

**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 VOYAGER DIGITAL LTD.

APPLICATION OF VOYAGER DIGITAL LTD. UNDER
SECTION 46 OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANT

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FASKEN MARTINEAU DuMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6
Fax: 416 364 7813

Stuart Brotman (LSO: 43430D)

sbrotman@fasken.com
Tel: 416 865 5419

Aubrey Kauffman (LSO: 18829N)

akauffman@fasken.com
Tel: 416 868 3538

Daniel Richer (LSO: 75225G)

dricher@fasken.com
Tel: 416 865 4445

Raajan Aery (LSO: 79876C)

raery@fasken.com
Tel: 416 865 4405

Lawyers for the Applicant

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PART I - OVERVIEW¹

1. The applicant, TopCo, is incorporated in B.C.; its shares traded on the TSX and OTC until such trading was suspended. TopCo's subsidiary, OpCo, operated a U.S.-based enterprise providing cryptocurrency brokerage, custodial and lending services to U.S.-based customers.

2. On July 5, 2022, TopCo, OpCo and their affiliate, HoldCo, commenced cases under chapter 11 of the U.S. Bankruptcy Code—TopCo's case was recognized by this Court as a "foreign main proceeding" under the CCAA and TopCo was declared to be the Foreign Representative of that case. The goal of these proceedings is to return value to the Debtors' stakeholders in accordance with the priority of their entitlements. After navigating a tortuous path that saw the Debtors lose two purchasers for their business and overcome opposition from creditors, equity holders and government stakeholders, such efforts have culminated in the Third Amended Plan, which was confirmed by order of the U.S. Bankruptcy Court on March 8, 2023.

3. TopCo is seeking, among other relief, an order of this Court recognizing and enforcing in Canada such Confirmation Order. The relief sought will facilitate the self-liquidation of the Debtors' business, the orderly wind-down of the Debtors' affairs and the return of value to the Debtors' stakeholders, all as contemplated in the Third Amended Plan, which went effective on May 19, 2023 notwithstanding an appeal of a discrete element thereof.

¹ Capitalized terms used in this Part I have the meaning ascribed thereto below.

4. TopCo, as Foreign Representative, is entitled to the relief it seeks. The principle of international comity requires this Court to cooperate, to the maximum extent possible, with the TopCo Chapter 11 Case and none of the relief sought is contrary to public policy.

5. This factum is filed in support of the motion of Voyager Digital Ltd. (“**TopCo**”) as the foreign representative (in such capacity, the “**Foreign Representative**”) of TopCo in respect of the case (the “**TopCo Chapter 11 Case**”) under chapter 11 of title 11 of the United States Code (the “**U.S. Bankruptcy Code**”) commenced by TopCo in the United States Bankruptcy Court (the “**U.S. Bankruptcy Court**”), for relief pursuant to Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), including (collectively, the “**Recognition Order**”):

- (a) an order recognizing and enforcing in Canada the following orders (collectively, the “**Additional U.S. Orders**”) made in the TopCo Chapter 11 Case:
 - (i) order of the U.S. Bankruptcy Court (I) authorizing entry into the asset purchase agreement between Voyager Digital, LLC (“**OpCo**”), as seller, and BAM Trading Services Inc. d/b/a Binance.US (“**Binance U.S.**”), as purchaser, dated as of December 18, 2022 (as amended, the “**Binance APA**”) and (II) granting related relief (the “**Binance APA Order**”);
 - (ii) final order of the U.S. Bankruptcy Court (I) authorizing the Debtors (defined below) to (A) continue to operate the Cash Management System (defined below), (B) honor certain prepetition obligations related thereto, (C) maintain existing business forms and (D) continue to perform Intercompany Transactions (defined below); (II) granting administrative

- expense status to postpetition intercompany balances; and (III) granting related relief (the “**Final Cash Management Order**”);
- (iii) corrected and amended order of the U.S. Bankruptcy Court (I) approving the Debtors’ second amended disclosure statement (the “**Second Amended Disclosure Statement**”) and (II) confirming the third amended joint plan of the Debtors (the “**Third Amended Plan**”) pursuant to chapter 11 of the Bankruptcy Code (the “**Confirmation Order**”);
 - (iv) order of the United States District Court for the Southern District of New York (the “**U.S. District Court**”) staying the Confirmation Order (the “**Stay Pending Appeal**”) pending the determination of the Confirmation Appeal (defined below) (the “**Stay Order**”);
 - (v) stipulation order of the U.S. District Court reducing the scope of the Stay Pending Appeal (the “**Government Stipulation**”) to cover only the exculpation provisions (the “**Exculpation Provisions**”) contained in the Third Amended Plan and the Confirmation Order (the “**Stipulation Order**”); and
 - (vi) order of the U.S. Bankruptcy Court (I) approving the mechanics and procedures to effectuate the Toggle Transaction (defined below) (the “**Liquidation Procedures**”) and (II) granting related relief (the “**Liquidation Procedures Order**”);
- (b) an order amending the articles of TopCo in accordance with the provisions of, and as required to implement, the Third Amended Plan, and providing that all issued and outstanding shares in the capital of TopCo shall be redeemed for cancellation

and cancelled and a single common share shall thereafter be issued to the Plan Administrator (as defined in the Third Amended Plan) (collectively, the “**Canadian Restructuring**”);

- (c) an order declaring that the releases, discharges, injunctions and exculpations contained and referenced in the Third Amended Plan and approved in the Confirmation Order, are valid and effective on the Effective Date, and that all such releases, discharges, injunctions and exculpations are sanctioned, approved, recognized and given full force and effect in all provinces and territories of Canada; provided, however, that such relief is subject in all respects to the Stay Pending Appeal and the Government Stipulation, and Alvarez & Marsal Canada Inc, in its capacity as information officer (in such capacity, the “**Information Officer**”), is directed to promptly report to this Court and the service list established in these proceedings on any further orders made or steps taken in or in connection with the Confirmation Appeal that affect the Exculpation Provisions or their enforceability;
- (d) an order authorizing and directing TopCo to pay to the Information Officer in respect of the Foreign Representative’s CCAA proceedings (the “**Canadian Proceeding**”), the sum required to increase the retainer held by the Information Officer (the “**Retainer**”) from \$150,000 to \$450,000 to provide the Information Officer and its legal counsel, Blake, Cassels & Graydon LLP (“**Blakes**”), funding to address remaining matters in the Canadian Proceeding; and
- (e) an order authorizing the Information Officer to pay from the Retainer, from time to time, the professional fees and disbursements owing to the Information Officer and Blakes in respect of the Canadian Proceeding and directing that, upon termination

of the Canadian Proceeding, the Information Officer shall deliver to TopCo or the Wind-Down Debtor (as defined in the Third Amended Plan), as applicable, any undisbursed balance of the Retainer.

Affidavit of Allyson B. Smith sworn May 17, 2023, tab 3 of the Motion Record of the Applicant dated May 17, 2023 (“Smith Affidavit”) at para 3 and Exhibits “A”–“H”; Supplementary Affidavit of Allyson B. Smith sworn May 23, 2017, tab 2 of the Supplementary Motion Record of the Applicants dated May 27, 2023 (“Supplementary Smith Affidavit”) at Exhibit “A”.

PART II - FACTS

Voyager

6. TopCo is incorporated under British Columbia’s *Business Corporations Act* (the “**BCBCA**”). TopCo’s shares traded on the Toronto Stock Exchange (the “**TSX**”) and via over-the-counter markets (“**OTC**”) until trading thereof was suspended by the TSX on July 6, 2022; TopCo’s shares have not traded on the TSX since that date.

Smith Affidavit at para 4.

7. TopCo’s operating U.S. subsidiary, OpCo, and other affiliates (collectively and together with TopCo and OpCo, “**Voyager**”) operate a U.S.-based enterprise providing cryptocurrency brokerage, custodial and lending services to U.S.-based customers.

Smith Affidavit at para 5.

Cash Management

8. In the ordinary course of business, TopCo, OpCo and Voyager Digital Holdings, Inc. (“**HoldCo**” and, collectively with TopCo and OpCo, the “**Debtors**”) maintain a cash and cryptocurrency management system (the “**Cash Management System**”) comparable to the

systems used by similarly situated companies to manage cash and digital assets on their platform in a cost-effective and efficient manner.

Smith Affidavit at para 58.

9. The Cash Management System is critical to the Debtors' business as it streamlines the Debtors' ability to collect, transfer and disburse cash.

Smith Affidavit at para 59.

10. The Debtors maintain business relationships with each other resulting in intercompany receivables and payables in the ordinary course of business (the "**Intercompany Transactions**"). In the ordinary course of business, the Debtors make Intercompany Transactions to either (a) reimburse certain Debtors or non-Debtor affiliates for various expenditures associated with their business or (b) fund certain Debtors' or non-Debtor affiliates' accounts in anticipation of such expenditures as needed.

Smith Affidavit at paras 60–61.

The TopCo Chapter 11 Case and the Canadian Proceeding

11. On July 5, 2022, TopCo commenced the TopCo Chapter 11 Case under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court.

Smith Affidavit at para 6.

12. Two other U.S.-incorporated entities in the Voyager group of companies, OpCo and HoldCo, also commenced cases under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court on July 5, 2022 (collectively with the TopCo Chapter 11 Case, the "**Voyager Chapter 11 Cases**"). At this time, recognition of these two cases has not been sought in Canada.

Smith Affidavit at para 7.

13. The TopCo Chapter 11 Case was recognized as a “foreign main proceeding” under section 47 of the CCAA by this Court on August 4, 2022.

Smith Affidavit at para 37.

14. Between commencement of the Voyager Chapter 11 Cases and October 19, 2022, the Debtors obtained, among other orders of the U.S. Bankruptcy Court:

- (a) an order authorizing TopCo to act as foreign representative of the Voyager Chapter 11 Cases (the “**Foreign Representative Order**”);
- (b) an order directing joint administration (but not substantive consolidation) of the Voyager Chapter 11 Cases (the “**Joint Administration Order**”);
- (c) an order approving bidding procedures in connection with the marketing and sale of the Debtors’ business (the “**Bidding Procedures Order**”);
- (d) three interim cash management orders (the “**Interim Cash Management Orders**”);
- (e) an order authorizing entry into an asset purchase agreement (the “**FTX APA**”) between OpCo and West Realm Shires Inc. (“**FTX U.S.**”); and
- (f) an order approving (I) the adequacy of the first amended disclosure statement (the “**Amended Disclosure Statement**”) relating to the second amended joint plan of the Debtors pursuant to chapter 11 of the U.S. Bankruptcy Code (the “**Second Amended Plan**”).

Affidavit of Raajan Aery sworn August 6, 2022, tab 4 of the Motion Record of the Applicant dated August 6, 2022 at paras 4; Affidavit of Raajan Aery sworn December 6, 2022, tab 3 of the Motion Record of the Applicant dated December 6, 2022 at paras 6 & 10.

15. This Court has recognized in the Canadian Proceeding several of the aforesaid orders granted in the TopCo Chapter 11 Case, including the Foreign Representative Order, the

Joint Administration Order, the Bidding Procedures Order and the Interim Cash Management Orders (collectively, the “**Previously Recognized U.S. Orders**”).

The Second Amended Plan and the FTX Bankruptcy

16. The Second Amended Plan, as described in the Amended Disclosure Statement, was propounded by the Debtors in contemplation of the eventual approval of the FTX APA by the U.S. Bankruptcy Court and the consummation of the transactions contemplated by the FTX APA and the Second Amended Plan. A hearing before the U.S. Bankruptcy Court was scheduled for December 8, 2022 to allow the Debtors to seek the approval of the FTX APA and confirmation of the Second Amended Plan (the “**Second Amended Plan Confirmation Hearing**”).

Smith Affidavit at paras 12–13.

17. On November 11 and 14, 2022, FTX U.S. and certain of its affiliates commenced proceedings under the U.S. Bankruptcy Code (collectively, the “**FTX Chapter 11 Case**”).

Smith Affidavit at para 14.

18. On November 15, 2022, the Debtors notified their stakeholders that, on account of the FTX Chapter 11 Case, (i) the transaction contemplated by the FTX APA would not proceed, (ii) approval of the FTX APA would not be sought, (iii) the voting and objection deadlines established by the Amended Disclosure Statement related to the Second Amended Plan would no longer apply and (iv) the Second Amended Plan Confirmation Hearing would be cancelled.

Smith Affidavit at paras 15 & 17.

19. Also on November 15, 2022, the U.S. Bankruptcy Court granted a fourth interim cash management order (the “**Fourth Interim Cash Management Order**”) in the TopCo Chapter

11 Case, which was subsequently recognized by this Court in the Canadian Proceeding on December 15, 2022.

Smith Affidavit at para 16.

Further Pre-Confirmation U.S. Orders

20. On January 10, 2023, the U.S. Bankruptcy Court granted, among other orders:

- (a) the Binance APA Order; and
- (b) an order scheduling a combined disclosure statement approval and plan confirmation hearing (the “**Third Amended Plan Confirmation Hearing**”) and conditionally approving the Second Amended Disclosure Statement.

Smith Affidavit at para 18 and Exhibit “I”.

21. Another hearing was held in the Voyager Chapter 11 Cases on February 7, 2023, where the U.S. Bankruptcy Court granted the Final Cash Management Order, which is a revised and final version of the Fourth Interim Cash Management Order.

Smith Affidavit at para 19.

22. The Third Amended Plan Confirmation Hearing was held on March 2, 3, 6 and 7, 2023, following which the U.S. Bankruptcy Court issued the Confirmation Order.

Smith Affidavit at para 20.

23. The decision rendered by the U.S. Bankruptcy Court on March 11, 2023 in connection with the Third Amended Plan Confirmation Hearing and the granting of the Confirmation Order (the “**Confirmation Decision**”) amended the terms of the Confirmation Order and the Third Amended Plan.

Smith Affidavit at para 21 and Exhibit “J”.

The Confirmation Order

24. The Confirmation Order, among other things,
- (a) approves of and confirms the Third Amended Plan as amended, supplemented or otherwise modified;
 - (b) approves the restructuring transactions described in, among other documents, the Third Amended Plan, including in the Restructuring Transactions Memorandum;
 - (c) provides that, upon the Effective Date, the Wind-Down Debtor shall be vested with the Wind-Down Debtor Assets (as defined in the Third Amended Plan);
 - (d) directs the Wind-Down Debtor to take such actions as it may determine necessary or desirable to carry out the purposes of the Third Amended Plan; and
 - (e) approves and authorizes the Exculpation Provisions—as described further below, the effect of the Exculpation Provisions is subject to the Stay Pending Appeal.

Smith Affidavit at para 64 and Exhibit “D”.

Appeal of the Confirmation Order, Stay Pending Appeal and Government Stipulation

25. On March 9, 2023, the United States of America and the United States Trustee (collectively, the “**Government Appellants**”) filed a notice of appeal indicating that they intend to appeal the Confirmation Order (the “**Confirmation Appeal**”) to the U.S. District Court.

Smith Affidavit at para 22 and Exhibit “K”.

26. The issues for appeal alleged by the Government Appellants all concern the Exculpation Provisions, which are provisions in the Third Amended Plan exculpating the Exculpated Parties (as defined in the Third Amended Plan) from certain liability or claims related

to negotiating, executing or implementing transactions or other acts approved by the U.S. Bankruptcy Court in connection with the Voyager Chapter 11 Cases.

Smith Affidavit at para 23 and Exhibit “L”.

27. Notwithstanding the Confirmation Appeal, the Confirmation Order is effective (except for the Exculpation Provisions) following:

- (a) a motion in the Voyager Chapter 11 Cases of the Government Appellants for a stay of the Confirmation Order pending the resolution of the Confirmation Appeal, which was dismissed by the U.S. Bankruptcy Court on March 15, 2023;
- (b) the issuance by the U.S. District Court of the Stay Order imposing the Stay Pending Appeal;
- (c) an appeal by the Debtors and the Official Committee of Unsecured Creditors of the Debtors (the “**Committee**”) of the U.S. District Court’s decision, which was dismissed by the United States Court of Appeals for the Second Circuit on April 11, 2023; and
- (d) the issuance of the Stipulation Order approving the Government Stipulation.

Smith Affidavit at para 24 and Exhibits “M”–“N”.

28. The Government Stipulation provides that the transactions contemplated by the Third Amended Plan and the Confirmation Order may go forward while the Government Appeal is litigated and resolved.

Smith Affidavit at para 25.

29. The Confirmation Appeal is pending a ruling from the U.S. District Court and a hearing thereof may be scheduled by the U.S. District Court. The disposition of the Confirmation

Appeal will not impact the Debtors' ability to implement the Third Amended Plan as required by the Confirmation Order.

Smith Affidavit at para 26.

Purported Termination of the Binance APA and pivot to the Toggle Transaction

30. On April 25, 2023, Binance U.S. sent the Debtors a notice (the “**Binance Termination Notice**”) purporting to terminate the transaction contemplated by the Binance APA and approved by the Confirmation Order.

Smith Affidavit at para 29.

31. Also on April 25, 2023, the Debtors filed a notice (the “**Toggle Notice**”) indicating that (a) they received the Binance Termination Notice, (b) they reserve all rights with respect to Binance U.S.'s purported termination of the Binance APA and (c) they intend to exercise the toggle to the self-liquidation transaction provided under the Third Amended Plan whereby the Debtors will return cryptocurrency assets and cash directly to creditors via the Voyager platform (the “**Toggle Transaction**”).

Smith Affidavit at para 30 and Exhibit “O”.

32. On May 18, 2023, the U.S. Bankruptcy Court entered the Liquidation Procedures Order approving the Liquidation Procedures, which are integral to the implementation of the Third Amended Plan and the Toggle Transaction.

Supplementary Smith Affidavit at Exhibit “A”.

The Third Amended Plan

33. The Third Amended Plan contemplates that the Debtors will complete the transaction contemplated by the Binance APA, failing which, they will complete the Toggle

Transaction. As described above, Binance U.S. has purported to terminate the Binance APA and the Debtors have signalled their intention to pursue the Toggle Transaction, which provides that the Debtors shall initiate recoveries to the holders of claims against the Debtors pursuant to the terms of the Liquidation Procedures.

Smith Affidavit at paras 46–48 and Exhibit “D”.

34. The Third Amended Plan, including the restructuring transactions memorandum included as a supplement thereto (as amended from time to time, the “**Restructuring Transactions Memorandum**”), contemplates that certain restructuring transactions will occur, including:

- (a) the rebalancing of the Debtors’ cryptocurrency portfolio (the “**Rebalancing Exercise**”), the procedure for which is approved by the Binance APA Order and Liquidation Procedures Order, as described in greater detail below;
- (b) the designation of HoldCo as the Wind-Down Debtor;
- (c) providing recoveries to Voyager’s account holders in accordance with their entitlement under the Third Amended Plan; and
- (d) the Canadian Restructuring.

Smith Affidavit at para 49 and Exhibit “D”.

35. In accordance with the Third Amended Plan, the Debtors’ estates will transfer to the Wind-Down Debtor for the purpose of, among other things, effectuating the wind-down of the Debtors, commencing, litigating or settling certain unreleased and uncompromised causes of action of the Debtors and making distributions pursuant to the terms of the Third Amended Plan,

the Plan Administrator Agreement (as defined in the Third Amended Plan) and the U.S. Bankruptcy Code.

Smith Affidavit at para 50 and Exhibit “D”.

36. The Third Amended Plan contemplates that the independent director at each Debtor shall act as a fiduciary for such Debtor in connection with matters that may implicate actual or potential intra-Debtor conflicts of interests between the Plan Administrator and the applicable Debtor(s) or the Wind-Down Debtor, including in respect of the Intercompany Claims and other claims that have been or may be asserted against TopCo. For example, issues have been raised with respect to the validity and quantum of the Intercompany Claims, which issues remain to be resolved through negotiation or litigation in the Voyager Chapter 11 Cases—those issues may affect the distributions to be made in accordance with the Third Amended Plan but do not affect the scheme of distribution set out therein.

Smith Affidavit at para 51 and Exhibit “D”.

37. The Third Amended Plan also contemplates standard releases by the Debtors and the holders of claims against, or interests in, the Debtors in favour of certain parties, including (a) the Debtors, (b) the Committee and its members, (c) certain professionals retained by the Debtors or the Committee and (d) certain directors, officers and members of senior management of the Debtors.

Smith Affidavit at para 52 and Exhibit “D”.

Plan Effectiveness

38. On May 19, 2023, the U.S. Bankruptcy Court entered a notice indicating that the Third Amended Plan had gone effective on May 19, 2023 (the “**Effective Date**”). At the Effective

Date, the Debtors, the Committee and the Plan Administrator began implementing the Toggle Transaction and the restructuring transactions contemplated by the Third Amended Plan. Such transactions will take time to implement—the Canadian Restructuring has yet to be implemented.

Supplementary Smith Affidavit at para 7 and Exhibit “D”.

PART III - ISSUES

39. The issues to be determined on this application are:
- (a) Should this Court recognize and enforce in Canada the Additional U.S. Orders, including the orders necessary to implement the Third Amended Plan?
 - (b) Should this Court recognize and enforce in Canada the Confirmation Order notwithstanding the Confirmation Appeal and the Stay of Proceedings?
 - (c) Should this Court grant the relief necessary to effect the Canadian Restructuring?

PART IV - LAW & ARGUMENT

The Additional U.S. Orders should be recognized

40. The Foreign Representative is seeking recognition of the Additional U.S. Orders under Part IV of the CCAA. Such recognition is consistent with Part IV and related case law.

41. The express purpose of Part IV of the CCAA 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.

[Companies' Creditors Arrangement Act, RSC 1985, c C-36 \[CCAA\], s 44.](#)

42. The confirmation of the Third Amended Plan is the culmination of the efforts of the Debtors, the Committee and other of the Debtors' stakeholders to maximize the value of the Debtors' estates. The Confirmation Order is the most important of the operative documents required for effectiveness of the Third Amended Plan. However, such effectiveness also relies on relief granted in the Binance APA Order and the Liquidation Procedures Order as well as many supplements to the Third Amended Plan appurtenant thereto, including the ninth amended plan supplement, which attaches the Restructuring Transactions Memorandum. The Stay Order and the Stipulation Order impact the effectiveness of the Third Amended Plan while the Confirmation Appeal is outstanding.

Smith Affidavit at para 53 and Exhibits "P"–"X"; Supplementary Smith Affidavit at para 5 and Exhibit "B".

43. Essentially, recognition of each of the Additional U.S. Orders apart from the Final Cash Management Order, which is necessary to permit the Debtors to continue operating the Cash Management System and performing Intercompany Transactions until such time as those functions are no longer required, is necessary or desirable to allow the Third Amended Plan to be implemented in Canada. Consequently, caselaw concerning the recognition and enforcement in

Canada of plans of arrangement in the context of cross-border insolvency proceedings is relevant to whether this Court should recognize the Additional U.S. Orders.

44. In considering whether it is appropriate to recognize and enforce in Canada a plan of arrangement in the context of a cross-border insolvency proceeding, Canadian courts have considered, among other factors (collectively, the “**Babcock Factors**”):

- (a) the promotion of comity and cooperation between the courts;
- (b) respect of the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless it diverges radically from the process in Canada;
- (c) the equitable and, to the extent reasonably possible, equal treatment of common or like stakeholders regardless of their location;
- (d) permitting the enterprise to reorganize as a global entity, including allowing for one jurisdiction to take charge of the principal administration of the enterprise's reorganization; and
- (e) the notice given to creditors.

[Re Xerium Technologies Inc, 2010 ONSC 3974 \[Xerium\] at paras 26–27; Re Babcock & Wilcox Canada Ltd \(2000\), 18 CBR \(4th\) 157 \(Ont Sup Ct J\) at para 21.](#)

This Court has a statutory mandate to cooperate with the TopCo Chapter 11 Case

45. The central principle guiding the exercise of the Court’s jurisdiction under Part IV of the CCAA is international comity.

[Re Hollander Sleep Products, LLC et al, 2019 ONSC 3238 \[Hollander\] at paras 41–42; Re Payless Holdings LLC, 2017 ONSC 2242 \[Payless\] at para 35; Xerium, supra, at paras 23.](#)

46. The primacy of comity in cross-border insolvency proceedings is reflected in section 52(1) of the CCAA: if an order recognizing a foreign proceeding is made, the Canadian

court must cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

CCAA, supra, s 52(1); Payless, supra, at paras 34–35.

47. As discussed above, the TopCo Chapter 11 Case was recognized by this Court as a foreign main proceeding on August 4, 2022. Consequently, this Court must cooperate with the Foreign Representative and the U.S. Bankruptcy Court in respect of the TopCo Chapter 11 Case.

48. Once a foreign main proceeding has been recognized under Part IV of the CCAA, in order to meet its statutory mandate to cooperate with the foreign main proceeding, a court may make any order that it considers appropriate if satisfied that such an order is necessary for the protection of the debtor's property or the interests of one or more creditors. Such an order may be made on any terms and conditions that the Court considers appropriate in the circumstances, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.

CCAA, supra, ss 49(1), 50 & 61(2).

49. As discussed above, this Court has already exercised such jurisdiction to recognize in Canada the Previously Recognized U.S. Orders. The relief granted by the U.S. Bankruptcy Court via the Additional U.S. Orders directly builds on the foundation laid by the Previously Recognized U.S. Orders. This Court ought to recognize the Additional U.S. Orders.

The Additional U.S. Orders accord with the CCAA

50. In considering certain of the *Babcock* Factors, this Court has held that it has the authority and obligation to recognize an order of the U.S. Bankruptcy Court confirming a plan. It has also held that such recognition (a) is precisely the kind of comity in international insolvency

contemplated by Part IV of the CCAA, (b) helps to ensure the orderly completion of the restructuring in question and (c) avoids what otherwise might have been a time-consuming and costly process were the applicant debtor required to undertake a separate restructuring in Canada.

[Xerium, supra, at paras 23 & 29.](#)

51. In fact, this Court routinely recognizes plans confirmed by the U.S. Bankruptcy Court, including liquidating plans such as the Third Amended Plan.

[Order of Justice Conway dated October 27, 2022 in Re Sungard Availability Services \(Canada\) Ltd, et al, Court File No CV-21-00679628-00CL at para 3\(a\); Order of Justice Cavanagh dated June 30, 2021 in Re Knotel, Inc, et al, Court File No CV-21-00658434-00CL at para 3\(a\).](#)

52. This Court has held that the principles that underlie the U.S. Bankruptcy Code also underlie the CCAA and that such harmony dictates in favour of recognizing a plan under the U.S. Bankruptcy Code confirmed by the U.S. Bankruptcy Court.

[Xerium, supra, at para 28.](#)

53. Collectively, the Additional U.S. Order satisfy the *Babcock* Factors. The dictates of comity are described above and the elements of the Additional U.S. Orders described below speak to the remaining factors.

The Confirmation Order

54. The Confirmation Order identifies that:

- (a) the Third Amended Plan was proposed in good faith;
- (b) no class of the Debtors' creditors voted to reject the Third Amended Plan and that, with respect to the classes of the Debtors' stakeholders that were deemed to have rejected the Third Amended Plan, the Third Amended Plan does not discriminate unfairly and is fair and equitable;

- (c) the Third Amended Plan was accepted by the requisite number of voting creditors holding the requisite value of claims;
- (d) the Debtors complied with the U.S. Bankruptcy Code in transmitting notices to their stakeholders and in soliciting and tabulating votes on the Third Amended Plan; and
- (e) the Third Amended Plan satisfies the requirements for confirmation set forth in the U.S. Bankruptcy Code.

Smith Affidavit at Exhibit “D” (Third Amended Plan) at paras 20, 25, 27, 36 & 38.

55. While recognition of the Confirmation Order is not a condition to effectiveness of the Third Amended Plan, as described above, the Confirmation Order will facilitate the cross-border restructuring as contemplated in the Third Amended Plan. The Third Amended Plan and the Confirmation Order affect TopCo and its stakeholders in Canada.

Smith Affidavit at para 65 and Exhibit “D”.

The Binance APA Order and the Liquidation Procedures Order

56. The Binance APA Order authorized the Debtors to enter into the Binance APA and to conduct the Rebalancing Exercise. The Foreign Representative is seeking recognition of the Binance APA Order because it authorizes the Rebalancing Exercise, which involves trading cryptocurrency to ensure that the proper types of coins are available for distribution to the Debtors’ customers in accordance with the Third Amended Plan. The Rebalancing Exercise is a necessary element of the Toggle Transaction and integral to the Third Amended Plan.

Smith Affidavit at paras 55–56 and Exhibits “A”–“B”.

57. While TopCo does not hold or transact in cryptocurrency for customers and will not be participating in the Rebalancing Exercise, the Third Amended Plan, which does affect TopCo, cannot function as confirmed without the Rebalancing Exercise.

Smith Affidavit at para 57.

58. Similarly, the Toggle Transaction contemplated by the Third Amended Plan cannot function without the Liquidation Procedures, which set out the terms upon which the Debtors will initiate recoveries to creditors. The Liquidations Procedures were approved by the Liquidation Procedure Order.

Smith Affidavit at paras 31 & 48; Supplementary Smith Affidavit at para 4 and Exhibit “A”.

The Stay Order and the Stipulation Order

59. The Stay Order and the Stipulation Order together provide that the Third Amended Plan may go effective except with respect to the Exculpation Provisions, which remain subject to the Stay Pending Appeal, allowing the Wind-Down Debtor to, among other things, make distributions to creditors and undertake restructuring steps, including the Canadian Restructuring.

Smith Affidavit at paras 24 & 33 and Exhibits “E”–“F”.

The Final Cash Management Order

60. The Final Cash Management Order, on a final basis, authorizes the Debtors to, among other things, continue to operate the Cash Management System and continue to perform Intercompany Transactions consistent with historical practice.

Smith Affidavit at para 62 and Exhibit “C”.

61. The Final Cash Management Order contains provisions substantially similar to those included in the Fourth Interim Cash Management Order except that it also places limits on the maximum balance in the Debtors' accounts maintained at the Bank of Montreal and waives the applicability of sections of the U.S. Bankruptcy Code that may apply to cryptocurrency tokens should they be determined to be money.

Smith Affidavit at para 63 and Exhibit "C".

None of the Additional U.S. Orders are contrary to public policy

62. Section 61(2) of the CCAA provides that nothing in Part IV prevents a court from refusing to do something that would be contrary to public policy. In *Re Hartford Computer Hardware, Inc.*, Justice Morawetz (as he then was) held that section 61(2) should be interpreted restrictively.

[CCAA, supra, s 61\(2\); Re Hartford Computer Hardware, Inc., 2012 ONSC 964 \[Hartford\] at para 18.](#)

63. While the practices and procedures set out in the U.S. Bankruptcy Code and followed by the U.S. Bankruptcy Court may differ from what is provided for under the CCAA, this Court will generally recognize an order made by the U.S. Bankruptcy Court so long as the order is not contrary to public policy. This is true even where the relief granted by the U.S. Bankruptcy Court would not necessarily be permissible under the CCAA.

[Hollander, supra, at paras 45–48; Hartford, supra, at paras 10–19.](#)

64. The Foreign Representative is not aware of any elements of the Additional U.S. Orders or the Third Amended Plan that are contrary to public policy. The Additional U.S. Orders should be recognized and given effect in Canada.

The Confirmation Order should be recognized notwithstanding the Confirmation Appeal

65. As described above, the Exculpation Provisions approved by the Confirmation Order have been stayed pursuant to the Stay Pending Appeal as limited by the Government Stipulation pending a determination of the Confirmation Appeal.

66. The Recognition Order carves out from the recognition of the Confirmation Order recognition of the Exculpation Provisions.

**Draft Recognition and Implementation Order, tab 1 of Supplementary Motion
Record of the Applicant dated May 23, 2023 at para 6.**

67. This Court has previously recognized an order of the U.S. Bankruptcy Court confirming a plan under the U.S. Bankruptcy Code notwithstanding an outstanding appeal.

[Third Report of FTI Consulting Canada Inc, in its capacity as Information Officer, dated March 8, 2018 in *Re TK Holdings Inc, et al*, Court File No CV-17-11857-00CL at para 60; Order of Justice Hailey dated March 14, 2018 in *Re TK Holdings Inc, et al*, Court File No CV-17-11857-00CL at para 3\(a\).](#)

68. Pursuant to a settlement memorialized in the Government Stipulation and approved by the U.S. District Court via the Stipulation Order, the Third Amended Plan is effective notwithstanding the Confirmation Appeal. This Court can and should recognize the Confirmation Order notwithstanding the Confirmation Appeal.

The relief necessary to effect the Canadian Restructuring should be granted

69. Related to the recognition of the Confirmation Order, the Foreign Representative is seeking ancillary relief necessary to give effect to elements of the Third Amended Plan, specifically the Canadian Restructuring.

70. The Canadian Restructuring contemplates the redemption for cancellation of all existing shares of TopCo. In order to effect such redemption for cancellation, TopCo's articles need to be amended.

71. Where this Court sanctions a plan of compromise or arrangement, this Court has jurisdiction to order that the debtor's constating instrument be amended in accordance with the plan to reflect any change that may lawfully be made under federal or provincial law.

[CCAA, supra, s 6\(2\).](#)

72. Such jurisdiction extends to proceedings under Part IV of the CCAA.

[Re Probe Resources Ltd, 2011 BCSC 552 at para 33 & 39-40.](#)

73. Such jurisdiction also allows this Court to order an amendment of the constating documents of a corporation incorporated under the BCBCA. In *Cline Mining*, Regional Senior Justice Morawetz (as he then was) ordered that the B.C.-incorporated, TSX-listed debtor's articles be amended in a manner substantially similar to those required to effect the Canadian Restructuring and further ordered that the shares of the debtor be redeemed for cancellation upon similar terms as those set out in the Recognition Order.

[Re Cline Mining Corporation, 2015 ONSC 622 at para 29; Plan Sanction Order of Regional Senior Justice Morawetz dated January 27, 2015 in Re Cline Mining Corporation, et al, Court File No CV-14-10781-00CL at para 9; Affidavit of Matthew Goldfarb sworn December 2, 2014 in Re Cline Mining Corporation, et al, Court File No CV-14-10781-00CL at para 6.](#)

74. The Information Officer recommends that this Court grant the Recognition Order.

PART V - RELIEF REQUESTED

75. The Foreign Representative requests that this Court grant the Recognition Order substantially in the form included in the Supplementary Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2023.

FASKEN MARTINEAU DuMOULIN LLP



per Daniel Richer

Lawyers for the Applicant

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Re Xerium Technologies Inc, 2010 ONSC 3974;](#)
2. [Re Babcock & Wilcox Canada Ltd \(2000\), 18 CBR \(4th\) 157 \(Ont Sup Ct J\);](#)
3. [Re Hollander Sleep Products, LLC et al, 2019 ONSC 3238;](#)
4. [Re Payless Holdings LLC, 2017 ONSC 2242;](#)
5. [Order of Justice Conway dated October 27, 2022 in Re Sungard Availability Services \(Canada\) Ltd, et al, Court File No CV-21-00679628-00CL;](#)
6. [Order of Justice Cavanagh dated June 30, 2021 in Re Knotel, Inc, et al, Court File No CV-21-00658434-00CL;](#)
7. [Re Hartford Computer Hardware, Inc, 2012 ONSC 964;](#)
8. [Third Report of FTI Consulting Canada Inc, in its capacity as Information Officer, dated March 8, 2018 in Re TK Holdings Inc, et al, Court File No CV-17-11857-00CL;](#)
9. [Order of Justice Hainey dated March 14, 2018 in Re TK Holdings Inc, et al, Court File No CV-17-11857-00CL;](#)
10. [Re Probe Resources Ltd, 2011 BCSC 552;](#)
11. [Re Cline Mining Corporation, 2015 ONSC 622;](#)
12. [Plan Sanction Order of Regional Senior Justice Morawetz dated January 27, 2015 in Re Cline Mining Corporation, et al, Court File No CV-14-10781-00CL;](#) and
13. [Affidavit of Matthew Goldfarb sworn December 2, 2014 in Re Cline Mining Corporation, et al, Court File No CV-14-10781-00CL.](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

Court may order amendment

6 (2) If a court sanctions a compromise or arrangement, it may order that the debtor’s constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

PART IV

Cross-border Insolvencies

Purpose

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.

Interpretation

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

(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.

Recognition of Foreign Proceeding

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.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

- (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
- (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

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

(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.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

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.

Commencement or continuation of proceedings

51 If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

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.

Obligations of foreign representative

53 If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- (a)** without delay, inform the court of
 - (i)** any substantial change in the status of the recognized foreign proceeding,
 - (ii)** any substantial change in the status of the foreign representative's authority to act in that capacity, and
 - (iii)** any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and
- (b)** publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Multiple Proceedings

Concurrent proceedings

54 If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

Multiple foreign proceedings

55 (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

Miscellaneous Provisions

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Foreign representative status

57 An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

Foreign proceeding appeal

58 A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Presumption of insolvency

59 For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

Credit for recovery in other jurisdictions

60 (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

- (a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and
- (b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

Court not prevented from applying certain rules

61 (1) Nothing in this Part prevents the court, on the application of a foreign represent-ative 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 THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF VOYAGER DIGITAL LTD.

APPLICATION OF VOYAGER DIGITAL LTD. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. CV-22-00683820-00CL

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

**Proceeding commenced at
Toronto**

FACTUM OF THE APPLICANT

FASKEN MARTINEAU DuMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Stuart Brotman (LSO: 43430D)

sbrotman@fasken.com

Tel: 416 865 5419

Aubrey Kauffman (LSO: 18829N)

akauffman@fasken.com

Tel: 416 868 3538

Daniel Richer (LSO: 75225G)

dricher@fasken.com

Tel: 416 865 4445

Raajan Aery (LSO: 79876C)

raery@fasken.com

Tel: 416 865 4405

Lawyers for the Applicant