

Court File No.:

**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 TK HOLDINGS INC., AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Chapter 11 Debtors")**

**APPLICATION OF TK HOLDINGS INC. UNDER SECTION 46 OF THE
*COMPANIES' CREDITORS ARRANGEMENT ACT***

**FACTUM OF THE APPLICANT
(Returnable June 28, 2017)**

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PART I. OVERVIEW

1. This is an application by TK Holdings Inc. ("**TKH**" or the "**Applicant**"), in its capacity as foreign representative of the Chapter 11 Debtors (the "**U.S. Foreign Representative**"), for recognition of the petitions commenced by the Chapter 11 Debtors in the United States Bankruptcy Court, District of Delaware on June 25, 2017 (the "**Chapter 11 Proceedings**") as "foreign main proceedings" pursuant to Part IV of the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") and related relief.

2. Takata (defined below) is one of the world's leading automotive safety systems companies. Its products, including seat belts and airbag systems, have saved countless lives. While Takata has no business or operations in Canada, its products appear in vehicles in Canada since Takata sells its products to original equipment manufacturer customers (the "**OEMs**" or the "**Customers**") who in turn manufacture and sell automobiles containing Takata component parts in Canada.¹

¹ Affidavit of Scott Caudill sworn June 27, 2017, Applicant's Motion Record at Tab 2 [**"Caudill Affidavit"**] at para. 8.

3. Notwithstanding its long history of leadership and excellence in the automotive safety market, Takata has experienced financial distress due to issues relating to certain of its products. Specifically, certain airbag inflators containing phase-stabilized ammonium nitrate (the “**PSAN Inflators**”) manufactured by Takata have ruptured during deployments of the airbag. This has prompted wide-ranging recalls of vehicles in the United States, Canada and elsewhere.²

4. Although substantial work has been done, and continues to be done to implement and complete the unprecedented recalls of non-desiccated PSAN Inflators, Takata nevertheless faces insurmountable claims and liabilities arising out of or relating to the recalls. This includes litigation in Canada in which Takata entities are named defendants in a number of actions relating to PSAN Inflators, including the Canadian Class Actions (defined below) (four of which have been dismissed, five of which are currently in abeyance and five of which have been consolidated into national class actions proceeding in Ontario).³

5. It is anticipated that, in the Foreign Proceedings (defined below), Takata will seek to implement a global sale transaction (the “**Global Transaction**”) that Takata identified in a thorough marketing and sale process conducted prior to the commencement of the Chapter 11 Proceedings. It is further anticipated that the Global Transaction will provide the best recovery to creditors, continued employment of substantially all of Takata’s employees, and continued production of PSAN Inflators for customers who need them, including to fulfill recalls.⁴

6. It is appropriate to recognize the Chapter 11 Proceedings in Canada and provide the requested relief. Among other things, as discussed herein:

- (a) the centre of main interests of the Chapter 11 Debtors is in the United States;
- (b) the U.S. Court has taken jurisdiction over the Chapter 11 Debtors and has granted relief in the Chapter 11 Proceedings and, therefore, determined that

² Caudill Affidavit at para. 9.

³ Caudill Affidavit at paras. 11 and 12.

⁴ Caudill Affidavit at paras. 15 to 17.

the relief requested therein is appropriate and reasonable in the circumstances;

- (c) recognition of the Chapter 11 Proceedings and the related stay of proceedings as against the Chapter 11 Debtors in Canada will provide breathing room necessary to continue towards the implementation of the Global Transaction and will otherwise facilitate implementation of the Global Transaction for the benefit of Takata's stakeholders;
- (d) it is intended that Canadian claimants will be treated in the same manner in the Chapter 11 Proceedings as other similarly situated creditors in the U.S.; and
- (e) the requested relief includes the appointment of FTI Consulting Canada Inc. ("**FTI**") as information officer to ensure that the Canadian Court is kept apprised of the status of the Foreign Proceedings and to assist in providing information to and responding to inquiries from potential Canadian creditors.

7. Unless as otherwise defined herein, capitalized terms have the meaning ascribed in the affidavit of Scott Caudill sworn June 27, 2017 (the "**Caudill Affidavit**") and all dollar figures are in U.S. dollars unless otherwise specified herein.

PART II. FACTS

A. The Chapter 11 Debtors

8. The Chapter 11 Debtors are part of a multi-national business that operates in Japan, Asia (excluding Japan), the Americas and EMEA (Europe, the Middle East, and Africa).⁵

9. Each of the Chapter 11 Debtors operates in the Americas region.⁶ **Takata Americas** is a Delaware partnership that serves as a holding company for Takata's operations in the Americas. **TKH** is the Delaware-incorporated operating company that directly or indirectly owns each of the other Chapter 11 Debtors (not including Takata Americas, which holds

⁵ Caudill Affidavit at para. 26.

⁶ Caudill Affidavit at para. 29.

99% of the equity in TKH).⁷ TKH manufactures and sells inflators, airbags and seat belts, and sells steering wheels (which are manufactured by its affiliates).⁸

10. The other Chapter 11 Debtors are companies or maquiladoras incorporated pursuant to the laws of the United States or Mexico.⁹

11. There is integration among the Chapter 11 Debtors, including that all strategic, management, operational, marketing and communication decisions regarding Takata's operations in the Americas are made by the management team at Takata's U.S. Head Office in Auburn Hills, Michigan.¹⁰ There are also inter-company transactions in the ordinary course of business between TKH and its indirect Mexican subsidiaries, including intercompany services, reimbursement for shared business expenses and intercompany loans.¹¹

12. The Chapter 11 Debtors have a retainer with professionals, including counsel, in Ontario but no operations or other assets in Canada in the course of its business.¹²

13. Takata Corporation ("**TKJP**") is the direct or indirect parent of the Chapter 11 Debtors. TKJP and many of its direct and indirect subsidiaries, collectively with TKH, are referred to herein as "**Takata**" or the "**Company**".¹³

14. The Chapter 11 Debtors filed for protection in the Chapter 11 Proceedings on June 25, 2017. Concurrently, TKJP and two of its Japanese subsidiaries initiated insolvency proceedings in Japan pursuant to the *Civil Rehabilitation Act* of Japan (the "**Japanese Proceedings**" and collectively with the Chapter 11 Proceedings, the "**Foreign Proceedings**").¹⁴

⁷ Caudill Affidavit at para. 29(a).

⁸ Caudill Affidavit at para. 29(b).

⁹ Caudill Affidavit at para. 29.

¹⁰ Caudill Affidavit at para. 29.

¹¹ Caudill Affidavit at para. 98.

¹² Caudill Affidavit at para. 99.

¹³ Caudill Affidavit at para. 27.

¹⁴ Caudill Affidavit at para. 5.

B. Takata's Business and Problems Leading to Filing

15. Takata is a leading manufacturer of automotive safety components, including seatbelts and airbag systems.¹⁵ Takata products are sold to OEMs and some are ultimately integrated into automobiles sold in Canada.¹⁶

16. Recently, Takata has experienced financial distress over certain non-dessicated PSAN Inflators produced and sold by Takata, which have ruptured during deployment.¹⁷ In recent years, there have been wide-ranging recalls in the United States, Canada and elsewhere of vehicles in which airbags using PSAN Inflators have been installed.¹⁸

17. The recalls are the largest and most complex automotive recall campaign in Canadian and U.S. history. Nearly 60 million automobiles were subject to recalls in Canada and more than 64 million were subject to recalls outside the United States (including more than 5.2 million in Canada).¹⁹ Although Takata continues to do substantial work to implement the recalls, it nevertheless faces insurmountable claims and liabilities arising out of or relating to the recalls.²⁰

18. In 2014, a formal defect investigation was commenced by the National Highway Traffic Safety Administration in the United States into the PSAN Inflators produced and sold by Takata. As a result of the investigation, TKH agreed to pay a civil penalty in the amount of up to \$200 million, consisting of \$70 million in non-contingent penalties (\$50 million of which remains due and outstanding); and \$130 million in penalties that are deferred and held in abeyance but become due in the event TKH fails to comply with certain obligations. In addition to the monetary penalties agreed to by TKH, TKH was also subject to other orders requiring TKH to take certain steps to replace the PSAN Inflators in affected vehicles.²¹

¹⁵ Caudill Affidavit at para. 7.

¹⁶ Caudill Affidavit at para. 8.

¹⁷ Caudill Affidavit at para. 9.

¹⁸ Caudill Affidavit at para. 9.

¹⁹ Caudill Affidavit at para. 10.

²⁰ Caudill Affidavit at para. 11.

²¹ Caudill Affidavit at para. 43.

19. In 2017, TKJP entered into a Plea Agreement with the U.S. Department of Justice, Criminal Decision, Fraud Section and agreed to a \$25 million criminal fine and \$975 million in restitution payments, of which \$850 million remains outstanding.²²

C. Litigation against Takata

20. Significant litigation claims have been commenced against TKH and TKJP and more may be pending. In Canada, class actions have been commenced in four provinces asserting claims for personal injury, wrongful death and economic losses relating to airbags containing non-dessicated PSAN Inflators produced by Takata (the “**Canadian Class Actions**”).²³ Certain of the Canadian Class Actions have been dismissed or held in abeyance.²⁴ The remaining actions (the “**Continuing Actions**”) have been consolidated into national class action proceedings in Ontario case managed by Justice Perell.²⁵ The aggregate damages sought in the Continuing Actions amount to CDN \$3.5 billion in aggregate.²⁶

21. Also in Canada, two personal injury actions have been commenced by individual plaintiffs against TKH or against TKH, TKJP and another non-debtor subsidiary asserting an aggregate of \$3.5 million in damages (together with the Canadian Class Actions, the “**Canadian Actions**”).²⁷

22. Although several of the Canadian Actions allege personal injuries, there have been no known instances of inflator rupture in Canada to date.²⁸

23. In the United States, the Applicant and certain OEMs have been named as defendants in a nationwide consumer class action. In addition, approximately 100 personal injury and wrongful death lawsuits relating to PSAN Inflators have been commenced in the United States. The damages asserted in the active personal injury lawsuits amount to tens of

²² Caudill Affidavit at para. 48.

²³ Caudill Affidavit at paras. 56 to 58.

²⁴ Caudill Affidavit para. 58.

²⁵ Caudill Affidavit at para. 59.

²⁶ Caudill Affidavit at para. 60.

²⁷ Caudill Affidavit at para. 66.

²⁸ Caudill Affidavit at para. 12.

millions of dollars. Further personal injury actions could be asserted in the United States in the future based on known incidents.²⁹

24. In Mexico, a class action was commenced against TKH, other defendants and certain OEMs relating to the PSAN Inflators.³⁰

D. Prepetition Restructuring Efforts and Global Transaction

25. Despite the complexities and risks resulting from the unprecedented product recalls and impending liquidity risks, the Debtors are close to finalizing the terms of a global transaction with Key Safety Systems, Inc. (“**KSS**” and, collectively with one or more of its current or newly formed subsidiaries or designated affiliates, the “**Plan Sponsor**”) for the sale of substantially all of Takata’s global operations after an expansive sale and marketing process.³¹

26. In selecting the Plan Sponsor, Takata engaged in many months of substantive, good faith and protracted negotiations with the Plan Sponsor and the consenting OEMs.³²

27. The Global Transaction is expected to provide for the sale of substantially all of Takata’s assets to the Plan Sponsor other than assets dedicated to the manufacture of PSAN Inflators and other excluded assets through the coordinated Foreign Proceedings.³³

28. The assets dedicated to the manufacture of PSAN Inflators are carved out of the sale and will remain with or be transferred to TKH and certain of its subsidiaries upon TKH’s emergence from Chapter 11 Proceedings (“**Reorganized Takata**”). In this way, Reorganized Takata will be able to produce PSAN propellant and PSAN Inflators for a defined period to ensure the continued production of such products for those Customers who need them, including to fulfill recalls and to comply with the Debtors’ obligations in that regard.³⁴

²⁹ Caudill Affidavit at para. 67.

³⁰ Caudill Affidavit at paras. 70 to 71.

³¹ Caudill Affidavit at para. 15.

³² Caudill Affidavit at para. 81.

³³ Caudill Affidavit at paras. 87 and 84 to 85.

³⁴ Caudill Affidavit at para. 85.

29. The Global Transaction, to be implemented pursuant to the Foreign Proceedings, provides for, among other things:

- (a) The sale of substantially all of Takata's assets (other than the Excluded Assets) to the Plan Sponsor for \$1.588 billion, subject to certain adjustments (the "**Purchase Price**");
- (b) Payment from the Purchase Price proceeds of the remaining \$850 million owing under the terms of the Plea Agreement;
- (c) The establishment of certain funds to provide distributions to the holders of allowed general unsecured claims, including personal injury and wrongful death claims;
- (d) In exchange for the Plan Sponsor's participation in the Global Transaction and the post-closing production of PSAN Inflators by Reorganized Takata for the benefit of certain Consenting OEMs, the Consenting OEMs are agreeing pursuant to separate agreements with the Plan Sponsor, to indemnify the Plan Sponsor for, among other things, certain claims relating to the manufacture and/or sale of the PSAN Inflators;
- (e) An Accommodation Agreements between the Consenting OEMs, Chapter 11 Debtors and certain other entities in the Takata group (other than the Japanese Debtors), and an Accommodation Agreement between the Consenting OEMs and the Japanese Debtors which each outline certain accommodation and liquidity support to provide to Takata in the U.S., Japan, and Europe through the insolvency proceedings including accelerated

payments, set-off waivers, resourcing limitations, and inventory purchase commitments; and

- (f) The continued employment of substantially all of Takata's 23,000 employees, either with Reorganized Takata in connection with the Reorganized Takata's post-closing PSAN Inflator production or with the Plan Sponsor following consummation of the Global Transaction.³⁵

E. The Foreign Proceedings

30. While Takata is close to finalizing the Global Transaction, its liquidity position is not sustainable without an insolvency filing in light of vendor reaction to news of a pending bankruptcy filing.³⁶

31. The Chapter 11 Debtors commenced the Chapter 11 Proceedings on June 25, 2017. The Chapter 11 Proceedings are judicial proceedings that deal with creditors' collective interests generally under a law relating to bankruptcy or insolvency in which the Chapter 11 Debtors' financial affairs are subject to control or supervision of the respective court for the purpose of reorganization.³⁷

32. The Applicant is seeking recognition of the Chapter 11 Proceedings in Canada. The Japanese Debtors do not presently seek recognition of the Japanese Proceedings in Canada. While Takata does not have a chief place of business or head office in Canada, it has assets in Ontario in the form of a retainer with its professionals, including its counsel, McCarthy Tetrault LLP.³⁸

³⁵ Caudill Affidavit at para. 87.

³⁶ Caudill Affidavit at para. 95.

³⁷ Caudill Affidavit at para. 94.

³⁸ Caudill Affidavit at para. 95.

33. It is anticipated that potential creditors in Canada will be treated in the same manner as similarly situated creditors in the U.S.. A claims process will not be conducted in Canada and Canadian claimants are to file their claims in the Chapter 11 Proceedings.³⁹

34. To facilitate the recognition proceeding in Canada, the Applicant seeks the appointment of FTI as an information officer. FTI has consented to the appointment.⁴⁰

PART III. ISSUES AND THE LAW

35. The issues to be determined on this motion are as follows:

- (a) Should this Court recognize the Chapter 11 Proceedings as “foreign main proceedings” under Part IV of the CCAA?
- (b) Should the Chapter 11 Debtors be granted the relief requested in the recognition orders, including the stay of proceedings?
- (c) Should the information officer be appointed?

36. The Applicant submits that each of these questions should be answered in the affirmative and that it is appropriate to grant the relief requested on this application.

A. Recognition of the Chapter 11 Proceedings as “Foreign Main Proceedings” is Appropriate

37. The purpose of Part IV of the CCAA is to, among other things, promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in the case of cross-border insolvencies.⁴¹

38. Part IV of the CCAA provides a structure for the recognition of foreign proceedings and mandates that, if the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court “shall” make an order recognizing the foreign

³⁹ Caudill Affidavit at para. 92.

⁴⁰ Caudill Affidavit at para. 105.

⁴¹ CCAA, s. 44.

proceeding.⁴² In such an order, the Court must specify whether the proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”.

39. Comity is a central principle of the CCAA and courts have long recognized the need to coordinate proceedings.⁴³

(a) ***Ontario is the correct jurisdiction to commence proceedings***

40. Ontario is the proper forum for recognition of the Chapter 11 Proceedings in Canada.

41. The Chapter 11 Debtors are insolvent corporations facing an impending liquidity crisis due to insurmountable claims and liabilities arising out of or relating to the recalls of PSAN Inflators and vendor contraction. They do not have any business or operations (including a chief place of business or head office) in Canada and do not have assets in Canada in the course of their business. The Chapter 11 Debtors have assets in Ontario in the form of a retainer with professionals, including counsel, and no assets elsewhere in Canada,⁴⁴ which provides jurisdiction to the Court in Ontario.⁴⁵

42. Moreover, the Continuing Actions – those Canadian Class Actions that have not been formally dismissed or held in abeyance – have been consolidated into national class actions proceeding in Ontario and being case managed by Justice Perell of the Ontario Superior Court of Justice.⁴⁶

43. It is appropriate for the recognition proceeding to occur in the same jurisdiction as the chief liabilities against the Chapter 11 Debtors. In *MtGox Co., Ltd. (Re)*, this Court recognized a Japanese foreign proceeding under substantially similar provisions of the *Bankruptcy and Insolvency Act* in Ontario in circumstances in which the debtor had no

⁴² CCAA, s.47.

⁴³ *Babcock & Wilcox Canada Ltd.*, 2000 CanLII 22482 (ONSC) paras. 4 to 13, Applicant’s BOA at Tab 1 [“*Babcock*”]; *Matlack Inc., Re*, 2001 CanLII 28467 (ONSC) at para. 4, Applicant’s BOA at Tab 2 [“*Matlack*”]; *Lear Canada (Re)*, 2009 CanLII 37931 (ONSC) at para. 11., Applicant’s BOA at Tab 3 [“*Lear*”].

⁴⁴ Caudill Affidavit at paras. 8, 21 and 95.

⁴⁵ Section 9 of the CCAA, to the extent it applies to a recognition proceeding, provides that an application under the CCAA may be made, if the company has no place of business in Canada, to the court that has jurisdiction in any province in which any assets of the company are situated. The Applicant has assets in the form of a retainer with its professionals, including counsel. See *Global Light Telecommunications Ltd. (Re)*, 2004 BCSC 745 at paras. 20, 21 and 24, Applicant’s BOA at Tab 4; see also *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000), Applicant’s BOA at Tab 5.

⁴⁶ Caudill Affidavit at para 59.

offices, subsidiaries or assets located in Canada but was subject to a pending class action filed in the Ontario Superior Court of Justice.⁴⁷

44. Accordingly, this Court has jurisdiction and Ontario is the proper forum for the recognition proceeding.

(b) ***Criteria for Recognition as a “Foreign Main Proceeding” is Met***

45. The CCAA requires the court to make an order recognizing a foreign proceeding if the court is satisfied that:

- (a) the application for recognition relates to a “foreign proceeding”, and
- (b) the applicant is a “foreign representative” in respect of that foreign proceeding.⁴⁸

46. With respect to the first requirement, the Chapter 11 Proceedings are “foreign proceedings”.

47. A “foreign proceeding” is defined in the CCAA to include

a judicial or administrative proceeding in a jurisdiction outside Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.⁴⁹

48. Chapter 11 proceedings are regularly recognized by Canadian courts as “foreign proceedings” under the CCAA.⁵⁰ The evidence provided on this application in the Caudill

⁴⁷ *MtGox Co., Ltd. (Re)*, 2014 ONSC 5811 at paras. 22 and 23, Applicant’s BOA at Tab 6. See also *Microbiz Corp. v. Classic Software Systems Inc.* 1996 CanLII 7276 (ONSC) at para. 3, Applicant’s BOA at Tab 7 and *Tucker v. Aero Inventory (UK) Ltd.*, 2009 CanLII 63138 (ONSC) at para 12, Applicant’s BOA at Tab 8 [“*Aero Inventory*”].

⁴⁸ CCAA, s. 47(1).

⁴⁹ CCAA, s. 45 “foreign proceeding”.

⁵⁰ *Lightsquared LP (Re)*, 2012 ONSC 2995 at paras. 18-19, Applicant’s BOA at Tab 9 [“*Lightsquared*”]; *Babcock*, *supra* note 43 at para. 13; *Lear*, *supra* note 43 at para. 12; *Massachusetts Elephant & Castle Group., Inc. (Re)*, 2011 ONSC 4201 at para. 13, Applicant’s BOA at Tab 10 [“*Elephant & Castle*”].

Affidavit is that the Chapter 11 Proceedings are “foreign proceedings” pursuant to the definition in section 45 of the CCAA.⁵¹

49. The second requirement under section 47 of the CCAA is that the applicant must be a “foreign representative” in respect of the foreign proceeding. In this case, TKH has been deemed “foreign representative” in the Chapter 11 Proceedings.

50. The CCAA defines a “foreign representative” as a person who is authorized in a foreign proceeding in respect of a debtor company to:

- (a) monitor the debtor’s business and financial affairs for the purpose of a reorganization, or
- (b) act as a representative in respect of the foreign proceeding.⁵²

51. TKH will be appointed pursuant to an order of the court in the Chapter 11 Proceedings to act as foreign representatives in respect of those proceedings.⁵³ It is sufficient, in any event, for the Applicant to have been authorized to act as a foreign representative by the debtors; there is no language in Part IV of the CCAA requiring the foreign representative to be appointed by order of the court.⁵⁴

52. Once a court is satisfied that the application relates to a “foreign proceeding” and a “foreign representative” has been appointed, it is mandatory that the court issue a recognition order.⁵⁵ The CCAA also directs the court to specify in the order whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.”⁵⁶

53. The CCAA defines a “foreign main proceeding” as a foreign proceeding in a jurisdiction in which the debtor company has its centre of main interests (“**COMI**”).⁵⁷

⁵¹ Caudill Affidavit at para. 94.

⁵² CCAA, s. 45 “foreign representative”.

⁵³ Caudill Affidavit at para. 100.

⁵⁴ *Re Caesars Entertainment Operating Co.*, 2015 ONSC 712 at para 25, Applicant’s BOA at Tab 11 [“*Caesars Entertainment*”].

⁵⁵ CCAA, s. 47(1).

⁵⁶ CCAA, s.47(2)

⁵⁷ CCAA, s. 45 “foreign main proceeding”.

54. The CCAA does not provide a definition of COMI but it provides, in section 45(2) that, in the absence of proof to the contrary, the debtor's COMI is the jurisdiction in which the debtor has its registered office.⁵⁸

55. In circumstances in which the court considers factors beyond the registered office presumption, courts have considered a number of relevant factors, including:

- (a) The location where corporate decisions are made;
- (b) The location of employee administration, including human resource functions;
- (c) The location of the debtor's marketing and communication functions;
- (d) Whether the enterprise is managed on a consolidated basis;
- (e) The extent of integration of an enterprise's international operations;
- (f) The centre of an enterprise's corporate, banking, strategic and management functions;
- (g) The existence of shared management within entities and in an organization;
- (h) The location where cash management and accounting functions are overseen;
- (i) The location where pricing decisions and new business development initiatives are created; and
- (j) The seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.⁵⁹

56. While evidence relating to the above factors may assist the Court in determining COMI, Ontario courts have held that the following "principal factors" tend to indicate the location of the debtor's COMI, when considered as a whole:

⁵⁸ CCAA, s. 45(2).

⁵⁹ *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115 at para 7, Applicant's BOA at Tab 12; *Elephant & Castle*, *supra* note 50 at para. 26.

- (a) the location that is readily ascertainable by creditors;
- (b) the location where the debtor's principal assets or operations are found; and
- (c) the location where the management of the debtor takes place.⁶⁰

57. Where the debtor entities function as an integrated group, factors including where corporate decisions are being made, where centralized services critical to the operations are being provided, and where strategic and directional decisions are made may be relevant.⁶¹

58. In this case, the COMI of each Chapter 11 Debtor is in the U.S.

59. Eight of the Chapter 11 Debtors are incorporated pursuant to U.S. law and four are incorporated pursuant to Mexican law. Takata Americas and TKH each have the U.S. Head Office as their registered head office. Each of the other Chapter 11 Debtors is a direct or indirect subsidiary of Takata Americas or TKH.

60. Regardless of their place of incorporation or registered head office, the Chapter 11 Debtors operate in an integrated global business and all strategic, management, operational, marketing and communication decisions regarding Takata's operations in the Americas are made by the management team at the U.S. Head Office.⁶² The U.S. Head Office is located in Auburn Hills, Michigan, in the U.S. Takata's Mexican operations rely heavily on the centralized operational and cash management structure implemented out of the U.S. Head Office.

61. Moreover, the Chapter 11 Debtors are integrated in the ordinary course of business in that the Chapter 11 Debtors maintain business relationships between and among themselves that generate intercompany receivables and payables from a variety of transactions, including intercompany services, reimbursement for shared business expenses, and intercompany loans. This includes transactions between and among the Chapter 11

⁶⁰ *Lightsquared*, *supra* note 50 at para. 25.

⁶¹ *Caesars Entertainment*, *supra* note 54 paras. 20 and 35.

⁶² Caudill Affidavit at para. 97.

Debtors and U.S. affiliates and transactions between TKH and its indirect Mexican subsidiaries (including the other Chapter 11 Debtors), among other things.

62. As noted above, the Chapter 11 Debtors have no operations or assets (other than their retainer with professionals, including counsel) in Canada. They function as part of a business enterprise in which corporate decisions and critical services and operations are provided from the U.S. Head Office and the U.S. Court has accepted jurisdiction with respect to each of the Chapter 11 Debtors. The COMI of each Chapter 11 Debtor is in the United States.

63. Accordingly, the Applicant submits that the Chapter 11 Proceedings are “foreign main proceedings”.

B. The Relief Requested is necessary and appropriate

64. Section 48(1) of the CCAA requires the Court to grant mandatory relief once a proceeding is found to be a foreign main proceeding, including

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, unless otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company’s property in Canada that relates to the business and prohibiting the debtor

company from selling or otherwise disposing of any of its other property in Canada.⁶³

65. Not only is the stay of proceedings mandatory once the Chapter 11 Proceedings are recognized as “foreign main proceedings” but also, in the circumstances it is both fair and necessary to allow the Chapter 11 Debtors breathing room as they attempt to finalize the terms of and maximize value through implementing the Global Transaction.

66. The Court also maintains overarching powers under the CCAA to make discretionary orders in a recognition proceeding. Section 49 of the CCAA provides that a court may make any order that it considers appropriate if it is necessary for the protection of the debtor company’s property or the interests of a creditor or creditors.⁶⁴

67. The Applicant also seeks an order recognizing the U.S. First Day Orders in the Chapter 11 Proceedings.

68. A list of the orders being sought by the Chapter 11 Debtors is set out in the Caudill Affidavit. The U.S. First Day Orders grant relief that: (i) is not dissimilar to the relief typically granted to debtors under the CCAA; and (ii) is appropriate and necessary for protection of the Chapter 11 Debtors’ property, in particular to provide for the implementation of the Global Transaction, including but not limited to:

- (a) stays of proceedings in each foreign jurisdiction;
- (b) authorization to pay pre-filing wages, salaries and other compensation and benefits and to maintain employee benefits programs;
- (c) authorization to pay certain pre-filing amounts related to the Applicant’s continuing business and operations; and
- (d) approving the Applicant’s cash management arrangements.

⁶³ CCAA, s. 48(1).

⁶⁴ CCAA, s. 49.

69. Under the principle of comity, where a cross-border proceeding is most closely connected to another jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings.⁶⁵

70. It is therefore just and reasonable that this Court recognize the U.S. First Day Orders, which were granted by the courts of the principal jurisdictions and that are in keeping with the spirit and purpose of the CCAA.

C. The Information Officer should be appointed

71. The final issue for this Court's consideration is whether FTI should be appointed as Information Officer. FTI has consented to the proposed appointment.

72. Appointment of the Information Officer is not required by the CCAA; however, a practice has developed whereby a firm of professionals (typically a licensed trustee) is appointed as an information officer pursuant to the court's discretionary powers.⁶⁶ The appointment of an Information Officer in this case will allow the Court to be kept apprised of the status of the foreign proceedings and will ensure the dissemination of information concerning the Foreign Proceedings to the Court and stakeholders, which will be particularly useful given that the Chapter 11 Debtors do not have operations or offices in Canada.⁶⁷

PART IV. ORDER REQUESTED

73. Accordingly, the Applicant seeks recognition of the Chapter 11 Proceedings as a foreign main proceeding and related relief, including a stay of proceedings and recognition of the U.S. First Day Orders.

74. The relief sought herein is appropriate and will provide the Chapter 11 Debtors with the breathing room necessary to continue towards implementation of the Global Transaction. The Global Transaction is expected to have the support of a significant majority of Takata's OEM customers and to produce a better result for the stakeholders of the Chapter 11 Debtors

⁶⁵ *Matlack*, *supra* note 43 at para. 7.

⁶⁶ CCAA, ss. 49-50. *Babcock*, *supra* note 43 at para. 22; *Aero Inventory*, *supra* note 47 at para. 20.

⁶⁷ *Lear*, *supra* note 43 at para. 23; *Lightsquared*, *supra* note 50 at paras. 35 to 37.

than a liquidation, including that it will avoid the negative impact a liquidation would have on the ongoing recalls.

75. The Chapter 11 Debtors intend to treat Canadian claimants in the same manner as similarly situated claimants in the U.S. and an Information Officer is being appointed in Canada to assist in keeping the Court and Canadian creditors apprised and responding to their inquiries.

76. Recognition of the Chapter 11 Proceedings and the U.S. First Day Orders in Canada is an important and appropriate step to assist the Chapter 11 Debtors in moving towards finalizing the Terms of the Global Transaction in a manner that is fair, equitable and in the best interests of the estates of the Debtors and the safety of the driving public, and it ought to be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of June, 2017.



McCarthy Tétrault LLP

Lawyers for the Foreign Representatives

TAB A

SCHEDULE A
LIST OF AUTHORITIES

1. *Babcock & Wilcox Canada Ltd.*, 2000 CanLII 22482 (ONSC)
2. *Matlack Inc., Re*, 2001 CanLII 28467 (ONSC)
3. *Lear Canada (Re)*, 2009 CanLII 37931 (ONSC)
4. *Global Light Telecommunications Ltd. (Re)*, 2004 BCSC 745
5. *Global Ocean Carriers Ltd.*, 251 B.R.
6. *MtGox Co., Ltd. (Re)*, 2014 ONSC 5811
7. *Microbiz Corp. v. Classic Software Systems Inc.* 1996 CanLII 7276 (ONSC)
8. *Tucker v. Aero Inventory (UK) Ltd.*, 2009 CanLII 63138 (ONSC)
9. *Lightsquared LP (Re)*, 2012 ONSC 2995
10. *Massachusetts Elephant & Castle Group., Inc. (Re)*, 2011 ONSC 4201
11. *Re Caesars Entertainment Operating Co.*, 2015 ONSC 712
12. *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115

TAB B

**SCHEDULE B
STATUTES CITED**

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

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

PART IV: Cross-border Insolvencies

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

2005, c. 47, s. 131.

Definitions

45 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (*principale*)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (*instance étrangère*)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding. (*représentant étranger*)

Centre of debtor company's main interests

45 (2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Application for recognition of a foreign proceeding

46 (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Order recognizing foreign proceeding

47 (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

47 (2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Terms and conditions of orders

50 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

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

Proceeding commenced at Toronto

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(RETURNABLE JUNE 28, 2017)**

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