SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-22-00691990-00CL **DATE:** **27 February 2023**

NO. ON LIST: 10

TITLE OF PROCEEDING: **DCL Corporation**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Linc Rogers	DCL Corporation	inc.rogers@blakes.com
Alexia Parente	DCL Corporation	alexia.parente@blakes.com
Milly Chow	DCL Corporation	milly.chow@blakes.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Josh Nevsky	Canadian Monitor, Alvarez & Marsal Canada Inc.	jnevsky@alvarezandmarsal.com
Stephen Ferguson	Canadian Monitor, Alvarez & Marsal Canada Inc.	sferguson@alvarezandmarsal.com
Marc Wasserman	Counsel to the Canadian Monitor	mwasserman@osler.com
Martino Calvaruso	Counsel to the Canadian Monitor	mcalvaruso@osler.com
Joseph Bellissimo	Canadian Counsel to the Term Loan Lenders and	jbellissimo@cassels.com

	Term Loan Agent	
Shayne Kukulowicz	Canadian Counsel to the Term Loan Lenders and Term Loan Agent	skukulowicz@cassels.com
Joe Latham	Canadian Counsel to Pre-Petition Agent and DIP Agent	jlatham@goodmans.ca
Erik Axell	Canadian Counsel to Pre-Petition Agent and DIP Agent	eaxell@goodmans.ca
Heather Meredith	Counsel to Vale Canada Limited	hmeredith@mccarthy.ca

---

ENDORSEMENT OF JUSTICE OSBORNE

1. The Applicant, DCL Corporation (the "Applicant" or "DCL") moves for an order authorizing DCL to enter into a stalking horse agreement, deeming that agreement to be a Qualified Bid, approving bidding procedures in connection with the solicitation and identification of bids for the purpose of selling substantially all of the assets of DCL, and a sealing order.

2. At the conclusion of the hearing of this motion on February 22, 2023, I granted the relief sought with reasons to follow. These are those reasons.

3. Defined terms in this Endorsement have the meaning given to them in the motion materials and/or the Second Report of the Monitor dated February 16, 2023.

4. None of the relief sought by DCL is opposed, and it is supported by the Term Loan Lenders and Term Loan Agent, the Pre-Petition Agent and DIP Agent and is recommended by the Monitor.

5. The Applicant relies principally on the affidavit of Mr. Scott Davido sworn February 15, 2023 and exhibits thereto, the affidavit of Ms. Nancy Thompson sworn February 22, 2023 and exhibits thereto, and the Second Report of the Monitor.

Background, Stalking Horse APA and Final Bidding Procedures

6. DCL obtained protection under the CCAA by Initial Order of Justice Conway of this Court dated December 20, 2022. On the same date, DCL's US-based affiliates commenced voluntary proceedings pursuant to Chapter 11 of the *United States Bankruptcy Code* before the United States Bankruptcy Court for the District of Delaware (the "US Proceedings").

7. On February 21, 2023, The Honourable J. Kate Stickles of the US Bankruptcy Court granted companion relief to that sought on this motion.

8. DCL seeks authorization to enter into an agreement, *nunc pro tunc*, between Pigments Holdings Inc. and the DCL Group dated as of December 21, 2022, as amended and restated pursuant to an amended and restated asset purchase agreement dated February 13, 2023 (the "Stalking Horse APA"). Pursuant to the Stalking Horse APA, the purchaser would acquire substantially all of the assets of the DCL Group, inclusive of assets held by the Applicant.

9. DCL began exploring options for restructuring its business prior to the commencement of these proceedings. An initial sales process to solicit interest in its business was conducted. DCL retained TM Capital to assist and evaluate strategic options. DCL and TM Capital developed a list of potentially interested parties, prepared a CIM and virtual data room and invited potential bidders to conduct due diligence.

10. That strategic process resulted in numerous letters of intent. DCL's term loan lenders submitted a credit bid which ultimately resulted in the agreement dated December 21, 2022 described above. Subsequently, the parties negotiated amendments to that agreement to reflect discussions with the Committee of Unsecured Creditors ("UCC") and its counsel and financial advisor.

11. The Applicant submits that approval of the Stalking Horse APA will provide demonstrated stability through this going concern solution. The Stalking Horse APA is the highest and best initial offer received as part of the pre-filing marketing process and, if approved, will be used as a floor or baseline to incentivize prospective bidders to submit other competitive offers for the Assets as against the minimum terms represented by the Stalking Horse APA itself.

12. The Stalking Horse APA would, if completed, provide for the purchase and sale of the Assets of the DCL Group on a going concern basis (other than the Ajax Plant) for an aggregate purchase price range of USD$166.2 million to USD$170.9 million. It reflects the Global Settlement reached with the UCC, and among other things clarifies the mechanics for the funding of the Designated Amount of USD$2 million (as defined in the Stalking Horse APA) and provides for the CCAA Cash Pool funded in the amount of USD$750,000. There is no due diligence or financing condition.

13. The proposed purchaser is sophisticated, is an affiliate of the Term Lenders and is therefore familiar with the business and operations of the DCL Group.

14. The proposed Final Bidding Procedures will govern the solicitation and evaluation of additional bids for the Assets all with the objective of producing the highest or otherwise best available recovery for affected stakeholders.

15. TM Capital has continued to actively market the Assets and has reached out to over 150 potential bidders, a number of whom have expressed interest.

16. The Final Bidding Procedures are described in detail in Mr. Davido's affidavit. They contemplate a bid deadline of March 10, 2023, an auction commencement date of March 13, 2023 if necessary and sale approval hearings in both this Court and in the US Bankruptcy Court on March 16, 2023. Closing of the successful bid would occur the following day, assuming the requisite approvals are granted. The process will be overseen by the Monitor.

17. Each bid is required to have a 10% deposit and a minimum overbid, in excess of the Stalking Horse APA of USD$2,250,000. The bid increment thereafter would be USD$250,000.

The Applicable Factors to a Consideration of a Sale Process and Stalking Horse Bid

18. This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

    a. the fairness, transparency and integrity of the proposed process;
    b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
    c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

19. These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

    a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
    b. the interests of all parties;
    c. the efficacy and integrity of the process by which the party obtained offers; and
    d. whether the working out of the process was unfair.

20. In *Re Nortel Networks Corp.,* [2009] O.J. No. 3169, Morawetz, J. (now Chief Justice) described several factors to be considered in a determination of whether to approve a proposed sales process, including:

    a. is a sale transaction warranted at this time?
    b. Will it benefit the whole economic community?
    c. Do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
    d. is there a better viable alternative?

21. Subsequent to that decision, the CCAA was amended in 2009 to clarify the jurisdiction of this Court to authorize a sale of assets of the debtor outside a plan of arrangement according to the non-exhaustive list of factors set out in section 36 of the CCAA. The section 36 factors apply to approval of a sale rather than a sale process, but Chief Justice Morawetz' *Nortel* factors continue to apply post-2009 amendments (*Brainhunter Inc*., 2009 62 CBR (5^{th}) 41).

22. Notwithstanding that the section 36 factors are not directly applicable to the relief sought on this motion, in my view they should be kept in mind since they will be considered when this Court is asked to approve a sale resulting from the very process now under consideration.

23. The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Justice Penny of this Court, they can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as they establish a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

24. Recently, Justice Fitzpatrick of the British Columbia Supreme Court surveyed the Canadian authorities relevant to consideration of stalking horse bids, including those referred to above, and considered as a

useful summary of relevant questions to consider in assessing the merits of a proposed stalking horse bid, the following:

a. How did the stalking horse agreement arise?
b. What are the stability benefits?
c. Does the timing support approval?
d. Who supports or objects to the stalking horse agreement?
e. What is the true cost of the stalking horse agreement? and
f. is there an alternative?

(See *Re Freshlocal Solutions Inc.,* 2022 BCSC 1616 at paras. 24-32).

25. A sales process is warranted here. The Applicant is insolvent and cannot indefinitely continue operations.

26. The evidence relied on by the Applicant here is clear that the market has been extensively canvassed by TM Capital, and the Stalking Horse APA is the result of extensive negotiations and represents the highest and best initial offer for the Assets. There were no limitations restricting potential bidders from submitting a stalking horse bid.

27. There is transparency. Both the proposed Purchase Price, and the components thereof, are described together with an estimate of the purchase price range which has been considered in consultation with the Monitor.

28. I am satisfied that the Stalking Horse APA will not only provide stability for the Applicant, but also demonstrate that stability to the marketplace with a view to maximizing potential recovery for stakeholders.

29. It remains to be seen whether the Stalking Horse APA will be the final or best bid. That is for another day, but for now, it sets the minimum price and thereby incentivizes prospective bidders. That benefits the economic community. It provides a going concern solution for DCL, preserving the jobs of active employees and important relationships with suppliers, customers and other stakeholders. It provides for the CCAA Cash Pool for the unsecured creditors.

30. During the hearing of this motion, I asked for and received submissions from counsel with respect to the minimum overbid of USD$2,250,000. It is required as a result of the fee of $2 million payable to TM Capital in the event there is at least one Qualified Bidder beyond the Stalking Horse APA.

31. The minimum overbid is therefore intended to provide for the payment of this fee and the equivalent of the subsequently applicable bid increment of USD$250,000 all with a view to permitting “an apples to apples” comparison of bids.

32. I was concerned that this could have a potentially chilling effect on the proposed bid procedure and auction since the amount is not immaterial, and therefore any other potential bidder would be required to submit a bid that was significantly higher than that represented by the Stalking Horse APA.

33. I accept that, as submitted by the Applicant and supported by all other parties represented in Court today, the potential for a chilling effect is mitigated by the fact that the Stalking Horse APA provides for a bid in an amount that is less than the full debt owed to that creditor (the pre-filing Term Lender, an affiliate of the bidder).

34. The idea is that recovery for stakeholders not be less favourable on a net basis as a result of a bid, for example, that exceeds the stalking horse bid by $250,000 since the creditors would be worse off as a result

of the fee payable to TM Capital. It is for these reasons that the relief sought today including this provision is supported by the UCC.

35. As noted, the Stalking Horse APA is supported by the DIP Agent and DCL's two principal secured creditors, and is recommended by the Court-appointed Monitor. The Monitor submits that in its view, creditors of the Applicant would not be materially prejudiced by approval of the Stalking Horse APA or the Final Bidding Procedures.

36. I am satisfied that there is no *bona fide* reason for creditors of DCL to object to the sale of the Assets or to the Final Bidding Procedures, and indeed none has done so. This provides additional comfort that there is no better viable alternative.

37. For all of these reasons, the Stalking Horse APA and the Final Bidding Procedures are approved.

Sealing Order

38. The Applicant seeks a sealing order over the Confidential Exhibit. That contains the unredacted disclosure schedules to the Stalking Horse APA. Those in turn contain personal information about employees as well as commercially sensitive information relating to material contracts.

39. Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.42, provides for the Court's authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.

40. The Supreme Court of Canada in *Sherman Estate v Donovan,* 2021 SCC 25, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (CanLII):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the 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 alternative measures will not prevent this risk; and
>
> c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22).

41. Under the first branch of the three-part test, an "important commercial interest" is one that can be expressed in terms of the public interest in confidentiality. The Applicant here relies on the sanctity of contract (see *Sierra Club* at para. 55). The Supreme Court was clear that the interest in question cannot merely be specific to the party requesting the order and must be one which can be expressed in terms of a public interest in confidentiality.

42. Here, as in *Sierra Club*, the Applicant submits that the exposure of the information sought to be sealed would cause a breach of confidentiality agreements entered into between the DCL Group and other potential bidders which provide in part that the information must be kept confidential by those bidders and used only for the purposes described. Accordingly, the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information as well as maintaining the sanctity of contract.

43. The Supreme Court recognized the potential need for a sealing order where the parties have agreed to a confidentiality provision (see *Bombardier Inc. v. Union Carbide Canada Inc.,* 2014 SCC 35 at para. 49).

44. Further, in *Sierra Club* (at paras. 59-60), the Supreme Court recognized that the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test, provided however that certain criteria were met. The applicant must demonstrate that the information question has been treated at all relevant times is confidential and that on a balance of probabilities its proprietary, commercial and scientific interest could reasonably be harmed by the disclosure of the information. The information must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the court room doors closed".

45. Accordingly, I am satisfied that the first branch of the test is met here, in that there is an important public interest present to which court openness (in the form of the refusal to grant a sealing order) poses a serious risk. If a sealing order is not granted, there will be a serious risk to an important public interest of preserving, to the extent necessary, contractual obligations of confidentiality. (See *Bombardier*, at paras. 3, 29 and 51). The parties have, throughout, treated the information in the Confidential Exhibit as confidential and I am satisfied that the commercial interests of DCL could reasonably be harmed by the disclosure of the information.

46. I am also satisfied that the second requirement is met since the order sought is necessary to prevent the risks identified above is an important public interest because reasonably alternative measures will not prevent the risk.

47. The third requirement is also met. The balance of the materials in the Application (which constitutes the overwhelming proportion of the information) would not be sealed, and available to the public. That includes the disclosure schedules (over 45 pages) attached to Mr. Davido's affidavit. The proposed redactions are minimal and proportion yet achieve the objective of protecting privacy and preventing commercial harm. The gist of the issues would remain available to the public. On balance, I am satisfied that the benefits of the requested order outweigh its negative effects. The overall objective is to maximize the integrity of the proposed sales process and a successful outcome to maximize recovery for all stakeholders.

48. The sealing order shall have effect until further order of this Court. I note the general comeback provision in the Amended and Restated Initial Order of Justice Conway.

49. Counsel for DCL are directed to file physical copies of the sealed documents with the Commercial List Office in a sealed envelope marked: "confidential and sealed by Court order; not to form part of the public record".

Disposition

50. For all of the above reasons, I granted the order on February 26 with immediate effect and without the requirement that it be issued and entered. I am grateful to the parties for resolving the outstanding issues and objections such that the relief was sought today on an unopposed basis.

51. The proposed sale approval motion will be returnable before me on March 16, 2023 commencing at 9 AM via Zoom. The Applicant advises that it intends to seek companion sale approval from Judge Stickles that same day.

Justice Peter Osborne

Addendum: Following release of this endorsement, Counsel to the Court-appointed Monitor drew to my attention typographical errors in paras. 6 and 51. I have corrected those but made no other changes. I have directed counsel to the Monitor to release this corrected version of my endorsement to the Service List.

Osborne, J.

March 2, 2023