

Court File No.:

**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 ARRANGEMENT OF DEL
EQUIPMENT INC.**

Applicant

MOTION RECORD

(Motion for Preservation Order Returnable October 22, 2019)

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**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 DEL EQUIPMENT INC.**

Applicant

NOTICE OF MOTION
(returnable October 22, 2019)

Del Equipment Inc. (“DEL”) will make a motion before this Honourable Court on October, 22, 2019 at 10:00 a.m. or as soon thereafter as the motion can be heard at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order requiring Gin-Cor Industries Inc. (“**Gin-Cor**”) to transfer the funds it received from Mack Defense, LLC (“**Mack Defense**”) by wire transfer on or about August 28, 2019 and September 5, 2019, being the amount of \$874,107.08 (the “**Funds**”), to the Monitor (as defined

below) pursuant to Rule 45.02 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “**Rules**”);¹

2. In the alternative, an Order requiring Gin-Cor to segregate and keep separate the Funds in a separate account, pursuant to Rule 45.02 of the Rules or otherwise and the granting of an equitable lien on such funds subject to further order of the Court;

3. In the further alternative, a Declaration that, until further order of the Court, DEL holds an equitable lien over Gin-Cor’s assets in the amount of \$874,107.08;

4. Costs of this motion on a substantial indemnity basis; and

5. Such further and other relief as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION are as follows:

6. On October 22, 2019, DEL sought protection from its creditors under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) and obtained an Order (the “**Initial Order**”) which granted, among other things, a stay of proceedings in respect of DEL and appointed MNP Ltd. as the monitor (the “**Monitor**”) of DEL in the CCAA proceedings (the “**CCAA Proceedings**”).

7. DEL brings this motion to ensure the preservation of the Funds that are its property but were improperly intercepted and are unlawfully being retained by Gin-Cor.

¹ All monetary references herein are references to Canadian dollars.

8. DEL is a leading Canadian truck body and equipment “up-fitter” that engineers, designs, manufactures and sells special truck bodies, attachments, equipment and work-ready vehicles.

9. In June 2017, an agreement was reached with Gin-Cor, a company that operates in the same field as DEL, pursuant to which Gin-Cor would acquire a 40% equity interest in and management control of DEL for a nominal sum, with a view to earning a 100% equity interest upon the achievement of certain profitability-related milestones (the “**Gin-Cor Transaction**”).

10. In mid-2018, DEL (through its Moncton branch) delivered a series of quotes and re-quotes to Mack Defense for the up-fit of four different truck configurations and 19 up-fit trucks (the “**MD Trucks**”) to be delivered to the Canadian Department of National Defence (“**DND**”) and the Parks Canada Agency (“**Parks Canada**”). Mack Defense issued purchase orders (“**POs**”) for the MD Trucks to DEL in July and November 2018. Over the course of late 2018 and over the first half of 2019, DEL up-fitted the MD Trucks as requested by Mack Defense and delivered them to DND bases and Parks Canada locations between May 3, 2019, and June 25, 2019.

11. On or about June 6, 2019, DEL (then operating under the tradename Gincor Werx due to the Gin-Cor Transaction) issued a series of invoices to Mack Defense for the MD Trucks totalling \$874,107.08, which invoices were due and payable upon receipt (the “**MD Invoices**”).

12. Although the quotes and the MD Invoices delivered to Mack Defense include the logo and trade name Gincor Werx, each is clear that they were issued by DEL as the legal entity. In addition, the POs issued by Mack Defense were addressed to “Del Equipment Ltd”.

13. On September 10, 2019, DEL followed up with its customers to collect overdue accounts receivable and became aware that the \$874,107.08 payment owing by Mack Defense to DEL in respect of the MD Invoices had instead been made by Mack Defense to Gin-Cor, and not DEL.

14. DEL immediately reached out to Mack Defense and also received and responded to various emails from Gin-Cor. DEL understands that:

- (a) On the morning of April 10, 2019, Mack Defense emailed DEL asking for payment instructions for the work performed in relation to the MD Trucks. When the DEL representative did not immediately respond, Mack Defense emailed a Gin-Cor representative minutes later asking for payment instructions.
- (b) At 11:28 am on April 10, 2019, Gin-Cor provided Mack Defense with its own payment instructions despite the fact that Gin-Cor was not entitled to such amounts and Gin-Cor knew (or should have known) that it was not entitled to such amounts. It appears that Gin-Cor provided payment instructions for invoice #53998 issued by Gin-Cor to Mack Defense, which invoice has nothing to do with the MD Trucks.
- (c) About an hour later, at 12:37 pm on April 10, 2019, DEL responded to Mack Defense, advising that DEL was "...now Del Equipment Inc. operated as Gincor Werx", providing DEL's payment instructions, and attaching a completed Mack Defense "New Supplier Request Mack Defense Purchasing Form" which clearly indicated DEL as the supplier and included DEL's correct banking information.

- (d) Based on the payment information provided by Gin-Cor, Mack Defense paid the Funds to Gin-Cor via wire transfers made August 28, 2019 and September 5, 2019, representing the total payment amount for the MD Trucks.
- (e) In making the payments to Gin-Cor, Mark Defense either ignored or overlooked the proper payment instructions that DEL had sent on April 10, 2019, which clearly set out DEL's correct banking and wire transfer information.
- (f) Neither Mack Defense nor Gin-Cor dispute that the Funds were intended to be paid to DEL for the MD Trucks.
- (g) On September 18, 2019, Gin-Cor acknowledged that the Funds were "Del funds", however, Gin-Cor has taken the position that it is entitled to retain the Funds it wrongfully received from Mack Defense in order to set-off the Funds against obligations of DEL to Gin-Cor, or to unilaterally retain the Funds as collateral for alleged obligations owed by DEL to Gin-Cor.
- (h) There are no significant amounts owing by Mack Defense to Gin-Cor. As such, even if the provision of the wrong payment instructions was an honest mistake, Gin-Cor should have immediately realized that the Funds since were not intended for it.
- (i) Although Mack Defense has admitted in multiple telephone conversations that Mack Defense had inadvertently paid the Funds to Gin-Cor, Mack Defense has refused to pay DEL the amount owed for the MD Trucks on the basis that it views this matter as a dispute between DEL and Gin-Cor.

15. DEL has attempted in good faith to resolve these issues through numerous emails and/or discussions with both Mack Defense and Gin-Cor, neither of whom agreed to pay the amount due and owing to DEL for the MD Trucks.

16. On October 10, 2019, DEL's counsel sent demand letters to each of Mack Defense and Gin-Cor, including advising Gin-Cor that it held the Funds in trust for DEL and that, to the extent it did not immediately pay the Funds to DEL, it should be segregated in a separate account.

17. Counsel to Mack Defense responded on October 15, 2019 indicating that Mack Defense views this matter as a dispute between DEL and Gin-Cor, while no formal reply to DEL's demand and request to segregate the Funds has been received from Gin-Cor.

18. Gin-Cor's wrongful retention of these Funds has been a significant contributing factor to the Company's current liquidity challenges and the commencement of the CCAA Proceedings at this time.

19. Based on DEL's prior involvement with Gin-Cor's business, including the Company's understanding of Gin-Cor's financial circumstances, the Company is concerned that if immediate steps are not taken to preserve and protect the Funds, there is a possibility that such funds will be dissipated by Gin-Cor and DEL will not be able to recover the Funds from Gin-Cor at the conclusion of this matter.

20. The provisions of the CCAA.

21. Rules 1.04, 1.05, 2.03, 3.02, 37, and 45.02 of the Ontario *Rules of Civil Procedure*.

22. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

23. The affidavit of Douglas Lucky sworn October 20, 2019 and the exhibits attached thereto.

24. Such further and other materials as counsel may advise and this Honourable Court may permit.

October 22, 2019

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THE HONOURABLE)	TUESDAY, THE 22 nd
)	
JUSTICE HAINEY)	DAY OF OCTOBER, 2019

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PRESERVATION ORDER

(October 22, 2019)

THIS MOTION, made by Del Equipment Inc. (the "**Applicant**" or "**DEL**"), pursuant to Rule 45.02 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the "**Rules**"), was heard without notice on this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Douglas Lucky sworn October 20, 2019, and the Exhibits thereto (the "**Lucky Affidavit**"), and on hearing the submissions of counsel for the Applicant, counsel for MNP Ltd. (the "**Monitor**"), and those other parties present as indicated on the counsel sheet,

SERVICE

1. THIS COURT ORDERS that the time for service, if applicable, for the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

PRESERVATION OF FUNDS

2. THIS COURT ORDERS that funds in the amount of \$874,107.08, representing the funds received by Gin-Cor Industries Inc. (“**Gin-Cor**”) from Mack Defense, LLC (“**Mack Defense**”) via wire transfers made on or about August 28, 2019 and September 5, 2019 (the “**Funds**”), are to be transferred by Gin-Cor to the Monitor forthwith and in any event no later than October _____, 2019.

3. THIS COURT ORDERS that the Monitor shall continue to hold the Funds and to account for the Funds until further Order of the Court.

4. THIS COURT ORDERS that the Monitor shall incur no liability or obligation as a result of its carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the Initial Order made in these proceedings on October 22, 2019, the CCAA or any applicable legislation.

5. THIS COURT ORDERS that the Monitor shall have no obligation or duty to deposit the Funds in an interest bearing account and shall not be required to take any steps with respect to the Funds without further Order of this Court.

6. THIS COURT ORDERS that this Order is without prejudice to any argument that Gin-Cor may wish to make on a motion to set aside or vary this Order.

7. THIS COURT ORDERS that any of the Company, Gin-Cor and the Monitor may make a motion to this Court to set aside or vary this Order on seven days’ notice to each of the Company and the Monitor provided that any such motion to set aside or vary this Order must be brought by no later than _____, 2019.

8. THIS COURT ORDERS that the Company and Gin-Cor shall attend at a 9:30 Chambers appointment by no later than _____, 2019, to set a timetable for the hearing to determine the entitlement to the Funds.

9. THIS COURT ORDERS that in addition to the above, the Monitor may make a motion to this Court to seek advice and directions on any matter relating to this Order.

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