

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

|                                               |   |                                  |
|-----------------------------------------------|---|----------------------------------|
| In re:                                        | ) |                                  |
|                                               | ) | Chapter 15                       |
| CDS U.S. HOLDINGS, INC., <i>et al</i>         | ) |                                  |
|                                               | ) | Case No. 20-11719 (CSS)          |
| Debtors in a Foreign Proceeding, <sup>1</sup> | ) |                                  |
|                                               | ) | (Joint Administration Requested) |
|                                               | ) |                                  |

**DECLARATION OF GUY P. MARTEL IN SUPPORT OF  
VERIFIED PETITION FOR (I) RECOGNITION OF FOREIGN MAIN  
PROCEEDINGS, (II) RECOGNITION OF FOREIGN REPRESENTATIVE,  
AND (III) RELATED RELIEF UNDER CHAPTER 15 OF THE BANKRUPTCY CODE**

I, Guy P. Martel, state as follows:

1. I submit this declaration (this “Declaration”) in support of the *Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* (the “Verified Petition”) filed by Cirque du Soleil Canada Inc., in its capacity as the authorized foreign representative (the “Foreign Representative”) of the above-captioned debtors (collectively, the “Debtors” or “Cirque du Soleil”), who are the subject of jointly-administered proceedings under the Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the “CCAA”) in the Superior Court of Quebec, Commercial Division (the “Canadian Proceedings” and such court, the “Canadian Court”). Concurrently herewith, the Foreign Representative has filed voluntary petitions for relief under chapter 15 of title 11 of the United States Code (the “Bankruptcy”

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<sup>1</sup> The last four digits of Debtor CDS U.S. Holdings, Inc.’s tax identification number are (0086). Due to the large number of debtor entities in these chapter 15 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent at [www.omniagentsolutions.com/cirquedusoleil](http://www.omniagentsolutions.com/cirquedusoleil). The location of the Debtors’ service address for purposes of these chapter 15 cases is: 8400, 2e Avenue Montréal, Quebec H1Z 4M6 Canada.

Code”) for each of the Debtors. All facts set forth in this Declaration are based on: (a) my knowledge; (b) my review of relevant documents; and/or (c) my opinion based upon my experience and knowledge of the Debtors’ operations. If I were called upon to testify, I could and would testify competently to the facts set forth herein.<sup>2</sup>

2. I am a partner in the firm of Stikeman Elliott LLP (“Stikeman”), 5300 Commerce Court West, 199 Bay Street, Toronto, Ontario M5L 1B9, where my broad-ranging practice focuses on restructuring and insolvency matters. Stikeman acts as Canadian counsel to the Debtors, whose Canadian Proceedings are pending before the Canadian Court. I appeared before the Canadian Court as counsel of record seeking the First Day CCAA Order (as defined below).

3. I graduated from the University of Ottawa in 1997. I was admitted to the Québec Bar in 1998.

4. I have experience acting for debtor corporations and large corporate groups, lenders, bondholders and other creditors, court appointed officers (e.g., CCAA monitors), investors, and acquirers. Over the course of my career, I have been involved in numerous arrangement proceedings under the CCAA, as well as proceedings under federal and provincial corporate and/or insolvency legislation, including appearing as counsel of record in at least 20 such proceedings in the last year.

#### **I. CANADIAN PROCEEDINGS.**

5. On June 29, 2020, Cirque du Soleil filed an application (the “Application”) with the Canadian Court pursuant to sections 9, 11, 11.51, 11.52, and 23 of the CCAA. On June 30, 2020, the Canadian Court issued a first day initial order (the “First Day CCAA Order”): (a) declaring that Cirque du Soleil are corporations to which the CCAA applies; (b) staying all

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meaning given to them in the Verified Petition.

proceedings and remedies taken or that might be taken in respect of Cirque du Soleil or certain related limited partnerships, or any of their property, except as otherwise set forth in the First Day CCAA Order or as otherwise permitted by law, for an initial period of ten (10) days in accordance with the CCAA; (c) appointing Ernst & Young Inc. as the court appointed monitor of Cirque du Soleil in the Canadian proceedings (the “Monitor”); (d) declaring that Montreal, Quebec is the “*center of main interest*” of Cirque du Soleil and, accordingly, authorizing Cirque du Soleil to apply, as they may consider necessary or desirable, to any other court, tribunal, regulatory, administrative or other body, wherever located, for orders to recognize and/or to assist in carrying out the terms of the First Day CCAA Order and any subsequent orders rendered by the Canadian Court in the context of the Canadian proceedings, including, without limitation, orders under Chapter 15 of the Bankruptcy Code; and (e) granting other customary relief.

**A. Overview of the CCAA Restructuring Process**

6. The CCAA process begins when a company files an initial application—often on an *ex parte* basis—in the court in the jurisdiction where the company’s headquarters or principal place of business is situated for protection under the CCAA. The initial application must, inter alia, be accompanied by: (a) projected weekly cash flow statements; (b) a statement regarding the preparation of the cash-flow statements; and (c) copies of all audited or unaudited financial statements prepared during the year prior to the application. *See* CCAA at 10(2).

7. Upon the filing of the initial application, the court may enter an order staying all proceedings and actions against the company and its property as well as against its directors and officers for an initial period that does not exceed 10 days. *See* CCAA at 11.02(1). This period may subsequently, from time to time, be extended by the CCAA court for the period of time required to implement a CCAA restructuring.

8. Once the court enters an initial order approving the initial application, the court will at the same time appoint a licensed insolvency professional to serve as a “monitor” of the business and financial affairs of the company.<sup>3</sup>

9. The First Day CCAA Order and the Initial CCAA Order may also include, among other things, (a) authority to disclaim certain contracts; (b) a prohibition on the payment of pre-filing obligations, subject to certain permitted exceptions; (c) authority to pay any outstanding wages, salaries, employee and pension benefits, as well as other entitlements and expenses; (d) an order to pay certain taxes; and (e) a prohibition on sales outside the ordinary course of business without court approval. *See CCAA at 11.09 (2).*

10. Prior to 2009, there was an on-going debate over whether creditor protection under the CCAA was appropriate to allow for an orderly liquidation of a debtor company. In 2009, the CCAA was amended to include, inter alia, statutory rights in favor of debtor companies to sell their assets outside of the ordinary course of business and outside of a CCAA plan. Accordingly, since then, Canadian courts have come to accept that the business and assets of an insolvent company can be sold under the CCAA free and clear of any lien, security, charge or other restriction, without the need to file a CCAA plan. The CCAA now allows a debtor to dispose of all or substantially all of its assets outside of the ordinary course of business without the formal approval of its creditors, provided it obtains prior authorization from the court. In

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<sup>3</sup> A monitor is an independent third party who is appointed by the court to monitor the company’s ongoing operations and assist with the filing and voting on the plan of arrangement. The monitor’s duties include, monitoring the business, reporting to the court on any major events that might impact the viability of the company, assisting the company in the preparation of the plan of arrangement, notifying the creditors (and shareholders) of any meetings and tabulating the votes at these meetings. The monitor will also prepare a report on any sale transaction involving an insolvent debtor’s assets conducted out of the ordinary course and on the plan of arrangement advising the court on the reasonableness of such step.

deciding whether to authorize the proposed sale of assets, the CCAA stipulates that the CCAA court is to consider, among other things:

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

11. These criteria are largely based on the principles which were previously enunciated by the Ontario Court of Appeal in the *Soundair* matter,<sup>4</sup> in which the court listed the following non-exhaustive criteria to examine in order to determine whether a sale of assets of an insolvent debtor should be approved:

- a. whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- b. the interests of all parties;
- c. the efficacy and integrity of the process by which offers have been obtained; and
- d. whether there has been unfairness in the working out of the process.

12. If the required test is met, the court will normally issue an approval and vesting order authorizing the transfer of the assets on a free and clear basis (other than

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<sup>4</sup> *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

assumed/permitted encumbrances). The order will also provide that creditor claims will have the same priority against the proceeds of the transaction that they had against the assets, prior to the sale.

13. It should be noted that court authorization will be granted only if the CCAA court is satisfied that the company can and will make the payments for any unpaid wages or pension plan contributions that would have been required if the court had approved a proposal or a plan of arrangement and compromise, as applicable. It should also be noted that if the sale transaction ultimately presented to the court for approval is with a related party, certain additional requirements must be met.

14. While, as mentioned, the sale of assets of a debtor company does not require the formal approval of its creditors, the CCAA require that a notice of application to the CCAA court for the approval of the sale or disposition of assets be given by the debtor to all of its secured creditors who are likely to be affected by the proposed sale or disposition.

15. The popularity of stalking horse bid processes has increased in recent years, particularly in situations where cross-border businesses were involved. The criteria set forth in the CCAA regarding the sale of assets of a debtor apply equally to stalking-horse processes. Canadian courts today are generally receptive to stalking horse bid processes. It should be noted that all of the customary features of a stalking horse bid, including bid protections, will be subject to court review.

## **II. THE STALKING HORSE APA AND THE SISP**

16. On June 28, 2020, the entities forming part of the Cirque du Soleil group, including the Debtors (the “CDS Group”) and Trapeze Holdings Limited Partnership (“Trapeze LP”), as well as the review of the non-binding indications of interest received before June 8, 2020 (the “Non-Binding Bid Deadline”), the CDS Group, on the recommendation of its

Financial Advisors and CDS Group's senior management and its transaction committee (the "Transaction Committee"), and with the support of the Monitor, entered into an Asset Purchase Agreement (the "Stalking Horse APA") with Trapeze LP, through its affiliate, Trapeze Acquisition Limited Partnership ("Acquisition LP"). As described below, the Stalking Horse APA also contemplates a sale and investment solicitation process under the supervision of the Canadian Court (the "SISP").

17. The Stalking Horse APA and the SISP described herein are the result of extensive discussions between, on the one hand, Trapeze LP and its legal and financial advisors, and on the other hand, the CDS Group, the Financial Advisors and legal counsel to the CDS Group, and the Monitor and its legal advisors, all of whom have worked tirelessly over the past few months to protect and maximize the value of the CDS Group's assets under the present difficult circumstances for the benefit of all stakeholders.

18. The Stalking Horse APA provides for the acquisition by Trapeze LP of substantially all of the assets of the CDS Group in exchange for an aggregate consideration of approximately \$420.25 million detailed as follows (subject to the consummation of the transactions provided therein):

- a. the amount of cash that should be sufficient to pay:
  - i. the outstanding principal amount of approximately \$50 million and all interest accrued thereon under the CDS 4 Term Loan in full on the Closing Date and all reasonable and documented fees and expenses then due and payable thereunder (up to a maximum amount of \$150,000 (plus taxes) with respect to such fees and expenses);
  - ii. the cash reserve in the amount agreed to by the Monitor, Trapeze LP, and CDS Group for the payment of administrative costs of the Monitor (the "Monitor Reserve");

- iii. the cash reserve in the amount agreed to by the Monitor, Trapeze LP, and CDS Group for paying administrative costs of CDS Group (the “Administrative Seller Reserve”), each of which will be in an amount that will be determined before the Closing Date; and
    - iv. all amounts necessary to cure any monetary defaults as a condition to assuming the Assigned Agreements;
  - b. the principal amount of \$50 million under the New Senior Unsecured Note issued on the Closing Date;
  - c. the value of the New LP Units as of the Closing Date, which represents 45% of the equity of Acquisition LP;
  - d. the amount of the Assumed Liabilities, which includes inter alia:
    - i. payables due to critical vendors, including all Québec-based vendors;
    - ii. ticket reimbursements; and
    - iii. letters of credit of the CDS Group in the aggregate amount of approximately \$11 million;
  - e. the establishment and funding by Acquisition LP of the Employee Fund in the amount of \$15 million to provide financial assistance to employees whose employment was terminated either by CDS Group (excluding for just cause) or by mutual agreement effective on or after January 1, 2020 (irrespective of the date on which the notice was given); and
  - f. the establishment and funding by Acquisition LP of the Contractor Fund in the amount of \$5 million to provide financial assistance to independent contractors whose contracts with the CDS Group are not assigned creator contracts.

19. The Stalking Horse APA is fully committed, fully financed and not contingent on additional business diligence.

20. The Stalking Horse APA establishes a valuable baseline of consideration which has the potential to improve with any bids received under the SISF. The Stalking Horse APA also provides significant value by ensuring that there will be a going concern outcome for the Debtors’ business. Most notably, the Stalking Horse APA provides:

- a. a clear path to restarting operations and maintaining the presence and home of the business of the CDS Group in Québec;
- b. significant consideration for the CDS Group's assets;
- c. material benefits and recoveries for the employees and contractors of the CDS Group;
- d. for the headquarters of the business and strategic decision-making activities of the business to remain in Montréal;
- e. assurance that the chair of the Council of Representatives and the Chief Executive Officer of Trapeze LP will be residents of the Province of Québec; and
- f. that the history of ownership and experience in the business and entertainment industry will continue to benefit the stakeholders.

21. In addition to the above, should the Stalking Horse APA be deemed the Successful Bid (as defined in the SISP), Trapeze LP has undertaken to use commercially reasonable efforts to offer employment to the employees whose employment was terminated as part of the shutdown due to COVID-19 and restart operations as soon as commercially reasonable taking into account the COVID-19 pandemic and related safety, health, gathering, confinement, and other restrictions imposed or measures recommended by governmental authorities.

22. As such, Trapeze LP's offer embodies TPG, CDPQ, and Fosun's commitment, to mitigate the impact of COVID-19 on CDS Group employees and independent contractors whose employment or contracts with the CDS Group was terminated. The new capital provided to the CDS Group under the Stalking Horse APA, in the approximate cash amount of \$249 million, will be used to fund the recovery and go-forward operations of the business, which, in turn, should position the CDS Group with the financial wherewithal to re-hire as many of its terminated employees and independent contractors as soon as possible. Separately, by contemplating the establishment of a \$15 million special assistance fund for terminated

employees and a \$5 million fund for independent contractors, the Stalking Horse APA also seeks to alleviate some of the hardships faced by terminated employees and independent contractors of the CDS Group.

23. The Stalking Horse APA does not include a break fee; however, as part of the negotiation, the CDS Group agreed to reimburse, concurrently with the execution of the Stalking Horse APA, a fixed amount of \$3 million plus applicable sales taxes in expenses to Acquisition LP (and of TPG, Fosun, CDPQ, and IQ) regarding the negotiations and preparation of the documentation relating to the Stalking Horse APA, to the financing to implement and complete the transaction, and to the restart of the Cirque du Soleil business, the whole in connection with and in furtherance of the CDS Group's restructuring efforts pursuant to the CCAA. This represents approximately 0.7% of the Purchase Price and the Debtors were informed that it represents a partial reimbursement of the fees actually incurred by Acquisition LP and its investors TPG, Fosun, CDPQ, and IQ. The closing of the transactions contemplated by the Stalking Horse APA is subject to standard conditions being fulfilled or performed.

24. Based on the facts and circumstances known as of the date hereof, the Stalking Horse APA includes the necessary capital to restart the business in all material respects and allow it to resume providing the first-class worldwide entertainment that is synonymous with the Cirque du Soleil brand while not overleveraging the business, which the Québec government has underscored as being an essential condition for its financing and which is particularly important in light of the ongoing shutdown of operations for an indefinite period of time due to the COVID-19 pandemic.

25. As indicated above, the Debtors and their advisors consider that the Stalking Horse APA represents the best possible option for maximizing value for Cirque du Soleil's stakeholders and preserving its Quebec roots.

26. The SISP, which was agreed to by the Debtors, the Financial Advisors, and the Monitor, provides for the procedures contemplated therein, and the achievement of the following milestones:

| <b>Milestones</b>                                                                                                               | <b>Key Dates</b>                                                                                                                                                                                   |
|---------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Distribution of the Solicitation Notice, the form of NDA and the Required Acknowledgment to the Potential Bidders               | By no later than July 10, 2020 at 5:00 p.m. (prevailing Eastern Time) or such later date as may be agreed to by Cirque du Soleil Holdings L.P. in consultation with the Monitor                    |
| Due date for delivery by Potential Bidders of a Participation Letter, an executed NDA, and an executed Required Acknowledgement | July 17, 2020, at 5:00 p.m. (prevailing Eastern Time)                                                                                                                                              |
| Due date for Bids and Deposits                                                                                                  | August 10, 2020, at 5:00 p.m. (prevailing Eastern Time)                                                                                                                                            |
| Date of Auction (if any)                                                                                                        | By no later than August 14, 2020                                                                                                                                                                   |
| Hearing of the Approval Motion                                                                                                  | No later than seven (7) calendar days following either the conclusion of the Auction or the date on which a determination is made by Cirque du Soleil Holdings L.P. not to proceed with an Auction |
| Deadline for completion of the transaction(s) represented by the Successful Bid(s)                                              | September 14, 2020, or such later date as may be agreed to by Cirque du Soleil Holdings L.P., in consultation with the Monitor                                                                     |

27. The SISP sets forth the terms and procedures for a fair and efficient sale process so as to (a) ensure certainty for the restart, the growth and the long-term continuation of the CDS Group's business operations and activities, which ceased due to the COVID-19 crisis, and

(b) obtain the highest or otherwise best offer for the CDS Group's personal, real, movable and immovable assets, rights, undertakings and properties, the whole in the best interest of the CDS Group's stakeholders, including their thousands of employees (those currently employed and those who had to be laid off due to the cessation of operations of the business), their creditors, their suppliers and contracting parties, the Quebec community where it is a key cultural business and a major talent incubator since its creation, their partners in cities around the world, and their shareholders.

28. To achieve the above-mentioned objectives, the SISP provides for, inter alia, the following unique terms and features:

- a. each bid must state any undertakings in favor of the government and the Province of Québec, including, for example, regarding the location of the business' primary headquarters, and Québec residency requirements for directors and officers;
- b. each bid must set forth the bidder's intentions regarding the offering of employment to the CDS Group's employees whose employment was terminated as a result of the COVID-19 pandemic and this restructuring process;
- c. each bid must provide any relevant details of the previous investments or acquisitions, or any other experience such bidder has and deemed relevant by such bidder, in the entertainment industry, including the date, nature of the investment, amount invested, geography and any other relevant information related to such investment;
- d. each bid must set forth key terms including (i) economic terms, (ii) the basis and rationale of the valuation, (iii) any major assumptions made, including the financial projections utilized in arriving at the valuation, and (iv) any other material terms and conditions required to consummate the transaction; and
- e. if one or more bids other than the Stalking Horse APA are received, then the CDS Group, in consultation with the Monitor and with the assistance of the Financial Advisors, shall conduct an auction to determine the highest or otherwise best bid(s).

29. Approval of the SISP is a condition to the Stalking Horse APA. The Debtors believe that the SISP provides for a fair and transparent process that will fairly canvass the market in order to maximize value for the Debtors' assets resulting in the best outcome for the Debtors' stakeholders. The Debtors submit that the SISP timelines are appropriate, even in the context of the current COVID-19 pandemic.

30. Given the nature of the assets, the current global context and the limited liquidity of the CDS Group, the Debtors are seeking approval of the proposed SISP by the Canadian Court.

### **III. THE CANADIAN PROCEEDINGS ARE FOREIGN MAIN PROCEEDINGS.**

31. To ensure the effective and economic administration of the Debtors' restructuring efforts, I believe that the Debtors require the protection afforded to foreign debtors pursuant to chapter 15 of the Bankruptcy Code in order to prevent disruption of business and recognize the legal effect of the Canadian Proceedings in the United States.

32. To the best of my information and belief, the Canadian Proceedings are collective judicial proceedings under Canadian law relating to the adjustment of debt of the Debtors in which the purpose is a corporate restructuring.

33. I believe, to the best of my information and belief, and as identified in the *Declaration of Foreign Representative Pursuant to 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure and In Support of Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code*, filed contemporaneously herewith, other than these chapter 15 cases, the Canadian Proceedings are the only proceedings related to the adjustment of debts pending for the Debtors and, therefore, are the only "foreign proceedings" with respect to the Debtors within the meaning of section 101(23) of the Bankruptcy Code.

34. Additionally, I understand that a statement identifying all foreign proceedings with respect to the Debtors has been filed with this Court.

*[Remainder of page intentionally left blank]*

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my information and belief.

Executed on this 1st day of July, 2020

Quebec, Canada

/s/ Guy P. Martel

Guy P. Martel

Partner

Stikeman Elliot LLP