, the Pre-Filing ABL Agent, and the DIP Agent have been provided unredacted copies of the Intercompany Agreements.[69]

52. The Applicant submits an appropriate and reasonable balance is struck by sealing the unredacted version of the Intercompany Agreements.

53. The Monitor supports the relief sought.[70]

C. The Applicant should be authorized to pay pre-filing arrears owing to Critical Suppliers

54. The Applicant is seeking authorization to pay pre-filing arrears to certain of its Critical Suppliers. For greater certainty, the Applicant is not seeking an order declaring that any of its suppliers are "critical suppliers" for the purposes of section 11.4 of the CCAA.[71]

55. Section 11.4 of the CCAA contemplates granting a charge against the assets of the debtor company, in exchange for compelling critical suppliers to continue to supply on trade terms that the court considers appropriate. In her 2009 decision in *Re Canwest Global*, shortly after section 11.4 of the CCAA came into force, Pepall J. (as she then was) considered whether the enactment of section 11.4 precluded a Court from permitting a debtor company from paying pre-filing amounts to critical suppliers. In that case, Her Honour held that the provision of a court-ordered charge was not the only remedy available to CCAA debtors in these circumstances, but, applies "when a court is compelling a person to supply" and the "charge then provides protection to the unwilling supplier".[72]

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[68] Initial Affidavit at paras 47, 49(f).
[69] *Ibid* at para 35.
[70] First Report at para 5.2.
[71] *CCAA*, s 11.4.
[72] *Re Canwest Global*, 2009 CanLII 55114 (ONSC) at para 42.

56. In the 2012 case of *Re Cinram International Inc.*, Morawetz J. (as he then was) accepted the following submission of counsel to the applicants as an accurate statement of the law regarding the court's ability to authorize payments to critical suppliers and the guidance provided in *Re Canwest Global*:

> There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.[73]

57. Following this reasoning, since the enactment of section 11.4 of the CCAA, courts have considered the following factors in determining whether to permit the payment of pre-filing obligations owing to suppliers: (i) whether the goods and services were integral to the business of the applicant; (b) the applicant's dependency on the uninterrupted supply of the goods or services; (c) that no payments would be made without the monitor's consent; (d) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized; (e) whether the applicant had sufficient inventory of goods on hand to meet its needs; and (f) not making the required payments would impair the debtor's ability to restructure.[74]

58. As set out above, all the above criteria are satisfied in the case at hand. The Applicant's Critical Suppliers, many of whom are outside of Canada and the U.S. and may take the position

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[73] *Re Cinram International Inc*, 2012 ONSC 3767 at Schedule C, para 67 [*Cinram*].

[74] *Cinram* at para 68. See also *Re Toys 'R Us*, 2017 ONSC 5571 at para 9; *Clover Leaf* at paras 24-27.

they are not subject to the jurisdiction of this Court, are essential to the Applicant's ongoing operations and its ability to implement a commercial resolution of the financial challenges which it is facing, in coordination with the broader DCL Group.[75] Any loss of these Critical Suppliers during the time following the commencement of the proceedings will impair the Applicant's effort to preserve and maximize the value of its business.

59. In addition to the above, given the level of integration of the Applicant with the rest of DCL US and the granting of the US Interim Critical Vendor Order which provides for the payment of prepetition amounts owing to critical vendors of DCL US, the Applicant is of the view that it is important to have symmetry with its US based counterparts and present a common and coordinated approach when negotiating and finalizing go forward arrangements with Critical Suppliers.[76]

60. Notably, the requested relief contemplates that, in exchange for Critical Suppliers receiving payment of their pre-filing obligations, they would commit to continue to provide payment terms to the Applicant, thus assisting with the Applicant's liquidity needs.[77]

61. The proposed form of order provides that payments will only be made to Critical Suppliers following the express authorization of the Monitor and the Monitor has indicated its support and willingness to work with the Applicant to ensure that only appropriate and necessary payments are made.[78]

62. For the reasons described above, the Applicant should be authorized to pay pre-filing arrears owing to Critical Suppliers in accordance with the terms of the Amended and Restated Initial Order, including the approval of the Monitor.

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[75] Initial Affidavit at para 179.

[76] *Ibid* at para 180.

[77] Draft Amended and Restated Initial Order at para 7(e).

[78] First Report at para 5.3-5.4.

D. The Related Party DIP Charge should be granted

63. The Applicant is requesting that the DIP Charge attach to the DCL USA LLC Inventory to secure the obligations owing by DCL USA LLC to the DIP Agent and DIP Lenders under the DIP ABL Facility. This Court has already extended the stay of proceedings as against such property pursuant to its discretionary authority under section 11 of the CCAA to "make any order it considers appropriate in the circumstances."[79]

64. The Applicant requests that this Court exercise such discretion to further the core goals of these proceedings. A Court-ordered charge from this Court provides all parties with the requisite comfort and assurance that the DCL USA LLC Inventory forms part of the DCL Group's collateral base used to support its borrowings.

65. With respect to the scope of discretion afforded by the CCAA, the SCC in *Canada v. Canada North Group Inc.* recently noted:

> The most important feature of the CCAA — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court. Section 11 of the CCAA confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances.[80]

66. In *Re Le Group SM* the SCC noted:

> The fundamental feature of the CCAA is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the CCAA's objectives are achieved (Century Services, at para. 19). The true "engine" driving the statutory scheme (Callidus, at para. 48, citing Stelco Inc. (Re) (2005), 2005 CanLII 8671 (ON CA), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36)…[81]

67. A CCAA judge's discretion, although vast, is not boundless. It must be exercised in furtherance of the CCAA's remedial objectives. The facts of this case clearly militate towards this

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[79] *CCAA*, s 11.

[80] *Canada v Canada North Group Inc*, 2021 SCC 30 at para 21.

[81] *Montreal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 at para 48.

Court exercising its discretionary authority to extend the DIP Charge to the DCL USA LLC Inventory, including for the following reasons:

(a) DCL USA LLC and the Applicant have highly intertwined business operations and are mutually reliant, with a common DIP Agent and DIP Lenders, interconnected financing, and cross-guarantees. The inventory in question is manufactured by the Applicant and most of inventory is then stored in the Distribution Centres in Ontario before being shipped on to third party customers of DCL USA LLC, all of which is necessary to generate revenue for the Applicant;[82]

(b) the extension of the DIP Charge over the DCL USA LLC Inventory does not materially alter the position of any creditors as the DIP Agent and DIP Lenders have been granted DIP liens pursuant to the US Interim DIP Order, and the Related Party DIP Charge, in effect, serves to give further effect to, and evidence, such DIP liens in Canada;[83]

(c) the Monitor supports the Related Party DIP Charge; [84]

(d) DCL USA LLC consents to the Related Party DIP Charge;[85] and

(e) the US Bankruptcy Court has requested that this Court provide aid and assistance to the US Bankruptcy Court by granting the Related Party DIP Charge. Responding to such request is in the interest of comity and international cooperation.[86]

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[82] See *e.g.* Initial Affidavit at paras 9(e), 21-22, 155(c).

[83] Second Davido Affidavit at para 11.

[84] First Report at para 6.12**.**

[85] Initial Affidavit at para 183.

[86] Exhibit "C" to the Second Davido Affidavit at para 5.17.

E. Final DIP ABL Credit Agreement

68. The Applicant seeks approval of the Final DIP ABL Credit Agreement. The grounds in support of the Draft DIP ABL Credit Agreement (before the Applicant entered into the Stalking Horse APA) were set out in detail in the Pre-Filing Report, the Initial Affidavit, and the factum dated December 20, 2022, filed in support of the issuance of the Initial Order and are not repeated here.

69. The Applicant notes that: (i) there are no material changes to the underlying economic and commercial terms from the DIP ABL Credit Agreement previously approved by this Court – the same interest rate, fees, borrowing base restrictions and maximum borrowing capacity remain in place under the Final DIP ABL Credit Agreement; (ii) the US Bankruptcy Court has approved the Final DIP ABL Credit Agreement on an interim basis pursuant to the US Interim DIP Order; (iii) the Monitor supports the approval of the Final DIP ABL Credit Agreement and is of the view that the revised DIP Milestones are on balance reasonable in the circumstances;[87] and (iv) the Applicant has no other viable alternative available to it to finance its post-filing obligations and the DIP ABL Facility is required to allow the Applicant to pursue a going concern solution for its broad cross-section of stakeholders.

70. The Monitor supports the requested relief.[88]

F. TM Engagement Letter

71. The TM Engagement Letter was entered into prior to the commencement of these proceedings and the terms of such engagement are detailed in the Initial Affidavit and the First Report.[89] TM Capital's efforts to market the business and assets of the DCL Group resulted in

[87] First Report at paras 3.7-3.8.

[88] *Ibid* at para 3.8.

[89] Initial Affidavit at paras 168-175; First Report at paras 5.5-5.6.

positive engagement by Potential Bidders. Pending the return to this Court for approval of the Stalking Horse APA, as a stalking horse agreement, and the Revised Bidding Procedures, TM Capital will continue to market the business and assets of the DCL Group. The Applicant seeks to provide the requisite assurance that the Applicant's obligations under the TM Capital Engagement Letter will be honoured and not subject to compromise. As noted above, fees payable to TM Capital will be paid by DCL USA LLC, with an appropriate allocation made to the Applicant, in consultation with the Monitor.[90]

72. The Monitor supports this requested relief.[91]

G. <u>Extension of Stay</u>

73. On an application other than an initial application, section 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court a) that circumstances exist that make the order appropriate, and b) that the applicant has acted, and is acting, in good faith and with due diligence.[92]

74. The Applicant is seeking to extend the Initial Stay Period up to and including March 17, 2023. This is the date on which repayment is required on the DIP ABL Facility following the anticipated sale of the Applicant's business.[93] The DIP Budget demonstrates that the Applicant should have sufficient liquidity to satisfy its post-filing obligations until that time.[94] The Applicant anticipates being in Court earlier in March 2023 in connection with a sale approval hearing and can provide the Court with an appropriate update of the Applicant's sale and restructuring efforts at that time.

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[90] Initial Affidavit at para 175.
[91] The First Report at para 5.7.
[92] *CCAA*, s 11.02(2).
[93] Second Davido Affidavit at para 25.
[94] *Ibid*.

75. The requested extension of the Initial Stay Period is necessary and appropriate in the circumstances to allow for continued steps to pursue a going concern sale of the Applicant's business assets.

76. During the Initial Stay Period, the Applicant has acted in good faith and with due diligence as evidenced by the execution of the Stalking Horse APA, which remains subject to Court approval as a stalking horse agreement. The Second Davido Affidavit and the First Report of the Monitor outline the steps taken by the Applicant since the granting of the Initial Order, including giving notice of these CCAA proceedings and the Comeback Hearing to affected parties and, in consultation with the Monitor, engaging in discussions with the Applicant's key stakeholders.[95]

77. The Monitor supports the request to extend the Initial Stay Period to March 17, 2023.[96]

PART V - RELIEF REQUESTED

78. For the foregoing reasons, the Applicant submits that the relief sought herein is appropriate in the circumstances and respectfully requests that the proposed form of Amended and Restated Initial Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th day of December 2022.

Blake Cassels + Graydon LLP

Blake, Cassels & Graydon LLP
Lawyers for the Applicant

[95] Second Davido Affidavit at para 29.

[96] First Report at para 5.9.

SCHEDULE "A"

LIST OF AUTHORITIES

	Case
1.	*Re Performance Sports Group Ltd*, 2016 ONSC 6800
2.	*Re Walter Energy Canada Holdings Inc*, 2016 BCSC 107
3.	*Arrangement Relatif à BioAmber Canada Inc*, 2018 QCCS 3170
4.	*Re Clover Leaf Holdings Company*, 2019 ONSC 6966
5.	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
6.	*Sherman Estate v Donovan*, 2021 SCC 25
7.	*Re Canwest Global*, 2009 CanLII 55114 (ONSC)
8.	*Re Cinram International Inc*, 2012 ONSC 3767
9.	*Re Toys 'R Us*, 2017 ONSC 5571
10.	*Canada v Canada North Group Inc*, 2021 SCC 30
11.	*Montreal (City) v Deloitte Restructuring Inc*, 2021 SCC 53

SCHEDULE "B"

RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

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.

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Court File No.: CV-22-00691990-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DCL CORPORATION

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

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(Returnable December 29, 2022)

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