

**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 **TRIBALSCALE INC.**

Applicant

FACTUM OF TRIBALSCALE INC.

(Re: Stay Extension and Approval of Restructuring Support Agreement)

October 27, 2020

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TO: THE SERVICE LIST

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PART I – OVERVIEW

1. TribalScale Inc. (the “**Applicant**” or the “**TribalScale**”) brings this motion for an Order, substantially in the form attached at Tab 3 of the Motion Record, that, among other things:

- (a) extends the stay of proceedings (the “**Stay Period**”) up to and including January 31, 2021, or such other date as determined by the Court; and
- (b) authorizes the Applicant to execute a restructuring support agreement (the “**RSA**”) between TribalScale and 1924191 Ontario Inc. (“**192**”), TribalScale’s largest secured creditor.

2. The proposed extended Stay Period will allow the Applicant to: (i) finalize the CCAA plan contemplated by the RSA (the “**CCAA Plan**”) and submit it to a creditor vote; and (ii) pursue recovery of its largest outstanding accounts receivable, owed to it by Sirius XM Connected Vehicle Services (“**Sirius**”).¹

3. The RSA, among other things, sets out a proposed transaction (the “**Transaction**”) between 192 and the Applicant to be effected through the CCAA Plan. At this time, the Applicant is not seeking approval of the Transaction or the CCAA Plan. The Applicant only requests that it be empowered to execute the RSA.

PART II – FACTS

A. Procedural History

4. TribalScale is a software engineering and development firm that provides digital product strategy, design, and development services to clients located in Canada and in the United States.

¹Jaitly Affidavit, *supra* at Affidavit para 21

TribalScale specializes in creating enterprise software solutions for large, institutional clients. Examples of past work include a project with the PGA Tour to develop voice user interface-based applications to engage fans through Google Assistant and Amazon Alexa, as well as a project with iHeartRadio to develop an application for the Amazon FireTV service.²

5. On May 19, 2020, TribalScale filed a Notice of Intention to Make a Proposal (“NOI”) pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended. MNP LTD (“MNP”), was appointed as the proposal trustee in the NOI proceedings.³

6. On July 31, 2020, the Honourable Justice Gilmore granted an Order (the “**Initial Order**”) converting the NOI proceedings into proceedings under the *Companies’ Creditors Arrangement Act*, RSC, 1985, c C-36 (the “**CCAA**”). MNP was appointed as TribalScale’s CCAA monitor (the “**Monitor**”), and an initial Stay Period was implemented up to and including October 31, 2020.⁴

B. Restructuring Efforts to Date

7. Since the Initial Order was granted, the Applicant’s management, together with the Monitor and company counsel, has been focused on:

- (a) continued discussions with its material secured creditor, 192, including the negotiation of the RSA;
- (b) the performance of current customer contracts;
- (c) the execution of new customer contracts;

² Affidavit of Sheetal Jaitley, dated 27 October 2020, Motion Record of TribalScale Inc. (Returnable October 31, 2020), at Tab 2 [**Jaitley Affidavit**] at Affidavit para 2

³ Jaitly Affidavit, *supra* at Affidavit para 3

⁴ Jaitly Affidavit, *supra* at Affidavit para 4

- (d) the collection of outstanding receivables;
- (e) the strategic “right-sizing” of the business with the assistance of MNP; and
- (f) the development of a restructuring plan.⁵

8. The Applicant and 192 recently finalized the terms of the RSA. The material terms of the RSA are summarized in paragraphs 23-27, below.

PART III – ISSUES

9. There are two issues to be determined in this motion:
- (a) whether the Court should extend the Stay Period up to and including January 31, 2021, pursuant to s. 11.02 of the CCAA; and
 - (b) whether the proposed RSA should be approved.

PART IV – LAW & ARGUMENT

A. Extension of the Stay Period

10. The Applicant is seeking an extension of the Stay Period up to and including January 31, 2020.

11. Under s. 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.⁶

⁵ Jaitly Affidavit, *supra* at Affidavit para 6

⁶ *Companies Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] at s 11.02(3)

The Proposed Stay Extension is Appropriate

12. The proposed extension of the Stay Period will be used to finalize the CCAA Plan and submit it for a creditor vote, and to bring a motion in respect of accounts receivable owed to the Applicant by Sirius. In accordance with the RSA, the Applicant expects that any funds collected from Sirius will be distributed to unsecured creditors (less legal and other fees associated with pursuing the claim).⁷

13. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period.⁸

14. The Applicant will have enough liquidity to continue going-concern operations beyond the proposed extension of the Stay Period.⁹

15. The Monitor supports the proposed extension.

16. Without an extension of time, the Applicant will not be able to finalize the CCAA Plan contemplated by the RSA and submit it to a creditor vote, nor will it be able to pursue the Sirius receivable. A complete shut-down and liquidation of the Applicant will throw away significant value that could be earned based on going-concern revenues. There is little to be gained from a liquidation as the Applicant's primary value is in its going concern operations,¹⁰ and it will also result in job losses for 30 employees.¹¹ This outcome is directly contrary to the purpose of these CCAA proceedings.

⁷ Jaitly Affidavit, *supra* at Affidavit paras 8 and 16(g)

⁸ Jaitly Affidavit, *supra* at Affidavit para 22

⁹ Jaitly Affidavit, *supra* at Affidavit para 20

¹⁰ Jaitly Affidavit, *supra* at Affidavit para 7

¹¹ Affidavit of Sheetal Jaitly, dated 24 July 2020, incorporated as Exhibit "A" to the Jaitly Affidavit, *supra*, at Tab 2-A, see Exhibit page 9, para 36

The Applicant is Acting in Good Faith and with Due Diligence

17. The Applicant's actions since the Initial Order illustrate that that it is acting in good faith and with due diligence. The Applicant's evidence on this motion is that it will continue to act in good faith and due diligence during the proposed extended Stay Period.¹²

B. The Restructuring Support Agreement Should be Approved

18. This Court has the authority under s. 11 of the CCAA to approve a debtor company entering into an agreement to facilitate a restructuring, provided that the order sought is appropriate in the circumstances.¹³

19. This Court has previously authorized restructuring support agreements pursuant to such powers.¹⁴

20. In *Stelco (Re)* the Court of Appeal for Ontario addressed the question of the approval of agreements said to be "intrinsic to the success" of a proposed plan of arrangement. These agreements established a framework for a proposed transaction, which in turn would form the basis of the proposed plan of arrangement. In upholding the decision of Farley J that approved the agreements, the Court of Appeal relied upon the following factors:

- (a) the agreement will facilitate the restructuring; and
- (b) the order sought does not usurp the creditors' right to decide whether to approve the plan.¹⁵

¹² Jaitly Affidavit, *supra* at Affidavit para 22

¹³ CCAA, *supra* at s 11; *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967 at para 19; *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899 at para 41

¹⁴ *Ibid*; see also: *Stelco (Re)*, 2005 CanLII 40140 (ON CA)

¹⁵ *Stelco (Re)*, 2005 CanLII 40140 (ON CA), at paras 18-19

21. In *U.S. Steel Canada Inc. (Re)*, Justice Wilton-Siegel heard an opposed motion regarding whether to approve a plan sponsor agreement. As in the case at hand, the sponsor agreement set out the terms of a proposed transaction to be effected through a CCAA plan of arrangement. In approving the agreement, His Honour relied upon the *Stelco (Re)* factors, as well the fact that the monitor supported the proposed order.

22. Applied to the within motion, the *Stelco/U.S. Steel* factors support granting the Order sought.

The RSA will Facilitate the Applicant's Restructuring

23. Under the RSA, the Applicant and 192 have agreed in principle to the Transaction, which will: (i) restructure the Applicant's secured indebtedness with 192; (ii) resolve the Applicant's secured indebtedness with the Business Development Bank of Canada; and (iii) vest out by way of a reverse vesting order, the Applicant's unsecured debt to a newly incorporated company.¹⁶

24. Under the RSA, unsecured creditors would receive the proceeds, if any, of the Sirius receivable.¹⁷

25. The main terms of the Transaction are:¹⁸

- (a) 192 will convert 50 % of its debt (the "**Secured Debt**") into 85% of the equity in the capital of TribalScale on a fully diluted basis;

¹⁶ Jaitly Affidavit, *supra* at Affidavit para 15

¹⁷ Jaitly Affidavit, *supra* at Affidavit para 15(c)

¹⁸ Jaitly Affidavit, *supra* at Affidavit para 16 (details key terms of Transaction); see also the full form of RSA attached as Exhibit "B" to the Jaitly Affidavit at Tab 2-B

- (b) the remaining 50% of 192's Secured Debt will remain on the balance sheet of TribalScale, with payment of interest accruing on the Secured Debt being deferred until the date that is one year from the closing of the Transaction. 192 will maintain security over the assets, property and undertaking of TribalScale for all of the obligations in respect to the remaining Secured Debt and for any obligations under the RSA or the Transaction;
- (c) the Bank of Nova Scotia ("**Scotiabank**"), which originated the debt now held by 192, will be issued 5% of the equity in the capital of TribalScale on a fully diluted basis in full and final satisfaction of the consideration owed to Scotiabank by TribalScale as a result of the assignment of the Secured Debt from Scotiabank to 192;
- (d) Sheetal Jaitly will be issued 10% of the equity in the capital of TribalScale on a fully diluted basis;
- (e) TribalScale will make a cash payment in the amount the secured indebtedness owing to BDC in full and final satisfaction of the indebtedness to BDC;
- (f) TribalScale will incorporate a new company ("**Newco**") and seek approval from the Court for an Order "vesting out" all unsecured liabilities to Newco, which will then be assigned into bankruptcy;
- (g) TribalScale will issue a promissory note to the unsecured creditors of Newco in the amount of the Sirius receivable, less the fees and costs incurred to collect;

- (h) TribalScale, as approved by 192, will continue payment of the following liabilities:
 - (i) all trade obligations incurred by TribalScale towards its suppliers following the filing of the NOI; and,
 - (ii) all obligations of TribalScale towards its employees; and
- (i) implementation of the Transaction will be conditional upon approval of the Court.¹⁹

26. Under the RSA, 192 has agreed to vote all of the Secured Debt in favour of the CCAA Plan to effect the Transaction.²⁰

27. The RSA contemplates the following timeline:

- (a) filing of the CCAA Plan by no later than November 11, 2020;
- (b) meeting of the secured creditors being compromised under the CCAA Plan by no later than November 13, 2020;
- (c) sanction of the CCAA Plan by the Court by no later than November 20, 2020; and
- (d) implementation of the CCAA Plan by no later than November 27, 2020.²¹

28. The Applicant's evidence is that executing the RSA is in the best interests of TribalScale and its stakeholders, and will enhance the prospect of a going-concern restructuring.²² It was negotiated with the purpose of facilitating the Applicant's emergence from CCAA protection.²³ It commits the Applicant and 192 to the Transaction, which (if closed) ensures a recovery for both

¹⁹ Jaitly Affidavit, *supra* at Affidavit para 16

²⁰ Jaitly Affidavit, *supra* at Affidavit para 17

²¹ Jaitly Affidavit, *supra* at Affidavit para 18

²² Jaitly Affidavit, *supra* at Affidavit para 23

²³ Jaitly Affidavit, *supra* at Affidavit para 11

secured creditors and the potential of a recovery for unsecured creditors. Conversely, a bankruptcy liquidation would be less favourable to all stakeholders.²⁴

The Applicant's Creditors Hold the Final Decision on the CCAA Plan

29. The RSA contemplates that the Transaction will be accomplished by way of the CCAA Plan to be voted on by its secured creditors and, if passed, sanctioned by this Honourable Court. The Order sought expressly states that it does not constitute approval of the Transaction. Creditors maintain the final word.

30. The RSA approval language sought by the Applicant in the draft Order is materially similar to language recently endorsed by Justice Romaine of the Court of Queen's Bench for Alberta, in the CCAA proceedings of Delphi Energy Corp.²⁵

The Monitor Supports the Proposed Order

31. The Applicant has been advised by the Monitor that it supports the relief requested.

32. The Applicant therefore submits that the Order sought is reasonable in the circumstances and should be approved.

PART V – RELIEF REQUESTED

33. Based on the foregoing, the Applicant respectfully requests that this Court grant the proposed form of Order found at Tab 3 of the Motion Record.

²⁴ Jaitly Affidavit, *supra* at Affidavit paras 7, 21

²⁵ *Delphi Energy Corp., et al (Re)*, Order dated July 10, 2020, para 2, appended as Schedule C to this factum

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF
OCTOBER, 2020

A handwritten signature in cursive script, appearing to read "C. Fell", positioned above a horizontal line.

WEISZ FELL KOUR LLP

SCHEDULE "A"

List of Authorities

1.	<i>U.S. Steel Canada Inc. (Re)</i> , 2017 ONSC 1967
2.	<i>U.S. Steel Canada Inc. (Re)</i> , 2016 ONSC 7899
3.	<i>Stelco (Re)</i> , 2005 CanLII 40140 (ON CA)
4.	<i>Delphi Energy Corp., et al (Re)</i> , Order dated July 10, 2020

SCHEDULE "B"

Statutory Authorities

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

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.

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.

(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.

SCHEDULE "C"

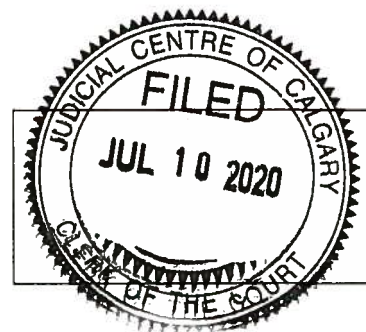
Delphi Energy Order

I hereby certify this to be a true copy of
the original ORDER

Dated this 10 day of JULY 2020

jc
for Clerk of the Court

Clerk's Stamp:



COURT FILE NUMBER

2001-05124

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS:

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

AND IN THE MATTER OF THE COMPROMISE OR
ARRANGEMENT OF DELPHI ENERGY CORP., and
DELPHI ENERGY (ALBERTA) LIMITED

DOCUMENT

ORDER

**(Approval of Restructuring Support Agreement, Capital
Investment Agreement and the Investor Agreement,
Restricted Court Access Order and Extension of Time to
Hold Annual Meeting)**

CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT:

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File Number: 1209635

DATE ON WHICH ORDER WAS PRONOUNCED: July 10, 2020

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Madam Justice B.E.C. Romaine

LOCATION OF HEARING: Calgary, Alberta

UPON the application of **DELPHI ENERGY CORP. (“Delphi Corp”)** and **DELPHI ENERGY (ALBERTA) LIMITED** (and, together with Delphi Energy Partnership, collectively, the “**Applicants**”) for an Order, among other things, approving the Restructuring Support Agreement, dated July 5, 2020 (as may be amended from time to time, the “**Restructuring Support Agreement**”), among the Applicants, Luminus Energy IE Designated Activity Company (“**Luminus**”), Concise Capital Management, LP and Stornoway Portfolio Management, Inc. directly and/or through their managed funds (collectively, the “**Initial Plan Sponsors**”), the Capital Investment Agreement, dated July 5, 2020 (as may be amended from time to time, the “**Capital Investment Agreement**”), between Delphi Corp. and Kiwetinohk Resources Corp. (“**Kiwetinohk**”), and the Investor Agreement dated July 5, 2020, among Luminus, Kiwetinohk, and Delphi Corp. (as may be amended from time to time, the “**Investor Agreement**”); **AND UPON** having read the Application filed by the Applicants on July 6, 2020, and the Affidavits of David J. Reid, sworn April 8, 2020, April 14, 2020, April 22, 2020, May 7, 2020, May 20, 2020 and July 6, 2020 (the “**Fifth Reid Affidavit**”); **AND UPON** reading the First, Second, Third and Fourth Reports of PricewaterhouseCoopers Inc. in its capacity as Monitor of the Applicants (the “**Monitor**”); **AND UPON** hearing from counsel for the Applicants, the Monitor, the Plan Sponsors, and such other parties present; **IT IS HEREBY ORDERED AND DECLARED THAT:**

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this Application, and the time for service of this Application is abridged to that actually given.

RESTRUCTURING SUPPORT AGREEMENT

2. The Restructuring Support Agreement is hereby approved. The execution and delivery of the Restructuring Support Agreement by the Applicants is hereby authorized and approved, with such minor amendments as the Applicants may deem necessary, and the Applicants are authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of their obligations pursuant to, the Restructuring Support Agreement. For greater certainty, nothing in this paragraph shall constitute approval of the Plan Term Sheet, Plan Transaction, or CCAA Plan (as each of those terms is defined in the Restructuring Support Agreement).

CAPITAL INVESTMENT AGREEMENT AND INVESTOR AGREEMENT

3. The Capital Investment Agreement is hereby approved. The execution and delivery of the Capital Investment Agreement by Delphi Corp. is hereby authorized and approved, with such minor amendments as Delphi Corp. may deem necessary, and Delphi Corp. is authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of its obligations pursuant to, the Capital Investment Agreement.

4. The Investor Agreement is hereby approved. The execution and delivery of the Investor Agreement by Delphi Corp. is hereby authorized and approved, with such minor amendments as Delphi Corp. may deem necessary, and Delphi Corp. is authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of its obligations pursuant to, the Investor Agreement.

RESTRICTED COURT ACCESS

5. Subject to further Order of this Honourable Court, Confidential Exhibits A, B and C to the Fifth Reid Affidavit (the “**Confidential Exhibits**”) shall be sealed on the Court file and shall not form part of the public record, notwithstanding Division 4, Part 6 of the Alberta Rules of Court.

6. The Clerk of this Honourable Court shall file the Confidential Exhibits in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states that:

THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS
FILED BY DELPHI ENERGY CORP., DELPHI ENERGY
(ALBERTA) LIMITED, AND DELPHI PARTNERSHIP. THE
CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO
THE SEALING ORDER ISSUED BY MADAM JUSTICE
ROMAINE ON JULY 10, 2020.

7. Leave is hereby granted to any person, entity or party affected by paragraphs 5 and 6 of this Order to apply to this Court for a further Order vacating, substituting, modifying or varying the terms of paragraphs 5 and 6 of this Order, with such Application to be brought on notice to the Applicants and any other affected party.

EXTENSION OF TIME TO HOLD ANNUAL MEETING

8. Pursuant to section 133(3) of the *Canada Business Corporations Act*, R.S.A. 1985, c. 44, as amended, the time within which Delphi Corp. is required to hold the next annual meeting of its shareholders is hereby extended, *nunc pro tunc*, to December 31, 2020.

9. Leave is hereby granted to any person, entity or party affected by paragraph 8 of this Order to apply to this Court for a further Order vacating, substituting, modifying or varying the terms of

paragraph 8 of this Order, with such Application to be brought on notice to the Applicants and any other affected party.

A handwritten signature in black ink, consisting of stylized initials and a long horizontal stroke extending to the right.

Justice of the Court of Queen's Bench of Alberta

**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 TRIBALSCALE INC.**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**FACTUM
(Motion Returnable October 30, 2020)**

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