Clerk's stamp:

COURT FILE NUMBER	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 FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 421 7 Ave SW Suite 1600 Calgary, AB T2P 4K9 Telephone: (403) 298-1946 Email: tom.cumming@gowlingwlg.com / sam.gabor@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A170537 **Attn: Tom Cumming/Sam Gabor/Stephen Kroeger**

I. Introduction

1. On June 4, 2023 Cyxtera Technologies, Inc. ("**CTI**" or, the "**Foreign Representative**"), 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 "**Debtors**") and several other of their affiliates (collectively the "**Chapter 11 Debtors**") each commenced proceedings pursuant to Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Cases**") 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 Debtors (collectively the "**Cyxtera**" or the "**Cyxtera Group**").

3. Contemporaneously with filing the petitions commencing the Chapter 11 Cases, the Chapter 11 Debtors filed first day motions therein ("**First Day Motions**"), which were heard on June 6, 2023 (the "**First Day Hearing**"), where they sought and obtained certain procedural and substantive orders from the US Bankruptcy Court, which included an interim cash management order, interim DIP financing order and interim share transfer order. (collectively the "**First Day Orders**"). Certain of the First Day Orders were interim orders and could become final orders on or before subsequent hearings before the US Bankruptcy Court.

4. Pursuant to an originating application to this Honourable Court by the Foreign Representative on behalf of the Debtors under Part IV of the CCAA (the proceedings commenced thereby being the "**Recognition Proceedings**"), this Honourable Court on June 7, 2023 granted, *inter alia*, a Supplemental Order – Foreign Main Proceeding, recognizing the aforementioned interim cash management order, interim DIP financing

order and interim share transfer order, among other First Day Orders, and granting a super-priority charge over the assets of the Debtors in Canada in favour of the debtor-in-possession lenders to the Chapter 11 Debtors.

5. On or before July 12, 2023, the US Bankruptcy Court granted certain second day orders, including a bidding procedures order and a second interim cash management order ("**Second Day Orders**") following the Chapter 11 Debtors filing certificates of no objection for these orders.

6. On July 12, 2023, this Honourable Court granted a recognition order recognizing the Second Day Orders.

7. 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 full force and effect in Canada to the following third day orders granted in the Chapter 11 Cases by the US Bankruptcy Court (collectively, the "**Third Day Orders**") pursuant to Part IV of the CCAA:

      (i) Bar Date Order (the "**Bar Date Order**");

      (ii) Final DIP Financing Order (the "**Final DIP Financing Order**");

      (iii) Final Share Transfer Order;

      (iv) Third Interim Cash Management Order;

   (b) Orders (the "**Fee Orders**") approving the fees of Canadian counsel for the Foreign Representative and the Debtors, Gowling WLG (Canada) LLP ("**Gowling**"), the Information Officer and counsel to the Information Officer McMillan LLP ("**McMillan**" and together with Gowling and the Information Officer, the "**Professionals**").

8. 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**") and the Affidavit of Eric Koza sworn July 27, 2023 (the "**Koza Affidavit #3** and with the Koza Affidavit #1 and the Koza Affidavit #2, the "**Koza Affidavits**"). The facts in support of this application are more particularly set out in the Koza Affidavits.

9. Capitalized terms not defined herein have the meanings given to them in the Koza Affidavit #3.

10. All references to monetary amounts referenced herein are in United States dollars, unless otherwise stated.

II. LAW AND ARGUMENT

11. The primary issue to be determined on this application is whether this Honourable Court should grant the relief requested which recognizes and gives full force and effect in Canada to the Third Day Orders.

Part IV of the CCAA

12. 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]**

13. 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 cases of cross border insolvencies so as to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in such insolvencies, promote the fair and efficient administration of such insolvencies so as to protect the interests of creditors, other interested persons and the debtor companies, protect and maximize the value of the debtor company's property, and permit the rescue of financially troubled businesses to protect investment and preserves employment.

CCAA, s. 44 **[Tab 1]**

14. Canadian courts should accord respect to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

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

15. 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." Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring 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 Third Day Orders is Appropriate

16. Section 49 gives this Honourable Court the authority to grant any order that it considers appropriate, on application by a foreign representative, if the court is satisfied that it is necessary for the protection of a debtor's property or the interests of a creditor or creditors. These include orders recognizing orders granted by the US Bankruptcy Court in the Chapter 11 Cases.

CCAA, sections 52 and 61 **[Tab 1]**

17. 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. The limits to this cooperation are set out in section 61 of the CCAA, which provides as follows:

"*Court not prevented from applying certain rules*

> 61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> *Public policy exception*
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy."

CCAA, sections 52 and 61 **[Tab 1]**

18. Hence, once an order recognizing a foreign proceeding is made by this Court, the Court is mandated to cooperate, to the maximum extent possible, with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.

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

19. When a Canadian court considers whether it should recognize a foreign order made in foreign proceedings, the following considerations should be taken into account:

(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 in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;

(c) whether stakeholders will be treated equitably, and in particular whether recognition will ensure that, to the extent reasonably possible, stakeholders are treated equally, regardless of the jurisdiction to which they reside;

(d) the importance of promoting plans that allow the enterprises to reorganize globally, especially where there is an established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take "charge" of the principal administration of the enterprise's reorganization,

where this approach will facilitate a potential reorganization and which will respect the claims of stakeholders in all jurisdictions and does not detract 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 is to have an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis 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]**

20. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have 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]**

21. In furtherance of the principle of comity, Canadian courts should allow a foreign court to exercise principal control over the insolvency process if that other jurisdiction has the closest connection to the proceeding. As noted above, the CCAA requires this Honourable Court to cooperate to the maximum extent possible with the foreign proceeding.

22. The Foreign Representative seeks recognition orders in respect of the Third Day Orders which were granted by the US Bankruptcy Court through certificates of no objection on or before July 19, 2023 meaning that no objections were received by any interested party prior to the applicable deadlines established by the US Bankruptcy Court.

Koza Affidavit #3, paras 18 and 24

23. Recognition of the Third Day Orders is consistent with Part IV of the CCAA and the principles of comity, is not contrary to public policy and are orders commonly granted in Canadian restructuring proceedings.

24. Recognition is important to ensure the equal treatment of Canadian stakeholders, that the proceedings are coordinated with the Chapter 11 Cases and that Canadian trade creditors and suppliers (if any) receive the benefit of the Third Day Orders as, among other things:

a) the 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 Debtors cannot be independent on any practical level of the restructuring or other resolution of the other Chapter 11 Debtors;

Koza Affidavit #2, para 36

b) the Debtors' centre of main interest is in the United States and therefore potential transactions restructuring or selling the Debtors or their assets will be within the overall Chapter 11 Cases, subject to obtaining any necessary recognition orders by this Honourable Court in these Recognition Proceedings and satisfying this Honourable Court that such relief is appropriate;

c) if the Third Day Orders are not recognized and given effect in Canada by this Honourable Court, the Debtors would be required to expend significant resources in seeking Orders from this Honourable Court providing similar or even identical relief to that contained in the Third Day Orders, which would involve significant expense and time 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 Third Day 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 enhances the chances of the Debtors and other Chapter 11 Debtors being successfully rescued; and

e) the Third Day Orders are intended to protect and maximize the value of the Debtors and other Chapter 11 Debtors' property.

25. On the basis of the foregoing factors, CTI requests that this Honourable Court recognize the Third Day Orders.

Recognition of the Bar Date Order is Appropriate

26. In addition to the foregoing section, the establishment of a claims process to determine claims to be advanced is a recognized step in proceedings in Canada under the CCAA.

Quest University (Re), 2020 CarswellBC 3030, at para 21 **[Tab 6]**

27. The Foreign Representative submits that recognition of the Bar Date Order by this Honourable Court is consistent with Part IV of the CCAA and the principles of comity and the approval of a claims process commonly granted in Canadian restructuring proceedings. Accordingly, recognition of the Bar Date Order is appropriate and necessary for the following reasons:

(a) the Chapter 11 Cases apply to all creditors of the Chapter 11 Debtors, wherever they may be located, and accordingly the single comprehensive claims process as provided under the Bar Date Order is appropriate so that Canadian creditors and creditors of Cyxtera Canada and Cyxtera LLC are treated in the same manner as creditors situated in the U.S. and creditors of the other Chapter 11 Debtors;

(b) the bar dates and procedures are reasonable and appropriate in the circumstances, providing claimants with notice and opportunity to prepare and file proofs of claim, as well as allowing the Chapter 11 Cases to move forward quickly with a minimum of administrative expense and delay;

(c) recognition of the Claims Bar Date Order by this Court will ensure that the deadline for filing proofs of claim is enforceable against all creditors of the Chapter 11 Debtors in Canada so that the Chapter 11 Debtors can have an accurate understanding of the claims against their estates; and

(d) all known creditors and known potential claimants will receive sufficient notice of the claims process.

Bul River Mineral Corporation (Re), 2014 BCSC 1732 at para 32 **[Tab 7]**
Koza Affidavit #3, paras 28 to 32

28. The Information Officer is supportive of recognition of the Bar Date Order.

Approval of the Final DIP Financing Order

29. Pursuant to the Supplemental Order, this Honourable Court granted the Interim DIP Financing Order which, among other things:

(a) approved an approximate $200 million superpriority secured debtor-in-possession facility (the "**DIP Facility**") issued pursuant to a senior secured superpriority debtor-in-possession credit agreement dated as of June 7, 2023 (the "**DIP Credit Agreement**") between Cyxtera DC Parent Holdings, Inc., Cyxtera DC Holdings, Inc., the lenders party thereto and Wilmington Savings Fund Society, FSB as administrative agent and collateral agent (the "**Collateral Agent**"), which DIP Facility provided for (i) $150 million in new money, of which $40 million was available upon entry of the Interim DIP Financing Order, and up to $110 million of which is to be made available upon entry of the Final DIP Financing Order; (ii) a "roll up" of any outstanding principal and accrued interest under a bridge facility |("**Bridge Facility**") as of the Petition Date, which was approximately $36 million (the "**Bridge Amount**"); and (iii) a $14 million deemed transfer of escrowed commitments under the Bridge Facility; and

(b) granted a superpriority charge in favour of the Collateral Agent for and on behalf of the DIP Lenders against all of the property and assets of the Chapter 11

Debtors securing their obligations under the DIP Facility and DIP Credit Agreement.

Koza Affidavit #3, para 36

30. As more particularly described in the Brief of Law of the Foreign Representative dated June 6, 2023 (the "**June 6 Brief**") section 11.2 of the CCAA vests the Court with the jurisdiction to grant interim financing and an interim financing charge over the assets of a debtor in priority to the claim of any secured creditor of the debtor, on notice to the secured creditors who are likely to be affected by such security or charge. In deciding whether to make an order, the court is to consider, among other things:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security charge; and

(g) the report of the proposed Information Officer.

Re Canwest Publishing Inc., 2010 ONSC 222 at para 54 **[Tab 8]**; CCAA section 11.2 **[Tab 1]**

31. Access to availability under the DIP Facility, including approval of the Lenders Charge in the Chapter 11 Proceedings and these Recognition Proceedings, is crucial to enable the Debtors to proceed with a successful restructuring.

Miniso International Hong Kong Limited v. Migu Investments Inc., 2019 BCSC 1234 at paras 46, 57
[Tab 9]; June 6 Brief, paras 60 to 75

32. The only primary changes between the Interim DIP Financing Order and Final DIP Financing Order are:

(a) the Chapter 11 Debtors are required to obtain consent from the Committee prior to making any amendments or modifications to the line items related to the fees and expenses of the Committee's professionals in any Approved Budget (as defined in the Final DIP Financing Order), provided that the Committee may seek US Bankruptcy Court Approval for such amendments absent the Committee's consent;

(b) certain protections for taxing authorities in the state of Texas;

(c) certain carve outs from the DIP Liens and the Prepetition First Lien Adequate Protection Liens (each as defined in the DIP Orders);

(d) creation of a reserve for payment of "stub rent" that came due during the period from June 4, 2023, to June 30, 2023; and

(e) "Avoidance Actions" are equivalent to preference and transfer at under value applications in Canadian insolvency proceedings, are required to be liquidated last by the Chapter 11 Debtors if Cyxtera's assets are required to be liquidated and the DIP Lenders are required to use commercially reasonable efforts to seek recovery from DIP Collateral other than Avoidance Actions before seeking recovery from Avoidance Actions or the proceeds thereof. Based on the foregoing, the Debtors seek recognition of the Final DIP Financing Order granted by the US Bankruptcy Court in the Recognition Proceedings.

Koza Affidavit #3, para 41

33. For the reasons set out above it is submitted that recognition of the Final DIP Financing Order is fair and reasonable in the circumstances, is necessary, and in the best interest of all of the Debtors' stakeholders.

Approval of the Accounts of the Professionals

Jurisdiction

34. The jurisdiction of this Court to pass the accounts of the Professionals is confirmed in the Supplemental Order, which directs that, "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

35. 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, para 17 **[Tab 10]**

36. 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. As the Court of Appeal has stated: "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 10]**

37. 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 are

not intended to be an exhaustive list and other factors may be material in any particular case. These factors include:

(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 Monitor'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 10]**

38. 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) Since their initial fees in the Recognition Proceedings were approved by this Honourable Court on July 12, 2023, the Professionals have continued to work diligently in respect of all matters concerning these CCAA Proceedings including, without limitation, communicating with creditors of the Debtors, researching legal issues affecting the 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, continuing to work with the US counsel and the restructuring advisor to the Chapter 11 Debtors respecting all matters in these

CCAA Proceedings, and attending the Chapter 11 Debtors' first meeting of creditors;

(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 chief restructuring officer who has confirmed that they are fair and reasonable.

Koza Affidavit #3, paras 43 and 44

39. 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

40. CTI and the 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 27th day of July, 2023.

GOWLING WLG (CANADA) LLP

Per: _____