

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 1000156489 ONTARIO INC.

Applicant

FACTUM OF THE MONITOR

June 20, 2024

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Corporation) and not in its personal or
corporate capacity

TO: SERVICE LIST

PART I - NATURE OF THE MOTION

1. This factum is filed in support of a motion by Alvarez & Marsal Canada Inc. (“**A&M**”), in its capacity as the monitor (in such capacity, the “**Monitor**”) of 1000156489 Ontario Inc. (f/k/a DCL Corporation) (the “**Applicant**”) in its proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**” and the within proceedings, the “**CCAA Proceedings**”).

2. On this motion, the Monitor seeks an order (the “**Stay Extension Order**”) extending the period of the CCAA stay of proceedings (the “**Stay Period**”) until and including January 31, 2025, and authorizing and empowering the Monitor to execute, for and on behalf of the Applicant, the Escrow Release and Termination Agreement (defined below).

3. The Applicant and its affiliated Chapter 11 Debtors (as defined below) underwent a sale process in Spring 2023 which cumulated in a going-concern sale of substantially all of the business and assets of the Applicant and the Chapter 11 Debtors. The Applicant no longer has any business, operations, or employees. On May 8, 2023, this Court granted the Monitor the expanded powers necessary to conduct an orderly wind-down of the Applicant (the “**Expansion of Monitor’s Powers Order**”). On December 6, 2023, this Court issued an Order, which extended the Stay Period until and including June 30, 2024.

4. The Monitor remains engaged with the following activities in relation to the wind-down at this time:

- (a) reviewing and adjudicating claims filed against the Applicant pursuant to the claims procedure established in accordance with this Court’s Order of June 20, 2023 (the “**Claims Procedure**” and the “**Claims Procedure Order**”);

- (b) pursuing a potential recovery in respect of any surplus balance remaining after the wind-down of certain of the registered pension plans for which the Applicant is sponsor; and
- (c) administering the USD\$750,000 CCAA Cash Pool.

5. The Monitor seeks to extend the Stay Period in order to continue the orderly wind-down of the Applicant as outlined above. The Monitor submits that the Stay Extension Order is fair and reasonable in the circumstances and should be granted.¹

PART II - SUMMARY OF FACTS

A. Background and Update on the CCAA Proceedings

6. The Applicant is a subsidiary of its U.S. parent, H.I.G. Colors Inc. (“**Holdings**”). Holdings is a direct wholly-owned subsidiary of the ultimate corporate parent, H.I.G. Colors Holdings, Inc. (“**HIG Colors Holdings**” and, together with Holdings and its direct and indirect subsidiaries, including the Applicant and its subsidiaries, the “**DCL Group**”).²

7. On December 20, 2022, the Applicant obtained an initial order from this Court under the CCAA, pursuant to which the Monitor was appointed.³

¹ Unless otherwise stated, all monetary amounts referred to in this factum are expressed in Canadian dollars. Capitalized terms used in this factum but not otherwise defined herein have the meanings accorded to them in the Eighth Report of the Monitor dated June 18, 2024 (the “**Eighth Report**”), the Fifth Report of the Monitor dated May 3, 2023 (the “[Fifth Report](#)”) or the Second Amended and Restated Sale Agreement dated as of March 28, 2023, between the Applicant, DCL US and Pigments (as appended to the Monitor’s Fifth Report).

² Eighth Report at para. 1.3.

³ Eighth Report at para. 1.1.

8. The CCAA Proceedings were commenced as part of a larger coordinated restructuring of the DCL Group, and on the Petition Date, HIG Colors Holdings and certain of its U.S.-based subsidiaries (the “**Chapter 11 Debtors**”) each filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “**U.S. Bankruptcy Court**”, and such proceedings, the “**Chapter 11 Proceedings**”, and together with the CCAA Proceedings, the “**Restructuring Proceedings**”).⁴

9. The DCL Group conducted a sales process in the Restructuring Proceedings that culminated in a transaction (the “**Transaction**”) with Pigments Services, Inc. (including any permitted assignees, “**Pigments**”) which included the sale of substantially all the business and assets of the Applicant. On March 29, 2023, this Court issued an Order approving the Transaction and extending the Stay Period until and including June 30, 2023. The Transaction closed on April 14, 2023.⁵

10. On May 8, 2023, this Court issued an Order (the “**Expansion of Monitor’s Powers Order**”), which granted the Monitor expanded powers to, among other things, oversee the wind-down activities of the Applicant.⁶

11. On December 6, 2023, this Court issued an Order, which extended the Stay Period until and including June 30, 2024.⁷

⁴ Eighth Report at para. 1.4.

⁵ Eighth Report at para. 1.5.

⁶ Eighth Report at para. 1.6.

⁷ Eighth Report at para. 1.8.

(a) Update on the Claims Procedure

12. On June 20, 2023, the Court granted the Claims Procedure Order approving the Claims Procedure for the identification, quantification, and resolution of claims of certain creditors of the Applicant and the Applicant's current and former Directors and Officers as at the date of the Initial Order.⁸

13. Pursuant to the Claims Procedure Order, the deadlines for filing claims were: (i) in respect of Pre-Filing Claims and Director/Officers Claims, August 18, 2023 (the "**Claims Bar Date**"); and (ii) in respect of Restructuring Period Claims, the later of 30 days after the date on which the Monitor sent a Claims Package with respect to a Restructuring Period Claim, or the Claims Bar Date.⁹

14. As of the date of the Eighth Report:¹⁰

- (a) 112 Claims, totalling approximately \$18.2 million, have been admitted as filed;
- (b) 57 Claims were subject to a Notice of Revision or Disallowance ("**NORD**"), which were issued by the Monitor and the time for Claimants to respond by way of a Notice of Dispute has expired. The 57 NORDs issued to date represent a total allowed amount of approximately \$12.6 million in the aggregate, and represent a total of approximately \$3.6 million in disallowed claims;

⁸ Eighth Report at para. 4.2.

⁹ Eighth Report at para. 4.3. A summary of filed Claims as of the applicable deadlines is included in the Seventh Report of the Monitor dated December 1, 2023.

¹⁰ Eighth Report at para. 4.5.

- (c) One (1) Pre-filing Claim, in the amount of approximately \$3.75 million for wrongful termination filed by a former employee, was subject to a NORD which was issued by the Monitor on December 20, 2023. The Monitor subsequently received a Notice of Dispute of Revision or Disallowance from the respective Claimant on January 3, 2024. The Monitor and the Claimant have been engaged in ongoing discussions to resolve the claim and the Monitor anticipates a settlement will be reached in the near term (the “**Unresolved Claim**”); and
- (d) Two (2) Claims totalling approximately \$136,000 were filed and subsequently withdrawn by the Claimant.¹¹

15. The Monitor continues to hold the balance of the CCAA Cash Pool, which has been reduced by an estimated \$100,000 in order to administer and finalize the Claims Procedure. Based on its current analysis, the Monitor expects that Claimants with accepted claims will receive a recovery of approximately 3.2%. This estimated recovery is subject to change as the Unresolved Claim continues to be reviewed and assessed.¹² Further, any recovery obtained from the surplus balance after the wind-down of the Hourly DB Plan and Salaried DB Plan may potentially increase the recovery to unsecured creditors.¹³

(b) Registered Pension Plans

16. The Applicant is the sponsor of the following registered pension plans: (i) the Salaried DC Plan; (ii) the Hourly DC Plan; (iii) the Hourly DB Plan; (iv) the Salaried DB Plan; and (v) the

¹¹ Eighth Report at para. 4.5.

¹² Eighth Report at para. 4.7.

¹³ Eighth Report at para. 4.8.

Pension Plan for the Employees of Monteith Inc. registered under the *Pension Benefits Act* (Ontario) and the *Income Tax Act* (Canada) with registration number 1046994 (the “**Canadian Pension Plans**”). The Canadian Pension Plans were not assumed by Pigments as part of the Transaction.¹⁴

17. On October 18, 2023, Wind-Up Orders were issued by the Financial Services Regulatory Authority of Ontario (“**FSRA**”) in respect of the Hourly DB Plan and Salaried DB, effective April 14, 2023.¹⁵ Wind-up reports filed with FSRA dated December 11, 2023 for the Hourly DB Plan and Salaried DB Plan (the “**Wind-Up Reports**”) show that as of April 14, 2023, being the wind-up date for both plans, the Salaried DB Plan had an estimated wind-up surplus of approximately \$2,770,900, and the Hourly DB Plan had an estimated wind-up surplus of approximately \$1,580,300. On February 11, 2024, FSRA approved the Wind-Up Reports.¹⁶

18. If after the liabilities of the Hourly DB Plan or the Salaried DB Plan are settled surplus assets remain, such assets will be allocated in accordance with each plan’s governing documents or as may otherwise be agreed with the Applicant’s plan members or as ordered by the Court. Absent a court order determining surplus ownership, entitlement to any surplus will be adjudicated by FSRA, and the distribution of such surplus is subject to the oversight and consent of FSRA.¹⁷

19. The Applicant’s pension counsel and the Monitor’s pension counsel have continued to work with the Applicant to locate documents that may be relevant to surplus entitlement. The documents are needed to assess whether the Applicant or the plan members are entitled to the

¹⁴ Eighth Report at para. 3.1.

¹⁵ Eighth Report at para. 3.2.

¹⁶ Eighth Report at para. 3.3.

¹⁷ Eighth Report at para. 3.4

surplus after all liabilities under the applicable plan have been discharged. The process of obtaining plan documents has taken longer than anticipated given that the Salaried DB Plan and the Hourly DB Plan were originally established in 1977 and 1978, respectively.¹⁸

20. Based on the Applicant's and the Monitor's pension counsel's review of available information and documents regarding the Hourly DB Plan, if an agreement with the plan members is not obtained, the Applicant, in coordination with the Monitor, intends to file an application to FSRA that demonstrates that entitlement to any surplus in the Hourly DB Plan (estimated to be approximately \$1.6 million) resides with the Applicant and intends to request that FSRA distribute all such surplus in the Hourly DB Plan accordingly. The Monitor understands that it is unlikely that all of the Hourly DB Plan's liabilities will have been discharged until late in 2024, following which the Applicant intends to file the surplus application as soon as practicable, in coordination with the Monitor.¹⁹ In an effort to avoid the additional time and costs of a full adjudication by FSRA of the surplus entitlement and to expedite distribution of the surplus once the liabilities have been discharged, counsel to the Applicant and the Monitor have shared a draft of the application for the Hourly DB Plan and all supporting materials with counsel to Teamsters Chemical, Energy and Allied Workers (Local Union No. 1979) (the "**Union**") and have discussed the merits of the application with Union counsel.²⁰

21. Documents related to the Salaried DB Plan have been more challenging to gather. Applicant's counsel has made significant efforts to locate the relevant documentation; however,

¹⁸ Eighth Report at para. 3.5.

¹⁹ Eighth Report at paras. 3.6-3.7.

²⁰ Eighth Report at para. 3.8.

there remain gaps in the documents located thus far. The Applicant and the Monitor continue to consider their options in light of these gaps. As is the case with the distribution of the Hourly DB Plan, the entitlement to any surplus, and the distribution of such surplus, will be subject to the review, oversight, and consent of FSRA. However, as is the case with the adjudication of the Hourly DB Plan surplus, the process and the timeline for the Salaried DB Plan could be expedited with an agreement with the plan members on surplus entitlement.²¹

(c) Amounts Received by the Monitor

22. Upon closing of the Transaction, Pigments paid the following amounts to the Monitor:

- (a) the Canadian Designated Amount Portion of USD\$575,000;
- (b) the CCAA Cash Pool of USD\$750,000; and
- (c) USD\$1,442,134.50 in respect of the amount of HST potentially exigible on the Transaction, to be held by the Monitor on behalf of DCL US, in trust.²²

Canadian Designated Amount Portion

23. The Canadian Designated Amount Portion was established to pay all remaining costs, professional fees and other amounts incurred in connection with the CCAA Proceedings and the wind-down of the Applicant.²³

²¹ Eighth Report at para. 3.9.

²² Eighth Report at para. 3.10.

²³ Eighth Report at para. 3.11.

24. The Canada Revenue Agency (the “**CRA**”) performed an audit of the Applicant’s HST account relating to the post-filing period, which was completed in January 2024. The refund that was being held by the CRA in the amount of approximately \$134,100 has now been released to the Applicant.²⁴

25. As of the date of this Eighth Report, approximately \$836,500 of professional fees and costs have been paid in connection with the completion of the CCAA Proceedings, the Claims Procedure, and the wind-down of the Applicant.²⁵

26. Approximately \$84,100 remains in the Monitor’s trust account, which is currently reserved to fund remaining professional fees anticipated to be incurred for final tax related and pension related work by the Monitor, the Monitor’s legal counsel, and the Applicant’s legal counsel (the “**Remaining Canadian Designated Amount Portion**”).²⁶

CCAA Cash Pool

27. The CCAA Cash Pool continues to be held by the Monitor for the benefit of the Applicant’s estate in the CCAA Proceedings, including any costs to administer the CCAA Proceedings. The Monitor has not yet disbursed any amounts from the CCAA Cash Pool and continues to hold USD\$750,000. The Monitor anticipates using a small portion of this balance in order to administer and finalize the Claims Procedure, which costs should not be greater than \$100,000.²⁷

²⁴ Eighth Report at para. 3.12.

²⁵ Eighth Report at para. 3.13.

²⁶ Eighth Report at para. 3.15.

²⁷ Eighth Report at para. 3.16.

HST Balance

28. DCL US and Pigments, with the assistance of its tax advisors, jointly filed a GST44 tax election form by the appropriate deadline such that DCL US's sale of its business to Pigments was not subject to HST (the "**Tax Election Form**"). The Monitor and its legal counsel reviewed correspondence provided by Pigments in respect of the Tax Election Form filing, and the HST Balance was returned by the Monitor to Pigments following the parties agreeing on arrangements satisfactory to the Monitor to allow for same.²⁸

(d) Escrow Arrangement

29. In September 2016, the DCL Group acquired the shares of Dominion Colour Corporation (through Colour Acquisition Corporation ("**Colors**"), which subsequently amalgamated with Dominion Colour Corporation, and after further amalgamations became the Applicant in 2022) from KNRV Investments Inc. ("**KNRV**") pursuant to a share purchase agreement (as amended, the "**Share Purchase Agreement**") that contemplated an earnout payment to KNRV.²⁹

30. Pursuant to section 2.9 of the Share Purchase Agreement, KNRV and Colors also entered into an escrow agreement with BMO Trust Company, as escrow agent, dated September 2016 (the "**Escrow Agreement**"), whereby an amount held by BMO Trust Company in accordance with the Escrow Agreement (together with any accrued interest thereon, the "**Escrow Amount**") would be made available to satisfy any *bona fide* claim of Colors against KNRV for a specified period. The Monitor understands that the specified period has expired, and the Monitor has not been advised

²⁸ Eighth Report at paras. 3.17-3.18.

²⁹ Eighth Report at para. 5.1.

of the existence of any such claims. Once such period has expired, the remaining Escrow Amount, less any amounts related to pending claims and applicable fees, costs and expenses, was to be released from escrow and remitted to KNRV in accordance with the terms and conditions of the Escrow Agreement. In advance of this motion, KNRV advised the Monitor that it was seeking the return of the Escrow Amount (of approximately \$700,000) pursuant to the Escrow Agreement.³⁰

PART III - THE ISSUES AND THE LAW

31. The issues now before this Court are (i) whether the Stay Period should be extended until January 31, 2025; and (ii) whether the Monitor should be authorized to execute the Escrow Release and Termination Agreement.

A. The Stay Period Should be Extended

32. Pursuant to section 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence. There is no statutory time limit on how long a stay of proceedings can be extended.

33. The Stay Period currently expires on June 30, 2024. The Monitor asks that the Stay Period be extended until January 31, 2025. The Monitor submits that extending the Stay Period is warranted for the following reasons:³¹

- (a) the stay of proceedings should provide the necessary time for the Monitor and the Applicant to continue the ongoing review of the Unresolved Claim, continue to

³⁰ Eighth Report at para. 5.2.

³¹ Eighth Report at para. 6.2.

pursue the surplus balance from the Hourly DB Plan and Salaried DB Plan, and continue to administer the CCAA Cash Pool;

- (b) the stay of proceedings is required to provide the necessary stability and certainty to enable the Monitor to facilitate the wind-down of the CCAA Proceedings;
- (c) the Remaining Canadian Designated Amount Portion and approximately \$100,000 of the CCAA Cash Pool, together with any funds received by the Applicant in respect of the Hourly DB Plan and/or Salaried DB Plan surplus funds, are expected to provide sufficient liquidity to fund the remaining costs anticipated to be incurred to complete the wind-down of the CCAA Proceedings (and any related wind-down proceedings such as formal bankruptcies); and
- (d) the Applicant, with the assistance and oversight of the Monitor, continues to act in good faith and with due diligence.

B. The Monitor Should be Authorized to Execute the Escrow Release and Termination Agreement

34. Pursuant to the terms of the Stay Extension Order, the Monitor seeks authorization to sign, for and on behalf of the Applicant, the Escrow Release and Termination Agreement, substantially in the form attached as Appendix “F” to the Eighth Report (the “**Escrow Release and Termination Agreement**”).³²

35. This relief should be granted, as it will allow for the release of the Escrow Amount in accordance with the terms of the Share Purchase Agreement and the Escrow Agreement, and is

³² Eighth Report at para. 5.3.

consistent with the powers granted to the Monitor pursuant to the Expansion of Monitor's Powers Order.³³

36. The Monitor has served all parties to the Share Purchase Agreement and the Escrow Agreement with its materials for the upcoming motion.

PART IV - NATURE OF THE ORDER REQUESTED

37. For the reasons set out above, the Monitor requests that this Court grant the proposed Stay Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of June, 2024.



OSLER, HOSKIN & HARCOURT, LLP
per Marleigh Dick

³³ See the [Expansion of Monitor's Powers Order](#) and [Endorsement](#) of the Honourable Justice Osborne dated May 8, 2023.

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**SCHEDULE “A”
LIST OF AUTHORITIES**

N/A

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(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.

Stays, etc. — other than initial application

(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.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

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

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

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PROCEEDING COMMENCED AT TORONTO

FACTUM

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