

**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 ("collectively, the "Chapter 11 Debtors")**

**AND IN THE MATTER OF TAKATA CORPORATION, AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "B" HERETO (the "Japanese Debtors", and
collectively with the Chapter 11 Debtors, the "Debtors")**

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

FACTUM OF THE U.S. FOREIGN REPRESENTATIVE

**(Re: Recognition of Chapter 11 Plan and Related Orders)
(Returnable March 14, 2018)**

March 9, 2018

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TO: SERVICE LIST

PART I—OVERVIEW

1. This is a motion to recognize the Confirmation Order¹ of the Chapter 11 Debtors and certain related orders that are key to implementing (a) the Chapter 11 plan of reorganization of the Chapter 11 Debtors; and (b) the global transaction in which substantially all of Takata's worldwide assets (excluding PSAN-Inflator-related assets) will be sold to Joyson KSS Auto Safety S.A. (the "**Global Transaction**").

2. Such orders are critical to the complex and largely-consensual restructuring of the Chapter 11 Debtors and the significant benefits to be derived from the Chapter 11 Plan and Global Transaction in a case that the U.S. Bankruptcy Court described, in the course of approving the Confirmation Order, as:

- (a) a "remarkable case" involving "the largest consumer recall in history; tens of millions of individuals and vehicle owners and parties around the world";
- (b) having so many moving parts in order to facilitate "the preservation of the enterprise [and] as many of the jobs as possible, to treat and provide for individuals that have been harmed either economically or by way of personal injury, and also to address the concerns and considerations of other stakeholders, including the OEMs" that it is "an extraordinary case"; and
- (c) having "more than adequate" and "substantial and sufficient" creditor support to warrant confirmation under Section 1126 of the U.S. Bankruptcy Code (including

¹ All capitalized terms used but not otherwise defined herein have the meanings given to them in the Affidavit of Kenneth Bowling, sworn March 6, 2018 ("**Bowling Affidavit**"), Motion Record of the U.S. Foreign Representative (Re: Recognition of Chapter 11 Plan and Related Orders), dated March 6, 2018 ("**Motion Record**"), Vol. I, Tab 2, or the Chapter 11 Plan.

“support of large creditor stakeholders, and more importantly, the estate fiduciaries”), to the point that it would have been a “fully consensual confirmation” by creditors entitled to vote if one claim (the \$1.8 billion claim of Puerto Rico) was reclassified, as the U.S. Bankruptcy Court noted in *obiter* it “likely” should be, and may still be if the Chapter 11 Debtors are successful in their motion, returnable on March 13, 2018, to reclassify this claim.

3. The Chapter 11 Plan implements the Global Transaction, which has numerous benefits, including:

- (a) sale of substantially all of the Chapter 11 Debtors’ non-PSAN Inflator assets and continued employment of substantially all of the Chapter 11 Debtors’ 14,000 employees;
- (b) continuation of limited production of PSAN Inflators and propellant to facilitate recalls – meeting a goal of the restructuring to not impede the ability of Takata to fulfil recalls for the benefit of the general public;
- (c) provision of significant value (in part due to the settlement of secured and priority claims for a fraction of their potential value) for distribution to unsecured creditors with allowed claims, including Canadian creditors, whose allowed claims are treated under the Chapter 11 Plan in the same manner as similarly situated claims of U.S. creditors in the same class;
- (d) creation of a trust to address the liabilities associated with PSAN Inflator-related personal injury/wrongful death claims and administer such claims;

- (e) compliance with ongoing obligations to the National Highway Traffic Safety Administration (the “**NHTSA**”) and in respect of the DOJ Restitution Order, including payments for the \$125 million personal injury and wrongful death restitution fund and the \$850 million OEM restitution fund; and
- (f) provision of appropriate releases and a permanent injunction of certain PSAN Inflator-related personal injury/wrongful death claims against Protected Parties, which was a principal motivating factor for the restructuring, particularly for the Plan Sponsor, for whom limiting exposure to PSAN Inflator-related liability was a precondition to the Global Transaction, while ensuring that such releases are appropriately narrow and targeted.

4. An Order recognizing the Confirmation Order in Canada is a precondition to these significant benefits being realized by the Chapter 11 Debtors, their creditors and other stakeholders. Such recognition is necessary for the protection of the Chapter 11 Debtors’ property and the interests of creditors in the implementation of the Chapter 11 Plan and the consummation of the Global Transaction.

5. Moreover, the orders to be recognized were granted in the Chapter 11 Proceedings, which have been recognized by this Court as “foreign main proceedings,” pursuant to standard and well-accepted procedures and practices of the U.S. Bankruptcy Court.

6. There is no basis to second-guess the orders of the principal foreign court and it is appropriate to recognize the Confirmation Order and other related orders in Canada.²

² See *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964 at para. 14 [**Hartford**], Brief of Authorities of the U.S. Foreign Representative (Re: Recognition of Chapter 11 Plan and Related Orders), dated March 9, 2018 (“**BOA**”), Tab 1.

PART II—FACTS

7. Takata entities commenced insolvency proceedings in the United States and Japan in June 2017 as a result of unprecedented and highly publicized recalls of Takata airbags containing PSAN Inflators. The U.S. and Japanese proceedings were recognized as “foreign main proceedings” in Canada in June 2017 and September 2017, respectively.³

8. On October 13, 2017, this Court also recognized the Chapter 11 Claims Process Order, which established deadlines and procedures associated with filing claims against the Chapter 11 Debtors, and approved a process to provide notice to creditors, including creditors in Canada.⁴

9. Since that time, the Chapter 11 Debtors have, among other things:

- (a) entered into a Restructuring Support Agreement with the Consenting OEMs and the Plan Sponsor, which was approved by the U.S. Bankruptcy Court on December 13, 2017 in the Restructuring Support Agreement Order;
- (b) established a supplemental claims and noticing process for PPICs who purchased vehicles between August 2, 2017 and December 19, 2017, which was approved by the U.S. Bankruptcy Court on December 18, 2017 in the Supplemental Bar Date Order;
- (c) prepared the Chapter 11 Plan, which implements the Global Transaction;
- (d) obtained approval from the U.S. Bankruptcy Court of the Disclosure Statement, Voting Deadline and procedures for solicitation, receiving and tabulation of votes and objections in the Solicitation Procedures Order, and distributed the Court-

³ Bowling Affidavit at para. 22, Motion Record, Vol. I, Tab 2.

⁴ Bowling Affidavit at para. 23, Motion Record, Vol. I, Tab 2.

- approved Solicitation Package (including to all Canadian creditors with Filed Canadian Claims);
- (e) obtained various orders sustaining objections to certain proofs of claim filed, including the Claims Objection Order, the only such order that related to a Filed Canadian Claim;
 - (f) participated in complex and extensive negotiations to obtain support for the Chapter 11 Plan from each of their major creditor groups, including the Consenting OEMs (by far the largest creditor constituency by value), the Creditors' Committee, the Tort Claimants' Committee and the Future Claims Representative;
 - (g) held a vote of creditors;
 - (h) obtained the Confirmation Order confirming the Chapter 11 Plan; and
 - (i) obtained the Disputed Claims Reserve Order, which estimated the Disputed Claims Reserve amounts in relation to claims classified in Class 6 and Class 7 pursuant to the Chapter 11 Plan.⁵

10. In the claims process for the Chapter 11 Proceedings, there were 46 proofs of claim filed from claimants with an address listed in Canada. In the Chapter 11 Plan, such claims are placed in either:

- (a) Class 4 – general unsecured claims of OEMs, which allowed claims receive a distribution, provided that certain recoveries of Consenting OEMs are paid in

⁵ Bowling Affidavit at paras. 18, 35-39, 45, 63, 93-94, 97, and 98, Motion Record, Vol. 1, Tab 2.

accordance with the Agreed Allocation to the Plan Settlement Fund and Support Party Creditor Fund, and are released;⁶

- (b) Class 5 – PSAN PI/WD Claims – which claims are released against the Chapter 11 Debtors and Protected Parties (including certain Debtor affiliates, Reorganized Takata, Participating OEMs in certain limited circumstances,⁷ and Plan Sponsor Parties) and channelled to the PSAN PI/WD Trust. Claims against OEMs other than Participating OEMs by members of this class are not affected;⁸
- (c) Class 6 – Other General Unsecured Claims – which claims, if allowed, receive a distribution from the Chapter 11 Debtors’ estates and are released as against the Released Parties (including the Chapter 11 Debtors, Future Claims Representative, Plan Sponsor Parties, Committees, and certain affiliates of the Chapter 11 Debtors) pursuant to the Consensual Release. Claims against OEMs by members of this class are not affected;⁹ or
- (d) Class 7 – Other PI/WD Claims – which claims are released as against the Released Parties pursuant to the Consensual Release, receive a distribution from the Chapter 11 Debtors’ estates if allowed and are administered by the PSAN

⁶ Bowling Affidavit at para. 63, Motion Record, Vol. 1, Tab 2; Chapter 11 Plan, s. 4.4(a)(i), Motion Record, Vol. II, Tab 2C, p. 487.

⁷ PSAN PI/WD Claims against Participating OEMs are only channeled to the PSAN PI/WD Trust and released as against the Participating OEM if the claimant is a U.S. citizen, is injured as a result of an incident occurring in the U.S. or its territories, or the claim involves a vehicle registered in the U.S. or its territories or possessions, Chapter 11 Plan, def’n of “PSAN PI/WD Claim”, Motion Record, Vol. II, Tab 2C, p. 453.

⁸ Bowling Affidavit at paras. 53, 55, Motion Record, Vol. 1, Tab 2; Chapter 11 Plan, s. 4.4(d)(i), Motion Record, Vol. II, Tab 2C, p. 488.

⁹ Bowling Affidavit at paras. 60-61, Motion Record, Vol. 1, Tab 2; Chapter 11 Plan, ss. 4.4(e), 10.6(b), Motion Record, Vol. II, Tab 2C, pp. 489, 573.

PI/WD Trustee. Claims against OEMs by members of this class are not affected.¹⁰

11. Further details with respect to the facts concerning the Chapter 11 Debtors, their business and the requested relief on this motion, are set out in the Bowling Affidavit, sworn by the Chief Financial Officer of Takata on March 6, 2018 in support of this motion.

PART III—ISSUES

12. The key issues on this motion are:

- (a) Should the Court recognize and give effect to the Confirmation Order?
- (b) Should the Court recognize and give effect to the Restructuring Support Agreement Order, Supplemental Bar Date Order, Solicitation Procedures Order, the Claims Objection Order, and the Disputed Claims Reserve Order?

13. Each of the orders that the U.S. Foreign Representative seeks to recognize has been granted by the U.S. Bankruptcy Court in the foreign “main” jurisdiction pursuant to standard and well-accepted practises and procedures and are necessary for the protection of the Chapter 11 Debtors’ property and the interests of creditors. It is appropriate for this ancillary court to grant the relief requested on this motion.

¹⁰ Bowling Affidavit at paras. 61, 73, Motion Record, Vol. 1, Tab 2; Chapter 11 Plan, s. 4.4(f), Motion Record, Vol. II, Tab 2C, p. 489.

PART IV—THE LAW

A. This Court has Jurisdiction to Recognize the Orders

14. The purpose of Part IV of the CCAA is to provide mechanisms for dealing with cross-border insolvencies and to promote cooperation between Canadian and foreign courts in cross-border insolvencies and the fair and efficient administration of cross-border insolvencies, among other things.¹¹

15. Pursuant to subsection 49(1) of the CCAA, once the Canadian Court has recognized a foreign proceeding, it may make any order that it considers appropriate if the court is satisfied that the order is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.¹² Such an order may be made on any terms and conditions that the Court considers appropriate in the circumstances.¹³

16. The CCAA also provides that once an order recognizing a foreign proceeding is made, the Court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.¹⁴

17. It is customary for a CCAA court to recognize orders made by courts in foreign proceedings so long as those orders are not contrary to public policy or the purposes of the CCAA.¹⁵

¹¹ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 44 [CCAA]. See also *Ultra Petroleum Corp.*, 2017 YKSC 23 at para. 7, BOA Tab 2 [*Ultra Petroleum*].

¹² CCAA, s. 49(1).

¹³ CCAA, s. 50.

¹⁴ CCAA, s. 52(1).

¹⁵ CCAA, s. 61. *Hartford* at paras. 15-18, BOA, Tab 1; *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 at para. 39, BOA, Tab 3.

18. The principle guiding the exercise of the court's jurisdiction under Part IV of the CCAA is comity.¹⁶ Comity, cooperation and accommodation between courts in cross-border proceedings is critical to enable companies to restructure on a cross-border basis.¹⁷ As Canadian courts have observed: "without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty."¹⁸

19. In cases involving U.S. bankruptcy proceedings, like this one, Canadian and U.S. courts have long "made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other."¹⁹

20. The Chapter 11 Proceedings have been recognized by this Court as "foreign main proceedings" with respect to the Chapter 11 Debtors. Therefore, pursuant to section 49 of the CCAA, this Court may recognize the orders at issue that were granted by the U.S. Bankruptcy Court, each of which is necessary for the protection of the debtor company's property or the interests of creditors, and it is appropriate and consistent with principles of comity and cooperation to do so in this case.

B. Appropriate to Recognize Confirmation Order

(i) Canadian Courts have recognized Chapter 11 Plans

21. Canadian Courts have recognized orders of the U.S. Bankruptcy Court confirming plans of reorganization in numerous cases.²⁰ In *Xerium*, the applicant sought to recognize an order

¹⁶ *Payless Holdings LLC, Re*, 2017 ONSC 4607 at para. 14, BOA Tab 4 [*Payless*].

¹⁷ *Payless* at para. 14, BOA, Tab 4; *Ultra Petroleum* at para. 8, BOA, Tab 2.

¹⁸ *Ultra Petroleum* at para. 8, BOA Tab 2; See also *Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704 at paras. 9-10 (SCJ) [*Babcock*], BOA, Tab 5; *Xerium Technologies Inc., Re*, 2010 ONSC 3974 at para. 23 [*Xerium*], BOA, Tab 6; *Matlack Inc., Re*, 2001 CarswellOnt 1830 at paras. 6-10 (SCJ), BOA, Tab 7.

¹⁹ *Babcock* at para. 9, BOA, Tab 5.

confirming a chapter 11 plan, which the CCAA Court noted, (i) reflected a global settlement of the competing claims and interests of all of the debtors' stakeholders, and (ii) served to maximize the value of the debtors' estate.²¹

22. In such circumstances, which are similar to the circumstances in this case, Justice Campbell stated that the Court had "the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA"²² and that the "recognition sought [was] precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA."²³

(ii) Recognition of the Chapter 11 Plan is Appropriate

23. In the Confirmation Order, the U.S. Bankruptcy Court affirmed that the Chapter 11 Plan satisfies the requirements of the U.S. Bankruptcy Code, including that the Chapter 11 Plan:

- (a) was proposed in good faith and with the legitimate and honest purpose of maximizing the estate and recoveries to holders of claims;
- (b) complies with applicable bankruptcy law;
- (c) satisfied the requirement that it be in the best interest of creditors; and
- (d) will not likely be followed by the need for liquidation or further financial reorganization of the reorganized Reorganized Takata, TK Global LLC, or the Warehousing Entity.²⁴

²⁰ See e.g. *Payless*, BOA, Tab 4; *Xerium*, BOA, Tab 6; *Lightsquared Inc. (Re)*, 2015 ONSC 2309, BOA, Tab 8; *Horsehead Holding Corp., Re*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-16-11271-00CL, Endorsement and Order of Newbould J. issued September 12, 2016, BOA, Tab 9 [*Horsehead*].

²¹ *Xerium* at para. 20, BOA, Tab 6.

²² *Xerium* at para. 23, BOA, Tab 6.

²³ *Xerium* at para. 23, BOA, Tab 6.

²⁴ Confirmation Order at paras T- U, Y, CC, Motion Record, Vol. II, Tab 2C pp. 329, 330, 332).

24. The U.S. Bankruptcy Court made the above findings and issued the Confirmation Order after a thorough hearing on the issues, which included hearing from numerous affected parties and considering the complex transaction and extensive filings.²⁵

25. In addition, the following factors support recognition of the Confirmation Order:²⁶

- (a) The Chapter 11 Plan and the Confirmation Order are essential for the restructuring of the Chapter 11 Debtors as a global enterprise. They implement a complex Global Transaction, provide for numerous multi-party settlements and requisite releases, enable continued compliance with NHTSA and DOJ requirements, and permit ongoing recalls to continue, while at the same time providing distributions to general unsecured creditors in excess of what they would receive in a hypothetical liquidation and creating a trust for PSAN PI/WD Claims and a mechanism to administer them;²⁷
- (b) Confirmation of the Chapter 11 Plan in the U.S. Bankruptcy Court occurred in accordance with standard and well-established procedures and practices in the U.S., including the approval of the Disclosure Statement and the process for solicitation and tabulation of votes, and notification was given to creditors in accordance with the Court-approved process, including to creditors in Canada;²⁸

²⁵ Bowling Affidavit at paras. 41-45, Motion Record, Vol. I, Tab 2.

²⁶ *Payless* at paras. 16-17, BOA, Tab 4.

²⁷ Bowling Affidavit at paras. 18-19, 56-58, Motion Record, Vol. II, Tab 2; Bowling Declaration at para. 10, Exhibit “A” to the Bowling Affidavit, Motion Record, Vol. I, Tab 2A, p. 76).

²⁸ Confirmation Order at paras MM, T-U, Y, CC, Motion Record, Vol. II, Tab 2C, pp. 329, 330, 332, 335).

- (c) The Chapter 11 Proceedings have been recognized as foreign main proceedings. The Chapter 11 Debtors have no assets (other than retainers with counsel) or business in Canada, which is an ancillary jurisdiction in the reorganization;²⁹
- (d) Canadian creditors are treated in the Chapter 11 Plan in the same manner as other similar claims in the same class. Canadian creditors have had the same access and ability to participate in the Chapter 11 Proceedings as other creditors as:
 - (i) Canadian creditors were given notice of the claims procedure pursuant to the Claims Procedure Order, which was recognized by this Court;³⁰
 - (ii) Canadian creditors who filed claims were given notice pursuant to the Solicitation Order and were entitled to vote in respect of the Chapter 11 Plan;³¹ and
 - (iii) notice of the Confirmation Hearing was published in publications in Canada;³² and
- (e) Recognition of the Confirmation Order by this Court is a condition precedent to the implementation of the Chapter 11 Plan and is necessary to ensure fair treatment of all creditors, regardless of whether they are located in Canada, the United States or elsewhere – in accordance with the terms of the Chapter 11 Plan.³³

²⁹ Bowling Affidavit at paras. 22, 52, Motion Record, Vol. I, Tab 2.

³⁰ Bowling Affidavit at paras. 30-32 and 37, Motion Record, Vol. I, Tab 2.

³¹ Bowling Affidavit at para. 52, Motion Record, Vol. I, Tab 2.

³² See Exhibits “T” and “U” to the Bowling Affidavit, Motion Record, Vol. V, Tab 2T and 2U.

³³ Bowling Affidavit at para. 86, Motion Record, Vol. I, Tab 2.

26. In addition, the Information Officer supports recognizing the Confirmation Order.³⁴

27. There is no basis to second guess the decision of the U.S. Court or to refuse to recognize the Chapter 11 Order pursuant to the public policy exception in section 61(2) of the CCAA, which should be read restrictively.³⁵

(iii) Recognition Appropriate Despite Cram Down

28. The “cram down” provisions of the U.S. Bankruptcy Code, for which there is no equivalent at Canadian law, permit the sanctioning of a plan and the binding creditors in other classes who may have voted against the plan.³⁶ Canadian courts have frequently recognized Chapter 11 restructuring plans that were approved by the U.S. Bankruptcy Court using this principle where one or more impaired classes had not accepted or were deemed not to have accepted the plan.³⁷

29. In this case, the U.S. Bankruptcy Court, after a thorough hearing, held that there was “substantial and sufficient” creditor support to win confirmation and found that the Chapter 11 Plan did not discriminate unfairly and was fair and equitable with respect to classes of claims that were impaired or that had not accepted the Chapter 11 Plan.

30. Indeed, if the high value Puerto Rico claim is classified as a subordinated claim in Class 9 along with the other States with similar claims (as the U.S. Bankruptcy Court judge

³⁴ Third Report of the Information Officer, dated March 8, 2018 at paras 76-77.

³⁵ *Hartford* at para. 17, BOA, Tab 1.

³⁶ See *Homburg Invest Inc., Re*, 2014 QCCS 3135 at para 49, BOA, Tab 10.

³⁷ See e.g. *In re Nortel Networks Inc.*, Order (Recognition of U.S. Chapter 11 Plan Confirmation order and U.S. Settlement and Plans Support Agreement Approval Order), Court File No. 09-CI-7951 (including excerpt from para. 43 of Confirmation Order), February 7, 2017, BOA, Tab 11; *Horsehead* (including excerpt from para. 73 of Confirmation Order), BOA, Tab 8.

commented in *obiter* that it “likely” should be), then the Chapter 11 Plan was approved by all classes eligible to vote by at least 74.38 % in number and 74.38% in value.³⁸

31. Moreover, there is no material prejudice to Canadian creditors. To the contrary, Canadian general unsecured creditors who are projected to receive nothing in a liquidation are expected to share in the approximately \$69 million available for distribution to unsecured creditors under the Chapter 11 Plan.³⁹

32. Accordingly, there is no basis to second guess the decision of the U.S. Bankruptcy Court, which granted the Confirmation Order after a thorough hearing and in reliance on established legal process in the U.S, particularly in circumstances in which there is no material prejudice to Canadian creditors.

(iv) Appropriate to Recognize Releases

33. As noted above, integral to the Chapter 11 Plan are the release provisions. These include releases of certain third parties, including a release of Participating OEMs by certain PSAN PI/WD claimants and a release of certain Consenting OEMs by the Chapter 11 Debtors.

34. OEMs are not released from claims of non-debtors except in one narrow circumstance: PSAN PI/WD Claims against Participating OEMs by a U.S. citizen or arising from an incident in the U.S. or involving a U.S. vehicle, are released and channelled to the PSAN PI/WD Trust. To be a Participating OEM, the OEM agrees to pay their portion of the relevant PSAN PI/WD Claims as determined by the Special Master in full. Any Canadian PSAN PI/WD Claimant with a claim arising in Canada in a Canadian vehicle would not have their PSAN PI/WD Claim

³⁸ Bowling Affidavit at para. 77, Motion Record, Vol. I, Tab 2.

³⁹ Bowling Affidavit at para. 70, Motion Record, Vol. I, Tab 2.

against any OEM channelled to the PSAN PI/WD Trust or released and may continue to proceed against the applicable OEM in the tort system.⁴⁰

35. In Canada, it is well established that courts have jurisdiction to sanction plans of arrangement pursuant to the CCAA that contain releases of third parties where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally.⁴¹ Canadian courts consider factors such as (i) whether the parties to be released from claims are necessary to the restructuring; (ii) whether the claims released are rationally connected to the purpose of the Plan and necessary for it to succeed; (iii) whether the Plan would fail without the releases; and (iv) whether the third parties being released contributed in a tangible and realistic way to the Plan.⁴²

36. The analysis conducted by the U.S. Bankruptcy Court in approving the third party releases contained in the Chapter 11 Plan, including the release of Participating OEMs as described above, was entirely consistent with the factors that Canadian Courts consider, as described above. In particular, the U.S. Bankruptcy Court held:

- (a) “The releases of non-Debtors under the Plan and the related injunction are fair to holders of Claims and are necessary to the proposed reorganization...and are otherwise appropriate...”;⁴³

⁴⁰ Bowling Affidavit at paras 62-63, Motion Record, Vol. I, Tab 2.

⁴¹ *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 at para. 23, BOA, Tab 12 [*Pacific Exploration*]; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 70, BOA, Tab 13 [*ATB Financial*].

⁴² *Pacific Exploration* at para. 23, BOA, Tab 12; *ATB Financial* at para. 71, BOA, Tab 13.

⁴³ Confirmation Order at para WW, Motion Record, Vol. II, Tab 2C, p. 340.

- (b) “Such releases and injunction are given in exchange for and are supported by fair, sufficient, and adequate consideration provided by or for each and all of the Consenting OEMs, Released Parties, or Protected Parties, as applicable;”⁴⁴
- (c) “The failure to implement the injunctions, releases, and exculpation would seriously impair the Debtors’ ability to confirm and consummate the Plan;”⁴⁵
- (d) “The injunction and release provisions are critical to the success of the Plan. Without the releases, and the enforcement of such releases through the Plan’s injunction provisions, the Restructuring Support Parties are not willing to make their contributions under the Plan;”⁴⁶ and
- (e) “The extensive efforts and substantial contributions by each of the Released Parties, along with the significant recoveries under the Plan, constitute extraordinary circumstances warranting the releases and injunctions set forth in the Plan.”⁴⁷

37. There is no basis to second guess the conclusions of the U.S. Bankruptcy Court in the foreign main proceedings, which were made in reliance on considerations entirely consistent with those that are made in Canada on this issue. The third party releases contemplated in the Chapter 11 Plan are reasonable and necessary and should be recognized by this Court.

⁴⁴ Confirmation Order at para WW, Motion Record, Vol. II, Tab 2C, p 340.

⁴⁵ Confirmation Order at para WW, Motion Record, Vol. II, Tab 2C, pp. 340-41.

⁴⁶ Confirmation Order at para WW(c), Motion Record, Vol. II, Tab 2C, p. 343.

⁴⁷ Confirmation Order at para WW(g), Motion Record, Vol. II, Tab 2C, p. 344.

(v) Appropriate to Recognize Notwithstanding Appeal

38. A Notice of Appeal of the Confirmation Order was filed on February 22, 2018 by the Objecting States, after their objections to the subordination of their claims were rejected by the U.S. Bankruptcy Court.⁴⁸

39. Service of the Notice of Appeal did not stay the Confirmation Order, it is not a condition precedent that there be no appeal extant with respect to the Confirmation Order, and the Chapter 11 Debtors do not expect the appeal to impede or prevent consummation of the Global Transaction.⁴⁹

40. Accordingly, the Notice of Appeal does not affect this Court's authority to recognize the Confirmation Order, which the U.S. Foreign Representative submits is necessary and appropriate in this case.

C. Recognition of Each of the Other Related Orders is Appropriate

41. The U.S. Foreign Representative also seeks to recognize the following orders of the U.S. Bankruptcy Court issued in relation to these proceedings:

- (a) The Restructuring Support Agreement Order, which approved the Restructuring Support Agreement among the Chapter 11 Debtors, the Consenting OEMs and the Plan Sponsor, setting out the terms of their support for the Restructuring Transaction;⁵⁰

⁴⁸ Bowling Affidavit at para. 85, Motion Record, Vol. I, Tab 2.

⁴⁹ Bowling Affidavit at para. 85, Motion Record, Vol. I, Tab 2.

⁵⁰ Bowling Affidavit at para. 93, Motion Record, Vol. I, Tab 2.

- (b) The Supplemental Bar Date Order, which established a supplemental claims and noticing process for PPICs who purchased vehicles between August 2, 2017 and December 19, 2017. In accordance with the Supplemental Bar Date Order, the Chapter 11 Debtors published notice of the Supplemental PPIC Bar Date in Canada in *The Globe and Mail* (National Edition) and *Le Devoir* on January 17, 2018;⁵¹
- (c) The Solicitation Procedures Order, in which the U.S. Bankruptcy Court approved the Disclosure Statement, the Voting Deadline and the procedures for solicitation, receiving and tabulation of votes and objections. Pursuant thereto, the Court-approved Solicitation Package was distributed to creditors, including to all Canadian creditors with Filed Canadian Claims;⁵²
- (d) The Claims Objection Order, which sustained objections of the Chapter 11 Debtors to certain proofs of claim filed, including by correcting the Chapter 11 Debtor against which the one Filed Canadian Claim was filed;⁵³ and
- (e) The Disputed Claims Reserve Order, which estimated the Disputed Claims Reserve amounts in relation to the claims placed in Class 6 and Class 7 of the Chapter 11 Plan.⁵⁴

42. Recognition of each of the foregoing orders in Canada is appropriate and necessary for the protection of the Chapter 11 Debtors' property, as they are each important to the implementation of the Chapter 11 Plan and the Global Transaction. Such orders were made by

⁵¹ Bowling Affidavit at paras. 31, 85, Motion Record, Vol. I, Tab 2.

⁵² Bowling Affidavit at para. 95, Motion Record, Vol. I, Tab 2.

⁵³ Bowling Affidavit at para. 97, Motion Record, Vol. I, Tab 2.

⁵⁴ Bowling Affidavit at para. 98, Motion Record, Vol. I, Tab 2.

the U.S. Bankruptcy Court in the “foreign main proceedings” pursuant to standard and well-accepted procedures and practices of the U.S. Bankruptcy Court, and do not prejudice Canadian creditors.⁵⁵ Moreover the Information Officer supports recognition of such orders. Accordingly, the Foreign Representative respectfully submits that such orders should be recognized pursuant to section 49 of the CCAA.

PART V—RELIEF SOUGHT

43. For the reasons set out above, the U.S. Foreign Representative requests that this Court grant relief by making an order substantially in the form of the Order included at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of March, 2018.



McCarthy Tétrault LLP

Lawyers for U.S. Foreign Representative

⁵⁵ Bowling Affidavit at paras. 99-100, Motion Record, Vol. I, Tab 2.

**SCHEDULE “A”
LIST OF AUTHORITIES**

Jurisprudence

1. *Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964
2. *Ultra Petroleum Corp.*, 2017 YKSC 23
3. *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201
4. *Payless Holdings LLC, Re*, 2017 ONSC 4607
5. *Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704 (SCJ)
6. *Xerium Technologies Inc., Re*, 2010 ONSC 3974
7. *Matlack Inc., Re*, 2001 CarswellOnt 1830
8. *Lightsquared Inc. (Re)*, 2015 ONSC 2309
9. *Horsehead Holding Corp., Re*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-16-11271-00CL, Order of Newbould J. issued September 12, 2016
10. *Homburg Invest Inc., Re*, 2014 QCCS 3135
11. *In re Nortel Networks Inc.*, Order (Recognition of U.S. Chapter 11 Plan Confirmation order and U.S. Settlement and Plans Support Agreement Approval Order), Court File No. 09-CI-7951
12. *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429
13. *Metcalf & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

**SCHEDULE “B”
RELEVANT STATUTES**

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

**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.

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.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

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.

Obligations

Cooperation — court

52 (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a)** the appointment of a person to act at the direction of the court;
- (b)** the communication of information by any means considered appropriate by the court;
- (c)** the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d)** the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e)** the coordination of concurrent proceedings regarding the same debtor company.

Court not prevented from applying certain rules

61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

IN THE MATTER OF APPLICATION OF AN APPLICATION BY TK HOLDINGS INC.
AND TAKATA CORPORATION UNDER SECTION 46 OF THE *COMPANIES'*
CREDITORS ARRANGEMENT ACT

Court File No. CV-17-11857-00CL

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

**FACTUM OF THE
U.S. FOREIGN REPRESENTATIVE
(Re: Recognition of Chapter 11 Plan
and Related Orders)
(Returnable March 14, 2018)**

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