

**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 DEL EQUIPMENT INC.**

Applicant

**MOTION RECORD
STAY EXTENSION ORDER
DEMONSTRATION VEHICLE EQUIPMENT APPROVAL & VESTING ORDER
(Motion returnable September 14, 2020)**

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Court File No.: CV-19-629552-00CL

**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 DEL EQUIPMENT INC.**

Applicant

NOTICE OF MOTION

(returnable September 14, 2020)

Del Equipment Inc. (“**DEL**” or the “**Company**”) will make a motion before Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) on September 14, 2020, at 9:30 a.m. or as soon thereafter as the motion can be heard by judicial videoconference call in light of the COVID-19 crisis. Please refer to the videoconference details attached as Schedule “A” hereto in order to attend the motion and advise if you intend to join the motion by emailing Andrew Harmes at aharmes@goodmans.ca.

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

THE MOTION IS FOR:

1. An Order (the “**Stay Extension Order**”), in substantially the form attached at Tab 3 of DEL’s Motion Record dated September 8, 2020, among other things, extending the Stay Period (as defined below) until and including October 30, 2020;

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2. An Order, in substantially the form attached at Tab 4 of DEL's Motion Record dated September 8, 2020, among other things, (i) approving the sale transaction contemplated by the bill of sale to be entered into between the Applicant and Diesel Equipment Limited ("**Diesel**"), and (ii) vesting in Diesel all of the DEL's right, title and interest in and to the Equipment installed on the Unsold Demonstration Vehicles (each as defined below) free and clear of all security interests, liens, charges and encumbrances; and

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

THE GROUNDS FOR THE MOTION are as follows:

Background

4. On October 22, 2019, DEL was granted protection from its creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the Initial Order of the Court (the "**Initial Order**").

5. The Initial Order, among other things, (i) appointed MNP as the monitor (the "**Monitor**") of DEL in the CCAA proceedings, (ii) granted a stay of proceedings in respect of DEL until and including November 21, 2019, or such later date as the Court may order (the "**Stay Period**"), and (iii) approved DEL's commencement of a sale and investment solicitation process (the "**Sale Process**"). The Stay Period was subsequently extended by further orders of this Court to September 18, 2020.

6. On February 27, 2020, this Court granted an Approval and Vesting Order, among other things, approving a sale transaction (the "**DPI Transaction**") between DEL and Drive Products Inc. ("**DPI**") resulting from the Sale Process. The DPI Transaction, among other things, resulted in the going concern sale of DEL's Ontario business (which represented a significant portion of

its overall business) and certain of DEL's additional assets to DPI, as well as the employment by DPI of 36 of DEL's employees. The DPI Transaction closed on March 31, 2020.

7. On May 27, 2020 this Court granted an Auction Approval Order approving an auction services agreement entered into between DEL and Infinity Asset Solutions Inc. (the "**Auctioneer**"), pursuant to which the Auctioneer conducted online auctions between June 9 and June 24, 2020 for the Company's remaining assets not included within the scope of the DPI Transaction (the "**Residual Assets**") located at the Company's Vancouver (Port Coquitlam), Calgary, Edmonton and Moncton branches, generating approximately \$1.04 million of net realizations to DEL. The Company also has carried out a self-liquidation of the relatively small amount of Residual Assets located at its Montreal branch, generating an approximately \$63,000 of additional net proceeds to DEL.

8. In addition to closing the DPI Transaction and completing the orderly liquidation of the Residual Assets not included within the scope of the DPI Transaction, the Company has been working diligently to complete various remaining wind-down matters,

9. Among other things, the Company has continued to work diligently to solicit the collection of outstanding accounts receivable to maximize recoveries, and estimates that it has collected approximately 96% of the accounts receivable due and owing to it as at March 31, 2020, being the closing date of the DPI Transaction and the time at which DEL's operations were materially discontinued.

10. In addition, the Company and its legal counsel have continued to work diligently since the commencement of these CCAA proceedings to advance the payment dispute (the "**Payment Dispute**") involving Gin-Cor Industries Inc. ("**Gin-Cor**") and Mack Defense, LLC ("**Mack**

Defense”), in respect of which DEL is seeking to recover \$874,107.08 (the “**Funds**”) attributable to work performed by DEL and invoiced to Mack Defense, for which payment had instead been made by Mack Defense to Gin-Cor.

11. On May 7, 2020, following a hearing in respect of the Payment Dispute held in accordance with the Court-approved litigation protocol, this Court determined, among other things, that Gin-Cor has been unjustly enriched by the receipt and retention of the Funds and ordered that Gin-Cor return the Funds to DEL (the “**Payment Dispute Decision**”). The Payment Dispute Decision was subject to a leave to appeal motion filed by Gin-Cor and the Payment Dispute Decision was stayed pending determination of such motion.

12. On September 8, 2020, the Ontario Court of Appeal delivered its decision dismissing Gin-Cor’s motion for leave to appeal the Payment Dispute Decision. As such, pursuant to an Order of the Ontario Court of Appeal dated June 24, 2020, the Funds are to be paid to DEL within two business days (i.e. by September 10, 2020).

Sale of Equipment Installed on Unsold Demonstration Vehicles

13. DEL has continued efforts since the closing of the DPI Transaction to market and sell the demonstration vehicles in which it has an interest.

14. While DEL has been able to sell the majority of the demonstration vehicles in which it has an interest, DEL has not been able to find any third-party buyers for three remaining unsold demonstration vehicles which were completed by DEL at its Calgary branch (the “**Unsold Demonstration Vehicles**”).

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15. In order to dispose of its interest in the Unsold Demonstration Vehicles and generate additional proceeds for the benefit of DEL's creditors, Diesel has agreed to purchase from DEL its rights in the equipment installed by DEL on the Unsold Demonstration Vehicles (the "**Equipment**") for an aggregate purchase price of approximately \$108,000.

16. DEL believes that the purchase price of \$108,000 payable by Diesel for the Equipment installed on the Unsold Demonstration Vehicles, which represents the combined price at which the Equipment had most recently been marketed, is appropriate in the circumstances, and that selling the Equipment to Diesel for the above-referenced purchase price will maximize value by preventing any further depreciation, generate proceeds for creditors, and also assist DEL in its efforts to wind-up its affairs and bring these CCAA proceedings to a timely conclusion.

17. The Monitor is supportive of the proposed sale by DEL of the Equipment installed on the Unsold Demonstration Vehicles to Diesel.

Extension of the Stay Period

18. The Stay Period currently expires on September 18, 2020.

19. DEL is requesting a six-week extension of the Stay Period to and including October 30, 2020.

20. In light of the recent Ontario Court of Appeal decision and the anticipated near-term recovery of the Funds, together with the expected completion of most remaining asset realization efforts, the Company, in consultation with its advisors and the Monitor, is in the process of considering and evaluating available options to address and finalize the remaining outstanding matters in these proceedings, including a claims process and distributions to creditors. The

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extension of the Stay Period is necessary in such circumstances to maintain stability for the Company while it determines the best manner in which to address these matters and bring these proceedings to a conclusion, and returns to Court to seek approval of same.

21. The Company's operating costs are currently minimal given that DEL has sold almost all of its assets and its wind-down is substantially complete, and it has sufficient liquidity to continue these CCAA proceedings during the Stay Period, as extended pursuant to the proposed Stay Extension Order.

22. The Company has been acting and continues to act in good faith and with due diligence in these CCAA proceedings.

23. Creditors will not suffer any material prejudice if the Stay Period is extended.

24. The extension of the Stay Period to and including October 30, 2020 is supported by the Monitor.

General

25. The provisions of the CCAA, including sections 11.02 and 36, and this Court's equitable and statutory jurisdiction thereunder.

26. Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

27. The Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media regarding Expanded Operations of Ontario Superior Court of Justice dated May 13, 2020.

28. Changes to Commercial List Operations in light of COVID-19 dated March 16, 2020.

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

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

30. The Affidavit of Douglas Lucky sworn September 8, 2020, and the exhibits attached thereto;

31. The Fifth Report of the Monitor and the appendices attached thereto; and

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

Date: September 8, 2020

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Lawyers for Del Equipment Inc.

SCHEDULE "A"

Videoconference Details

Please advise if you intend to join the hearing of the motion by emailing Andrew Harmes at aharmes@goodmans.ca.

To join hearing using a computer:

<https://us02web.zoom.us/j/87692627125?pwd=Q3R6ekZTOEl6OUNQWlpBd2pQY2lkQT09>

Meeting ID: 876 9262 7125

Passcode: 788388

One tap mobile

+19292056099,,87692627125#,,,,,0#,,788388# US (New York)

+12532158782,,87692627125#,,,,,0#,,788388# US (Tacoma)

Dial by your location

+1 929 205 6099 US (New York)

+1 253 215 8782 US (Tacoma)

+1 301 715 8592 US (Germantown)

+1 312 626 6799 US (Chicago)

+1 346 248 7799 US (Houston)

+1 669 900 6833 US (San Jose)

Meeting ID: 876 9262 7125

Passcode: 788388

Find your local number: <https://us02web.zoom.us/j/87692627125?pwd=Q3R6ekZTOEl6OUNQWlpBd2pQY2lkQT09>

**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.**

Court File No: CV-19-629552-00CL

Applicant

<p>ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) Proceeding commenced at Toronto</p>
<p>NOTICE OF MOTION (returnable September 14, 2020)</p>
<p>GOODMANS LLP Barristers & Solicitors 333 Bay Street, Suite 3400 Toronto, Canada M5H 2S7</p> <p>Christopher G. Armstrong LSO#: 55148B carmstrong@goodmans.ca</p> <p>Andrew Harmes LSO#: 73221A aharmes@goodmans.ca</p> <p>Tel: (416) 979-2211 Fax: (416) 979-1234</p> <p>Lawyers for Del Equipment Inc.</p>

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Court File No. CV-19-629552-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS
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ARRANGEMENT OF DEL EQUIPMENT INC.**

Applicant

**AFFIDAVIT OF DOUGLAS LUCKY
(sworn September 8, 2020)**

I, Douglas Lucky, of the City of Toronto, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am the Chief Restructuring Officer (“**CRO**”) of Del Equipment Inc. (“**DEL**” or the “**Company**”). DEL retained 2255987 Ontario Limited o/a Strategic Results Advisors (a company which I am the principal of) on July 23, 2019, to provide restructuring and turn-around advisory services. I was appointed by DEL as CRO immediately prior to the Company’s commencement of the within proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), with such appointment becoming effective upon the issuance by this Court of the Initial Order (as defined below). Accordingly, I have personal knowledge of the matters to which I depose in this affidavit. Where I do not possess

personal knowledge, I have stated the source of my information and, in all such cases, believe it to be true.¹

2. On October 22, 2019, DEL sought and obtained an order of this Court (the “**Initial Order**”) providing creditor protection and related relief under the CCAA. The Initial Order, among other things, appointed MNP Ltd. (“**MNP**”) as the Court-appointed monitor of DEL in these CCAA proceedings (the “**Monitor**”), granted a stay of proceedings in respect of DEL, its business and property (the “**Stay of Proceedings**”), and approved DEL’s proposed sale and investment solicitation process (the “**Sale Process**”) pursuant to which the Company would seek to identify a going-concern solution or other transaction that maximizes the value of DEL and its business for the benefit of the Company and all stakeholders.

3. On February 27, 2020, this Court granted an Order (the “**Approval and Vesting Order**”), among other things, approving a sale transaction (the “**DPI Transaction**”) between DEL and Drive Products Inc. (“**DPI**”) resulting from the Sale Process. The DPI Transaction, among other things, resulted in the going concern sale of DEL’s Ontario business (which represented a significant portion of its overall business) and certain of DEL’s additional assets to DPI, as well as the employment by DPI of 36 of DEL’s employees. The DPI Transaction closed on March 31, 2020.

4. On May 27, 2020, this Court granted an Order (the “**Auction Approval Order**”) approving an auction services agreement entered into between DEL and Infinity Asset Solutions Inc. (the “**Auctioneer**”) dated May 19, 2020 (the “**Auction Services Agreement**”) pursuant to

¹ Capitalized terms not defined herein shall have the meaning given to them in the Initial Affidavit (as defined below). Unless otherwise indicated, monetary references in this affidavit are references to Canadian dollars.

which the Auctioneer would conduct online or webcast auctions of DEL's remaining assets not included within the scope of the DPI Transaction (the "**Residual Assets**") located at the Company's Vancouver (Port Coquitlam), Calgary, Edmonton and Moncton branches. The Auctioneer conducted the auctions pursuant to the Auction Services Agreement between June 9 and June 24, 2020, generating approximately \$1.04 million of net proceeds for DEL. The Company also has carried out a self-liquidation of the relatively small amount of Residual Assets located at its Montreal branch, generating an approximately \$63,000 of additional net proceeds to DEL.

5. In addition to the closing of the DPI Transaction and the completion of the sale of Residual Assets pursuant to the Auction Services Agreement and the Montreal self-liquidation, the Company and its advisors have been working diligently to maximize the value of DEL's remaining assets for the benefit of stakeholders and otherwise wind-up its affairs, including by collecting the vast majority of DEL's outstanding accounts receivable, responding to Gin-Cor's leave to appeal application in the Payment Dispute (which was denied by the Ontario Court of Appeal earlier today) and entering into an agreement to sell DEL's interest in certain unsold demonstrator vehicles to Diesel, for which approval is being sought from this Court.

6. The Stay of Proceedings granted by the Court currently expires on September 18, 2020 (the "**Stay Period**"). In light of today's decision of the Ontario Court of Appeal denying leave in the Payment Dispute and the anticipated recovery of the \$874,107.08 (the "**Funds**") related thereto in the near term, together with the expected conclusion of substantially all other remaining asset realization efforts, the Company, in consultation with its advisors and the Monitor, is in the process of considering and evaluating available options to address and finalize the remaining outstanding matters in these proceedings, including a claims process and

distributions to creditors. In these circumstances, DEL seeks an Order (the “**Stay Extension Order**”) granting a six-week extension of the Stay Period to and including October 30, 2020, in order for DEL to further evaluate and determine next steps, and to return to this Court to seek approval of same. As DEL’s operating costs are currently minimal, the Company believes that its stakeholders will not be prejudiced by a six-week extension of the Stay Period.

II. OVERVIEW OF DEVELOPMENTS IN THE CCAA PROCEEDINGS

7. Prior to the commencement of these CCAA proceedings, DEL operated a truck body and equipment “up-fitting” business pursuant to which DEL engineered, designed, manufactured and sold special truck bodies, attachments, equipment and work-ready vehicles across Canada through its six manufacturing and distribution locations. My affidavit previously sworn in these proceedings on October 20, 2019 (the “**Initial Affidavit**”) in support of the Initial Order, a copy of which (without exhibits) is attached as Exhibit “A” to this affidavit, sets out comprehensive background information with respect to DEL, its business operations, financial position, and the circumstances that precipitated the commencement of these CCAA proceedings.

8. As described in the Initial Affidavit, DEL initiated these CCAA proceedings to provide stability and breathing space necessary for it to advance the Sale Process to seek to identify a going-concern solution or other transaction that would maximize the value of DEL and its business for the benefit of the Company and all stakeholders. The Sale Process culminated in the completion of the DPI Transaction, which resulted in the going concern sale of DEL’s Ontario business (which represented a significant portion of the Company’s overall business) and certain additional DEL assets to DPI. DEL has also now completed an orderly liquidation of the Residual Assets not included within the scope of the DPI Transaction pursuant to the Auction

Services Agreement and by self-liquidation, which, together with the DPI Transaction and efforts by the Company to collect outstanding accounts receivable, have been essential to maximizing value and potential recoveries for the benefit of DEL stakeholders.

9. As explained in the Initial Affidavit, the Company's only material secured debt obligation at the time of its CCAA filing consisted of amounts owing to Diesel under the Secured Credit Agreement. The Bank of Montreal was the original lender under the Secured Credit Agreement, but assigned all of its rights thereunder to Diesel in July 2019. As discussed further below, pursuant to the Stay Extension and Distribution Order (as defined below), DEL has now repaid in full all amounts owing to Diesel under the Secured Credit Agreement.

10. In addition, as set out in more detail in the Initial Affidavit, DEL's liquidity at the time of commencing these proceedings was negatively impacted by the Payment Dispute involving Gin-Cor Industries Inc. ("**Gin-Cor**") and Mack Defense, LLC ("**Mack Defense**"). Since commencing these CCAA proceedings, DEL and its legal counsel have worked diligently to advance the Payment Dispute, pursuant to which DEL seeks to recover the Funds attributable to work performed by DEL and invoiced to Mack Defense, for which payment had instead been made by Mack Defense to Gin-Cor. On May 7, 2020, this Court held, among other things, that Gin-Cor had been unjustly enriched by the receipt and retention of the Funds and ordered that Gin-Cor return the Funds to DEL (the "**Payment Dispute Decision**").

11. As discussed further below, Gin-Cor sought leave to appeal the Payment Dispute Decision and it had been stayed pending determination of such motion pursuant to a consent Order of the Ontario Court of Appeal dated June 24, 2020, a copy of which is attached as Exhibit "B" hereto (the "**Stay Order**"). Earlier today, the Ontario Court of Appeal released its decision

dismissing Gin-Cor’s leave to appeal motion. As a result of the Ontario Court of Appeal’s decision, pursuant to the Stay Order the Funds are to be paid to DEL within two business days (i.e. by September 10, 2020).

12. The following chart sets out a summary of certain key dates and developments in the CCAA proceedings:

Date	Development
October 22, 2019	Initial Order is issued which, among other things, approved the Sales Process.
February 27, 2020	Approval and Vesting Order is issued approving the DPI Transaction.
March 31, 2020	Closing of the DPI Transaction.
April 29, 2020	<p>Stay Extension and Distribution Order is issued, among other things, authorizing DEL to make certain distributions to Diesel in respect of the Secured Credit Agreement until the amounts outstanding thereunder are repaid in full.</p> <p>MNP is appointed as receiver, without security, over certain accounts of DEL pursuant to the <i>Bankruptcy and Insolvency Act</i>, R.S.C., 1985, c. B-3, as amended, for the sole purpose of allowing former employees of DEL to benefit from payments provided under the <i>Wage Earner Protection Program Act</i>, S.C. 2005, c. 47, s. 1, which they may be entitled to.</p> <p>The Stay Period was extended to and including September 18, 2020.</p>
May 7, 2020	Payment Dispute Decision is issued, among other things, ordering that Gin-Cor return the Funds to DEL.
May 27, 2020	Auction Approval Order is issued.
June 24, 2020	Completion of the final auction pursuant to the Auction Approval Order.
July/August, 2020	Disclaimer of most remaining contracts, collection of remaining accounts receivable and responding to leave to appeal in respect of Payment Dispute Decision.
September 8, 2020	Decision of the Ontario Court of Appeal is issued dismissing Gin-Cor’s motion for leave to appeal the Payment Dispute Decision.

III. RECENT ACTIVITIES OF THE COMPANY

A. Results of Auction and Self-Liquidation

13. In accordance with the Auction Services Agreement, the Auctioneer conducted online or webcast auctions for the Residual Assets located at the Company's Vancouver (Port Coquitlam), Calgary, Edmonton and Moncton branches beginning on June 9, 2020 and concluding on June 24, 2020. The Residual Assets located at the aforementioned branches that were included in the auction consisted of, without limitation, DEL's remaining serialized and non-serialized inventory and shop machinery and equipment.

14. The Auction Services Agreement provided for DEL to receive a net minimum guarantee of \$725,000, of which \$150,000 was paid by the Auctioneer to DEL as a deposit upon execution of the Auction Services Agreement. Additionally, the Auction Services Agreement provided for 85% of the proceeds resulting from the auction in excess of \$875,000 to be allocated to DEL.

15. In accordance with the Auction Services Agreement, the Auctioneer completed the reconciliation of accounts associated with the auction and provided DEL with such report on or about July 20, 2020. The Auctioneer's reconciliation listed total cash receipts equal to approximately \$1.25 million. DEL's net entitlement to the auction proceeds totalled approximately \$1.04 million in the aggregate, with the outstanding balance owing being paid to DEL in two installments on July 15 and July 20, 2020.

16. In total, the auctions in respect of the Residual Assets located at the Company's Vancouver (Port Coquitlam), Calgary, Edmonton and Moncton branches, and DEL's self-liquidation of Residual Assets located at its Montreal branch, generated net proceeds to DEL of approximately \$1.1 million in the aggregate.

B. Collection of Outstanding Accounts Receivable

17. The Company has continued to work diligently to solicit the collection of outstanding accounts receivable in order to maximize recoveries.

18. DEL estimates that it has collected approximately 96% of the accounts receivable due and owing to it as at March 31, 2020, being the closing date of the DPI Transaction and the time at which DEL's operations were substantially discontinued, and that only approximately \$88,000 remains outstanding. In addition to collections from third parties, due to the reconciliation of certain intercompany accounts between DEL and Diesel relating to DEL's normal course business operations, DEL has received payment from Diesel of approximately \$350,000.

19. DEL intends to continue its efforts, with the assistance of its counsel and the Monitor, to collect the Company's outstanding accounts receivable pending completion of these CCAA proceedings. However, due to the current economic circumstances relating to COVID-19 and the nature of the accounts that remain outstanding, among other factors, DEL is of the view that the collection of its outstanding accounts receivable is substantially complete.

C. Sale of Equipment Installed on Unsold Demonstration Vehicles

20. DEL, pursuant to the terms of its converter pool agreements with various OEMs and as part of its normal business practice, would, from time to time, install equipment on customer supplied truck chassis in order to build a limited number of demonstration vehicles for display without having reached an agreement for the purchase or sale of the completed vehicle. As DEL's interests in such demonstration vehicles were excluded from the DPI Transaction, DEL has continued efforts since the closing of the DPI Transaction to market and sell such demonstration vehicles. While DEL has been able to sell the majority of the demonstration

vehicles in which it has an interest, the Company has been unable to find any third-party buyers for three unsold demonstration vehicles (the “**Unsold Demonstration Vehicles**”), all of which were completed by DEL at its Calgary branch. In order to generate additional proceeds for the benefit of DEL’s creditors, Diesel has agreed to purchase the Unsold Demonstration Vehicles, which will include purchasing DEL’s rights in the equipment installed by DEL on the Unsold Demonstration Vehicles (the “**Equipment**”) for an aggregate purchase price of approximately \$108,000. The Equipment will be conveyed pursuant to a bill of sale to be entered into by DEL and Diesel, substantially in the form attached hereto as Exhibit “C”.

21. DEL believes that the purchase price for the Equipment installed on the Unsold Demonstration Vehicles is appropriate in the circumstances. The Unsold Demonstration Vehicles are in the range of one to three years old and have been widely marketed, including in connection with the comprehensive Sale Process and as part of efforts in connection with the liquidation of the Residual Assets not included within the scope of the DPI Transaction. In addition to marketing the Unsold Demonstration Vehicles as part of DEL’s broader sale efforts, the availability of these Unsold Demonstration Vehicles has been advertised by DEL on its website and on the websites for the Peterbilt Motor Company and Freightliner Trucks dealerships at which the Unsold Demonstration Vehicles are located, existing customers (both of DEL itself and of the specific dealerships) have been directly contacted and advised of the existence of the Unsold Demonstration Vehicles, and the listing price of the Unsold Demonstration Vehicles has been significantly reduced. The \$108,000 payable by Diesel for DEL’s interest in the Equipment installed on the Unsold Demonstration Vehicles represents the combined price at which the Equipment had most recently been marketed.

22. DEL believes in the circumstances that selling the Equipment installed on the remaining Unsold Demonstration Vehicles in which it has an interest to Diesel will maximize value by preventing any further depreciation, generate proceeds for creditors, and also assist DEL in its efforts to wind-up its affairs. Granting of the proposed Demonstration Vehicle Equipment Approval and Vesting Order will facilitate completion of this sale by vesting out any existing claims so that DEL's rights in the Equipment can be transferred to Diesel free and clear.

D. Update on Payment Dispute

23. As referenced above, DEL and its legal counsel have worked diligently to advance the Payment Dispute and on May 7, 2020, obtained the Payment Dispute Decision, pursuant to which this Court, among other things, ordered that Gin-Cor return the Funds in the amount of \$874,107.08 to DEL. As noted, the Payment Dispute Decision was subject to a leave to appeal motion filed by Gin-Cor on May 26, 2020, and the Payment Dispute Decision was stayed pending appeal pursuant to the Stay Order, which was issued on a consensual basis following discussions between DEL and Gin-Cor's respective legal counsel, and also provided that the leave to appeal motion would be heard by the Ontario Court of Appeal in writing on an expedited timeline. In addition, pursuant to the Stay Order, if Gin-Cor's leave to appeal motion was dismissed, or if leave was granted and the ultimate appeal dismissed, the Funds (which have been held by Gin-Cor's legal counsel in trust pursuant to a prior Order of this Court) are to be paid to DEL within two business days.

24. In accordance with the timeline set by the Stay Order, DEL's counsel finalized and delivered the Company's responding leave to appeal materials on July 27, 2020.

25. In a decision released earlier today, the Ontario Court of Appeal dismissed Gin-Cor's leave to appeal motion. A copy of the Court of Appeal decision is attached as Exhibit "D" to this affidavit.

26. As a result of the dismissal of Gin-Cor's leave to appeal motion, pursuant to the Stay Order the Funds are to be paid to DEL within two business days, i.e. by September 10, 2020.

E. Disclaimer of Agreements

27. Over the course of these CCAA proceedings, in order to reduce operating costs and otherwise wind-down its business affairs, DEL has issued a number of disclaimer notices pursuant to section 32(1) of the CCAA. As of the date of this affidavit, DEL has issued a total of 12 disclaimer notices, each of which was issued with the approval of the Monitor, and each of which have now become effective.

IV. ESTATE VALUE

28. As authorized pursuant to the Stay Extension and Distribution Order issued by this Court on April 29, 2020 (the "**Stay Extension and Distribution Order**"), the Company, shortly following the issuance of the Stay Extension and Distribution Order, completed an initial distribution of \$9 million to Diesel in respect of Diesel's secured claim against DEL under the Secured Credit Agreement. On or about June 1, 2020, the Company, as authorized pursuant to the Stay Extension and Distribution Order and with the consent of the Monitor, completed a further distribution to Diesel of approximately \$2.5 million, resulting in the repayment in full of all amounts owing by DEL to Diesel under the Secured Credit Agreement.

29. Although Diesel also agreed to provide DEL with DIP Financing of up to \$2.5 million in the aggregate, no amounts were ever drawn by DEL under the DIP Financing and so no repayment was required. The DIP Financing matured pursuant to its terms upon the closing of the DPI Transaction.

30. As set out in the cash flow forecast to be attached to the Monitor's fifth report (the "**Monitor's Fifth Report**"), which I understand will be filed in connection with this motion, the Company currently has approximately \$3.687 million of cash on hand.

V. EXTENSION OF THE CCAA STAY OF PROCEEDINGS

31. As referenced above, the current Stay Period expires on September 18, 2020. DEL is seeking a six-week extension of the Stay Period to and including October 30, 2020, pursuant to the proposed Stay Extension Order.

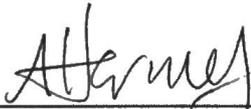
32. DEL continues to act diligently and in good faith to advance the wind-down of the Company's affairs and the eventual completion of these CCAA proceedings. In light of today's Ontario Court of Appeal decision and the anticipated near-term recovery of the Funds, together with the expected completion of most remaining asset realization efforts, the Company, in consultation with its advisors and the Monitor, is in the process of considering and evaluating available options to address and finalize the remaining outstanding matters in these proceedings, including a claims process and distributions to creditors. The extension of the Stay Period is necessary in such circumstances to maintain stability for the Company while it determines the best manner in which to address these matters and bring these proceedings to a conclusion, and returns to Court to seek approval of same. As DEL's operating costs are currently minimal, the Company believes that its stakeholders will not be prejudiced by a six-week extension of the

Stay Period to October 30, 2020. I also understand that the Monitor supports the proposed six-week extension of the Stay Period.

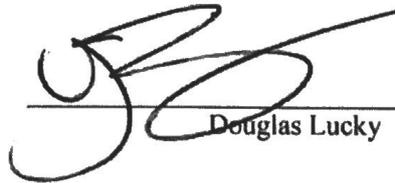
VI. CONCLUSION

33. For the reasons set out herein, the Company respectfully requests that this Court grant the Stay Extension Order and the Demonstration Vehicle Equipment Approval and Vesting Order.

SWORN BEFORE ME over
videoconference by Douglas Lucky stated
as being located in the City of Toronto in
the Province of Ontario, before me at the
City of Toronto in the Province of Ontario,
on September 8, 2020, in accordance with
O. Reg 431/20, Administering Oath or
Declaration Remotely



A Commissioner for taking affidavits
Name: Andrew Harnes



Douglas Lucky

A

**THIS IS EXHIBIT "A"
TO THE AFFIDAVIT OF DOUGLAS LUCKY
SWORN BEFORE ME OVER VIDEOCONFERENCE
THIS 8th DAY OF SEPTEMBER, 2020**



Commissioner for Taking Affidavits

Court File No.: CV-19-629552-00CL

**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 DEL EQUIPMENT INC.**

Applicant

AFFIDAVIT OF DOUGLAS LUCKY

(sworn October 20, 2019)

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**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF DEL EQUIPMENT INC.**

Applicant

AFFIDAVIT OF DOUGLAS LUCKY

(sworn October 20, 2019)

I, Douglas Lucky, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the principal of 2255987 Ontario Limited o/a Strategic Results Advisors (“**SRA**”), which was retained on July 23, 2019, to provide restructuring and turn-around advisory services to Del Equipment Inc. (“**DEL**” or the “**Company**”). I was previously employed as the chief executive officer and chief operating officer of DEL Equipment Limited (“**DEL Limited**”) (the previous entity through which DEL’s business was operated) from April 2013 to November 2017.¹ Earlier in my career, I was a partner and senior vice-president of Ernst & Young LLP practicing in the corporate finance and restructuring

¹ For ease of reference, I will refer to DEL Limited throughout as DEL unless there is a need to distinguish between DEL Limited and DEL.

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groups. Over the course of the past fifteen years, I have served as an officer of a number of companies in need of restructuring or turn-around support. Based on my previous experience with DEL's business and SRA's recent engagement in an advisory capacity, I have personal knowledge of the Company and the matters to which I depose in this affidavit. Where I do not possess personal knowledge, I have stated the source of my information and, in all such cases, believe it to be true. As part of these proceedings, it is proposed that I will become the chief restructuring officer of DEL.

2. Unless otherwise indicated, monetary references in this affidavit are references to Canadian dollars.

I. OVERVIEW

3. This affidavit is sworn in support of an application for an Order (the "**Initial Order**") in respect of the Company pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**").
4. 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. The Company has operations nation-wide at six manufacturing and distribution locations where it employs approximately 174 employees. DEL has been serving the Canadian market for over 70 years, and has a broad and diverse customer base, including municipalities, truck dealerships, national fleet accounts and business operators.
5. DEL's primary business consists of the commercial sale of work-ready trucks through its nation-wide distribution network. It is an authorized "chassis holder" for a number of original equipment manufacturer ("**OEM**") partners, including General Motors of Canada

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Company (“**GM**”) and Ford Motor Company of Canada, Limited (“**Ford**”). DEL sources truck chassis from its OEM partners pursuant to various converter pool agreements. DEL then installs truck body, equipment and accessories onto the chassis to complete work-ready trucks for sale by OEM-authorized dealers.

6. As discussed previously, I served as CEO and COO of DEL from 2013 until 2017. I was engaged by DEL at that time to assist in implementing certain business improvements and to prepare the Company for a strategic transaction. By 2017, DEL had successfully implemented the majority of these improvements and produced break-even EBITDA for the six-month period ending June 2017.
7. In June 2017, an agreement was reached with Gin-Cor Industries Inc. (“**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**”).
8. The Gin-Cor Transaction was intended to enhance DEL’s performance through the achievement of business synergies arising from Gin-Cor managing DEL’s business, including through a relocation of DEL’s Toronto branch and national headquarters to a shared facility with Gin-Cor in Newmarket, Ontario.
9. Unfortunately, although DEL’s revenues increased in 2017 and 2018 compared to 2016, the Gin-Cor Transaction did not produce the hoped-for synergies, with the result that DEL has suffered increasing losses over the past two and a half years. In July 2019, Gin-Cor and the majority shareholder of DEL, Diesel Equipment Limited (“**Diesel**”), agreed to

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terminate the Gin-Cor Transaction, with the result that 100% ownership and control of DEL reverted to Diesel on or about July 18, 2019, and Gin-Cor ceased to manage DEL's business as of that date.

10. Since July 2019, DEL has undertaken efforts to address the operational issues that challenged the business while under Gin-Cor management and to pursue other restructuring initiatives, including closing its Regina branch and pursuing sales of non-core assets. While these early initiatives have begun to improve DEL's performance, the Company is currently in significant arrears to its supplier base, many of whom have compressed trade terms (in some cases requiring "cash in advance" payment terms), which has negatively impacted DEL's liquidity.
11. To make matters worse, on September 10, 2019, DEL discovered that a significant payment owing to it from a customer, Mack Defense, LLC ("**Mack Defense**"), was instead paid to Gin-Cor. Despite DEL's good faith efforts over the past month to resolve this issue with Mack Defense and Gin-Cor, the Company has been unable to recover this payment. This has placed a significant additional strain on DEL's liquidity.
12. In light of the foregoing circumstances, the Company is facing a liquidity crisis and seeks CCAA protection at this time to provide stability to its business while it continues restructuring efforts and implements a sale and investment solicitation process (the "**Sale Process**") to pursue a going-concern solution that maximizes the value of its business for the benefit of all stakeholders. The commencement of CCAA proceedings will also enable DEL to obtain interim financing to fund the Sale Process and its working capital requirements while it pursues restructuring efforts, and provide a forum to expeditiously

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resolve the payment dispute involving Mack Defense and Gin-Cor to the extent it cannot be resolved on a consensual basis in the near-term.

II. THE COMPANY

A. Overview

13. DEL is a family-owned OEM-approved vehicle up-fitter which, together with its predecessors, has been operating for more than 70 years.
14. The Company is a private corporation incorporated under the laws of the province of Ontario. Its registered and head office is located at 210 Harry Walker Parkway North, Newmarket, Ontario. To facilitate the Gin-Cor Transaction, DEL acquired substantially all of the assets of DEL Limited and assumed most of its liabilities pursuant to a transaction that closed on April 30, 2018.
15. DEL operates six distribution and manufacturing facilities across Canada in Moncton, Montréal, Calgary, Edmonton, Vancouver (Port Coquitlam) and Newmarket. DEL's Newmarket branch is the primary manufacturing facility and is also the central warehouse for DEL-manufactured landscape and contractor dump bodies, as well as DEL-manufactured pneumatics and hydraulics. Each of DEL's facilities has full equipment assembly and installation capabilities and are certified as an Intermediate and Final Stage Manufacturer, meaning DEL's facilities have proven that their vehicle production complies with safety standards under applicable legislation.
16. The Company's sole shareholder is Diesel. As discussed in greater detail below, Diesel is also DEL's senior secured creditor as a result of recently taking an assignment of DEL's secured credit facility from the Bank of Montreal ("BMO"), and is the owner (and

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landlord) of five of the six premises from which DEL operates. Diesel is also the parent company of certain U.S. entities – Holt Industries, Inc. (“**Holt**”) and DEL Hydraulics, Inc. (“**DEL Hydraulics**”). Holt is an inactive holding company. DEL Hydraulics distributes DEL-manufactured pneumatic control valves in the U.S., along with third-party supplied truck equipment.

17. DEL is also a distributor of products produced by Unicell Limited and its affiliates (collectively, “**Unicell**”). Unicell is controlled by a minority shareholder of Diesel who is related to the controlling shareholder of Diesel. As further discussed herein, DEL, DEL Hydraulics and Unicell have historically shared certain financing arrangements, although in recent months the other parties have taken steps to establish their own financing arrangements independent of DEL. None of Diesel, Holt, DEL Hydraulics or Unicell are proposed to be subject to these CCAA proceedings.

B. The Business of the Company

(i) The Truck Business

18. The Company’s primary business consists of the sale of work-ready trucks to OEM-authorized dealers, end users, large fleets, government, and large leasing companies through its nation-wide distribution network (the “**Truck Business**”). The Truck Business consists of the design, manufacturing, installation, marketing and sale of specialized truck bodies, attachments and equipment.
19. OEMs such as GM or Ford produce heavy-duty trucks, truck chassis or cab-chassis that are suitable for completion as a work-performing vehicle, meaning that they require additional equipment or customization to serve a specific vocation or function (e.g. for

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utility service providers, municipalities, construction companies or landscapers). DEL is a final-stage manufacturer that produces or purchases a range of products, including truck bodies, truck equipment, and parts and accessories, that DEL can install onto OEM-supplied chassis, completing end-product work vehicles.

20. As referenced above and described in further detail below, DEL has entered into various converter pool agreements with OEMs which set out the terms under which the OEMs supply DEL with truck chassis. The terms of such arrangements vary depending on the OEM; however, the converter pool agreements generally provide that the OEM will provide a supply of chassis to DEL to be stored at DEL's facilities on the condition that DEL will not alter or remove any such chassis from its storage facilities until DEL has entered into a separate agreement with one of the OEM's authorized dealers for the purchase and sale of a work-ready truck. Depending on the converter agreement, title to the unfinished vehicle may pass to DEL upon delivery, or DEL may hold the vehicle as bailee. Upon entering into the separate agreement with the OEM-authorized dealer, DEL proceeds to install such body or equipment as agreed to between DEL and the OEM-authorized dealer.

(ii) Distribution Network

21. DEL operates a nationwide distribution network with six regional facilities across Canada. It also recently closed a facility in Regina. Each of DEL's facilities are managed locally, with centralized services such as corporate management, human resources (including payroll), insurance, IT and finance being provided from DEL's headquarters in Newmarket.

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(iii) *Distribution Arrangements*

22. DEL is party to distribution arrangements for a number of business lines. Among other arrangements, DEL has historically been the exclusive Canadian dealer for Unicell, a manufacturer of one-piece fiberglass van bodies, which is headquartered in Toronto, Ontario. At present, DEL distributes Unicell products in all Canadian provinces except Ontario. DEL is also distributor of a variety of other OEM equipment from Aebi Schmidt, Swenson, Everest, Swaploader, NRC, Waltco, Dhollandia, Tommygate, Beaucroc, Effer, Maxilift, Cobra, and Autocrane, among others.

(iv) *Hydraulics Business*

23. As referenced above, Diesel, the parent company of DEL, is also the parent company of certain U.S. entities, including DEL Hydraulics. DEL Hydraulics distributes DEL-manufactured shifters and pneumatic valves in the U.S.
24. In connection with its restructuring initiatives, DEL has agreed to sell certain assets used in or relating to the DEL Hydraulics distribution arrangement to DEL Hydraulics for cash consideration of \$588,721.40 (the “**Hydraulics Transaction**”), which amount equals the total book value of the assets to be transferred. The Hydraulics Transaction is scheduled to be completed on or about October 24, 2019, pursuant to the provisions of the proposed Initial Order. Under the terms of the sale agreement, DEL Hydraulics will also pay an hourly fee to DEL to continue to manufacture pneumatic valves and shifters during a 90 day transition period. The Company believes the Hydraulics Transaction will assist in generating needed working capital and also allow it to streamline and focus on its core Truck Business. I do not believe that these assets could be sold to a third party for anything

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other than liquidation value. The proceeds that will be generated from this transaction will assist with the Company's liquidity and cash flow during the CCAA process.

C. Real Property Lease Obligations

25. DEL leases each of the facilities from which it operates. In particular, DEL leases its five operating facilities in Moncton, Montréal, Calgary, Edmonton and Vancouver from Diesel. These leases were entered into on July 1, 2017, and provide for a five-year term, with DEL having a one-time option to renew such leases for a further five-year term. These leases provide for a minimum annual aggregate lease commitment of \$588,000 for 2019, 2020 and 2021, and \$245,000 for 2022.
26. In connection with the Gin-Cor Transaction, in 2018 DEL relocated its Toronto branch and head office to a facility leased by Gin-Cor in Newmarket. A written sub-lease was prepared but never executed, although DEL and Gin-Cor have conducted themselves in conformity with its proposed terms. Upon termination of the Gin-Cor Transaction, DEL and Gin-Cor agreed that DEL would continue to sub-lease a portion of the Newmarket premises from Gin-Cor in exchange for DEL paying 50% of the base rent and related occupancy costs payable by Gin-Cor under the head lease. However, in light of various business disputes between DEL and Gin-Cor, including the Payment Dispute relating to Mack Defense (as defined and discussed below), DEL has elected not to make payments under the sub-lease for July, August and September 2019. DEL is prepared to make sub-lease payments to Gin-Cor on the terms agreed for the period from and after the commencement of the CCAA proceedings, provided that the appropriate safeguards are implemented to protect DEL's interest in the fund at issue in the Payment Dispute.

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D. Equipment Leases

27. DEL is party to a number of long-term equipment lease arrangements (for instance, for forklifts, telehandlers and office equipment) that are necessary for the continuing operation of its business. In many (if not all cases), the lessors have made registrations under applicable provincial personal property security legislation in respect of the equipment leases.

E. Converter Pool Agreements with OEMs

28. As noted above, the Company sources chassis from OEMs pursuant to converter pool agreements. Currently, DEL is party to the following converter pool agreements:

(i) **Special Vehicle Manufacturer Converter's Agreement with GM effective as of June 9, 2016** (as amended, the "**GM Converter Agreement**"). Pursuant to the GM Converter Agreement, DEL purchases chassis from GM (which purchase is financed by the RBC Floor Plan Facility (as defined and described below)), with title to such truck chassis passing to DEL upon deemed delivery. DEL agrees not to make any modifications or remove any of such truck chassis from its premises until it has reached an agreement with a GM-authorized dealer for the sale of the completed vehicle. Once DEL sells the up-fitted chassis to a GM-authorized dealer, DEL notifies GM who then bills the dealer directly and credits DEL for the original cost of the truck chassis.

(ii) **Ford Authorized Converter Pool Agreement effective as of February 1, 2010** (as amended, the "**Ford Converter Agreement**"). Pursuant to the Ford Converter Agreement, Ford provides truck chassis to DEL as bailee such that Ford retains title

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to the truck chassis until they are sold to a Ford-authorized dealer. DEL pays Ford a storage fee and agrees not to make any modifications or remove any Ford truck chassis from its premises until it has reached an agreement with a Ford-authorized dealer for the sale of the completed vehicle.

- (iii) **Commercial Vehicle Bailment Agreement effective November 14, 2007 with Chrysler Canada Inc. (“Chrysler”)** (the “**Chrysler Converter Agreement**”). Pursuant to the Chrysler Converter Agreement, Chrysler provides truck chassis to DEL as bailee such that Chrysler retains title to the truck chassis until they are sold to a Chrysler-authorized dealer. DEL agrees not to make any modifications or remove any such truck chassis from its premises until it has reached an agreement with a Chrysler-authorized dealer for the sale of the completed vehicle. The Chrysler Converter Agreement was executed between Chrysler and DEL Limited and has not been formally assigned to DEL, although the parties have continued to operate under its terms.

F. Employees and Independent Contractors

29. DEL currently employs approximately 174 employees, comprised of approximately 55 salaried and sales employees and 119 hourly employees, most of whom are located in Ontario and Alberta. None of DEL’s employees are unionized. In addition, DEL currently directly retains approximately three independent contractors.
30. DEL’s employees are paid weekly in arrears, and its monthly payroll obligation is approximately \$1.1 million. DEL also funds certain medical, dental, life insurance and other benefits to its employees pursuant to an administrative services only benefits plan with

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Blue Cross Canada (“**Blue Cross**”). Payments are made to Blue Cross at the beginning of each month, and average approximately \$35,000.

31. Subject to the applicable waiting period, DEL’s employees participate in one of two multi-employer defined contribution pension plans (one for salaried employees, the other for hourly employees) administered by Sun Life Financial Canada, pursuant to which DEL makes contributions based on an employee’s tenure with DEL (the “**DC Plans**”). Aggregate monthly contributions to the DC Plans by DEL total approximately \$21,000. In addition, certain of DEL’s long-standing employees are also beneficiaries under one of two defined benefit pension plans originally sponsored by DEL Limited and assumed by Diesel (the “**DB Plans**”). The DB Plans were closed in 2011, were excluded from the liabilities assumed by DEL in its 2018 transaction with DEL Limited, and are not sponsored or otherwise contributed to by DEL.
32. As part of the relief sought in the CCAA proceedings, DEL proposes to continue to pay amounts owing to or in respect of its employees in the normal course, including outstanding and future salaries, expenses, vacation pay, pension contributions and other benefit amounts (whether incurred prior to or after the date of the Initial Order), in each case consistent with existing compensation policies and arrangements.

III. FINANCIAL POSITION OF THE COMPANY

A. Financial Statements

33. Attached as Exhibit “A” hereto is a copy of draft unaudited financial statements for DEL for the year ended December 31, 2018. DEL, with the assistance of its accountant, is in the process of taking the necessary steps to allow for the completion of the review of these

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financial statements and expects review engagement report financial statements to be available in the coming weeks.

34. As at December 31, 2018, DEL's unaudited financial statements reflect (all amounts approximate) assets with a book value of \$21.3 million and total liabilities of \$26.2 million, with a shareholders' deficit of \$4.9 million.

B. Revenue

35. Although DEL has had increasing revenues every year since 2016 and total revenues of approximately \$58 million in 2018, the Company has recorded negative EBITDA in each of 2016, 2017 and 2018, including negative EBITDA of approximately \$5.4 million in 2018.

C. Secured Debt Obligations

36. DEL's primary secured debt liabilities consist of amounts owed under its Secured Credit Agreement and the RBC Floor Plan Facility (each as defined and described below). Approximately \$11.5 million is currently outstanding under the Secured Credit Agreement, plus interest and expenses which continue to accrue. In addition, as at October 15, 2019, approximately 25 GM chassis with a value of approximately \$1 million were being financed under the RBC Floor Plan Facility, although all such chassis are designated for use by Unicell.

(i) Secured Credit Agreement

37. DEL is a borrower under the Second Amended and Restated Credit Agreement dated as of May 31, 2018, among DEL Limited, DEL, DEL Hydraulics and certain Unicell entities, as co-borrowers, and Diesel, Diequip Limited ("**Diequip**"), Holt, Camellia Holdings Limited,

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and 654831 Ontario Limited, as guarantors, and BMO, as lender (as amended and restated, the “**Secured Credit Agreement**”). Diesel, DEL Limited and Diequip were amalgamated on June 1, 2018 and continued as Diesel.

38. The credit facilities available under the Secured Credit Agreement consist of: (i) a \$16 million revolving credit facility; (ii) a \$2.755 million term loan facility; (iii) a \$2 million overdraft facility; and (iv) a \$7 million floor plan facility; however, the only amounts outstanding under the Secured Credit Agreement relate to the revolving credit facility. As discussed below, DEL has been (and is) in breach of various financial and other covenants under the Secured Credit Agreement that restricts its borrowings thereunder.
39. Canadian prime loans and U.S. base rate loans under the revolving facility bear interest at a rate based on the applicable Canadian prime rate or U.S. base rate plus 1.25% per annum if there is greater than 20% available to be drawn under the revolving facility, or 1.75% per annum if there is less than 20% available. The default rate of interest under the Secured Credit Agreement is an additional 2%.
40. All obligations under the Secured Credit Agreement are secured by a first priority security interest on substantially all of the assets of the Company, subject to the terms of the Priority Agreements (as defined and described below).
41. The significant majority of amounts outstanding under the Secured Credit Agreement represent amounts borrowed by DEL to finance its business, including to fund its working capital needs over the past several years. In addition, DEL has historically acted as the “banker” for the other borrowers under the Secured Credit Agreement by borrowing funds and on-lending them to the other borrower entities on an as-needed basis. Over the course

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of the past year, the other borrowers under the Secured Credit Agreement have, or are in the process of, establishing independent financing arrangements to finance their respective businesses on a go forward basis. The Unicell entities have repaid amounts on-lent to them in full and DEL intends to collect other amounts it has on-lent to other borrowers that have not been repaid to date.

42. The Secured Credit Agreement has several compliance requirements, including a financial covenant that the borrowers and certain of the guarantors on a combined basis, must maintain a Fixed Charge Coverage Ratio (as defined in the Secured Credit Agreement) of not less than 1.1:1.0 calculated on the last day of each calendar month measured on a 12 month trailing basis. As a result of its deteriorating financial performance, the Company breached this financial covenant as at the end of 2018 and for subsequent periods through to the end of May 2019.
43. Following discussions with BMO regarding the status of the Secured Credit Agreement and DEL's business more generally, in July 2019 Diesel agreed to acquire all of BMO's rights under the Secured Credit Agreement. Since the acquisition of BMO's position, Diesel has made discretionary advances under the Secured Credit Agreement to assist in addressing DEL's ongoing liquidity constraints.
44. As discussed below, DEL and Diesel have entered into a DIP Term Sheet (as defined below) pursuant to which, subject to Court approval, Diesel will extend up to \$1 million of additional financing to DEL to finance these proceedings, the restructuring initiatives described herein, and DEL's immediate working capital needs.

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(ii) *RBC Floor Plan Facility re: GM Truck Chassis*

45. DEL is the borrower under an amended and restated credit facilities agreement dated as of January 19, 2015, among DEL Limited and DEL, as borrowers, and Diesel, certain Unicell entities, Holt, DEL Hydraulics and GCD Holdings (2017) Limited,² as guarantors, and Royal Bank of Canada, as lender (“**RBC**”) (as amended, the “**RBC Floor Plan Facility**”).
46. The RBC Floor Plan Facility authorizes the borrowers thereunder to draw up to \$4.95 million, in the aggregate, in order to acquire GM truck chassis. Advances under the RBC Floor Plan Facility bear interest at a floating rate based on a cost of funds plus 3.00% per annum. All obligations under the RBC Floor Plan Facility are secured by a security interest in the financed GM truck chassis and certain additional assets of the Company, subject to the terms of the Priority Agreements.
47. There are currently no GM chassis in DEL’s possession that were financed under the RBC Floor Plan Facility. There are certain GM chassis financed under the RBC Floor Plan Facility which were designated for Unicell; however, it is expected that on or about October 21, 2019, GM’s finance subsidiary will acquire all of RBC’s rights under the RBC Floor Plan Facility as relates to Unicell and these chassis.
48. In light of the reduction in financing activity under the RBC Floor Plan Facility resulting from Unicell and the other borrowers under the RBC Floor Plan Facility establishing independent floor-plan financing arrangements for their businesses, the Company has had

² GCD Holdings (2017) Limited is the Gin-Cor entity that acquired the equity interest in DEL in connection with the Gin-Cor Transaction.

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preliminary discussions with RBC to terminate the facility and enter into a new floor plan financing arrangement for GM vehicles with GM's finance subsidiary.

(iii) Ford Converter Agreement

49. As described above, DEL receives Ford truck chassis from Ford pursuant to the terms of the Ford Converter Agreement, which establishes a bailment relationship whereby Ford maintains ownership of the Ford truck chassis delivered to DEL until they are sold to a Ford-authorized dealer. As at September 30, 2019, DEL was in possession of 50 Ford chassis with a value of approximately \$3.8 million.

(iv) Priority Agreements

50. The respective priorities of Diesel (formerly BMO), RBC and Ford are governed by various priority agreements that have been executed by the parties (the "**Priority Agreements**"). In brief summary, the Priority Agreements provide, among other things, that: (i) as between Diesel and RBC, RBC has priority in the GM chassis inventory, and Diesel has priority in all other property of DEL; and (ii) each of Diesel and RBC recognize Ford's ownership of the Ford truck chassis supplied to DEL and agree that Ford's ownership rights shall not be affected by their respective security interests and other rights in DEL's property. As discussed below, DEL and Diesel are not proposing to prime or otherwise impact these arrangements through the DIP Financing.

D. Cash Management

51. The Company's cash management system, including the collection, transfer and disbursements of funds, is administered from its head office in Newmarket (the "**Cash Management System**").

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52. The Company maintains a Canadian and USD bank account with BMO into which all receipts are deposited and from which all disbursements are made. The majority of the Company's receipts are from customer payments made at branch locations via cheques deposited at local BMO branches combined with electronic funds transfers and credit and debit transactions processed by Moneris Solutions Corporation, which are deposited into the Company's accounts within one to two business days. Purchases are managed at the branch level while payments to vendors are reviewed and authorized on a weekly basis by the Company's head office finance team for release. None of the Company's accounts are part of an umbrella system or otherwise linked with accounts of Diesel or any of its other affiliates.
53. As at the close of business on October 17, 2019, the Company's cash balance was approximately \$2 million, net of outstanding cheques and anticipated disbursements, including payroll.
54. The Company utilizes approximately 11 corporate credit cards issued through BMO (the "**Credit Cards**") to facilitate certain day-to-day required payments at both the head office and branch level, subject to a \$100,000 credit limit. The Company has continued to maintain the Credit Cards following BMO's assignment of the Secured Credit Agreement to Diesel, and BMO holds \$100,000 of cash collateral in respect thereof. As at October 16, 2019, there was an aggregate approximate amount of \$58,000 outstanding on the Credit Cards.
55. In connection with the CCAA proceedings, the Company is seeking the authority to continue to operate the Cash Management System to fund the obligations of the Company and to maintain its existing banking arrangements. The continued operation of the Cash

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Management System will minimize disruption to the Company's operations caused by the CCAA proceedings and avoid the need to negotiate and implement alternative banking arrangements. The Cash Management System includes the necessary accounting controls to enable the Company and the proposed Monitor to trace funds and ensure that all transactions are adequately documented and readily ascertainable.

56. The Company is also requesting authority during the CCAA proceeding to continue to utilize the Credit Cards and make full repayment of all amounts outstanding thereunder, including with respect to pre-filing charges. As with the Cash Management System, the continued use of the Credit Cards will assist in minimizing the disruption to the Company's operations caused by the CCAA proceedings.

IV. MATTERS LEADING UP TO THE CCAA FILING

A. The Failed Gin-Cor Transaction and DEL's Operational Struggles

57. As described above, the Gin-Cor Transaction was intended to be a transformative transaction that would achieve certain synergies by transferring a 40% equity interest and full operational control of DEL to Gin-Cor, with a view to Gin-Cor acquiring a 100% equity interest in DEL over time.
58. Unfortunately, although DEL saw increased revenues in 2017 and 2018 compared to 2016, most of the expected synergies failed to materialize and DEL experienced increasing losses during the period of Gin-Cor management control, including as a result of significantly increased costs. Among other issues, the transition from DEL's Toronto facility to Gin-Cor's shared facility in Newmarket proved to be highly disruptive and costly, inefficient

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chassis and pool stock management led to significant inventory and sales order conversion challenges, and sales practices became focused on growth at the expense of profitability.

59. Since the termination of the Gin-Cor Transaction in July 2019, the Company's former management team has re-established management control and SRA was engaged to conduct a review of the Company's business and assist the Company in developing and implementing restructuring initiatives. To date, these efforts have included closing the Company's facility in Regina, which closure is expected to save over \$500,000 on an annual basis, exploring the sale of non-core assets, implementing reductions in head office expenses and management fees charged to DEL's facilities, workforce reductions, operational changes at certain DEL facilities, the elimination of certain unprofitable products and the re-implementation of certain core DEL processes, among other things.
60. Notwithstanding these efforts, it is now apparent that a formal restructuring process is required to stabilize the business and implement a process to explore and execute a strategic transaction. At present, more than \$8 million is owing to the Company's supplier base and in recent weeks suppliers have begun to compress payment terms, including in some cases requiring cash in advance and cash on delivery. As described in greater detail below, DEL's liquidity has also been negatively impacted by a recent payment dispute involving Mack Defense and Gin-Cor (the "**Payment Dispute**"), which resulted in an approximately 20% reduction in anticipated receipts for September 2019. While Diesel has provided certain limited discretionary emergency financing to DEL in recent weeks, it has indicated that it is not prepared to provide further financing in the absence of a formal restructuring process being commenced.

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B. The Mack Defense/Gin-Cor Payment Dispute

61. 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. On or about June 6, 2019, DEL (then operating under the tradename Gincor Werx) 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**”). Copies of the quotes issued by DEL to Mack Defense, the POs issued by Mack Defense and the MD Invoices issued by DEL to Mack Defense for the MD Trucks are attached hereto as Exhibit “B”. Although the quotes and the MD Invoices delivered to Mack Defense include the logo and trade name Gincor Werx, each is clear that they are issued by the legal entity DEL. In addition, the POs issued by Mack Defense are addressed to “Del Equipment Ltd”.
62. On September 10, 2019, DEL was following up with its customers to collect overdue accounts receivable when it became aware that the \$874,107.08 payment owing by Mack Defense to DEL in respect of the MD Invoices had been made by Mack Defense to Gin-Cor, and not DEL. Upon learning of this, DEL immediately reached out to Mack Defense via telephone calls and emails to understand what had transpired. DEL also received and responded to various emails from Gin-Cor. Based on these inquiries and exchanges (many

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of which were made by me personally but in some instances were made by DEL's controller (Isabel Marques) and director (Paul Martin)) and subsequent telephone conferences and emails with Brian Happel (Director of Business Control & Treasurer of Mack Defense) and Terry Grube (General Counsel of Mack Defense), and emails with Renzo Silveri (Chief Operating Officer of Gin-Cor), I understand as follows:³

- (a) On the morning of April 10, 2019, Brett Stoddart, a buyer at Mack Defense, emailed Jim Hazlehurst, a representative of DEL, asking for payment instructions for the work performed in relation to the MD Trucks. When Mr. Hazlehurst did not immediately respond, Mr. Stoddart emailed a Gin-Cor representative minutes later asking for payment instructions.
- (b) At 11:28 am on April 10, 2019, the Gin-Cor representative provided Mack Defense with Gin-Cor's own payment instructions despite the fact that Gin-Cor was not entitled to such accounts and Gin-Cor knew (or should have known) that it was not entitled to such accounts. Based on this email chain, it appears that the Gin-Cor representative was providing payment instructions for an invoice #53998 issued by Gin-Cor to Mack Defense, which invoice, to the best of my knowledge and belief, has nothing to do with the MD Trucks. A copy of the email chain between Mr. Stoddart and the Gin-Cor representatives, including the attachment, is attached as Exhibit "C" hereto.⁴

³ DEL expressly reserves the right to seek discovery of both Mack Defense and Gin-Cor in relation to the matters addressed herein as well as to deliver further evidence in respect of these matters.

⁴ Account details have been redacted from the payment instructions.

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- (c) At 12:37 pm on April 10, 2019, Steve Lewin of DEL (who had been forwarded Mr. Stoddart's email by Mr. Hazelhurst of DEL) responded to Mr. Stoddart advising that DEL was "...now Del Equipment Inc. operated as Gincor Werx" and provided correct payment instructions for DEL, including filling out Mack Defense's "New Supplier Request Mack Defense Purchasing Form" which clearly indicated DEL as the supplier and included DEL's correct banking information. A copy of this email chain, including attachments, is attached as Exhibit "D" hereto.⁵
- (d) Based on the payment information provided by the Gin-Cor representative, Mack Defense paid a total of \$874,107.08 (the "**Payment Amount**") 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, Mack Defense either ignored or overlooked the valid payment instructions that DEL had sent on April 10, 2019, which clearly specified DEL's identity and correct banking information for the Payment Amount to be wired to.
- (f) Neither Mack Defense nor Gin-Cor dispute that the Payment Amount was intended to be made to DEL for the MD Trucks.
- (g) By email dated September 18, 2019, Gin-Cor acknowledged that the Payment Amount received by it was "Del funds". Notwithstanding this acknowledgement, Gin-Cor has taken the position that it is entitled to retain the Payment Amount it

⁵ Account details have been redacted from the payment instructions.

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wrongfully received from Mack Defense in order to set-off the Payment Amount against obligations of DEL to Gin-Cor, or to unilaterally retain the Payment Amount as collateral for alleged obligations owed by DEL to Gin-Cor. A copy of the email correspondence between Gin-Cor and DEL in this regard is attached as Exhibit "E" hereto.

- (h) Based on my discussions with Mack Defense and Gin-Cor, I do not understand there to have been any significant amounts owing by Mack Defense to Gin-Cor. As such, even if the provision of the wrong payment instructions by Gin-Cor to Mack Defense was an honest mistake, Gin-Cor should have immediately realized on receipt that the Payment Amount was not intended for it.
 - (i) Although Mack Defense has admitted in telephone conversations (i) between Isabel Marques, DEL's controller, and Brett Stoddart, the buyer at Mack Defense, on September 12, 2019; and (ii) between myself and Brian Happel, Director of Business Control & Treasurer of Mack Defense, on September 1, 2019, that Mack Defense had inadvertently paid the Payment Amount to Gin-Cor, Mack Defense has refused to pay DEL the amount owed for the MD Trucks on the basis that it views the Payment Dispute as a dispute between DEL and Gin-Cor.
63. Over the course of September 11, 2019, through October 1, 2019, DEL 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. 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 Payment Amount in trust for DEL and that, to the extent it did not immediately pay the Payment Amount to

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DEL, it should be segregated in a separate account. Copies of these letters are attached at Exhibit “F” and “G”.⁶ On October 15, 2019, counsel to Mack Defense responded via letter, a copy of which is attached as Exhibit “H”, indicating that Mack Defense views the Payment Dispute as being between DEL and Gin-Cor. Gin-Cor has advised via text message that the matter is now being dealt with by their lawyers, but no formal reply has been received to DEL’s demand and request to segregate the Payment Amount.

64. 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 Payment Amount, there is a possibility that such funds will be dissipated by Gin-Cor and DEL will not be able to recover the Payment Amount from Gin-Cor if it prevails in the Payment Dispute.
65. In light of the foregoing (including Gin-Cor’s failure to confirm that it will segregate the Payment Amount), at the return of the CCAA application, DEL is also seeking an order that will compel Gin-Cor to immediately turn over the Payment Amount to the Monitor, to be held in a segregated account pending resolution of the Payment Dispute and further order of the Court.
66. As mentioned above, Gin-Cor’s wrongful retention of the Payment Amount has been a significant contributing factor to the Company’s current liquidity challenges. While DEL, with the assistance of the proposed Monitor, is prepared to try again to achieve a consensual resolution of the Payment Dispute, in the event such resolution is not achieved in a timely

⁶ Account details have been redacted from the payment instructions enclosed with the demand letters.

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fashion, it intends to return to the Court in the near term to seek approval of an expedited litigation process to resolve this dispute.

V. CCAA PROCEEDINGS AND RELIEF SOUGHT

A. The Company is Insolvent

67. Despite its best efforts, the Company has been unable to resolve its financial and operational challenges and it is unable to meet its obligations to its creditors in the normal course.

68. The Company's financial challenges have worsened in recent months and it is facing an impending liquidity crunch. Without the benefit of creditor protection and access to the DIP Financing (as defined below), the Company will not have sufficient working capital to operate its business in the coming weeks. DEL is therefore insolvent and requires CCAA protection at this time.

B. Stay of Proceedings

69. In light of DEL's financial circumstances and without the benefit of CCAA protection, there could be an immediate and significant erosion of value to the detriment of all stakeholders. In particular, the Company is mindful of the following risks, which could materialize without the benefit of a stay of proceedings and the other relief sought under the CCAA: (a) suppliers ceasing to supply DEL or tightening payment terms in a manner that further exacerbates the liquidity challenges facing the Company; (b) suppliers terminating exclusive and non-exclusive distribution arrangements with DEL; (c) the potential termination of other agreements that are critical to the operation of DEL's

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business, including the Company's converter agreements with its OEM partners; and (d) suppliers commencing legal action to recover amounts due and owing to them.

70. The Company is seeking CCAA protection to provide it with the opportunity to undertake the Sale Process and to identify and assess other strategic alternatives to maximize the value of its business for its stakeholders, including creditors, employees, customers, suppliers and other business partners. The stay of proceedings is necessary to maintain the stability and value of DEL's business while such actions are undertaken.

C. Cash Flow Forecast and Interim Financing

71. As indicated in the cash flow forecast attached hereto as Exhibit "I" (the "**Cash Flow Forecast**"), it is expected the Company will require access to additional funding while it pursues the Sale Process and its other restructuring initiatives. The Company's principal use of cash during these CCAA proceedings will consist of costs associated with the ongoing operation of its business, including, among other things, employee compensation, supplier payments, lease payments and general administrative expenses. In addition to these normal course operating expenditures, the Company will also incur professional fees and disbursements in connection with these CCAA proceedings and the Sale Process.
72. Given its current financial situation, the Company believes that it requires interim financing in order to provide stability and fund operations while implementing the Sale Process. Subject to certain terms and conditions, including the granting of the proposed Initial Order, Diesel has agreed to provide up to \$1 million (the "**DIP Financing**") to fund DEL's operations and expenses during the CCAA proceedings. Given the current financial circumstances of the Company, Diesel has indicated that it is not prepared to advance

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additional funds to the Company without the security of the DIP Lender’s Charge (as defined below), including the proposed priority thereof.

73. Subject to Court-approval, the Company expects to enter into a DIP financing term sheet with Diesel (the “**DIP Term Sheet**”) substantially in the form of the unexecuted DIP Term Sheet attached hereto as Exhibit “J”.
74. The material terms of the DIP Term Sheet are summarized in the below table. Capitalized terms used in the below table that are not otherwise defined herein have the meaning given to such terms in the DIP Term Sheet.

Summary of Certain Key Terms of the DIP Financing	
Maximum Availability	Maximum principal amount of \$1 million.
Interest	Interest shall be payable in cash on the aggregate outstanding principal from the date of funding at a rate of 6.5% <i>per annum</i> , compounded monthly and payable in full on the Maturity Date (as defined below).
Fees	None.
Costs and Expenses	DEL shall reimburse Diesel for all reasonable and documented expenses (including reasonable and documented legal fees and expenses of its legal counsel) in connection with the CCAA proceedings and the DIP Financing.
Use of Funds	<p>DEL shall use the proceedings of the DIP Financing (in accordance with the DIP Budget, subject to the Permitted Variance (each as defined below)) to:</p> <ul style="list-style-type: none"> (a) pay (i) the reasonable and documented legal fees and expenses of Diesel in accordance with the DIP Term Sheet, (ii) the reasonable and documented financial advisory fees and legal fees and expenses of DEL (including, without limitation, any fees and expenses of SRA, including legal fees), including as relates to the services of the CRO and (iii) the reasonable and documented fees and expenses of the Monitor and its legal counsel; (b) pay the fees and interest owing to Diesel under the DIP Term Sheet; and (c) fund the Company’s general corporate and working capital needs, including funding these CCAA proceedings and the pursuit of the Sale Process. <p>The Company may use the proceeds of the DIP Financing to pay pre-filing obligations, provided that such amounts are permitted to be paid pursuant to the Initial Order and the aggregate amount of all such pre-filing amounts shall not exceed the amount set out in the DIP Budget.</p>
Maturity	The earlier of (i) the occurrence of any Event of Default in respect of which a demand for repayment has been made in writing by Diesel; (ii) the implementation of a transaction pursuant to the Sale Process or a plan of compromise or arrangement under the CCAA; and (iii) April 15, 2020 (the “ Maturity Date ”).

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Summary of Certain Key Terms of the DIP Financing	
	The Maturity Date may be extended from time to time at the request of the Company and with the prior written consent of Diesel for such period and on such terms and conditions as the Company and Diesel may agree, provided that any material amendments to the terms and conditions shall be also be subject to the prior written consent of the Monitor.
Certain Key Conditions Precedent	<ul style="list-style-type: none"> • The Initial Order, in a form reasonably acceptable to Diesel, including the approval of the DIP Lender's Charge on the terms set forth in the DIP Term Sheet, shall have been issued and entered by the Court. • The DIP Term Sheet shall have been duly executed. • No Event of Default under the DIP Term Sheet shall have occurred or will occur as a result of the requested advance. • All reasonable and documented expenses (including all reasonable and documented legal fees and expenses) of Diesel incurred in connection with the DIP Financing and invoiced to the Company no later than two business days' prior to the initial funding shall have been paid in full. Such expenses may be deducted from the advance.
Milestones	<ul style="list-style-type: none"> • The Company shall achieve the following milestones (as such dates may be extended on consent of Diesel, acting reasonably): <ul style="list-style-type: none"> ○ the Sale Process shall have been approved by an order of the Court (which may be the Initial Order) on or before the date which is 5 days following the entry of the Initial Order; ○ a Successful Bid(s) pursuant to the Sale Process shall have been approved by an order of the Court on or before February 29, 2020; and ○ the transaction contemplated by the Successful Bid(s) shall be implemented on or before March 31, 2020.
Certain Key Events of Default	<ul style="list-style-type: none"> • Failure by the Company to pay (i) principal, interest or other amounts within three business days of such amounts becoming due under the DIP Term Sheet; or (ii) costs and expenses of Diesel in accordance with the DIP Term Sheet within 10 business days of receiving an invoice therefor. • Any representation or warranty by the Company made in the DIP Term Sheet is or proves to be incorrect or misleading in any material respect as of the date made. • Issuance of a Court Order: (i) dismissing the CCAA proceedings or lifting the stay to permit the enforcement of any security against the Company or the Collateral; (ii) granting any other Lien in respect of the Collateral that is in priority to or pari passu with the DIP Lender's Charge other than as permitted pursuant to the DIP Term Sheet, or (iii) staying, reversing, vacating or otherwise modifying the DIP Term Sheet or the DIP Lender's Charge, in each case unless otherwise consented to by Diesel. • The expiry without further extension of the stay under the Initial Order.
Security and DIP Lender's Charge	All obligations of the Company under the DIP Term Sheet shall be secured by the DIP Lender's Charge on the Collateral.
Priority of the DIP Charge	The DIP Lender's Charge shall have priority on the Collateral over all Liens other than the "Permitted Priority Liens," which is defined to mean (i) the Administration Charge, (ii) the Directors' Charge, (iii) charges securing the RBC Floor Plan Facility (but solely in respect of the RBC Collateral (as such term is defined in the applicable Priority Agreement), and (iv) any amounts payable by the Company for certain unpaid employment and tax obligations to the extent such amounts have priority by applicable law and have not been subordinated to the DIP Lender's Charge pursuant to an order of the Court entered in connection with these CCAA proceedings.

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75. Based on my review of interim financings approved in other CCAA cases, I believe that the economic terms of the DIP Term Sheet (including the interest rate and the absence of any commitment or other fees) are significantly below market, and that the structure and terms of the DIP Term Sheet otherwise provide significant flexibility to DEL to allow it to explore and implement a comprehensive restructuring transaction.
76. In August and September 2019, DEL, with the assistance of SRA, also sought bridge financing proposals from nine financial institutions, including providing preliminary diligence information to the extent an expression of interest was received. All of the preliminary expressions of interest received from potential third-party lenders proposed interest rates that were significantly higher than the 6.5% interest rate under the DIP Term Sheet and also included significant additional fees and other terms that would provide significantly less flexibility to DEL in pursuing its restructuring options. Accordingly, the Company believes that the DIP Financing is being offered on more favourable terms than any other potentially available third-party financing and that no third-party would be prepared to provide non-priming financing on acceptable terms in these circumstances.
77. The DIP Term Sheet provides for a super-priority court-ordered charge over the assets, property and undertaking of the Company (the “**DIP Lender’s Charge**”) to secure the obligations outstanding from time to time in connection with the DIP Financing. It is not proposed, however, that the DIP Lender’s Charge prime RBC’s security in any GM chassis financed through RBC or impair Ford’s rights in any Ford chassis held by DEL as bailee from time to time (in short, it is contemplated that, as amongst Diesel, RBC and Ford, their respective rights and priorities will remain as set forth in the Priority Agreements). Further,

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the DIP Lender's Charge will not secure any obligation that existed prior to the date of the Initial Order.

D. Approval of the Engagement of the CRO and Corporate Governance Matters

78. As noted above, SRA was engaged in July 2019 to provide the Company with restructuring advisory services and to assist with developing and implementing the Sale Process. On October 18, 2019, the Company entered into an engagement letter with SRA (the "**CRO Engagement Letter**"), a copy of which is attached hereto as Exhibit "K". The CRO Engagement Letter contemplates a monthly work fee of \$25,000 per month payable to SRA, along with payment of a success fee of \$100,000 (the "**Success Fee**") upon the implementation of a successful restructuring transaction in respect of DEL (on and subject to the terms described in the CRO Engagement Letter).
79. The Engagement Letter also contemplates that I will be appointed as chief restructuring officer of the Company (the "**CRO**") upon the commencement of these proceedings, with full authority to oversee and exercise decision making authority in respect of all restructuring matters concerning DEL, subject to the approval of DEL's sole director where necessary.
80. As I understand is customary, the Initial Order contemplates that certain protections will be extended to me in my capacity as CRO, including the Director's Charge and related indemnity and a declaration that I will not be deemed to be in control of the Property (as defined in the Initial Order). Given the challenging circumstances facing DEL and the prospect of potential liability, I would not be willing to serve as CRO absent the granting of such protections and the other protections contemplated by the CRO Engagement Letter.

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81. The proposed Initial Order also provides for the CRO's fees and expenses under the CRO Engagement Letter (other than the Success Fee) will be secured by the Administration Charge (as defined and described below), and that the Success Fee will be secured by a charge over DEL's property (the "**Success Fee Charge**") with the priority described below.
82. I note that following recent resignations, the sole remaining director and officer of DEL is Mr. Paul Martin, DEL's former president who is also the majority shareholder of Diesel (who is both DEL's senior secured lender and its sole shareholder). Given the circumstances facing DEL, I believe it would be very difficult to identify another individual who would be willing to serve on DEL's board, and were Mr. Martin to resign it would create a potential governance vacuum. Further, given Mr. Martin's extensive experience with DEL, his involvement is critical to executing a successful restructuring. I understand that Mr. Martin has been informed of the duties of directors and officers of DEL by restructuring counsel to the Company and further believe that with the assistance of the CRO and the Company's other advisors, and under the supervision of both the Monitor and this Court, DEL's current governance regime is appropriate in the circumstances.

E. Proposed Sale Process

83. The Company is also seeking the Court's approval of the Sale Process attached hereto as Exhibit "L". Diesel, in its capacity as both senior secured lender to DEL and its sole shareholder, has indicated a preference to exit its investments in DEL and provide for an orderly and value maximizing transition of DEL's business to a third party for the benefit of all stakeholders, either by way of a sale of DEL's business or assets or a strategic investment in DEL. In connection with such a transaction, Diesel has also expressed a desire to sell the real property DEL operates from to a purchaser of, or investor in, DEL,

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and it is contemplated that such real property will be marketed along with DEL’s business. Accordingly, the Company believes that it is appropriate at this time and in the interests of all stakeholders to proceed with the Sale Process to seek to identify a potential going-concern sale or restructuring transaction that would maximize the value of DEL’s business for the benefit of the Company and its stakeholders.

84. The material terms of the Sale Process are summarized in the below table.

Summary of Certain Key Terms of the Sale Process	
Conduct	The Sale Process shall be conducted by DEL under the supervision of the Monitor. DEL will, among other things, prepare marketing materials, prepare a data room, and solicit interest from parties to enter into non-disclosure agreements and participate in the Sale Process.
Process and Timeline	<ul style="list-style-type: none"> • <u>Non-Binding EOI Bid Deadline</u> – Interested parties must submit initial non-binding expressions of interest (an “EOI”) by a target date of December 6, 2019 (as may be extended by DEL) (the “Non-Binding EOI Bid Deadline”). • <u>Phase 2 Parties</u> – DEL may select from parties that submit an EOI by the Non-Binding EOI Bid Deadline the parties invited to the second phase of the Sale Process (the “Phase 2 Parties”) to conduct detailed due diligence. • <u>Binding Bid Deadline</u> – Phase 2 Parties must submit binding offers (“Binding Bids”) with duly executed proposed transaction documents by 5:00 p.m. (Toronto time) on January 31, 2020 (as may be extended by the Company with the consent of the Monitor or further order from the Court) (the “Binding Bid Deadline”).
Requirements for Binding Bids	<ul style="list-style-type: none"> • Contains (i) duly executed binding transaction document(s), (ii) the identity and contact information of the bidder, (iii) a blackline to the form of transaction document(s) provided by the Company, and (iv) evidence of authorization and approval from the bidder’s board of directors (or comparable governing body). • Includes a letter stating that the bid is irrevocable for a period of at least 15 business days after the Binding Bid Deadline, as may be extended by such bidder. • Provides written evidence of a firm, irrevocable financial commitment for all required funding or financing. • Does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment. • Does not include any due diligence or financing conditions. • Specifies any regulatory or other third party approvals the party anticipates would be required to complete the transaction. • Includes a cash deposit of 10% of the total cash purchase price contemplated by such bid. The cash deposit shall be paid to and held in trust by the Monitor. • Is received by the Binding Bid Deadline. <p>The Company, in consultation with the Monitor, may waive compliance with any one or more of the above requirements and deem a non-compliant bid to be a Binding Bid.</p>

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Summary of Certain Key Terms of the Sale Process	
Review, Selection and Court Approval of Successful Bid	<p>Following the Binding Bid Deadline, the Company may, in consultation with the Monitor, determine to continue negotiations with a selected number of bidders that have submitted Binding Bids with a view to selecting one or more non-overlapping Binding Bids as the successful bid(s) (the “Successful Bid(s)”), and take such steps as are necessary to finalize and consummate the Successful Bid(s). The Company shall be under no obligation to accept the highest bid as the Successful Bid.</p> <p>Following the selection of a Successful Bid(s), if any, the Company will finalize any necessary definitive documentation in respect of such Successful Bid(s) and may apply to the Court for an order approving the Successful Bid(s).</p> <p>The Company shall have no obligation to conclude a sale or other transaction arising out of the Sale Process and reserves the right to reject any bid or proposal (including any Binding Bid), or to complete a standalone restructuring transaction outside of the Sale Process, subject to consultation with the Monitor.</p>
Amendments	Any amendments to the Sale Process by the Company require the written consent of the Monitor or by further order of the Court.

85. The terms of the Sale Process were developed with the assistance of SRA and in consultation with the proposed Monitor and the Company’s legal and financial advisors. The Company believes that the Sale Process is appropriate in the circumstances, and in particular will provide sufficient time and flexibility to allow DEL to explore all strategic alternatives available to it.

F. Proposed Monitor

86. The Company seeks the appointment of MNP Ltd. (“**MNP**”) as the monitor (the “**Monitor**”) in these proceedings. MNP has consented to act as the Monitor of the Company in the within proceedings, subject to Court approval. I understand a copy of the Consent to Act as Monitor provided by MNP will be included in the Company’s application record.

87. MNP became involved with the Company in August 2019 to assist the Company in its review of certain financial and restructuring matters, and has reviewed the Company’s financial and liquidity position (including the Cash Flow Forecast), the development of the

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Sale Process, the terms of the DIP Financing and the other relief requested by the Company in connection with the CCAA proceedings.

88. MNP is a trustee within the meaning of Section 2 of the *Bankruptcy and Insolvency Act* (Canada), as amended, and is not subject to any of the restrictions on who may be appointed as monitor set out in Section 11.7(2) of the CCAA.
89. The professionals at MNP who will have carriage of this matter have acquired knowledge of the Company, its business, financial circumstances and strategic and restructuring efforts to date. I believe that MNP is in a position to assist the Company with its restructuring efforts in these CCAA proceedings.

G. Administration Charge

90. It is contemplated that a Court-ordered charge over the Property would be granted in favour of the Monitor, counsel to the Monitor, the Company's financial advisor (Grant Thornton LLP), counsel to the Company and the CRO to secure the payment of their respective professional fees and disbursements (but excluding with respect to the Success Fee, which will be secured by the Success Fee Charge), whether incurred prior to, on or after the date of the Initial Order (the "**Administration Charge**"). The proposed Administration Charge is in an aggregate amount of \$400,000. All of the beneficiaries of the Administration Charge have contributed, and will continue to contribute, to the Company's restructuring efforts.

H. Directors' Charge

91. Both Mr. Martin, as the sole remaining director and officer of the Company, and myself (as a restructuring advisor and proposed CRO) have been actively involved in the

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Company's efforts to address its challenging circumstances, including its efforts to unwind the Gin-Cor Transaction, the review and consideration of the Company's financial circumstances and business challenges, the development of the Sale Process, and the preparation for and commencement of these proceedings.

92. It is my understanding, based on information from Goodmans LLP ("**Goodmans**"), the Company's restructuring counsel, that in certain circumstances, directors and officers may be held personally liable for certain corporate obligations, including in connection with salary, wages, payroll remittances, vacation pay, harmonized sales taxes, workers compensation remittances, and certain other corporate obligations.
93. Diesel maintains directors and officers insurance policies (collectively, the "**D&O Policy**"). The D&O Policy insures DEL's directors and officers for certain claims that may arise against them in their capacity as directors and/or officers of the Company. However, the D&O Policy contains exclusions and limitations to the coverage provided. Further, there is the potential for coverage limits to be exhausted and for there to be insufficient coverage.
94. Both Mr. Martin and I have expressed the desire for certainty with respect to any potential personal liability arising from our respective roles. The Company requires the active and committed involvement of its director and officers during the CCAA proceedings as it pursues strategic options and alternatives to address its current circumstances.
95. Accordingly, the Company requests a Court-ordered charge in the amount of \$1,200,000 over the Property (the "**Directors' Charge**") to secure the indemnity provided to the directors, officers and CRO in the Initial Order in respect of liabilities they may incur

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during the CCAA proceedings in their capacities as such. The amount of the Directors' Charge has been calculated by the Company based on the estimated potential exposure of the directors and officers and has been reviewed with the proposed Monitor. The proposed Directors' Charge would apply only to the extent that the directors and officers do not have coverage under the D&O Policy.

I. Payments During the CCAA Proceedings

96. The Company is seeking the authorization to pay certain expenses, whether incurred prior to, on or after the date of the proposed Initial Order, in respect of:

- (a) all outstanding and future wages, salaries, compensation, employee benefits, pension contributions, vacation pay and expenses (including, without limitation, payroll and benefits processing and servicing expenses) payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
- (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges;
- (c) all outstanding and future amounts related to honouring customer obligations, whether existing before or after the date of this Order, including with respect to customer warranty obligations and as relates to customer deposits and pre-payments, in each case incurred in the ordinary course of business and consistent with existing policies and procedures;

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- (d) amounts owing by the Company to insurance premium financiers as necessary to ensure continued coverage for the Company under its existing insurance policies, including director and officer insurance; and
 - (e) amounts owing for goods or services supplied to the Company prior to the date of this Order if, in the opinion of the Company and with the consent of the Monitor, such payment is necessary to maintain the operations of the Business.
97. The Company is also seeking the authority to pay all reasonable expenses incurred in carrying on its business in the ordinary course after the date of the Initial Order, including expenses and capital expenditures reasonably necessary for the preservation of its business and payment for goods and services supplied to the Company during the CCAA proceedings.
98. The authority to make the foregoing payments is necessary for the continued preservation of the Company's business and assets during the CCAA proceedings, as well as to advance the restructuring initiatives described herein. The Company requires the commitment and support of its employees and key suppliers and service providers while it attempts to address its current challenges.
99. Of particular note, the Company's ability to operate its business in the normal course is dependent on its ability to obtain an uninterrupted supply of inventory on commercially reasonable terms. The Company has maintained long-term relationships with key industry suppliers, many of which are critical to the operation of its business. The Company has already experienced tightening of the trade terms of certain suppliers in advance of these proceedings and is concerned that certain suppliers may discontinue supplying on existing

- 39 -

preferred terms. Any such discontinuance could have a material adverse impact on the operation and value of DEL's business.

100. Moreover, DEL obtains some of its equipment from suppliers outside Canada. While I understand foreign suppliers will be subject to the relief granted in the CCAA proceedings, I also understand from Goodmans that there may be practical difficulties with enforcing the stay of proceedings and other relief granted extraterritorially and there is no guarantee that foreign suppliers will continue to supply the Company without continued payment of invoices, including pre-filing amounts. A failure to pay these amounts may lead to the relevant supplier refusing to supply the Company and cause significant harm to the Company's business.
101. In light of the foregoing, DEL believes that the payment of certain pre-filing amounts to certain suppliers may be necessary to ensure an uninterrupted supply of merchandise during the CCAA proceedings and the maintenance of existing trade terms. The Company intends to work closely with the Monitor with respect to these matters and to seek the consent of the Monitor before making any such payment.

J. Priority of Proposed Charges

102. It is contemplated that the priorities of the various charges over the assets of the Company proposed to be granted pursuant to the Initial Order (collectively, the "**Charges**"), as among them, will be as follows:
- (a) First – the Administration Charge;
 - (b) Second – the Directors' Charge;

- 40 -

(c) Third – the DIP Lender’s Charge; and

(d) Fourth – the Success Fee Charge.

103. The Initial Order sought by the Company provides for the Charges to rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, save and except for those secured creditors which did not receive notice of the application for this Order. The proposed Initial Order authorizes the Company to seek an Order granting priority of the Charges ahead of those secured creditors on the comeback motion in these proceedings.

104. The Company believes the amounts of the Charges are fair and reasonable in the circumstances.

VI. CONCLUSION

105. The Company has initiated these CCAA proceedings to obtain the protection and breathing room necessary to stabilize its business while it seeks to implement the Sale Process to identify a sale or other restructuring transaction that enables DEL’s business to continue on a going-concern basis for the benefit of the Company and its stakeholders, as well as to achieve an expedited and efficient resolution of the Payment Dispute with Mack Defense and Gin-Cor.

106. I believe the granting of the requested relief is in the best interest of the Company and its stakeholders.

SWORN before me at the City of Toronto, in the Province of Ontario, on October 20, 2019



A Commissioner for taking affidavits

ANDREW HARMS



DOUGLAS LUCKY

**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.**

Court File No.: CV-19-629552-00CL

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

AFFIDAVIT OF DOUGLAS LUCKY
(Sworn October 20, 2019)

GOODMANS LLP
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333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Christopher G. Armstrong LSO# 55148B
carmstrong@goodmans.ca

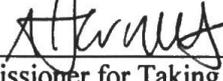
Andrew Harmes LSO# 73221A
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Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Del Equipment Inc.

B

THIS IS EXHIBIT "B"
TO THE AFFIDAVIT OF DOUGLAS LUCKY
SWORN BEFORE ME OVER VIDEOCONFERENCE
THIS 8th DAY OF SEPTEMBER, 2020



Commissioner for Taking Affidavits

M51568
File No. M51568

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE)	WEDNESDAY THE 24 th DAY OF
)	
JUSTICE THORBURN)	JUNE, 2020

BETWEEN:

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
(Respondent)

ORDER

THIS MOTION, brought by GinCor Industries Inc. ("GinCor") for an Order Staying the Order of The Honourable Mr. Justice Hainey made May 7, 2020, was heard this day at Toronto, Ontario by video/audioconference in light of the COVID-19 crisis.

ON READING the Affidavit of Renzo Silveri and the consent of the Applicant, DEL Equipment Inc. and the moving party, GinCor and on hearing the submissions of counsel for the parties,

SERVICE

1. **THIS COURT ORDERS** that the time for the service of the materials filed on this motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

-2-

2. **THIS COURT FURTHER ORDERS** that the Order of The Honourable Mr. Justice Hainey made May 7, 2020 be and hereby is stayed pending determination of GinCor's Motion for Leave to Appeal and should leave be granted, the Appeal.
3. **THIS COURT FUTHER ORDERS** that the parties shall comply with the timetable set out in Appendix "A" attached in respect of the delivery of materials for the Motion for Leave to Appeal.
4. **THIS COURT FURTHER ORDERS** that the Motion for Leave to Appeal shall be expedited.
5. **THIS COURT FURTHER ORDERS** that if leave is not granted or if leave is granted and the Appeal is dismissed, the funds on deposit with the firm of Kagan Shastri LLP, standing to the credit of this proceeding, shall be paid out to the Applicant within two (2) business days of the earlier of either event.

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 24 2020

PER / PAR: TS



REGISTRAR

COURT OF APPEAL FOR ONTARIO

APPENDIX "A"

1. Moving Party (GinCor) will perfect its Motion for Leave on or before Monday June 29, 2020.
2. Responding Party (DEL) will deliver its Factum and any Responding Record on or before July 27, 2020.
3. Moving Party shall have seven (7) days following delivery of the Respondent's materials to delivery its Reply Factum, if any.

DEL EQUIPMENT INC.
Applicant
(Respondent)

M51581
Court File No. M51568

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO (COMMERCIAL LIST)

ORDER

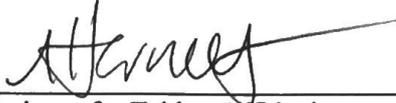
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Lawyers for the Moving Party (Appellant),
Gin-Cor Industries Inc.

RCP-E 4C (May 1, 2016)

C

**THIS IS EXHIBIT "C"
TO THE AFFIDAVIT OF DOUGLAS LUCKY
SWORN BEFORE ME OVER VIDEOCONFERENCE
THIS 8th DAY OF SEPTEMBER, 2020**



Commissioner for Taking Affidavits

BILL OF SALE

THIS BILL OF SALE (“**Bill of Sale**”), is made as of September ●, 2020 by and between Del Equipment Inc., a corporation incorporated under the laws of the Province of Ontario (the “**Vendor**”), and Diesel Equipment Limited, a corporation incorporated under the laws of the Province of Ontario (the “**Purchaser**”).

RECITALS:

- A. On October 22, 2019, the Vendor commenced proceedings under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) and sought and obtained an initial order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) among other things, appointing MNP Ltd. as monitor in the CCAA proceedings (the “**Monitor**”).
- B. The Vendor and the Purchaser desire to execute and deliver this Bill of Sale in order to evidence the sale by the Vendor and the vesting in the Purchaser of the Equipment (as defined below).

NOW THEREFORE, the parties agree as follows:

1. Conveyance. Subject to the granting of the Approval and Vesting Order (as defined below) by the Court, in consideration of the payment by the Purchaser of CAD\$108,062.50, plus ● of HST to the Vendor, the receipt of which is hereby acknowledged by the Vendor, the Vendor hereby sells, assigns, conveys and transfers to the Purchaser, its successors and assigns, all of the Vendor’s rights, titles and interests in and to the equipment described in Schedule “A” hereto which has been installed on certain customer supplied truck chassis (the “**Equipment**”).
2. Further Assurances. The Vendor shall execute and deliver such further instruments of transfer and assignment and take such other actions as the Purchaser may reasonably request to more effectively transfer and assign to and vest in the Purchaser the Equipment, all at the sole cost and expense of the Purchaser.
3. Court Approval. The Vendor hereby agrees to serve and file a motion in its CCAA proceedings seeking an Order of the Court (the “**Approval and Vesting Order**”) approving the sale by the Vendor of the Equipment pursuant to this Bill of Sale and vesting the Equipment in the Purchaser free and clear of any security interest, lien, prior claim, charge, hypothec, hypothecation, reservation of ownership, pledge, encumbrance, mortgage or adverse claim of any nature or kind.
4. Successors and Assigns. This Bill of Sale and the provisions hereof shall be binding upon and shall enure to the benefit of the parties hereto and their respective successors and permitted assigns.
5. Amendments. No amendment or modification of this Bill of Sale shall be effective unless it is in writing and signed by each of the parties hereto.

- 2 -

6. Governing Law. This Bill of Sale shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein without regard to any applicable principles of conflicts of law. The parties hereby irrevocably attorn to the exclusive jurisdiction of the Court with respect to any and all disputes arising out of or in connection with this Bill of Sale.

7. Counterparts. This Bill of Sale may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same instrument. Any party may deliver an executed signature page to this Bill of Sale by electronic transmission (including in portable document format (PDF)) and such delivery will be as effective as delivery of a manually executed copy by such party.

[SIGNATURE PAGES TO IMMEDIATELY FOLLOW]

IN WITNESS WHEREOF the Vendor and the Purchaser have duly executed this Bill of Sale as of the date first written above.

DEL EQUIPMENT INC.

Per: _____

Name: Douglas Lucky

Title: Chief Restructuring Officer

DIESEL EQUIPMENT LIMITED

Per:

Name: Paul Martin

Title: President

MNP Ltd. in its capacity as the Monitor of the Vendor in its CCAA proceedings hereby acknowledges the Vendor entering into and performing any of its obligations under this Bill of Sale.

MNP LTD., in its capacity as the Monitor of Del
Equipment Inc. and not in its personal or corporate
capacity

Per: _____

Name: Sheldon Title

Title: Senior Vice-President

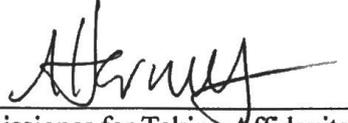
SCHEDULE A**DESCRIPTION OF EQUIPMENT**

Make and Year of Truck Chassis on which the Equipment is Installed	Equipment
Freightliner - 2018	Effer Model 135 4S folding crane & DEL model 22' flat deck.
Peterbilt - 2019	Beuroc 15' Dump Box Model 1503648 (serial # DHS-383862).
Peterbilt - 2020	NRC 40TB28' slide back tilting carrier (NRC serial #40-743, DEL serial # 12191484).

7086235

D

THIS IS EXHIBIT "D"
TO THE AFFIDAVIT OF DOUGLAS LUCKY
SWORN BEFORE ME OVER VIDEOCONFERENCE
THIS 8th DAY OF SEPTEMBER, 2020



Commissioner for Taking Affidavits

COURT OF APPEAL FOR ONTARIO

CITATION: DEL Equipment Inc. (Re), 2020 ONCA 555

DATE: 20200908

DOCKET: M51568

Lauwers, Brown and Nordheimer JJ.A.

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 (Respondent/Responding Party)

Rahul Shastri and David Winer, for the moving party Gin-Cor Industries Inc.

Jason Wadden, Christopher Armstrong and Andrew Harmes, for the responding party DEL Equipment Inc.

Heard: in writing

Motion for leave to appeal from the order of Justice Glenn A. Hainey of the Superior Court of Justice, dated May 7, 2020.

REASONS FOR DECISION

OVERVIEW

[1] Gin-Cor Industries Inc. ("GCI") seeks leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), from the order of Hainey J. dated May 7, 2020, which required GCI to pay DEL Equipment Inc. ("DEL") the amount of \$874,107.08 (the "Funds") then being held in trust pursuant to an earlier court order.

[2] We refuse GCI leave to appeal. In accordance with the practice of this court on motions for leave to appeal under the CCAA, these brief reasons explain our refusal.

THE DISPUTE

[3] DEL manufactures special truck bodies and equipment. GCI also manufactures and customizes trucks. In June 2017, DEL and GCI entered into a management agreement under which GCI assumed management control of DEL and ultimately could earn a 100% equity interest in DEL if certain milestones were reached. However, the parties terminated the agreement on July 18, 2019, at which time GCI ceased to manage DEL's business.

[4] In 2018, DEL received two purchase orders from Mack Defense LLC ("Mack Defense") for certain trucks. In May and June 2019, DEL delivered the trucks. In June 2019, DEL issued invoices totaling \$874,107.08 to Mack Defense, which made two payments totaling that amount in late August and early September 2019.

[5] However, Mack Defense mistakenly sent the payments to GCI, instead of to DEL. It appears the mistake originated when Mack Defense sought to confirm payment instructions for the trucks back in April 2019, when GCI was managing DEL. A GCI representative answered Mack Defense's inquiry and mistakenly provided instructions to direct payment to GCI's account. Although a DEL representative later provided Mack Defense with the proper payment instructions, Mack Defense ended up mistakenly paying the DEL invoiced amounts to GCI.

[6] In mid-September 2019, DEL followed up with Mack Defense and learned about the mistaken payments. DEL asked GCI to transfer the \$874,107.08 to it. Although GCI acknowledged that the payments by Mack Defense were intended to satisfy DEL's invoices, GCI refused to transfer the Funds. GCI took the position that it was entitled to retain the Funds as a set-off against other obligations of DEL to GCI, including those that arose under the management agreement.

[7] Mack Defense viewed the matter as a dispute between DEL and GCI.

[8] On October 22, 2019, DEL was granted protection under the CCAA. As of that date, DEL owed GCI and related companies approximately \$1.5 million.

[9] The motion judge then granted a preservation order requiring that GCI transfer the Funds to its lawyers pending further order of the court.

[10] Subsequently, DEL and GCI brought competing motions asserting entitlement to the Funds. The motion judge ordered the Funds be paid to DEL and that, pending payment of the Funds to DEL, the Funds are subject to a constructive trust in favour of DEL. GCI now seeks leave to appeal that order.

[11] By order dated June 24, 2020, Thorburn J.A. directed that this motion for leave to appeal be expedited and, if leave was not granted, the Funds be paid out to DEL within two business days of the order refusing leave to appeal.

ANALYSIS

The governing test

[12] This court will only sparingly grant leave to appeal in the context of a CCAA proceeding. Leave will be granted only where there are “serious and arguable grounds that are of real and significant interest to the parties”, determined by considering whether: (i) the proposed appeal is *prima facie* meritorious or frivolous; (ii) the issue on the proposed appeal is of significance to the practice; (iii) the issue on the proposed appeal is of significance to the proceeding; and (iv) the proposed appeal will unduly hinder the progress of the proceeding: *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24.

Whether the proposed appeal is *prima facie* meritorious or frivolous

[13] The motion judge concluded that: (i) GCI unjustly enriched itself by retaining the Funds and refusing to pay them to DEL or return them to Mack; and (ii) GCI’s retention of the Funds constitutes an improper preference over DEL’s other creditors. In dealing with the issue of whether a juristic reason existed for GCI’s receipt and retention of the Funds, the motion judge stated:

I have also concluded that there is no juristic reason for GCI’s enrichment of receiving and retaining the Funds because,

- (a) the Funds were never intended for GCI;
- (b) GCI cannot rely on set off as a juristic reason for its enrichment because the Supreme Court of Canada made this clear at para. 114 of its decision in *Kerr v.*

Baranow, 2011 SCC 10, [2011] 1 S.C.R. 269;

(c) GCI has acknowledged that it received the Funds by mistake which is not a juristic reason for its enrichment;

(d) GCI is not an “innocent” recipient of the Funds because its own employees were at least, in part, the cause of the mistaken payment; and

(e) GCI’s retention of the Funds constitutes an improper preference over DEL’s other creditors.

[14] GCI’s primary submission is that the motion judge erred in holding that GCI could not rely on set-off as a juristic reason to defend a claim of unjust enrichment. GCI contends that set-off can constitute a juristic reason in a commercial law context and CCAA s. 21 creates a statutory right of set-off available in CCAA proceedings.

[15] We are not persuaded that the proposed appeal is *prima facie* meritorious. In our view, GCI has not raised any arguments that provide good reason to doubt the motion judge’s decision.

[16] In particular, we are not persuaded GCI’s submission on juristic reason is *prima facie* meritorious. *Kerr* remains the leading authority on the elements of a claim for unjust enrichment. On the issue of juristic reason, *Kerr* drew upon the two-step juristic reason analysis described in the Supreme Court of Canada’s earlier decision in *Garland v. Consumers Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R.

629. As the motion judge correctly noted, that two-step analysis is summarized at para. 114 of *Kerr*, where the Supreme Court stated, in part:

The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. [Emphasis added.]

[17] While the fact that the parties have conferred benefits on each other may be considered at the juristic reasons stage, it can only be considered for the limited purpose of providing evidence of the parties' reasonable expectations that could support the existence of a juristic reason outside the settled categories: *Kerr*, at para. 115.

[18] The motion judge's reasons reveal that he applied *Kerr's* two-step juristic reason analysis to the specific facts of this case. There was no evidence that GCI's receipt of a benefit of \$874,107.08 from Mack Defense was pursuant to a legal obligation. On the contrary, GCI mistakenly received the Funds from Mack Defense, which should have sent the Funds to DEL to satisfy the invoices for DEL's

delivery of trucks to Mack Defense. CCAA s. 21¹ recognizes that a creditor may raise the common law defence of set-off when sued by a company under CCAA protection. However, this does not alter the fact that, in this case, the Funds were mistakenly paid to and received by GCI.

[19] Further, the fact that DEL was indebted to GCI at the time of Mack Defense's mistaken payments was not, in the circumstances, evidence of any reasonable expectation by DEL and GCI that a juristic reason existed for GCI to retain the mistakenly paid Funds. Indeed, the evidence was to the contrary. As soon as DEL discovered that Mack Defense had mistakenly paid the Funds to GCI, DEL demanded that GCI transfer the Funds to it.

The remaining factors: the significance of the issue to the proceeding; significance to the practice; and the impact on the progress of the CCAA proceeding

[20] While the issue of the entitlement to the Funds is of significance to the parties to the proceeding, we are not persuaded that the proposed appeal raises any issues of significance to the practice. The proposed appeal turns on applying well-established principles of law to the unique facts of this case, which include the existence of a management agreement in effect between DEL and GCI at the time Mack Defense sought instructions for the payment of the Funds.

¹ CCAA s. 21 states: "The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be."

[21] The final factor to consider is whether the proposed appeal will unduly hinder the progress of the proceeding. We regard this factor as neutral. On the one hand, DEL submits that the only remaining task in the CCAA proceeding is to distribute funds to unsecured creditors, which cannot occur until the amount available to unsecured creditors is determined. That, in turn, would depend upon the outcome of the proposed appeal. On the other hand, GCI argues that there is no evidence in the record of any prejudice to the CCAA proceeding in the event leave were to be granted. As well, GCI submits that the appeal could be expedited, as was the hearing of this motion for leave to appeal.

Conclusion

[22] Leave to appeal is only sparingly granted in CCAA proceedings. In our view, the proposed appeal is neither *prima facie* meritorious nor does it raise issues of significance to the practice. Therefore, we are not persuaded that GCI's motion merits granting leave to appeal.

DISPOSITION

[23] For the reasons set out above, the motion is dismissed.

Pham/A

Pham/A

Pham/A

**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.**

Court File No: CV-19-629552-00CL

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**AFFIDAVIT OF DOUGLAS LUCKY
(Sworn September 8, 2020)**

GOODMANS LLP
Barristers & Solicitors
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Andrew Harmes LSO# 73221A
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Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Del Equipment Inc.

3

Court File No. CV-19-629552-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	MONDAY, THE 14 TH
)	
JUSTICE HAINEY)	DAY OF SEPTEMBER, 2020

**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

STAY EXTENSION ORDER

THIS MOTION, made by Del Equipment Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, was heard this day by videoconference in light of the COVID-19 crisis.

ON READING the affidavit of Douglas Lucky sworn September 8, 2020, and the Exhibits thereto, the Fifth Report of MNP Ltd. in its capacity as monitor of the Applicant (the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, the Monitor, and those other parties present as indicated on the counsel sheet, and on reading the affidavit of service, filed:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Applicant's Notice of Motion, the Motion Record and the Fifth Report is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

- 2 -

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meanings given to them in the Initial Order of this Court made in the within proceedings dated October 22, 2019 (as amended, the “**Initial Order**”).

EXTENSION OF STAY PERIOD

3. **THIS COURT ORDERS** that the Stay Period be and is hereby extended to and including 11:59 p.m. (Toronto time) on October 30, 2020, and that all other terms of the Initial Order shall remain in full force and effect during the Stay Period.

GENERAL

4. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.
 5. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.
-

**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.**

Court File No: CV-19-629552-00CL

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

STAY EXTENSION ORDER

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Fax: (416) 979-1234

Lawyers for Del Equipment Inc.

4

Court File No. CV-19-629552-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	MONDAY, THE 14 TH
)	
JUSTICE HAINEY)	DAY OF SEPTEMBER, 2020

**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

DEMONSTRATION VEHICLE EQUIPMENT APPROVAL AND VESTING ORDER

THIS MOTION, made by Del Equipment Inc. (the “**Applicant**” or “**DEL**”), pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) for an order (this “**Order**”), among other things, (i) approving the sale transaction (the “**Transaction**”) contemplated by the bill of sale (the “**Bill of Sale**”) to be entered into between the Applicant and Diesel Equipment Limited (“**Diesel**”) substantially in the form attached as Exhibit “C” to the Lucky Affidavit (as defined below), and (ii) vesting in Diesel all of the Applicant’s right, title and interest in and to the Equipment (as defined in the Bill of Sale), was heard this day by videoconference in light of the COVID-19 crisis.

ON READING the affidavit of Douglas Lucky sworn September 8, 2020 (the “**Lucky Affidavit**”), and the Exhibits thereto, the Fifth Report (the “**Fifth Report**”) of MNP Ltd. in its capacity as monitor of the Applicant (the “**Monitor**”), and on hearing the submissions of counsel for the Applicant, the Monitor, and those other parties present as indicated on the counsel sheet, and on reading the affidavit of service of ● sworn September ●, 2020:

1. **THIS COURT ORDERS** that the time for service of 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.

- 2 -

2. **THIS COURT ORDERS** that unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meaning given to them in the Bill of Sale or the Lucky Affidavit, as applicable.
3. **THIS COURT ORDERS AND DECLARES** that the Transaction is hereby approved, and the execution of the Bill of Sale by the Applicant is hereby authorized and approved, with such minor amendments as the Applicant and Diesel may agree to with the consent of the Monitor. The Applicant is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Equipment to Diesel.
4. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to the Applicant and Diesel substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), all of the Applicant's right, title and interest in and to the Equipment described in the Bill of Sale shall vest absolutely in Diesel, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of this Court dated October 22, 2019 or any other Order of this Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Personal Property Security Act* (British Columbia), the *Personal Property Security Act* (Alberta), the *Personal Property Security Act* (Saskatchewan), the *Personal Property Security Act* (New Brunswick) (all of which are collectively referred to as the "**Encumbrances**"), and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Equipment are hereby expunged and discharged as against the Equipment.
5. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Equipment shall stand in the place and stead of the Equipment, and that from and after the delivery of the Monitor's Certificate all

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Claims and Encumbrances shall attach to the net proceeds from the sale of the Equipment with the same priority as they had with respect to the Equipment immediately prior to the sale, as if the Equipment had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof to the Applicant and Diesel.
7. **THIS COURT ORDERS** that, notwithstanding:
 - (a) the pendency of these proceedings;
 - (b) any applications for a bankruptcy or receivership order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Applicant and any bankruptcy or receivership order issued pursuant to any such applications; and
 - (c) any assignment in bankruptcy made in respect of the Applicant;

the entering into of the Bill of Sale and the vesting of the Equipment in Diesel pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicant and shall not be void or voidable by creditors of the Applicant, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or

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desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

**SCHEDULE “A”
FORM OF MONITOR’S CERTIFICATE**

Court File No. CV-19-629552-00CL

**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 DEL EQUIPMENT INC.**

MONITOR’S CERTIFICATE

RECITALS

- A. Pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated October 22, 2019, MNP Ltd. was appointed as the monitor (the “**Monitor**”) of Del Equipment Inc. (the “**Applicant**”) in proceedings pursuant to the *Companies’ Creditors Arrangement Act* (Canada).
- B. Pursuant to an Order of the Court dated September ●, 2020 (the “**Demonstration Vehicle Equipment Approval and Vesting Order**”), the Court approved the bill of sale (the “**Bill of Sale**”) to be entered into between the Applicant and Diesel Equipment Limited (“**Diesel**”) (which Bill of Sale was subsequently entered into on ●, 2020) and provided for the vesting in Diesel of all of the Applicant’s right, title and interest in and to the Equipment, which vesting is to be effective with respect to the Equipment upon the delivery by the Monitor to the Applicant and Diesel of a certificate confirming (i) the payment by Diesel of the Purchase Price for the Equipment; (ii) that the conditions set out in the Bill of Sale have been satisfied or waived by the Applicant and Diesel; and (iii) the Transaction has been completed to the satisfaction of the Applicant and Diesel.
- C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Bill of Sale.

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THE MONITOR CERTIFIES the following:

1. Diesel has paid and the Applicant has received the Purchase Price for the Equipment pursuant to the Bill of Sale.
2. The conditions set out in the Bill of Sale have been satisfied or waived by the Applicant and Diesel, as applicable.
3. The Transaction has been completed to the satisfaction of the Applicant and Diesel.
4. This Certificate was delivered by the Monitor at _____ [a.m/p.m.] on _____, 2020.

MNP LTD., in its capacity as Court-appointed Monitor of Del Equipment Inc. and not in its personal or corporate capacity

Per: _____

Name:

Title:

**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.**

Court File No: CV-19-629552-00CL

Applicant

<p>ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) Proceeding commenced at Toronto</p>
<p>DEMONSTRATION VEHICLE EQUIPMENT APPROVAL AND VESTING ORDER</p>
<p>GOODMANS LLP Barristers & Solicitors 333 Bay Street, Suite 3400 Toronto, Canada M5H 2S7</p>
<p>Christopher G. Armstrong LSO#: 55148B carmstrong@goodmans.ca</p>
<p>Andrew Harmes LSO#: 73221A aharmes@goodmans.ca</p>
<p>Tel: (416) 979-2211 Fax: (416) 979-1234</p>
<p>Lawyers for Del Equipment Inc.</p>

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Revised: January 21, 2014

Court File No. ~~_____~~ CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE ~~_____~~ MR.) ~~WEEKDAY~~ MONDAY, THE # 14TH
JUSTICE ~~_____~~ HAINY) DAY OF ~~MONTH~~ SEPTEMBER,
20YR 2020

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

~~B E T W E E N:~~

~~PLAINTIFF~~

~~Plaintiff~~

~~—and—~~

~~DEFENDANT~~

~~Defendant~~

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF DEL EQUIPMENT INC.

Applicant

DEMONSTRATION VEHICLE EQUIPMENT APPROVAL AND VESTING ORDER

~~THIS MOTION~~, made by ~~[RECEIVER'S NAME]~~ in its capacity as the Court appointed receiver (the "Receiver") of the undertaking, property and assets of ~~[DEBTOR]~~ (the "Debtor") for ~~an order~~ Del Equipment Inc. (the "Applicant" or "DEL"), pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA") for an order (this "Order"), among other things, (i) approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and the bill of sale (the "Sale Agreement") between the Receiver and [NAME OF PURCHASER] (the "Purchaser") dated [DATE] and appended to the Report of the Receiver dated [DATE] (the "Report"), and vesting in the Purchaser the Debtor "Bill of Sale") to

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be entered into between the Applicant and Diesel Equipment Limited (“**Diesel**”) substantially in the form attached as Exhibit “C” to the Lucky Affidavit (as defined below), and (ii) vesting in Diesel all of the Applicant’s right, title and interest in and to the ~~assets described~~ Equipment (as defined in the ~~Bill of Sale Agreement (the “Purchased Assets”)~~), was heard this day ~~at 330 University Avenue, Toronto, Ontario~~ by videoconference in light of the COVID-19 crisis.

ON READING the ~~Report~~ affidavit of Douglas Lucky sworn September 8, 2020 (the “**Lucky Affidavit**”), and the Exhibits thereto, the Fifth Report (the “**Fifth Report**”) of MNP Ltd. in its capacity as monitor of the Applicant (the “**Monitor**”), and on hearing the submissions of counsel for the ~~Receiver, [NAMES OF OTHER PARTIES APPEARING], no one appearing for any other person on the service list, although properly served as appears from the affidavit of [NAME]~~ Applicant, the Monitor, and those other parties present as indicated on the counsel sheet, and on reading the affidavit of service of ~~●~~ sworn ~~{DATE} filed¹: September ●, 2020:~~

1. **THIS COURT ORDERS** that the time for service of 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.
2. **THIS COURT ORDERS** that unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meaning given to them in the Bill of Sale or the Lucky Affidavit, as applicable.
3. ~~1.~~ **THIS COURT ORDERS AND DECLARES** that the Transaction is hereby approved,² and the execution of the ~~Bill of Sale Agreement~~ by the ~~Receiver~~³ Applicant is hereby authorized and approved, with such minor amendments as the ~~Receiver may deem~~

¹ ~~This model order assumes that the time for service does not need to be abridged. The motion seeking a vesting order should be served on all persons having an economic interest in the Purchased Assets, unless circumstances warrant a different approach. Counsel should consider attaching the affidavit of service to this Order.~~

² ~~In some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary. Evidence should be filed to support such a finding, which finding may then be included in the Court's endorsement.~~

³ ~~In some cases, the Debtor will be the vendor under the Sale Agreement, or otherwise actively involved in the Transaction. In those cases, care should be taken to ensure that this Order authorizes either or both of the Debtor and the Receiver to execute and deliver documents, and take other steps.~~

~~necessary. The Receiver~~Applicant and Diesel may agree to with the consent of the Monitor. The Applicant is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the ~~Purchased Assets to the Purchaser~~Equipment to Diesel.

4. ~~2.~~ **THIS COURT ORDERS AND DECLARES** that upon the delivery of a ~~Receiver~~Monitor's certificate to the ~~Purchaser~~Applicant and Diesel substantially in the form attached as Schedule A hereto (the "~~Receiver~~Monitor's Certificate"), all of the ~~Debtor~~Applicant's right, title and interest in and to the ~~Purchased Assets~~Equipment described in the ~~Bill of Sale Agreement [and listed on Schedule B hereto]~~⁴ shall vest absolutely in ~~the Purchaser~~Diesel, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "~~Claims~~"⁵) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of ~~the Honourable Justice [NAME] dated [DATE]~~this Court dated October 22, 2019 or any other Order of this Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) ~~or any other personal property registry system; and (iii) those Claims listed on Schedule C hereto,~~ the *Personal Property Security Act* (British Columbia), the *Personal Property Security Act* (Alberta), the *Personal Property Security Act* (Saskatchewan), the *Personal Property Security Act* (New Brunswick) (all of which are collectively referred to as the "**Encumbrances**", ~~which term~~

⁴ ~~To allow this Order to be free standing (and not require reference to the Court record and/or the Sale Agreement), it may be preferable that the Purchased Assets be specifically described in a Schedule.~~

⁵ ~~The "Claims" being vested out may, in some cases, include ownership claims, where ownership is disputed and the dispute is brought to the attention of the Court. Such ownership claims would, in that case, still continue as against the net proceeds from the sale of the claimed asset. Similarly, other rights, titles or interests could also be vested out, if the Court is advised what rights are being affected, and the appropriate persons are served. It is the Subcommittee's view that a non-specific vesting out of "rights, titles and interests" is vague and therefore undesirable.~~

~~shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D),~~ and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the ~~Purchased Assets~~Equipment are hereby expunged and discharged as against the ~~Purchased Assets~~Equipment.

~~3. — THIS COURT ORDERS that upon the registration in the Land Registry Office for the [Registry Division of {LOCATION}] of a Transfer/Deed of Land in the form prescribed by the Land Registration Reform Act duly executed by the Receiver][Land Titles Division of {LOCATION}] of an Application for Vesting Order in the form prescribed by the Land Titles Act and/or the Land Registration Reform Act]⁶, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the “Real Property”) in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule C hereto.~~

5. ~~4.~~ **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds⁷ from the sale of the ~~Purchased Assets~~Equipment shall stand in the place and stead of the ~~Purchased Assets~~Equipment, and that from and after the delivery of the ~~Receiver~~Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the ~~Purchased Assets~~Equipment with the same priority as they had with respect to the ~~Purchased Assets~~Equipment immediately prior to the sale⁸, as if the ~~Purchased Assets~~Equipment had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

⁶~~Elect the language appropriate to the land registry system (Registry vs. Land Titles).~~

⁷~~The Report should identify the disposition costs and any other costs which should be paid from the gross sale proceeds, to arrive at "net proceeds".~~

⁸~~This provision crystallizes the date as of which the Claims will be determined. If a sale occurs early in the insolvency process, or potentially secured claimants may not have had the time or the ability to register or perfect proper claims prior to the sale, this provision may not be appropriate, and should be amended to remove this crystallization concept.~~

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6. ~~5.~~ **THIS COURT ORDERS AND DIRECTS** the ~~Receiver~~Monitor to file with the Court a copy of the ~~Receiver~~Monitor's Certificate, forthwith after delivery thereof to the Applicant and Diesel.

~~6. — THIS COURT ORDERS that, pursuant to clause 7(3)(e) of the Canada Personal Information Protection and Electronic Documents Act, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees, including personal information of those employees listed on Schedule "•" to the Sale Agreement. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.~~

7. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy or receivership order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the ~~Debtor~~Applicant and any bankruptcy or receivership order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the ~~Debtor~~Applicant;

the entering into of the Bill of Sale and the vesting of the ~~Purchased Assets in the Purchaser~~Equipment in Diesel pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the ~~Debtor~~Applicant and shall not be void or voidable by creditors of the ~~Debtor~~Applicant, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

~~8. — THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).~~

8. ~~9.~~ **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the ~~Receiver~~Applicant, the Monitor and ~~its~~their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the ~~Receiver~~Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the ~~Receiver~~Monitor and its agents in carrying out the terms of this Order.

Revised: January 21, 2014

~~Schedule A—Form of Receiver’s Certificate~~ SCHEDULE “A”
FORM OF MONITOR’S CERTIFICATE

Court File No. ~~_____~~ CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

~~BETWEEN:~~

~~PLAINTIFF~~

Plaintiff

~~—and—~~

~~DEFENDANT~~

Defendant

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.

~~RECEIVER~~ MONITOR’S CERTIFICATE

RECITALS

- A. ~~A.~~ Pursuant to an Order ~~of the Honourable [NAME OF JUDGE]~~ of the Ontario Superior Court of Justice (Commercial List) (the “Court”) dated ~~[DATE OF ORDER]~~, ~~[NAME OF RECEIVER]~~ was appointed as the receiver (the “Receiver”) of the undertaking, property and assets of [DEBTOR] (the “Debtor”) dated October 22, 2019, MNP Ltd. was appointed as the monitor (the “Monitor”) of Del Equipment Inc. (the “Applicant”) in proceedings pursuant to the Companies’ Creditors Arrangement Act (Canada).
- B. ~~B.~~ Pursuant to an Order of the Court dated ~~[DATE]~~ September 9, 2020 (the “Demonstration Vehicle Equipment Approval and Vesting Order”), the Court

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approved the ~~agreement~~bill of ~~purchase and~~ sale ~~made as of~~ ~~[DATE OF AGREEMENT]~~ (the "~~Sale Agreement~~") "Bill of Sale") to be entered into between the ~~Receiver~~ ~~[Debtor]~~ and ~~[NAME OF PURCHASER]~~ (the "~~Purchaser~~" Applicant and Diesel Equipment Limited ("Diesel") (which Bill of Sale was subsequently entered into on ●, 2020) and provided for the vesting in ~~the Purchaser~~ Diesel of all of the ~~Debtor~~ Applicant's right, title and interest in and to the ~~Purchased Assets~~ Equipment, which vesting is to be effective with respect to the ~~Purchased Assets~~ Equipment upon the delivery by the ~~Receiver~~ Monitor to the ~~Purchaser~~ Applicant and Diesel of a certificate confirming (i) the payment by ~~the Purchaser~~ Diesel of the Purchase Price for the ~~Purchased Assets~~ Equipment; (ii) that the conditions ~~to Closing as~~ set out in ~~section ● of~~ the Bill of Sale Agreement have been satisfied or waived by the ~~Receiver~~ Applicant and ~~the Purchaser~~ Diesel; and (iii) the Transaction has been completed to the satisfaction of the ~~Receiver~~ Applicant and Diesel.

C. ~~C.~~—Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Bill of Sale Agreement.

THE ~~RECEIVER~~ MONITOR CERTIFIES the following:

1. ~~1.~~—~~The Purchaser~~ Diesel has paid and the ~~Receiver~~ Applicant has received the Purchase Price for the ~~Purchased Assets payable on the Closing Date~~ Equipment pursuant to the Bill of Sale Agreement;
2. ~~2.~~—The conditions ~~to Closing as~~ set out in ~~section ● of~~ the Bill of Sale Agreement have been satisfied or waived by the ~~Receiver and the Purchaser; and~~ Applicant and Diesel, as applicable.
3. ~~3.~~—The Transaction has been completed to the satisfaction of the ~~Receiver~~ Applicant and Diesel.
4. ~~4.~~—This Certificate was delivered by the ~~Receiver~~ Monitor at _____ ~~[TIME a.m/p.m.]~~ on _____ ~~[DATE]~~ _____, 2020.

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~~[NAME OF RECEIVER]~~MNP LTD., in its capacity as **Receiver of the undertaking, property and assets of [DEBTOR]**,Court-appointed Monitor of Del Equipment Inc. and not in its personal or corporate capacity



Per:

Name:

Title:

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.

Court File No: CV-19-629552-00CI

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

DEMONSTRATION VEHICLE EQUIPMENT
APPROVAL AND VESTING ORDER

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Lawyers for Del Equipment Inc.

7086180

Schedule B - Purchased Assets

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~~Schedule C—Claims to be deleted and expunged from title to Real Property~~

**Schedule D—Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property
(unaffected by the Vesting Order)**

**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.**

Court File No: CV-19-629552-00CL

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

MOTION RECORD
(Motion returnable September 14, 2020)

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