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2301-07385

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, RSC 1985,
c C-36, as amended

AND IN THE MATTER OF CYXTERA
TECHNOLOGIES, INC., CYXTERA CANADA,
LLC, CYXTERA COMMUNICATIONS
CANADA, ULC and CYXTERA CANADA TRS,
ULC

APPLICANTS

CYXTERA TECHNOLOGIES, INC., CYXTERA
CANADA, LLC, CYXTERA
COMMUNICATIONS CANADA, ULC and
CYXTERA CANADA TRS, ULC

DOCUMENT

**BRIEF OF LAW OF THE FOREIGN
REPRESENTATIVE**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
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I. Introduction

1. On June 4, 2023, Cyxtera Technologies, Inc. (“**CTI**”), Cyxtera Communications Canada, ULC (“**Communications ULC**”), Cyxtera Canada, LLC (“**Cyxtera LLC**”) and Cyxtera Canada TRS, ULC (“**TRS ULC**”, which together with Communications ULC, “**Cyxtera Canada**”, and together with Cyxtera LLC, the “**Canadian Debtors**”) and several other of their affiliates (collectively the “**Chapter 11 Debtors**”) each commenced cases (the “**Chapter 11 Cases**”) under Chapter 11 of Title 11 of the United States Code (the “**US Bankruptcy Code**”) in the United States Bankruptcy Court for the District of New Jersey (the “**US Bankruptcy Court**”).
2. CTI is a United States corporation incorporated pursuant to the laws of the State of Delaware with its head office in Coral Gables, Florida and its registered office in Wilmington, Delaware. CTI is the ultimate parent corporation of a group of companies operating under the tradename “Cyxtera” that are incorporated in the United States, Canada, United Kingdom, Germany, Australia, Japan, the Netherlands, Hong Kong, Singapore and the Cayman Islands, including the Chapter 11 Debtors (collectively “**Cyxtera**”).
3. Pursuant to first day motions filed by the Chapter 11 Debtors in the Chapter 11 Cases (“**First Day Motions**”), on June 6, 2023 the US Bankruptcy Court issued certain procedural and substantive orders (collectively, the “**First Day Orders**”), including an order designating CTI as foreign representative (the “**Foreign Representative**”), an interim cash management order, an interim debtor-in-possession financing order and an interim share transfer order. Certain First Day Orders were interim but would become final orders on or before subsequent hearings before the US Bankruptcy Court.
4. Pursuant to an originating application by the Foreign Representative on behalf of the Canadian Debtors under Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”, these proceedings under Part IV, the “**Recognition Proceedings**”), on June 9, 2023. this Honourable Court granted an Initial Recognition Order – Foreign Main Proceedings recognizing the Chapter 11 Cases (the “**Initial Recognition Order**”) and a Supplemental Order – Foreign Main Proceeding, recognizing

and giving effect in Canada to certain of the First Day Orders including the interim cash management order, interim debtor-in-possession financing order and interim share transfer order, and granting a super-priority first ranking charge over the assets of the Chapter 11 Debtors in Canada in favour of the debtor-in-possession lenders.

5. The following is a summary of certain Orders granted by the US Bankruptcy Court and recognized by this Honourable Court subsequent to June 6, 2023:
 - (a) following the Chapter 11 Debtors filing certificates of no objection, on or before June 29, 2023, the US Bankruptcy Court granted certain second day orders, including a bidding procedures order, a second interim cash management order and an order authorizing and approving procedures to reject or assume executory and unexpired leases (collectively, the “**Second Day Orders**”) for these orders, and on July 12, 2023, this Honourable Court granted an Order under Part IV of the CCAA recognizing and giving effect in Canada to the Second Day Orders;
 - (b) following the Chapter 11 Debtors filing certificates of no objection, on or before July 19, 2023, the US Bankruptcy Court granted certain third day orders, including a claims bar date order and a third interim cash management order (collectively, the “**Third Day Orders**”), and on July 31, 2023, this Honourable Court granted an Order under Part IV of the CCAA recognizing and giving effect in Canada to the Third Day Orders;
 - (c) following the Chapter 11 Debtors filing a certificate of no objection, on August 16, 2023, the US Bankruptcy Court granted a fourth interim cash management order (“**Fourth Interim Cash Management Order**”) and on September 6, 2023, this Honourable Court granted an order recognizing and giving effect in Canada to the Fourth Interim Cash Management Order;
 - (d) on September 21, 2023, the US Bankruptcy Court granted, *inter alia*, a fifth interim cash management order pursuant to a certificate of no objection and on October 11, 2023, this Honourable Court granted an order recognizing and giving effect in Canada to that order;

- (e) on October 25, 2023, the US Bankruptcy Court granted, *inter alia*, a sixth interim cash management order pursuant to a certificates of no objection and on November 21, 2023, this Honourable Court granted an order recognizing and giving effect in Canada to such order; and
- (f) on December 11, 2023, the US Bankruptcy Court granted the Seventh Interim Cash Management Order (as defined below) and on January 8, 2024, the US Bankruptcy Court granted the Second Supplemental Assignment of Acquired Agreements Order.

Affidavit of Eric Koza sworn October 5, 2023, paras 30, 41, 45, 47; Affidavit of
Raymond Li sworn January 23, 2024 (the “**Li Affidavit**”), paras 27, 32.

- 6. In addition to the foregoing orders, the US Bankruptcy Court granted certain orders which approved:
 - (a) an order (i) authorizing and approving an asset purchase agreement dated as of October 31, 2023 (the “**Brookfield APA**”) between Phoenix Data Center Holdings LLC (together with its designees, “**Brookfield**”) and CTI, the Canadian Debtors and the other Chapter 11 Debtors and the purchase and sale of substantially all of the Chapter 11 Debtors’ assets contemplated thereby (the “**Brookfield Transaction**”), and (ii) confirming the Chapter 11 Debtors’ fourth amended joint plan of reorganization under the US Bankruptcy Code filed November 13, 2023 (as amended, the “**Plan**”, and such order, the “**Confirmation Order**”); and
 - (b) a Canada Sale Order with respect to an asset purchase agreement dated October 30, 2023 (the “**Cologix APA**”), Cologix Canada, Inc. (“**Cologix**”) agreed to purchase certain assets (the “**Cologix Transaction**”) from Communications ULC (the “**Cologix Assets**”). On November 17, 2023, the US Bankruptcy Court granted a Canada Sale order approving the Cologix Transaction (the “**Canada Sale Order**”).

- 7. On November 21, 2023, this Honourable Court granted:

- (a) an order which, among other things, recognized and gave full effect to the Confirmation Order in Canada; and
 - (b) an order which, among other things, recognized and gave full effect to the Canada Sale Order in Canada (the “**Cologix Recognition Order**”).
- 8. On December 1, 2023, Communications ULC closed the Cologix Transaction. Thereafter, on December 7, 2023, Gowling delivered the Cologix Closing Certificates and Specified Assets Certificate to Brookfield and Cologix, whereupon pursuant to the Cologix Recognition Order all of the right, title and interest of Communications ULC in the Vancouver and Montreal data centres and all assets related thereto vested in Cologix free and clear of all encumbrances, with the effect that those assets and the Cologix APA became Excluded Assets (as such term is defined in the Brookfield APA). Gowling thereafter served the Cologix Certificates on the Service List and KCC served the Cologix Certificates on the contract counterparties.

Li Affidavit #2, paras 15-17.
- 9. On January 12, 2024, the Brookfield Transaction closed and on January 12, 2024, Gowling delivered the Closing Certificate under the Brookfield Transaction to Brookfield, whereupon pursuant to the Confirmation Recognition Order all of the right, title and interest of Communications ULC in the Ontario Data centre and the assets related thereto and of the other Chapter 11 Debtors in the assets subject to the Brookfield Transaction vested in Brookfield free and clear of all encumbrances. On January 12, 2024, the Chapter 11 Debtors emerged from the Chapter 11 Cases in accordance with the Plan and became “Post Effective Date Debtors”.

Li Affidavit #2, paras 18-19.
- 10. This Bench Brief is submitted on behalf of CTI as the Foreign Representative in support of an application, among other things, for the following Orders:

- (a) an Order (the “**Recognition Order**”) recognizing and giving effect in Canada to the following orders of the US Bankruptcy Court pursuant to Part IV of the CCAA (collectively, the “**US Orders**”):
 - (i) an Order of the US Bankruptcy Court entered on January 8, 2024 approving the assumption of certain executory contracts and/or unexpired leases in connection with the sale of certain assets by Communications ULC (the “**Supplemental Assignment of Acquired Agreements Order**”);
 - (ii) a seventh interim Order entered on December 11, 2023 (i) authorizing the Chapter 11 Debtors to (A) continue using the cash management system, (B) honour certain prepetition obligations related thereto, (C) maintain existing Chapter 11 Debtor bank accounts, business forms, and books and records, and (D) continue intercompany transactions, and (ii) granting related relief (the “**Seventh Interim Cash Management Order**” and with the Supplemental Assignment of Acquired Agreements Order, the “**US Orders**”); and
 - (b) an Order (the “**Fee Order**”) approving the fees and disbursements of Gowling WLG (Canada) LLP, counsel to the Foreign Representative, Alvarez & Marsal Canada Inc., in its capacity as information officer in the Recognition Proceedings (the “**Information Officer**”) and McMillan LLP, counsel to the Information Officer (collectively, the “**Professionals**”).
11. The Foreign Representative’s application is supported by the Affidavit of Eric Koza sworn June 6, 2023 (the “**Koza Affidavit #1**”), the Affidavit of Eric Koza sworn June 30, 2023 (the “**Koza Affidavit #2**”), the Affidavit of Eric Koza sworn July 27, 2023 (the “**Koza Affidavit #3**”), the Affidavit of Eric Koza sworn September 1, 2023 (the “**Koza Affidavit #4**”), the Affidavit of Eric Koza sworn October 5, 2023 (the “**Koza Affidavit #5**”), the Affidavit of Raymond Li sworn November 17, 2023 (the “**Li Affidavit #1**”) and the Affidavit of Raymond Li sworn January 23, 2024 (the “**Li Affidavit #2**” and with the Koza Affidavit #1, the Koza Affidavit #2, the Koza Affidavit #3, the Koza Affidavit #4,

the Koza Affidavit #5 and the Li Affidavit #1, the “**Affidavits**”). The facts in support of this application are more particularly set out in the Affidavits.

12. Capitalized terms not defined herein have the meanings given to them in the Li Affidavit #2. All references to monetary amounts referenced herein are in United States dollars, unless otherwise stated.

II. LAW AND ARGUMENT

13. The primary issues to be determined on this application are whether:

- (a) this Honourable Court should grant the Recognition Order; and
- (b) this Honourable Court should grant the Fee Order.

Part IV of the CCAA

14. Part IV of the CCAA establishes the applicable process for addressing the administration of cross-border insolvencies to promote cooperation and coordination with foreign courts.

CCAA, Part IV [Tab 1]

15. The foundational principles are comity and cooperation between courts of various jurisdictions. Section 44 of the CCAA states that the purpose of Part IV is to provide mechanisms for dealing with cross border insolvencies in order to (a) promote cooperation in such insolvencies between the courts and competent authorities of Canada and the courts and competent authorities of foreign jurisdictions, (b) promote the fair and efficient administration of such insolvencies in order to protect the interests of creditors, other interested persons and the debtor company, (c) protect and maximize the value of the debtor company’s property, and (d) permit the rescue of financially troubled businesses so as to protect investment and preserve employment.

CCAA, s. 44 [Tab 1]

16. Canadian courts have recognized that they should accord respect to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless the foreign

legislation is in substance so different from Canada's legislation, or the legal process generating a foreign order diverges so radically from Canada's process, that it ought not be recognized.

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 (ON SC), at para 21(b) [Tab 2]

17. Canadian courts recognize that comity and cooperation between courts under Part IV promotes the "fair and efficient administration of cross-border insolvencies" and the "protection and maximization of the value of the debtors' property", and avoids multiplicity of proceedings, inconsistent judgments and general uncertainty. With international insolvencies, coordination is particularly critical to ensure the equal and fair treatment of creditors regardless of their location.

MtGox Co., Ltd (Re), 2014 ONSC 5811, at paras 10-12 [Tab 3]; *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, at paras 41 & 42 [Tab 4]

Recognition of the US Orders is Appropriate

18. Under section 49 of the CCAA, the court has the authority on application by a foreign representative to grant any order that it considers appropriate if it is satisfied that the order is necessary for the protection of a debtor's property or the interests of a creditor or creditors. Such orders include the recognition of orders made by a United States court supervising a Chapter 11 case under the US Bankruptcy Code.

CCAA, sections 52 and 61 [Tab 1]

19. Section 52 of the CCAA provides that 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 exercising this authority, the Canadian court will apply any Canadian legal or equitable rules governing the recognition of foreign insolvency orders, such assistance cannot be inconsistent with the provisions of the CCAA, and the Canadian court retains its authority to refuse to do something that would be contrary to public policy.

CCAA, sections 49 and 50 [Tab 1];
Purdue Pharma L.P., Re, 2019 ONSC 7042 at para 22 [Tab 5]
 CCAA, sections 52 and 61 [Tab 1]

20. A Canadian court, in determining whether to recognize a foreign order made in foreign proceedings, will consider factors such as the following:
- (a) the principles of comity and the need to encourage cooperation between courts of various jurisdictions;
 - (b) the need to accord respect to foreign bankruptcy and insolvency legislation unless that legislation gives rise the concerns summarized in paragraph 19 of this Brief;
 - (c) whether stakeholders are and will be treated equitably and to the extent reasonably possible equally regardless of the jurisdiction in which they reside;
 - (d) the importance of promoting plans that allow enterprises to reorganize globally, especially where there are established transnational interdependencies within the enterprises, and of permitting one jurisdiction, to the extent reasonably practical, to take “charge” of the principal administration of enterprises’ reorganizations, where this approach facilitates potential reorganizations and respects the claims of stakeholders in all jurisdictions without detracting from the net benefits that may be available from alternative approaches;
 - (e) the appropriate level of court involvement depends to a significant degree upon the court’s nexus to the enterprise;
 - (f) where one jurisdiction will have an ancillary role, the court in the ancillary jurisdiction should on an ongoing basis be provided with information and be kept apprised of developments regarding the reorganizational efforts in the foreign principal jurisdiction, and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and
 - (g) all affected stakeholders should receive effective notice as is reasonably practicable in the circumstances.

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 at para 21 [Tab 2]

21. Given that the central governing principle of Part IV of the CCAA is comity, Canadian courts should recognize and enforce the judicial acts of a foreign jurisdiction provided that the foreign jurisdiction has assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238 at para 41 [Tab 4]

22. The Foreign Representative seeks an order of this Honourable Court recognizing and giving effect in Canada to the Seventh Interim Cash Management Order and the Supplemental Assignment of Acquired Agreements Order, which were both granted by the US Bankruptcy Court on the basis of certificates of no objection filed December 6, 2023 and January 2, 2024 respectively (meaning that no objection was received by any interested party prior to the applicable deadline established by the US Bankruptcy Court).

Li Affidavit #2, paras 27, 28, 32, 33 Exhibits “C” to “F”.

23. The granting of the Recognition Order is consistent with Part IV of the CCAA and the principles of comity and the Seventh Interim Cash Management Order and the Supplemental Assignment of Acquired Agreements Order consistent with orders commonly granted in Canadian restructuring proceedings and are not contrary to public policy.
24. The Recognition Order is also important in ensuring the equal treatment of all stakeholders in the Chapter 11 Cases, whether in Canada or elsewhere, and in ensuring that Canadian trade creditors, suppliers and stakeholders receive the benefit of the US Orders. The Recognition Order also ensures the continuing coordination of the Chapter 11 Cases and the Recognition Proceedings. The reasons for this include the following:
- (a) the Canadian Debtors have no business or activity, or senior management structures, or access to debt or equity financing, or administrative structures, that is or could be independent of or separate from the other Chapter 11 Debtors, and therefore the restructuring or other resolution of the Canadian Debtors cannot be independent on any practical level of the restructuring or other resolution of the other Chapter 11 Debtors;

- (b) the Cologix Transaction and the Brookfield Transaction were approved by the US Bankruptcy Court pursuant to orders that were subsequently recognized in Canada, the Cologix Transaction and Brookfield Transaction have now closed, and the Chapter 11 Debtors have emerged from the Chapter 11 Cases in accordance with the Plan;
 - (c) if the US Orders are not recognized and given effect in Canada by this Honourable Court, the Canadian Debtors would have to incur significant professional costs to seek Orders from this Honourable Court providing similar or even identical relief to that contained in the US Orders, without any benefit to the creditors and stakeholders in the Chapter 11 Cases and Recognition Proceedings;
 - (d) the recognition and giving effect in Canada of the US Orders ensures the consistency of relief provided by the US Bankruptcy Court in the Chapter 11 Cases and this Honourable Court in the Recognition Proceedings, ensures that creditors and other interested parties in both the United States and Canada are treated fairly because they receive substantively similar treatment in both proceedings, and the availability of such order in these Recognition Proceedings enhanced the chances of the Canadian Debtors and other Chapter 11 Debtors being successfully rescued; and
 - (e) the US Orders are intended to protect and maximize the value of the properties, business and estates of the Canadian Debtors and other Chapter 11 Debtors' property in both the United States and Canada.
25. In addition to the foregoing, under the Second Supplemental Assignment of Acquired Agreements Order, the US Bankruptcy Court made the following findings of fact:
- (a) the assumption and assignment of the Assigned Contracts (as defined in the Cologix APA) is integral to the Cologix APA and a material component to the overall consideration provided by Cologix, does not constitute unfair discrimination, and will maintain the ongoing business of the Chapter 11 Debtors,

limit the losses of counterparties to the Assigned Contracts, and maximizes the distributions available to the creditors;

- (b) the Chapter 11 Debtors properly filed and served the Assumption and Assignment Notice on each applicable counterparty in accordance with the terms of the Contract Rejection/Assumption Procedures Order entered by the US Bankruptcy Court on June 29, 2023; and
- (c) Cologix has demonstrated that it can reasonably perform the ongoing obligations under the Assigned Contracts.

26. On the basis of the foregoing factors, CTI requests that this Honourable Court recognize the US Orders.

Approval of the Accounts of the Professionals

Jurisdiction

27. The jurisdiction of this Court to pass the accounts of the Professionals is confirmed in the Supplemental Order, which directs as follows:

“The Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, are hereby referred to a judge of the Commercial List of the Court of Kings Bench of Alberta, and the accounts of the Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, shall not be subject to approval in the Foreign Proceeding.”

Supplemental Order, para 17

Fair and Reasonable Test

28. The overarching test for assessing the fees and disbursements of the Monitor and its counsel in a CCAA proceeding is whether they are “fair and reasonable” in all of the circumstances, and are appropriate.

Nortel Networks Corp. (Re), 2017 ONSC 673, paras 14-15 [Tab 6]

29. The court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional's services may not be instructive when looked at in isolation. In complex cases, detailed assessments are not practical and do not aid in determining the overall value of the services provided. Rather, as indicated by the Ontario Court of Appeal, the focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took.

Nortel Networks Corp. (Re), 2017 ONSC 673, paras 15 and 21[**Tab 6**]

30. To aid in the determination of whether a court-appointed officer's fees are fair and reasonable, courts have recognized certain factors as a useful guideline. These factors, which are not intended to be exhaustive, include the following:

- (a) the nature, extent and value of the assets being handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees;
- (d) the time spent;
- (e) the court officer's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.

Nortel Networks Corp. (Re), 2017 ONSC 673, para 14 [**Tab 6**]

31. Applying the foregoing factors to these proceedings, the Foreign Representative submits that the accounts of the Professionals are fair and reasonable in the circumstances and should be approved as, among other things:

- (a) the fees of the Professionals in the Recognition Proceedings were approved by this Honourable Court at applications between July 12, 2023 to November 21, 2023, the Professionals have continued to work diligently in respect of all matters concerning these Recognition Proceedings including, without limitation, communicating with creditors of the Canadian Debtors, researching legal issues affecting the Canadian Debtors, drafting application materials for recognition of orders granted in the US Bankruptcy Court, attending and making submissions at court for recognition of said orders, assisting in closing the Cologix Transaction and the Brookfield Transaction and continuing to work with the US counsel and the restructuring advisor to the Chapter 11 Debtors respecting all matters in these Recognition Proceedings;
- (b) the Professionals are experienced restructuring professionals who have played an integral part in these CCAA proceedings and who have at all times demonstrated diligence and thoroughness; and
- (c) the accounts of the Professionals have been reviewed by Cyxtera's Deputy Chief Restructuring Officer who has confirmed that they are fair and reasonable.

Li Affidavit #2, paras 38, 39.

32. Accordingly, for the reasons set out above, it is submitted that when considering the applicable factors in the context of these proceedings, the remuneration of the Professionals is fair and reasonable in the circumstances and should be approved.

III. CONCLUSION AND RELIEF SOUGHT

33. CTI and the Canadian Debtors seek the granting of the Recognition Order and the Fee Order under the *CCAA* substantially in the form as attached to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2024.

GOWLING WLG (CANADA) LLP

Per:

DocuSigned by:

Thomas Cumming

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Tom Cumming

TABLE OF AUTHORITIES

TAB AUTHORITY

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985
2. *Babcock & Wilcox Canada Ltd., Re*, 2000 CanLII 22482 (ON SC)
3. *MtGox Co., Ltd (Re)*, 2014 ONSC 5811
4. *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238
5. *Purdue Pharma L.P., Re*, 2019 ONSC 7042
6. *Nortel Networks Corp. (Re)*, 2017 ONSC 673