

**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 February 22, 2023)**

February 20, 2023

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**FACTUM OF THE APPLICANT
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PART I - OVERVIEW

1. The Applicant obtained protection under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**"),¹ on December 20, 2022, pursuant to an initial order of this Court (the "**Initial Order**"). The Initial Order was subsequently amended and restated by an Order (the "**Amended and Restated Initial Order**") of this Court granted on December 29, 2022. Among other things, the Amended and Restated Initial Order authorized the Applicant to exercise certain restructuring powers and pursue all avenues of restructuring, selling, and/or reorganizing the business of the Applicant.

2. On December 20, 2022, the Applicant's US based affiliates (collectively, "**DCL US**" and together with the Applicant and its subsidiaries, the "**DCL Group**") commenced voluntary proceedings pursuant to chapter 11 of the United States Bankruptcy Code (the "**Chapter 11 Proceedings**") before the United States Bankruptcy Court for the District of Delaware (the "**US Bankruptcy Court**").

¹ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA].

3. Background information regarding the DCL Group's business, these proceedings and the Chapter 11 Proceedings are more fully set out in the affidavit of Scott Davido sworn December 20, 2022 (the "**Initial Affidavit**") in support of the issuance of the Initial Order, the affidavit of Scott Davido sworn December 23, 2022, in support of the issuance of the Amended and Restated Initial Order and the affidavit of Scott Davido sworn February 15, 2023, in connection with the relief sought in the within motion (the "**Third Davido Affidavit**"). Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Third Davido Affidavit.

4. This factum is filed in support of the Applicant's motion for an order ("**Order**"), among other things:

- (a) authorizing the Applicant to enter into the Stalking Horse APA, *nunc pro tunc*, approving the Stalking Horse APA as a stalking horse bid and deeming the Stalking Horse APA as a Qualified Bid for the purposes of the Final Bidding Procedures;
- (b) approving the Final Bidding Procedures to allow the Applicant, together with other members of the DCL Group, to solicit and identify bids in addition to the Stalking Horse APA for the purpose of selling substantially all of the Assets (such process, the "**Stalking Horse Sales Process**"); and
- (c) sealing the unredacted copy of the disclosure schedules to the Stalking Horse APA attached as Confidential Exhibit "**1**" to the Third Davido Affidavit (the "**Confidential Exhibit**").

5. The Applicant submits that the Final Bidding Procedures, supported by the Stalking Horse APA, is the only viable going concern exit strategy available to the Applicant. Both the Stalking Horse APA and the Final Bidding Procedures are necessary and urgent for the preservation of value of the Applicant's business.

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

PART II – FACTS

A. Background

7. As noted above, detailed background on the Applicant’s business and an explanation of the necessity for these CCAA proceedings is set out in the Initial Affidavit and summarized in the Third Davido Affidavit.

(i) *Chapter 11 Proceedings*

8. Following the granting of certain interim relief at a first day hearing held on December 22, 2022 (the “**First Day Hearing**”), the US Bankruptcy Court scheduled a second day hearing for February 21, 2023 (the “**Second Day Hearing**”).² At the Second Day Hearing, DCL US will request, among other things, a final order in respect of the Final DIP Credit Agreement, which was approved on an interim basis at the First Day Hearing.³ In addition, DCL US filed a motion, scheduled to be heard at the Second Day Hearing, seeking approval by the US Bankruptcy Court of the same Stalking Horse Sales Process that the Applicant is seeking approval of before this Court. Such joint approval is a requirement under the Stalking Horse APA and the Final DIP ABL Credit Agreement.⁴

(ii) *The Marketing Process*

9. As stated in the Initial Affidavit, prior to making any final determination with respect to commencing formal insolvency proceedings, the DCL Group engaged TM Capital as exclusive

² Third Davido Affidavit at para 15.

³ Third Davido Affidavit at para 15.

⁴ Third Davido Affidavit at paras 16-17.

investment banker to assist the DCL Group in evaluating various strategic options to generate a recovery for the DCL Group's stakeholders (the "**Pre-Filing Marketing Process**").⁵

10. In connection with the Pre-Filing Marketing Process, TM Capital:

- (a) developed a list of strategic parties that would potentially be interested in purchasing the DCL Group;
- (b) prepared a confidential information memorandum ("**CIM**") and virtual data room ("**VDR**") containing information about the DCL Group, its business, and the sale opportunity generally; and
- (c) invited potential bidders to conduct due diligence with respect to the opportunity, which included: (i) allowing the bidders to review the CIM and VDR, and (ii) extending invitations to qualified parties to meet with the management of the DCL Group.⁶

11. In addition to receiving letters of intent from various potential bidders, the DCL Group also obtained a credit bid from the Term Lenders, which, through extensive negotiations, culminated in the execution of the Original Stalking Horse APA on December 22, 2022.⁷

B. The Stalking Horse APA

12. The parties have negotiated amendments to the Original Stalking Horse APA in the form of the Stalking Horse APA to (a) reflect the Global Settlement reached with the UCC; (b) clarify the mechanics for funding of the Designated Amount (as defined in the Stalking Horse APA); (c)

⁵ Initial Affidavit at para 142.

⁶ Third Davido Affidavit at para 65.

⁷ Third Davido Affidavit at para 67.

provide for the CCAA Cash Pool; (d) update the disclosure schedules; and (e) make certain other technical amendments to the Original Stalking Horse APA.⁸

13. The Stalking Horse APA is being submitted by a sophisticated purchaser, an affiliate of the Term Lenders, that is familiar with the business and operations of the DCL Group.⁹ Consistent with other stalking horse processes undertaken in insolvency proceedings in Canada and the United States, the Stalking Horse APA is intended to act as a floor offer against which all future bids received will be assessed.¹⁰

14. A non-exhaustive description of the key terms of the Stalking Horse APA is set out in the Third Davido Affidavit. In summary, the Stalking Horse APA provides for: (i) an aggregate purchase price range of \$166.2 million to \$170.9 million; (ii) acquisition of substantially all Assets of the DCL Group on a going concern basis (other than the Ajax Plant where operations have been discontinued by the Applicant and is to be acquired on an idled basis); (iii) payment of a Designated Amount of \$2 million to facilitate an orderly wind-down of the DCL Group, with \$575,000 of such amount to be paid to the Monitor on behalf of the Applicant (and any excess remaining from such Designated Amount to be transferred to the CCAA Cash Pool); and (iv) the funding of a CCAA Cash Pool in the amount of \$750,000 to be used to the benefit of the Applicant's estate, including any cost of administration of the CCAA proceedings. The Stalking Horse APA contains no due diligence condition, no financing condition and no expense reimbursement or break fee.¹¹

⁸ Third Davido Affidavit at para 68.

⁹ Third Davido Affidavit at para 66.

¹⁰ Third Davido Affidavit at para 72.

¹¹ Third Davido Affidavit at paras 73-74.

15. The Stalking Horse APA will incentivize prospective bidders to submit further competitive offers for the Assets.¹² The Applicant believes that the approval of the Stalking Horse APA – which will remain subject to higher and/or better offers in accordance with the Final Bidding Procedures described more fully below – will help maximize value for the DCL Group’s Assets and potential recoveries for the DCL Group’s various stakeholders.¹³

16. The Monitor supports approval of the Stalking Horse APA, as a stalking horse bid.¹⁴

17. Certain information in the disclosure schedules attached to the Stalking Horse APA contains personal information relating to employees as well as commercially sensitive information relating to material contracts, and has been lightly redacted for that reason. The Applicant is requesting the unredacted version of the disclosure schedules be sealed.

C. The Final Bidding Procedures

18. The Applicant is also seeking approval of the Final Bidding Procedures to allow the DCL Group to solicit additional bids to the Stalking Horse APA for the sale of the Assets.¹⁵

19. During the period from the commencement of these CCAA proceedings, TM Capital has continued to actively market the Assets, including outreach to over 150 potential bidders.¹⁶

20. A number of parties have expressed an interest in the DCL Group and TM Capital, and the DCL Group management team continues to work with them to provide increased diligence access, management meetings and facility tours as the parties move toward the Bid Deadline of March 10, 2023.¹⁷

¹² Third Davido Affidavit at para 79.

¹³ Third Davido Affidavit at para 83.

¹⁴ Third Davido Affidavit at para 82; Second Report of the Monitor dated February 16, 2023 at para 5.6 [*Second Report*].

¹⁵ Third Davido Affidavit at para 84.

¹⁶ Third Davido Affidavit at para 85.

¹⁷ Third Davido Affidavit at para 85.

21. Potential bidders have been provided with copies of the Original Stalking Horse APA and the Prior Bidding Procedures, and the disclosure schedules to the Original Stalking Horse APA are posted in the VDR. Going forward, potential bidders will be provided with copies of the Stalking Horse APA (including the updated disclosure schedules) and the Final Bidding Procedures.¹⁸

22. Although these extensive marketing efforts have continued following the Filing Date, the purpose of the Final Bidding Procedures is to maximize value to the DCL Group's stakeholders by creating a process which:

- (a) creates a floor offer against which all future bids will be assessed (via the Stalking Horse APA);
- (b) will enable the Applicant to conduct an additional Court-sanctioned marketing process over and above the Pre-Filing Marketing Process which continued following the Filing Date and culminated in the Stalking Horse APA;
- (c) will provide prospective purchasers additional time to conduct due diligence;
- (d) confirms and finalizes a sale and marketing process for the Assets, thus encouraging prospective purchasers to submit their highest and best offer for the Assets.¹⁹

23. A non-exhaustive description of the key terms of the proposed Final Bidding Procedures is set out in the Third Davido Affidavit.²⁰ The key dates are: (i) Bid Deadline of March 10, 2023; (ii) an auction commencement date of March 13, 2023, if necessary; (iii) US and Canadian sale

¹⁸ Third Davido Affidavit at para 85.

¹⁹ Third Davido Affidavit at para 86.

²⁰ Third Davido Affidavit at para 87.

approval hearing date of March 16, 2023; and (iv) closing of the successful bid on March 17, 2023.²¹

24. Other key Bid Requirements (as defined in the Final Bidding Procedures) include: (i) a 10% deposit to accompany each bid (other than with respect to the Stalking Horse Bid); (ii) a minimum overbid of \$2,250,000; (iii) acknowledging the bid is irrevocable unless a higher bid is accepted; and (iv) identifying how employee obligations are to be treated. If requested by the Monitor, the Stalking Horse Bidder or any other bidder will be required to allocate the Purchase Price as among the Canadian and U.S. Assets if the bidding exceeds the Applicant's total pre-petition secured indebtedness.²²

25. Pursuant to the requested Order, the Monitor is empowered to oversee the Applicant's participation in the Stalking Horse Sales Process. The Monitor supports approval of the Final Bidding Procedures.²³

PART III - ISSUES

26. The key issues before this Court are:

- (a) whether the Stalking Horse APA should be approved as a stalking horse bid;
- (b) whether the Final Bidding Procedures should be approved; and
- (c) whether the unredacted version of the Stalking Horse APA schedules should be sealed.

²¹ Third Davido Affidavit at para 87.

²² Third Davido Affidavit at para 87.

²³ Third Davido Affidavit at para 90; Second Report at para 5.12.

PART IV - THE LAW AND DISCUSSION

A. The Stalking Horse APA should be approved

27. Stalking horse agreements facilitate sales by establishing a baseline price and deal structure for the solicitation of superior bids from interested parties, maximizing the value of a business for the benefit of its stakeholders and enhancing the fairness of the sales process. Stalking horse agreements have been approved concurrently with a sales process under the CCAA and in other insolvency proceedings.²⁴

28. In the recent decision of *Freshlocal Solutions Inc (Re)*, Justice Fitzpatrick of the Supreme Court of British Columbia (the “**BCSC**”) observed that certain themes or factors emerged from cases considering the approval of a stalking horse bid.²⁵ In applying these factors, Her Honour posited that the following questions provided a helpful roadmap to assess the merits of the stalking horse bid under consideration:

- (i) how did the stalking horse agreement arise?
- (ii) what are the stability benefits of the stalking horse agreement?
- (iii) does the timing support the stalking horse agreement?
- (iv) who supports/objects to the stalking horse agreement?
- (v) what is the true cost of the stalking horse agreement? and
- (vi) is there an alternative?²⁶

29. Ultimately, Justice Fitzpatrick found the stalking horse agreement under consideration in *Freshlocal* (the “**Freshlocal SHA**”) did not meet the requisite threshold for approval. The facts in

²⁴ See also [Re Danier Leather, 2016 ONSC 1044](#) [Danier]; [CCM Master Qualified Fund Ltd v Blutip Power Technologies Ltd, 2012 ONSC 1750](#) [CCM]; [Re Nortel Networks Corp. \[2009\] OJ No 3169](#); [Brainhunter Inc \(2009\), 62 CBR \(5th\) 41](#) at para 13 [Brainhunter].

²⁵ See also [Re Boutique Euphoria Inc, 2007 QCCS 7129](#); Brainhunter at para 13; CCM at para 6; Danier at para 20; [Re Freshlocal Solutions Inc, 2022 BCSC 1616](#) at paras 24-32 [Freshlocal].

²⁶ *Freshlocal* at paras 35-76.

the present case, however, stand in stark contradistinction from the case before the BCSC. The weight of judicial authority clearly supports approving the Stalking Horse APA, as a stalking horse bid, in these circumstances.

30. The chart below contrasts the circumstances in *Freshlocal* to those in the case at bar:

| Consideration | <i>Freshlocal</i> | Applicant |
|---|---|--|
| How did the stalking horse agreement arise? | <ul style="list-style-type: none"> • The Freshlocal SHA did not come about through a competitive process. • The debtor was under substantial time pressures to move the proceeding forward. • There was no transparency as to how the purchase price in the stalking horse agreement came about.²⁷ • Further, the stalking horse bidder made veiled threats of litigation if the debtor did not select it as the stalking horse bidder.²⁸ | <ul style="list-style-type: none"> • The market was canvassed over a two-month period by TM Capital, resulting in participation from interested parties and competition amongst same. • The Stalking Horse APA is the result of extensive negotiations with the Stalking Horse Bidder and represents the highest and best initial offer for the Assets.²⁹ • The components of the Purchase Price under the Stalking Horse APA are detailed in the Stalking Horse APA and an estimate of the purchase price range has been disclosed by the Applicant and Monitor.³⁰ |
| Stability Benefits | <ul style="list-style-type: none"> • Although the Freshlocal SHA offered stability and provided positive messaging to suppliers and the market, the debtor did not provide any specific instances of any stakeholder expressing support of the Freshlocal SHA and in fact the | <ul style="list-style-type: none"> • The DCL Group is experiencing ongoing financial challenges. Although the DCL Group is actively managing those challenges, approval of the Stalking Horse APA will provide needed stability and |

²⁷ *Freshlocal* 22 at paras 37, 40.

²⁸ *Freshlocal* at para 37.

²⁹ Third Davido Affidavit at para 77.

³⁰ Third Davido Affidavit at para 73; Second Report at para 5.6.

| | | |
|--------------------|---|---|
| | <p>Freshlocal SHA was not supported by its secured creditors.³¹</p> | <p>demonstrate a vote of confidence to employees, customers and suppliers that a going concern solution has been secured.³²</p> <ul style="list-style-type: none">• The Stalking Horse APA is supported by the Pre-Filing ABL Agent/DIP Agent as a stalking horse bid and has been made by an affiliate of the Term Lenders. |
| Timing Perspective | <ul style="list-style-type: none">• The letter of intent with the stalking horse bidder, which was entered into two days after the investment banker was engaged, restricted the debtor from soliciting a stalking horse bid from any other party.³³• A week after the investment banker was engaged, 25 parties began performing due diligence but as noted above the debtor was contractually restricted by the stalking horse bidder from seeking stalking horse bids from them.• One of the key benefits of a stalking horse bid is that potential bidders could rely, to some extent, on the diligence performed by the stalking horse bidder. In <i>Freshlocal</i>, potential bidders could not rely on the due diligence performed by the stalking horse bidder as potential bidders were performing due diligence at the | <ul style="list-style-type: none">• There were no limitations that restricted potential bidders from submitting a stalking horse bid.• Potential bidders were given the opportunity, prior to the letters of intent submission deadline, to review the CIM and VDR and meet with the management of the DCL Group as part of their due diligence and had the opportunity to submit a stalking horse bid.³⁵• The Stalking Horse Bidder, an affiliate of the Term Lenders, is a sophisticated purchaser familiar with the DCL Group's business and the Stalking Horse APA contains no due diligence condition. Potential bidders can derive confidence from the absence of a due diligence condition that the |

³¹ *Freshlocal* at paras 46-48.

³² Third Davido Affidavit at para 76.

³³ *Freshlocal* at paras 51-53.

³⁵ Third Davido Affidavit at para 65.

| | | |
|--|--|--|
| | same time as the stalking horse bidder. ³⁴ | DCL Group has a viable go forward business. |
| Who Supports/Objections? | <ul style="list-style-type: none"> • The secured creditors, and principal economic stakeholders, objected to the Freshlocal SHA.³⁶ • The support in favour of the Freshlocal SHA by the directors was qualified as they felt contractually obligated as a result of litigation threats.³⁷ • With respect to the monitor, the BCSC noted: “For reasons not entirely apparent, the Monitor seemingly pays scant attention to the views of the [secured lenders]. The Monitor states that the market will determine their interests and that is unquestioned. The more salient consideration are the views—and business judgment—of the [secured lenders] who stand to bear the brunt of the consequences of approval of the SH Agreement in relation to the SISP.”³⁸ | <ul style="list-style-type: none"> • The Stalking Horse APA is supported by the Pre-Filing ABL Agent/DIP Agent as a stalking horse bid.³⁹ • The Monitor supports the Stalking Horse APA as a stalking horse bid.⁴⁰ • The Monitor’s recommendation reflects a considered view, as the Monitor notes that it does not believe creditors of the Applicant would be materially prejudiced by the Stalking Horse APA or the Stalking Horse Sales Process.⁴¹ |
| What is the true cost of the stalking horse agreement? | <ul style="list-style-type: none"> • Costs were not fair and reasonable in the circumstances. The break fee and expense reimbursement provisions in the Freshlocal SHA were not designed to | <ul style="list-style-type: none"> • The Stalking Horse APA does not have a break fee or reimbursement expense.⁴² |

³⁴ *Freshlocal* at paras 54-55.

³⁶ *Freshlocal* at para 21.

³⁷ *Freshlocal* at paras 37, 57.

³⁸ *Freshlocal* at paras 59-60.

³⁹ Third Davido Affidavit at para 80.

⁴⁰ Third Davido Affidavit at para 82.

⁴¹ Second Report at para 5.12(v).

⁴² Third Davido Affidavit at para 81.

| | | |
|--------------------------|---|--|
| | fundamentally compensate the stalking horse bidder for its “up front” expenses and were not payable only in circumstances where a higher and better offer was obtained. | |
| Is there an alternative? | <ul style="list-style-type: none"> • The secured creditors advocated for the sale process proceeding without the approval of the Freshlocal SHA. • If the Freshlocal SHA was not approved and no alternate transaction was concluded, it would be the objecting secured creditors that would “bear the brunt of that.”⁴³ | <ul style="list-style-type: none"> • The Applicant has considered and assessed other alternatives and concluded that the Stalking Horse APA represents the highest and best initial offer among those alternatives. • The Pre-Filing Agent/DIP Agent supports the Stalking Horse APA as a stalking horse bid as part of the Final Bidding Procedures and unlike the secured creditors in <i>Freshlocal</i>, it is not prepared to risk that no alternative transaction can be identified.⁴⁴ |

31. In summary, the Stalking Horse APA is the cumulation of a competitive process and was extensively negotiated. It is supported by the Pre-Filing ABL Agent/DIP Agent and the Monitor. The Stalking Horse APA does not provide the Stalking Horse Bidder with a break fee or expense reimbursement. It provides needed stability and represents a vote of confidence by a sophisticated party familiar with the DCL Group’s business. It is the best alternative available to the DCL Group in the circumstances and provides a strong starting point for the proposed Final Bidding Procedures.⁴⁵

⁴³ *Freshlocal* at para 76.

⁴⁴ Third Davido Affidavit at para 80.

⁴⁵ Third Davido Affidavit at para 75.

B. The Final Bidding Procedures should be approved

32. In *Nortel*, the Court identified several factors to consider in determining whether to approve a sales process:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole “economic community”?
- (c) do any of the debtor’s creditors have a bona fide reason to object to a sale of the business? and
- (d) is there a better viable alternative?⁴⁶

33. The above *Nortel* criteria were articulated in the CCAA context prior to the 2009 amendments to the CCAA. The amendments, among other things, confirmed this Court’s ability to authorize the sale of the debtor’s assets outside of a plan and directed the Court to apply the non-exhaustive list of factors set out in section 36 of the CCAA. This Court in *Brainhunter* confirmed that the *Nortel* criteria apply to the post-2009 CCAA.⁴⁷ These criteria have also recently been applied by this Court in *Green Growth Brands*.⁴⁸

34. This Court has noted that section 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sale process.⁴⁹ Accordingly, it is not this Court’s role in approving a sale process to apply the section 36 criteria. Such criteria will apply and be considered when this Court is eventually asked to approve a transaction. This approval will be sought at the conclusion of the Final Bidding Procedures, if approved, whether that is the Stalking Horse APA or an alternative transaction.

⁴⁶ *Nortel* at para 49; *Brainhunter* at para 13; *Danier* at para 23.

⁴⁷ *Brainhunter* at paras 15-17.

⁴⁸ *Re Green Growth Brands*, [2022 ONSC 3565](#) at para 61.

⁴⁹ *Brainhunter* at para 17.

35. Nevertheless, the *Nortel* criteria for approving a sales process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a concluded sale under section 36.⁵⁰ The Court is entitled to consider whether the Final Bidding Procedures is likely to satisfy the requirement that the process be fair and that the best price has been obtained, whether the Monitor supports the Final Bidding Procedures and the Stalking Horse APA as a stalking horse bid, as well as the extent to which creditors were consulted and other relevant factors.

36. The Applicant submits that the *Nortel* criteria are satisfied in these circumstances.

(a) **A sale process is warranted**

37. The Applicant is insolvent, unable to indefinitely continue operations in its current state and must restructure to preserve its business. The Stalking Horse Sales Process, which builds off the Pre-Filing Marketing Process that continued following the Filing Date, will provide a fair and reasonable process to further canvass the market to determine whether the Stalking Horse APA is the best possible result for stakeholders.⁵¹

(b) **The sale will benefit the whole economic community**

38. While the Stalking Horse APA may, or may not, be the final or best bid at the end of the Final Bidding Procedures, it maximizes value for the stakeholders by, among other things, generating interest in the Assets by setting a “floor price” to incentivize prospective bidders to submit further competitive offers for the Assets.⁵²

39. If the Stalking Horse APA is the Successful Bid, it will benefit the whole economic community by providing a going concern solution for substantially all of the DCL Group⁵³, thereby

⁵⁰ *Brainhunter* at para 16.

⁵¹ Third Davido Affidavit at para 83.

⁵² Third Davido Affidavit at para 79.

⁵³ The Ajax Plant operations have been discontinued by the Applicant and is to be acquired on an idled basis by the Stalking Horse Bidder under the Stalking Horse APA.

preserving the jobs of the DCL Group's active employees, as well as critical economic relationships with multiple suppliers, customers, and other stakeholders, including through the provision of the CCAA Cash Pool for the Applicant's unsecured creditors. If the Final Bidding Procedures generate an alternative transaction that is superior to the Stalking Horse APA, the benefits available to the DCL Group's stakeholders will only be heightened. The proposed Final Bidding Procedures, together with the Stalking Horse APA, will demonstrate whether there is a better option that could provide greater recoveries.⁵⁴

(c) **The debtors' creditors do not have a bona fide reason to object to a sale of the business**

40. The DCL Group does not believe that there is any bona fide reason for its creditors to object to the sale of the business or the Final Bidding Procedures. In fact, the Final Bidding Procedures are supported by the DCL Group's two principal secured creditors. The proposed process is transparent, reasonable, fair and subject to Monitor oversight and any Successful Bid identified through the process remains subject to Court approval.

(d) **There is no better viable alternative**

41. As described throughout, the DCL Group determined, after careful consideration of its strategic options and the LOIs submitted by other prospective purchasers, that the Stalking Horse APA and the Final Bidding Procedures present the best solution for the DCL Group and represents the best alternative available to the DCL Group and its stakeholders.

(e) **Additional considerations**

42. The Applicant submits that the Final Bidding Procedures are well suited to produce a resulting transaction that satisfies the section 36 criteria.

⁵⁴ Third Davido Affidavit at para 83.

43. Given the transparent and commercially reasonable nature of the Final Bidding Procedures, the Applicant believes that the proposed process will allow for the efficient sale of the Assets, will help the DCL Group identify additional prospective purchasers, and will help produce the highest or otherwise best available recoveries to affected stakeholders.⁵⁵ Further, the timeframe to conduct the Final Bidding Procedures is appropriate in light of all the circumstances (including the Pre-Filing Marketing Process and the ongoing marketing efforts) and will provide prospective bidders with sufficient time to complete any due diligence required to identify and fully evaluate the Assets.⁵⁶

44. The Monitor supports the approval of the Final Bidding Procedures in the circumstances as, in the Monitor's view, they are commercially reasonable and designed to maximize value through a competitive bidding process, including a potential auction.⁵⁷

C. The sealing order should be approved

45. The Applicant also requests that this Court grant the relief requested in the Order to seal the Confidential Exhibit pursuant to its jurisdiction under subsection 137(2) of the *Courts of Justice Act*.⁵⁸ Courts should exercise their discretion to grant sealing orders where the order is necessary to prevent a serious risk to an important interest, including a commercial interest and the salutary effects of the order outweigh its deleterious effects.⁵⁹

46. In *Sherman Estate v Donovan* ("***Sherman Estate***"), the SCC applied the test from *Sierra Club* differently, without altering its essence.⁶⁰ As provided in *Sherman Estate*, an applicant

⁵⁵ Third Davido Affidavit at para 88.

⁵⁶ Third Davido Affidavit at para 89.

⁵⁷ Third Davido Affidavit at para 90; Second Report at para 5.12.

⁵⁸ *Ontario Courts of Justice Act*, RSO 1990, c C 43, s 137(2).

⁵⁹ [*Sierra Club of Canada v Canada \(Minister of Finance\)*, 2002 SCC 41](#) at para 53 [*Sierra Club*].

⁶⁰ [*Sherman Estate v Donovan*, 2021 SCC 25](#) [*Sherman Estate*].

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 alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁶¹

47. 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.⁶²

48. Some of the information contained in the schedules to the Stalking Horse APA is personal information about employees as well as commercially sensitive information relating to terms of certain material contracts.

49. The principle of proportionality is respected. There are over 45 pages of disclosure schedules attached to the Third Davido Affidavit which sets out extensive details about the Applicant’s business and commercial relationships. The schedules have been minimally redacted, to protect privacy and prevent commercial harm. The Applicant submits that an appropriate and reasonable balance is struck.

50. This information is also subject to the terms of the existing confidentiality agreements between the DCL Group and other potential bidders in the Stalking Horse Sales Process. The information must be kept confidential by such bidders in accordance with the terms of such agreements and used only for the purposes set forth therein. The DCL Group would be hindered

⁶¹ *Sherman Estate* at para 38.

⁶² *Sherman Estate* at para 41.

in enforcing such confidentiality obligations and restrictions on use to the extent such information was publicly filed in these CCAA proceedings.

51. The Monitor supports the relief sought.⁶³

PART V - RELIEF REQUESTED

52. 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 the Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th day of February, 2023.

Blake Cassels & Graydon LLP

Blake, Cassels & Graydon LLP
Lawyers for the Applicant

⁶³ Second Report at para 7.1.

SCHEDULE “A”

LIST OF AUTHORITIES

| <u>Case</u> | |
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| 1. | <i>Re Nortel Networks Corp.</i>, [2009] OJ No 3169 |
| 2. | <i>Re Danier Leather</i>, 2016 ONSC 1044 |
| 3. | <i>CCM Master Qualified Fund Ltd v Blutip Power Technologies Ltd</i>, 2012 ONSC 1750 |
| 4. | <i>Brainhunter Inc</i> (2009), 62 CBR (5th) |
| 5. | <i>Re Green Growth Brands Inc</i>, 2020 ONSC 3565 |
| 6. | <i>Re Boutique Euphoria Inc</i>, 2007 QCCS 7129 |
| 7. | <i>Re Freshlocal Solutions Inc</i>, 2022 BCSC 1616 |
| 8. | <i>Re Target Canada Co</i>, 2015 ONSC 1487 |
| 9. | <i>Re Grant Forest Products Inc</i> (2009), 57 CBR (5th) 128 |
| 10. | <i>Re Canwest Global Communications Corp</i> (2009), 59 CBR (5th) 72 |
| 11. | <i>Re Cinram International Inc</i>, 2012 ONSC 3767 |
| 12. | <i>Re Aralez Pharmaceuticals Inc</i>, 2018 ONSC 6980 |
| 13. | <i>Sierra Club of Canada v Canada (Minister of Finance)</i>, 2002 SCC 41 |
| 14. | <i>Sherman Estate v Donovan</i>, 2021 SCC 25 |

SCHEDULE “B”

RELEVANT STATUTES

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

Factors to be considered

36 (3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Ontario Courts of Justice Act, R.S.O., 1990, c. C.43

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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 February 22, 2023)

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