

**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 JACK COOPER VENTURES, INC., JACK COOPER DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK COOPER TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP, JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

APPLICANT

**FACTUM OF THE APPLICANT
(Motion returnable October 18, 2019)**

October 17, 2019

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TO: THE SERVICE LIST

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

AND IN THE MATTER OF JACK COOPER VENTURES, INC., JACK COOPER
DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER
HOLDINGS CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO
HANDLING CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS,
LLC, AUTO & BOAT RELOCATION SERVICES, LLC, AXIS LOGISTIC
SERVICES, INC., JACK COOPER CT SERVICES, INC., JACK COOPER RAIL
AND SHUTTLE, INC., JACK COOPER INVESTMENTS, INC., NORTH
AMERICAN AUTO TRANSPORTATION CORP., JACK COOPER
TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK
COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED
PARTNERSHIP, JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 49 OF
THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36,
AS AMENDED

APPLICANT

FACTUM OF THE APPLICANT

PART I - NATURE OF THE MOTION

1. Jack Cooper Ventures Inc. ("**JCV**") and the 18 other debtors in possession that filed voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code (the "**Chapter 11 Debtors**") recently obtained an order from the United States Bankruptcy Court for the Northern District of Georgia (the "**U.S. Court**") approving the sale of substantially all of the Chapter 11 Debtors' assets (including the assets of the JC Canada Group (defined below)) pursuant to an Asset Purchase Agreement dated August 23, 2019, as amended, among other relief (the "**Sale Order**").

2. This factum is filed in support of a motion brought by JCV, in its capacity as foreign representative (the “**Foreign Representative**”) of the Chapter 11 Debtors, seeking an order (the “**Sale Recognition and Vesting Order**”), *inter alia*:

- (a) recognizing and enforcing the Sale Order and Pension Approval Order (as defined in the May Affidavit) pursuant to section 49 of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”); and
- (b) approving the sale of the Acquired Assets of the Chapter 11 Debtors over which the Ontario Court has jurisdiction (the “**Canadian Acquired Assets**”) to the Buyer or one of its affiliates (a “**Buyer Designee**”), as applicable, vesting the Canadian Acquired Assets in and to the Buyer or a Buyer Designee, as applicable, and authorizing the Chapter 11 Debtors to take such steps and execute such additional documents as may be necessary or desirable for the completion of the sale of the Canadian Acquired Assets to the Buyer or Buyer Designee; and
- (c) terminating these CCAA recognition proceedings and discharging and releasing the Information Officer upon closing of the sale transaction contemplated by the Asset Purchase Agreement (the “**Sale Transaction**”).

3. The Chapter 11 Debtors have acted in good faith and in the exercise of their business judgment to maximize the value of the Acquired Assets through the court-approved sale process and, with the assistance of their financial advisor, Houlihan Lokey, Inc. (“**HL**”), have thoroughly canvassed the market for the sale of the Acquired Assets. The Asset Purchase Agreement represents the only offer received for the Acquired Assets.

4. The Sale Transaction will: (a) preserve the employment of over 3000 jobs in North America, including all of the approximately 181 individuals in Canada employed by one or more members of the JC Canada Group (the “**Transferred Employees**”); (b) ensure ongoing pension and benefit coverage for the Transferred Employees; (c) ensure continued performance of the Canadian Acquired Contracts and maintain customer relationships; and (d) minimize the losses of trade and other unsecured creditors. Absent the Sale Transaction, the Chapter 11 Debtors are facing an immediate value-destructing liquidation.

5. The Foreign Representative submits that this Court has the jurisdiction to grant the Sale Recognition and Vesting Order and that it is appropriate to do so in the circumstances.¹

PART II - THE FACTS

A. Background

6. The JC Group (consisting of the Chapter 11 Debtors and their other non-debtor affiliates) is a leading provider of finished vehicle logistics in North America for both new and used vehicles, as well as a provider of logistical services in select non-automotive markets.

7. The JC Canada Group (consisting of the Canadian Chapter 11 Debtors) operate 11 trucking terminals in Canada and employ approximately 181 employees (all of whom are resident in Canada), of which 15 are independent contractors (the “**Owner/Operators**”). The JC Canada Group is entirely dependent on and integrated with U.S. operations. On a standalone basis, the JC Canada Group is not profitable. Prior to the Petition Date, the JC Canada Group only remained cash flow positive because the U.S. Chapter 11 Debtors provide all back office and overhead

¹ Capitalized terms used herein and not otherwise defined shall have the meaning given to them in Affidavit #4 of Greg R. May, sworn October 15, 2019 (the “**May Affidavit**”). All dollar references herein are in U.S. dollars unless otherwise specified.

services to the JC Canada Group. As of June 30, 2019, the JC Canada Group owed intercompany debts of approximately US\$17 million to its U.S. affiliates.

8. On August 6, 2019 (the “**Petition Date**”), each of the Chapter 11 Debtors filed voluntary petitions for relief (the “**Petitions**”) pursuant to Chapter 11 of the U.S. Bankruptcy Code with the U.S. Court (the “**Chapter 11 Cases**”).²

9. By Orders dated August 9, 2019, the Honourable Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the “**Ontario Court**”) recognized the Chapter 11 Cases as “foreign main proceedings” as defined in section 45 of the CCAA, recognized the appointment of the Foreign Representative, appointed Alvarez & Marsal Canada Inc. as Information Officer, recognized certain “first day” orders made by the U.S. Court, and granted a stay of proceedings in favour of the Chapter 11 Debtors (the “**Initial Recognition Orders**”).³

10. The Foreign Representative also obtained authority to segregate CDN \$500,000 of JC Canada Group funds to be held in trust by the Information Officer for the benefit of Owner/Operators and third party carriers engaged by the JC Canada Group to haul goods as security for the payment of amounts due and accruing to them in the ordinary course of business following the Petition Date (the “**Load Broker Funds**”).⁴

11. Since the Initial Recognition Orders, the Ontario Court has recognized several other interim and final orders entered by the U.S. Court, including the Interim and Final DIP Orders, the Interim and Final Cash Management Orders and the Bid Procedures Order (described below).⁵

² May Affidavit, para 5.

³ May Affidavit, paras 7-8.

⁴ May Affidavit, para 8.

⁵ May Affidavit, paras 10-14.

12. The Chapter 11 Cases are funded by two separate DIP loan facilities:
- (a) a US\$85 million asset-based lending credit facility among the Chapter 11 Debtors and their prepetition ABL lenders (the “**DIP ABL Facility**”). JC Canada, LP1 and LP2 are borrowers under the DIP ABL Facility up to an amount of US\$5 million (the “**Canadian DIP Sub-Facility**”). The JC Canada Group is jointly and severally liable for all the outstanding obligations under the DIP ABL Facility (including those incurred by the U.S. Chapter 11 Debtors; and
 - (b) a US\$15 million term loan facility (the “**DIP Term Facility**”) with Wilmington Trust, National Association, as administrative agent, on behalf of the lenders party thereto. The JC Canada Group is a guarantor under the DIP Term Facility, but not a borrower.

B. Sale Approval Motion and Sale Order

(a) Asset Purchase Agreement

13. Faced with declining revenues, onerous pension obligations in the U.S., and an unsustainable capital structure, the Chapter 11 Debtors commenced the Chapter 11 Cases to pursue a restructuring process and consummate a value maximizing sale of their business to the highest or otherwise best bidder.⁶

14. In this regard, and in order to streamline the Chapter 11 Cases and minimize any impact on the Chapter 11 Debtors’ operations, the Chapter 11 Debtors negotiated a comprehensive restructuring transaction prior to the Petition Date, embodied in a Restructuring Support

⁶ May Affidavit, para 16.

Agreement dated August 6, 2019 (the “**RSA**”) with holders of claims under the 1.5 Lien Term Loan and Second Lien Term Loan (together, the “**Junior Term Loan Lenders**”) and the Cerberus Senior Secured Term Loan.⁷

15. Pursuant to the RSA, the Junior Term Loan Lenders agreed that a newly formed entity owned by or on behalf of an investment vehicle affiliated with the Junior Term Loan Lenders (the “**Buyer**”) would act as a stalking horse bidder and credit bid certain of their claims under the 1.5 Lien Term Loan, the Second Lien Term Loan and the DIP Term Facility as consideration for a sale of substantially all of the Chapter 11 Debtors’ assets, including the Canadian Acquired Assets (the “**Acquired Assets**”) to the Buyer or a Buyer Designee, as applicable.⁸

16. In accordance with the RSA, the Chapter 11 Debtors and the Buyer, JC Buyer Company, Inc., entered into an Asset Purchase and Sale Agreement dated August 23, 2019 (as amended, the “**Asset Purchase Agreement**”) for the sale of the Acquired Assets.⁹

17. The Purchase Price under the Asset Purchase Agreement consists of:¹⁰

- (a) cash in an aggregate amount equal to: (a) all fees and expenses incurred on or prior to the closing date of the Asset Purchase Agreement by any professional retained by the Chapter 11 Debtors, the Unsecured Creditors’ Committee (“**UCC**”), or any other official committee appointed in the Chapter 11 Cases, plus (b) an amount representing the aggregate amount sufficient to satisfy all reasonable costs and expenses of winding down the Chapter 11 Debtors and their affiliates’ estates up to

⁷ May Affidavit, para 16.

⁸ May Affidavit, para 17.

⁹ May Affidavit, para 18. For a summary of the material terms of the Asset Purchase Agreement see paras 18(a)-(e) of the May Affidavit.

¹⁰ May Affidavit, para 18(c).

a maximum of US\$250,000 or such greater amount as agreed by the Buyer in its sole discretion (the “**Wind-Down Amount**”), plus (c) to the extent not covered by the foregoing, an additional amount that shall be sufficient to pay for any assets that cannot be acquired through a credit bid (if any), provided that such additional cash shall not exceed US\$1,000,000 (collectively, the “**Cash Consideration**”);

- (b) the assumption by the Buyer of the Assumed Liabilities, including the assumption of (i) all obligations under the ABL Exit Facility and the Cerberus Senior Secured Term Loan, and (ii) the obligation to pay all cure costs to the counterparties of the applicable Assumed Contracts; and
- (c) the release of all Chapter 11 Debtors that are borrowers or guarantors under the 1.5 Lien Term Loan, the Second Lien Term Loan and/or the DIP Term Facility of the obligations arising thereunder, in an amount not less than (a) US\$425,000,000, minus (b) the Cash Consideration, minus (c) the aggregate outstanding principal amount under the DIP ABL Facility, the Canadian DIP Sub-Facility and the Cerberus Senior Secured Term Loan.

18. Although the Acquired Assets are being sold free and clear of all Claims and Liens except Assumed Liabilities, this does not affect liabilities existing under the Canadian CBAs, in respect of which, pursuant to section 2.3(e) of the Asset Purchase Agreement, the Buyer has agreed to assume under applicable laws.¹¹

¹¹ May Affidavit, para 35(f).

19. On September 3, 2019, the U.S. Court granted the Bid Procedures Order, as recognized and approved by this Court on September 9, 2019, which found, among other things, that:¹²

- (a) the Asset Purchase Agreement was in the best interests of the Chapter 11 Debtors, their creditors, and their estates and performance by the Chapter 11 Debtors of their obligations thereunder represented a prudent exercise of the Chapter 11 Debtors sound business judgment;
- (b) the approval of the Asset Purchase Agreement was a necessary and constructive step toward the consummation of a sale of all or substantially all of the Chapter 11 Debtors' assets, and the Asset Purchase Agreement allowed the Chapter 11 Debtors to continue to solicit the highest or otherwise best bid for their assets through the Bidding Procedures; and
- (c) the Asset Purchase Agreement was negotiated by the Chapter 11 Debtors and the Buyer at arm's-length and in good faith.

(b) No Other Bids Received in the Sales Process

20. The Asset Purchase Agreement was subject in all respects to higher or otherwise better offers that may emerge through the sale process. To that end, the Bid Procedures Order established a competitive marketing and auction process for the sale of the Chapter 11 Debtors' assets (the "**Bidding Procedures**").¹³

¹² May Affidavit, para 20.

¹³ May Affidavit, para 22.

21. Through the marketing process, the Chapter 11 Debtors and HL contacted 104 potential strategic and financial parties in the United States, Canada, and internationally to canvass interest in a potential acquisition of the Chapter 11 Debtors' assets.¹⁴

22. Of the 104 parties contacted by HL, five (5) parties executed Confidentiality Agreements, thereby obtaining access to the Chapter 11 Debtors' data room and the ability to engage in discussions with management of the Chapter 11 Debtors and HL.¹⁵

23. Despite the best efforts of the Chapter 11 Debtors and HL, the Chapter 11 Debtors did not receive any formal indications of interest, let alone any Qualified Bids (apart from the Asset Purchase Agreement) for the Acquired Assets prior to (or subsequent to) the expiration of the Bid Deadline. Moreover, and notwithstanding that the Bidding Procedures expressly permitted potential purchasers to bid for any part of the Chapter 11 Debtors' assets, including the Canadian Acquired Assets, no expressions of interest or Qualified Bids (or bids of any kind apart from the Asset Purchase Agreement) were submitted for the Canadian Acquired Assets.¹⁶

24. Accordingly, since the Buyer was the only party to submit a Qualified Bid, the Auction scheduled for October 4, 2019 was cancelled and the Buyer was declared to be the Successful Bidder.¹⁷

(c) U.S. Court Grants the Sale Order and the Pension Approval Order

25. On October 11, 2019, the U.S. Court granted the Sale Order, the entry of which was fully supported by each of the Chapter 11 Debtors' primary stakeholders, including the UCC. The UCC

¹⁴ May Affidavit, paras 23-24.

¹⁵ May Affidavit, para 25.

¹⁶ May Affidavit, paras 26 & 39.

¹⁷ May Affidavit, para 27.

agreed to support the Sale Transaction on the basis of (i) the preservation of a going-concern business; (ii) the preservation of employment for substantially all of the Chapter 11 Debtors' employees; and (iii) the payment by the Buyer of US\$750,000 into an escrow fund on Closing for the benefit of unsecured creditors of the Chapter 11 Debtors with proven claims in accordance with their pro-rata entitlements (the "**Unsecured Creditors' Escrow Fund**").¹⁸

26. In approving the Sale Order, the U.S. Court found that:¹⁹

- (a) the credit bid and release by the Buyer of the obligations under the 1.5 Lien Term Loan, the Second Lien Term Loan and the DIP Term Facility, as well as adequate protection obligations granted pursuant to the DIP Orders, plus the assumption of the Assumed Liabilities and the Cash Consideration, was a valid and proper offer pursuant to the Bidding Procedures Order and the U.S. Bankruptcy Code;
- (b) the Bidding Procedures were substantively and procedurally fair to all parties and all potential bidders and afforded a full, fair and reasonable opportunity for any person to make a higher or otherwise better offer to purchase the Acquired Assets;
- (c) the Chapter 11 Debtors conducted the sale process without collusion and in accordance with the Bidding Procedures;
- (d) entry into the Asset Purchase Agreement, and performance of the Sale Transaction, constitutes the exercise of the Chapter 11 Debtors' sound business judgment and is in the best interest of the Chapter 11 Debtors, their estates and creditors, and all parties in interest;

¹⁸ May Affidavit, paras 29 & 31.

¹⁹ May Affidavit, para 32.

- (e) the Asset Purchase Agreement constitutes the highest and best offer for the Acquired Assets; and
- (f) the Asset Purchase Agreement and the closing of the Sale Transaction presents the best opportunity for the Chapter 11 Debtors to realize the highest value for the Acquired Assets and to avoid further decline and devaluation of the Acquired Assets.

27. The Asset Purchase Agreement requires that the Ontario Court recognize the Sale Order and vest the Canadian Acquired Assets in the name of the Buyer or Buyer Designee within 5 calendar days of the entry of the Sale Order by the U.S. Court.²⁰

28. The U.S. Court also granted an order on October 11, 2019 (the “**Pension Approval Order**”) authorizing Jack Cooper Transport Company, Inc. and Auto Handling Corporation (together, “**Old JC**”) to enter into a Pension Plan Agreement and Release with the Buyer and the Central States, Southeast and Southwest Areas Pension Fund (“**CSPF**”). Among other things, the Pension Approval Order acknowledges the withdrawal by Old JC from the CSPF pension fund and provides that the Buyer will not have any obligation with respect to Old JC’s resulting withdrawal liability or otherwise with respect to Old JC’s participation in the CSPF pension fund, other than the special contribution detailed in the Pension Plan Agreement and Release.²¹

(d) Treatment of Canadian Unsecured Creditors

29. Pursuant to the Asset Purchase Agreement, the Buyer will assume the Assumed Liabilities as partial consideration for the Acquired Assets, including the Canadian Acquired Assets. These

²⁰ May Affidavit, para 34.

²¹ May Affidavit, para 15(c).

Assumed Liabilities include: (i) accrued post-filing accounts payable; (ii) accrued payroll obligations; (iii) liabilities under the Canadian CBAs; (iv) liabilities under the pension and benefit plans required to be provided by the Buyer pursuant to the Canadian CBAs and (v) liabilities under Assumed Contracts. The foregoing Assumed Liabilities also include amounts owing to Owner/Operators and third party carriers as at the Closing Date. In addition, the Buyer has advised that it intends on extending offers of employment to all of the employees of the Canadian Chapter 11 Debtors.²²

30. Under the terms of a Stipulation of Settlement entered into between the Chapter 11 Debtors, the Buyer, the ABL Agent, Cereberus, the Junior Term Loan Lenders, and the DIP Lenders, the Buyer will fund US750,000 into the Unsecured Creditors' Escrow Fund on closing for the benefit of unsecured creditors of the Chapter 11 Debtors with proven claims, including unsecured creditors of the Canadian Chapter 11 Debtors.²³

C. Discharge of the Certain CCAA Priority Charges

31. As described above, the DIP Term Loan obligations will be credit bid and released in partial consideration for the Acquired Assets. On Closing, the Buyer and/or its affiliates will enter into an Exit Revolver Facility in full and final satisfaction, compromise, settlement, release, discharge and exchange for all obligations outstanding under the DIP ABL Facility (including the Canadian sub-facility). In addition, subject to approval by the Court, the outstanding fees and disbursements of the Information Officer and its counsel will be paid or reserved for on Closing. Accordingly, the

²² May Affidavit, paras 18(b) & 35.

²³ May Affidavit, para 29.

proposed form of Sale Recognition and Vesting Order provides for a discharge and release of the DIP ABL Charge, the DIP Term Loan Charge and the Administration Charge on Closing.²⁴

D. Termination of these CCAA Proceedings

32. The Chapter 11 Debtors anticipate that following closing of the Asset Purchase Agreement, these CCAA recognition proceedings will terminate and the Information Officer will be discharged. Each member of the JC Canada Group and the other Chapter 11 Debtors will thereafter be wound-down utilizing the Wind-Down Amount funded by the Buyer on Closing.²⁵

PART III -THE ISSUES

33. The sole issue on this motion is whether this Court should grant the Sale Recognition and Vesting Order.

PART IV - THE LAW

A. This Court has jurisdiction to grant the Sale Recognition and Vesting Order under Part IV of the CCAA

34. This Court has recognized the Chapter 11 Cases as a “foreign main proceeding” pursuant to sections 47 and 48 of the CCAA.²⁶ When a foreign main proceeding has been recognized under Part IV of the CCAA, section 49 empowers this Court to make any order that it considers appropriate to protect the debtor’s property or the interest of one or more creditors.²⁷ The Court’s discretion is broad: an order under Part IV “may be made on any terms and conditions that the court considers appropriate in the circumstances”.²⁸

²⁴ May Affidavit, para 47.

²⁵ May Affidavit, paras 49-51.

²⁶ May Affidavit, para 7; *Jack Cooper Ventures, Inc et al (Re)*, (August 9, 2019), Ont SCJ [Commercial List], Court File No CV-19-625200-00CL (Initial Recognition Order) [*Jack Cooper Initial Recognition Order*] at para 3.

²⁷ CCAA s 49(1).

²⁸ CCAA s 50.

35. It is appropriate for this Court to grant the Sale Recognition and Vesting Order, and such relief is necessary to effect the Asset Purchase Agreement and to protect the interests of the Chapter 11 Debtors' creditors and other stakeholders. This Court thus has jurisdiction to grant the Sale Recognition and Vesting Order.

(a) The Sale Recognition and Vesting Order satisfies the standard of Part IV of the CCAA

36. Section 49(1) of the CCAA empowers this Court to make any order it considers appropriate in a Part IV proceeding if the order is "necessary for the protection of the debtor company's property or the interests of a creditor or creditors." The Sale Recognition and Vesting Order meets this standard.

37. The central principle animating the exercise of the Court's discretion under Part IV is comity, which is embodied in sections 44(a) and 52(1) of the CCAA.²⁹ Comity mandates that Canadian courts should recognize and enforce the judicial acts of foreign courts, provided that those foreign courts have assumed jurisdiction on a basis consistent with the principles of order, predictability, and fairness. To that end, Canadian courts have consistently emphasized comity and cooperation between courts across jurisdictions to facilitate successful cross-border restructurings.³⁰ Courts in Canada and the United States have made particular efforts to complement, coordinate and accommodate each other's proceedings.³¹

38. The Sale Recognition and Vesting Order is necessary for the protection of the interests of the Chapter 11 Debtors' creditors and other stakeholders. The Asset Purchase Agreement

²⁹ *Babcock & Wilcox Canada Ltd (Re)*, 2000 CarswellOnt 704 (SCJ [Commercial List]) [*Babcock & Wilson*] at paras 6 & 9-13; *Olympia & York Developments Ltd v Royal Trust Co*, 1993 CarswellOnt 212 (Ct J [Gen Div]) at para 5.

³⁰ *Caesars Entertainment Operating Co (Re)*, 2015 ONSC 712 at para 38.

³¹ *Hartford Computer Hardware Inc (Re)*, 2012 ONSC 964 [*Hartford*] at paras 14-15 & 17; *Massachusetts Elephant & Castle Group Inc (Re)*, 2011 ONSC 4201 [*Elephant & Castle*] at para 39; *Babcock & Wilson* at para 9.

represents the highest and best offer (in fact, the only offer) for the Acquired Assets, including the Canadian Acquired Assets. Absent the closing of the Sale Transaction, the Chapter 11 Debtors are surely facing a value-destructing liquidation of their business. Thus, the Asset Purchase Agreement and the closing of the Sale Transaction therein presents the only opportunity for the Chapter 11 Debtors to preserve the business as a going-concern and preserve employment for substantially all of their employees, including all of their Canadian employees.³²

39. Moreover, the Sale Recognition and Vesting Order is fully supported by each of the Chapter 11 Debtors' primary stakeholders, including: (a) 100% of the holders of secured debt; (b) CSPF, the largest unsecured creditor of the Chapter 11 Debtors with unsecured withdrawal liability claims in excess of US\$2.1 billion, (c) the Chapter 11 Debtors' two largest unions – the International Brotherhood of Teamsters and the International Association of Machinists and Aerospace Workers, (d) GM, the largest customer of the Chapter 11 Debtors, and (e) the UCC.³³

(b) Canadian Courts have recognized U.S. Sale Orders in other Part IV Proceedings

40. Comity, cooperation, and accommodation with U.S. Courts have guided CCAA courts in cross-border insolvency proceedings.³⁴ Canadian courts will generally recognize sale and plan approval orders granted by U.S. Courts in Chapter 11 cases that are foreign main proceedings.³⁵

41. Canadian courts will not lightly second-guess the decisions made by a U.S. court in a foreign main proceeding. In a foreign non-main proceeding under Part IV, Canada has an

³² May Affidavit, paras 32, 38 & 41.

³³ May Affidavit, para 46.

³⁴ *Payless Holdings Inc LLC (Re)*, 2017 ONSC 2242 at para 35; *Ultra Petroleum Corp (Re)*, 2017 YKSC 23 [*Ultra Petroleum*] at paras 8-9.

³⁵ See for example, *Lightsquared Inc (Re)*, 2015 ONSC 2309; *Xerium Technologies Inc (Re)*, 2010 ONSC 3974 [*Xerium*].

“ancillary role”.³⁶ So long as the U.S. court’s orders are not contrary to public policy or the purposes of the CCAA, Canadian courts will give deference to the judgment of a U.S. court charged with overseeing a restructuring.³⁷

42. The Sale Recognition and Vesting Order satisfies many of the contextual factors Canadian courts have considered when recognizing U.S. court orders in a Part IV proceeding:³⁸

- (a) All of the Chapter 11 Debtors operate on an integrated basis.³⁹
- (b) The Sale Order and the Pension Approval Order were made by the U.S. Court in accordance with well-established procedures and practices.⁴⁰
- (c) Canada is an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors.⁴¹
- (d) The JC Canada Group are Chapter 11 Debtors and had the same access and participation in the Chapter 11 proceedings as the other Chapter 11 Debtors.
- (e) Recognition of the Sale Order and the Pension Approval Order are necessary to ensure the fair and efficient administration of this cross-border insolvency. Such recognition is necessary to effect the Asset Purchase Agreement and to protect the interests of the Chapter 11 Debtors’ creditors and other stakeholders.

³⁶ *Babcock & Wilson* at para 21.

³⁷ *Hartford* at paras 14-15 and 17; *Elephant & Castle* at para 39.

³⁸ *Xerium* at para 27; *Ultra Petroleum* at para 9; *Babcock & Wilson* at para 21.

³⁹ May Affidavit, para 40.

⁴⁰ May Affidavit, para 32.

⁴¹ As acknowledged by this Court when it granted the Initial Recognition Order in which the Chapter 11 proceedings were recognized as Foreign Main Proceedings: *Jack Cooper Initial Recognition Order* at para 3.

B. The Sale Recognition and Vesting Order meets the standards for sale approval under section 36 of the CCAA

43. When considering whether to recognize a sale approval order granted by a foreign court in a Part IV proceeding, Canadian courts must determine whether the order is “necessary for the protection of the debtor company’s property or the interests of a creditor or creditors”, pursuant to section 49(1) of the CCAA. In making this determination, courts may consider the factors governing sale approval under section 36(3) of the CCAA:

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

44. These overlap to a certain degree with the *Soundair*⁴² factors that governed sale transactions under pre-amendment CCAA case law. The *Soundair* factors were considered in *Re Digital Domain Media Group Inc*, a case that recognized a sale order granted in a U.S. foreign main proceeding.⁴³ The *Soundair* test considered: (a) whether sufficient efforts were made to obtain the best price and that the debtor had not acted improvidently; (b) whether the interests of all parties were considered; (c) the integrity and efficacy of the process; and (d) whether there was any unfairness in working out the process.

⁴² *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA).

⁴³ 2012 BCSC 1567 at para 15.

45. The Foreign Representative submits that, taking into account the *Soundair* test, the relevant factors in section 36(3) of the CCAA, and the requirement to protect the interests of creditors pursuant to section 49(1), the Sale Recognition and Vesting Order satisfies the standard for a sale approval under the CCAA.

46. First, the sale process was reasonable. As described above, the Chapter 11 Debtors and HL undertook a comprehensive marketing process to engage the interest of bidders. Through the marketing process, the Chapter 11 Debtors and HL contacted 104 potential strategic and financial parties in the United States, Canada, and internationally to canvass interest in a potential acquisition of the Chapter 11 Debtors' assets. Throughout the process, the Chapter 11 Debtors' management team and HL worked to address questions and issues raised by potential bidders.⁴⁴

47. The Chapter 11 Debtors conducted the sale process without collusion and in accordance with the Bidding Procedures. The Bidding Procedures, which were recognized by this Court, were substantively and procedurally fair to all parties and all potential bidders and afforded a full, fair and reasonable opportunity for any person to make a higher or otherwise better offer to purchase the Acquired Assets.⁴⁵

48. Moreover, with the assistance of HL, the Chapter 11 Debtors, in their business judgment, determined prior to the Petition Date that no benefit would be realized by the Chapter 11 Debtors by any stand-alone process for the marketing of the Canadian Acquired Assets. All of the Chapter 11 Debtors operate on an integrated basis. The JC Canada Group is not profitable on a stand-alone basis. In any event, the Bidding Procedures expressly permitted potential purchasers to bid for any part of the Chapter 11 Debtors' assets, including the Canadian Acquired Assets. No bids of any

⁴⁴ May Affidavit, paras 23-25.

⁴⁵ May Affidavit, para 32.

kind, apart from the Asset Purchase Agreement, were submitted for the Canadian Acquired Assets.⁴⁶

49. Second, the interests of all parties were considered. Notice of the motion before the U.S. Court seeking approval of the Sale Order was served by the Chapter 11 Debtors' noticing agent (Prime Clerk) on the core service list for the Chapter 11 Debtors⁴⁷ and posted on the website maintained by Prime Clerk for the Chapter 11 Cases, and notice of the present motion was served on the Canadian Service List.

50. As described above, on October 10, 2019, the Chapter 11 Debtors entered a Stipulation of Settlement with the UCC, the Buyer, the ABL Agent, Cereberus, the Junior Term Loan Lenders, and the DIP Lenders settling all disputes and issues relating to, among other things, the Asset Purchase Agreement, the transfer and waiver of the Acquired Assets, and the distribution of the proceeds from the Chapter 11 Debtors' estates.⁴⁸

51. The Chapter 11 Debtors were also able to resolve all other objections relating to the proposed Sale Order prior to the date of the hearing thereof, such that, at the time of the Sale Order the proposed relief was fully supported by all primary stakeholders.⁴⁹

52. Third, the Information Officer is of the view that the Sale Transaction and the proposed recognition of the Sale Order is reasonable in the circumstances.⁵⁰

53. Fourth, the consideration to be received for the Acquired Assets is appropriate. The Chapter 11 Debtors exercised their business judgment to conclude that the consideration received was fair

⁴⁶ May Affidavit, para 40.

⁴⁷ See Affidavit of Service of Christian Rivera, sworn August 7, 2019.

⁴⁸ May Affidavit, para 29.

⁴⁹ May Affidavit, para 46.

⁵⁰ Third Report of the Information Officer, para 54.

and reasonable. This conclusion was approved by the U.S. Court. The consideration offered in the Asset Purchase Agreement is the best and only offer for the assets. To the extent that there are creditors of the Canadian Chapter 11 Debtors with unsecured claims that are not assumed by the Buyer on the Closing Date, any such creditors with proven claims will be treated the same as unsecured creditors of the U.S. Chapter 11 Debtors, including being entitled to participate in the distribution of the US\$750,000 Escrow Fund in accordance with their pro-rata entitlements.⁵¹

54. Moreover, unsecured creditors of the Canadian Chapter 11 Debtors are unlikely to fare materially better in a full liquidation. As a result of the complete withdrawal of Old JC and their controlled group from the Pension Plan, CSPF could seek to file a US\$2.1 billion claim against each of the Canadian Chapter 11 Debtors on account of withdrawal liability under the *Employment Retirement Income Security Act of 1974*, as amended (“**ERISA**”).⁵² Even if the ERISA claims are ultimately determined to be invalid under Canadian law,⁵³ litigation of such claim would likely drain whatever limited estate resources remain and significantly delay the timing of any distributions to Canadian creditors.

55. Further, even if CSPF's claim was dismissed, the approximately US\$16.9 million intercompany balance owing by the Canadian Chapter 11 Debtors to their U.S. affiliates would constitute the largest unsecured claim against the Canadian Chapter 11 Debtors and the U.S. Chapter 11 Debtors would, based on relative claim amounts, be entitled to approximately 97% of any distribution made.

⁵¹ May Affidavit, para 37.

⁵² May Affidavit, paras 32, 38 & 43-44.

⁵³ See *Walter Energy Canada Holdings, Inc (Re)*, 2017 BCSC 709. This decision was subsequently appealed but the dispute was settled before the appeal was heard.

56. Finally, the Asset Purchase Agreement represents the best result for all stakeholders. The Sale Transaction will: (a) preserve the employment of approximately 3,000 jobs in North America, including all of the approximately 181 individuals in Canada employed by one or more members of the JC Canada Group; (b) ensure ongoing pension and benefit coverage for the Transferred Employees; (c) ensure continued performance of the Canadian Acquired Contracts and maintain customer relationships; and (d) minimize the losses of trade and other unsecured creditors.⁵⁴ Absent the Sale Transaction, the Chapter 11 Debtors are facing an immediate value-destructing liquidation.

C. It is Appropriate to Authorize the Assignment of the Canadian Assumed Contracts to the Buyer

57. Canadian Courts have recognized orders made by foreign courts authorizing the assignment of agreements to proposed purchasers in connection with the consummation of a Sale Transaction.⁵⁵

58. The CCAA allows the court to make orders assigning rights and obligations of debtor companies under agreements upon notice to every party to an agreement and the monitor. Factors to be considered in deciding whether to make the order requested include, but are not limited to:

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

⁵⁴ May Affidavit, para 41.

⁵⁵ *Hartford Computer Hardware, Inc (Re)*, (March 9, 2012), Ont SCJ [Commercial List], Court File No CV-11-9514-00CL (Recognition, Approval and Vesting Order).

(c) whether it would be appropriate to assign the rights and obligations to that person.⁵⁶

59. All of the Canadian contract counterparties with consent rights whose contracts are being assigned (“**Canadian Assumed Contracts**”) were served in the Chapter 11 Cases with notice of the potential assignment of their contract to the Buyer and the Chapter 11 Debtors’ determination of the cure costs, if any, relating thereto and have been given notice and served with the Notice of Motion for the present motion.

60. Further, the Sale Order granted by the U.S. Court provides that the Chapter 11 Debtors have demonstrated that it is an exercise of their sound business judgment to assign the Assumed Contracts (including the Canadian Assumed Contracts) to the Buyer, the assignment is in the best interests of the Chapter 11 Debtors, the Assumed Contracts are an integral part of the Acquired Assets being purchased by the Buyer and the Buyer has demonstrated adequate assurance of future performance with respect to the Assigned Contracts. The Sale Order also provides that the Buyer shall pay all cure costs associated with the Assumed Contracts promptly after closing of the sale transaction under the Asset Purchase Agreement.

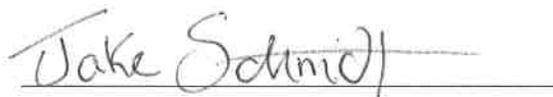
61. The assignment of the Canadian Assumed Contracts does not disadvantage the Canadian contract counterparties, nor is the proposed assignment contrary to the CCAA or in violation of public policy. The approval of the Sale Order authorizing the assignment of the Assumed Contracts, including the Canadian Assumed Contracts, was fair and reasonable and therefore, is appropriate in the circumstances.

⁵⁶ CCAA, s 11.3.

PART V - RELIEF REQUESTED

62. For the foregoing reasons, the Applicant requests that this Court grant the Sale Recognition and Vesting Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2019

A handwritten signature in black ink that reads "Jake Schmidt". The signature is written in a cursive style and is positioned above a horizontal line.

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SCHEDULE A - LIST OF AUTHORITIES

Case Law

1. *Babcock & Wilcox Canada Ltd (Re)*, 2000 CarswellOnt 704 (SCJ [Commercial List])
2. *Caesars Entertainment Operating Co (Re)*, 2015 ONSC 712
3. *Digital Domain Media Group Inc, (Re)*, 2012 BCSC 1567
4. *Hartford Computer Hardware Inc, (Re)*, 2012 ONSC 964
5. *Hartford Computer Hardware, Inc (Re)*, (March 9, 2012), Ont SCJ [Commercial List], Court File No CV-11-9514-00CL (Recognition, Approval and Vesting Order)
6. *Jack Cooper Ventures, Inc et al (Re)*, (August 9, 2019), Ont SCJ [Commercial List], Court File No CV-19-625200-00CL (Initial Recognition Order)
7. *Lightsquared Inc (Re)*, 2015 ONSC 2309
8. *Massachusetts Elephant & Castle Group Inc (Re)*, 2011 ONSC 4201
9. *Olympia & York Developments Ltd v Royal Trust Co*, 1993 CarswellOnt 212 (Ct J [Gen Div])
10. *Payless Holdings Inc LLC, (Re)*, 2017 ONSC 2242
11. *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA)
12. *Ultra Petroleum Corp (Re)*, 2017 YKSC 23
13. *Walter Energy Canada Holdings, Inc (Re)*, 2017 BCSC 709
14. *Xerium Technologies Inc (Re)*, 2010 ONSC 3974

SCHEDULE B - STATUTES

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

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

[...]

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or

provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[...]

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

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

[...]

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.

[...]

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.

[...]

Other orders

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

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

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

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

[...]

Terms and conditions of orders

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

[...]

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.

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

Court File No: CV-19-625200-00CL

AND IN THE MATTER OF JACK COOPER VENTURES, INC., JACK COOPER DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK COOPER TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP, JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 49 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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(Motion returnable October 18, 2019)

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