

**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 SUNGARD AVAILABILITY SERVICES
(CANADA) LTD./SUNGARD, SERVICES DE CONTINUITE DES
AFFAIRES (CANADA) LTEE

APPLICATION OF SUNGARD AVAILABILITY SERVICES (CANADA)
LTD./SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES
(CANADA) LTEE UNDER SECTION 46 OF THE *COMPANIES'
CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

FACTUM OF THE FOREIGN REPRESENTATIVE

October 19, 2022

CASSELS BROCK & BLACKWELL LLP

Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2

Ryan Jacobs LSO#: 59510J

Tel: 416.860.6465
rjacobs@cassels.com

Jane Dietrich LSO#: 49302U

Tel: 416.860.5223
jdietrich@cassels.com

Natalie E. Levine LSO#: 64908K

Tel: 416.860.6568
nlevine@cassels.com

Lawyers for the Foreign Representative

TO: THE SERVICE LIST

**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 SUNGARD AVAILABILITY SERVICES
(CANADA) LTD./SUNGARD, SERVICES DE CONTINUITE DES
AFFAIRES (CANADA) LTEE

APPLICATION OF SUNGARD AVAILABILITY SERVICES (CANADA)
LTD./SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES
(CANADA) LTEE UNDER SECTION 46 OF THE *COMPANIES'
CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

TABLE OF CONTENTS

	Page No.
PART I - INTRODUCTION.....	1
PART II - SUMMARY OF FACTS.....	3
A. BACKGROUND.....	3
B. THE CROSS-BORDER INSOLVENCY PROCEEDINGS.....	4
C. THE PROPOSED ORDER.....	11
PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES.....	11
A. THE CONFIRMATION ORDER AND THE EAGLE SALE ORDER SHOULD BE RECOGNIZED.....	12
B. THE TERMINATION PROVISIONS.....	14
PART IV - ORDER REQUESTED.....	15
SCHEDULE "A".....	17
SCHEDULE "B".....	18

**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 SUNGARD AVAILABILITY SERVICES
(CANADA) LTD./SUNGARD, SERVICES DE CONTINUITE DES
AFFAIRES (CANADA) LTEE

APPLICATION OF SUNGARD AVAILABILITY SERVICES (CANADA)
LTD./SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES
(CANADA) LTEE UNDER SECTION 46 OF THE *COMPANIES'
CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

FACTUM OF THE FOREIGN REPRESENTATIVE

PART I - INTRODUCTION

1. This factum is filed in support of the motion by Sungard Availability Services (Canada) Ltd./Sungard, Services de Continuite des Affaires (Canada) Ltee in its capacity as the foreign representative (the “**Foreign Representative**”) of itself and the other Debtors¹, for an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “**CCAA**”) recognizing the Confirmation Order and the Eagle Sale Order of the U.S. Bankruptcy Court and granting related relief in terminating these CCAA Proceedings.

2. The Debtors commenced their Chapter 11 Cases in April 2022 with the intent to sell their business or reorganize through an equitization of their funded debt. In August of this year, the Debtors obtained approval of the U.S. Bankruptcy Court with respect to sales of the CMS and Bravo businesses to 11:11 Systems and 365 Data Centers, respectively, and in September, this

¹ Terms not defined in the Factum have the meanings ascribed thereto in the Affidavit of Michael K. Robinson sworn October 15, 2022 (the “**Robinson Affidavit**”) and the Second Amended Plan attached to the Confirmation Order. A copy of the Confirmation Order granted by the U.S. Bankruptcy Court and the Second Amended Plan is attached to the Sixth Report of the Information Officer, dated October 18, 2022 (the “**Sixth Report**”).

Court granted an order recognizing those sale orders. Without a purchaser for the Debtors' remaining assets, the "Eagle" business, the Debtors solicited votes on a plan of reorganization which provided for the distribution of the proceeds of the CMS and Bravo sales, and a reorganization around the Eagle business through equitization of the Debtors' funded debt or, alternatively, a distribution of proceeds from the sale of the Eagle business if a sale could be completed consistent with the Bidding Procedures Order.

3. The Debtors have now entered into the Eagle APA, which provides for the sale of the Debtors' last remaining line of business. They have also revised the Second Amended Plan to remove the Equitization Scenario and address the wind down of the Debtors businesses and the distribution of the proceeds to the Debtors' secured lenders. On October 17, 2022, the U.S. Bankruptcy Court granted both the Confirmation Order, which approved the Second Amended Plan, and the Eagle Sale Order, clearing a path for the Debtors to conclude the Chapter 11 Cases.

4. The Foreign Representative's motion under section 49 of the CCAA is the last substantial step in these CCAA Proceedings. Recognition of the Confirmation Order and the Eagle Sale Order will allow Sungard AS Canada (and, to the extent applicable, the Guarantor Debtors (as defined below)) to sell the property located in Canada and implement the Second Amended Plan on a timeline consistent with the other Debtors. The Debtors do not expect to require the assistance of this Court through the completion of these CCAA Proceedings in any substantial way following the implementation of the Second Amended Plan. As such, the Draft Order provides for relief to assist in the conclusion of these proceedings including: the termination of the CCAA Proceedings upon the filing of a termination certificate, termination of the court-approved charges, approval of the Information Officer's reports, approval of the Information Officer's fees and disbursements and those of its counsel, and a release of the Information Officer and the other professionals in the CCAA Proceedings.

5. The Foreign Representative has served a second motion seeking recognition of an order approving a stipulation with one of the remaining Canadian landlords (the “**Settlement Stipulation Order**”) concurrent with this motion. If the Settlement Stipulation Order is not entered in advance of the hearing, the Foreign Representative will be seeking to adjourn the motion in respect of the Settlement Stipulation Order.

PART II - SUMMARY OF FACTS

A. Background

6. The Company provides high availability, cloud-connected infrastructure services built to deliver business resilience to its customers in the event of an unplanned business disruption, ranging from man-made events to natural disasters.²

7. As of the Petition Date, the Debtors had approximately USD\$424 million in aggregate principal amount of prepetition secured funded debt obligations.³ Sungard AS Canada is a borrower or guarantor in respect of over USD\$400 million of the Debtors’ indebtedness and has granted security in respect of those loans.⁴ Sungard AS Canada relies on other Debtors for substantially all of its back-office functions.⁵

8. As of the Petition Date, the Company’s business operated in four general business units:

- (a) **Colocation & Network Services (“Bravo”)**: The Company offers colocation services through its facilities and connectivity at those facilities to support customers, providing space, reliable power with backup and fully-redundant network connectivity. The Company also offers customers the option of having the Company procure, manage and deploy network services on their behalf, including traffic management, carrier diversity and workload optimization.

² Robinson Affidavit at para 9.

³ Robinson Affidavit at para 9.

⁴ Robinson Affidavit at para 10.

⁵ Robinson Affidavit at para 10.

- (b) **Cloud & Managed Services (“CMS”)**: The Company offers both public cloud services (through, for example, Amazon Web Services and Microsoft Azure) and private cloud services. Through its managed services, the Company acts as a trusted partner to customers by providing tools to ensure that they have a simple, secure and integrated model that enables cross-platform deployments and meets compliance, scalability and availability requirements.
- (c) **Recovery Services (“Eagle”)**: The Company’s recovery services offerings include cloud recovery, disaster recovery as a service (DRaaS), business continuity management, data protection, recovery management, infrastructure recovery and discovery and dependency mapping.
- (d) **Workplace Recovery**: The Company’s workplace recovery services are primarily offered in the form of either dedicated or shared business continuity locations, where customers’ employees can resume work duties even if their primary office space is disrupted.⁶

B. The Cross-Border Insolvency Proceedings

9. On April 11, 2022, the Debtors filed voluntary petitions for relief under the Bankruptcy Code in the U.S. Bankruptcy Court and Sungard AS Canada commenced the CCAA Proceedings to recognize its Chapter 11 Case.⁷

10. On the same date, the Court granted an interim stay of proceedings in respect of Sungard AS Canada as well as Sungard AS New Holdings III, LLC and Sungard Availability Services, LP (the “**Guarantor Debtors**”), pending the hearing on the Foreign Representative’s initial application to, among other things, recognize Sungard AS Canada’s Chapter 11 Case as a foreign main proceeding.⁸

⁶ Robinson Affidavit at para 11.

⁷ Robinson Affidavit at para 13.

⁸ Robinson Affidavit at para 14.

11. On April 12, 2022, the U.S. Bankruptcy Court entered an order authorizing Sungard AS Canada to act as the Foreign Representative of itself and the other Debtors in any proceedings in Canada.⁹

12. On April 14, 2022, the Court entered an order which, among other things, (a) recognized Sungard AS Canada as the Foreign Representative of itself and the other Debtors in respect of the Chapter 11 Cases; (b) recognized the United States as the centre of main interests for Sungard AS Canada; and (c) recognized Sungard AS Canada's Chapter 11 Case as a "foreign main proceeding".¹⁰ The Court also granted the Supplemental Order, which, among other things, (a) recognized an interim order entered by the U.S. Bankruptcy Court in the Chapter 11 Cases to approve certain emergency funding for the Debtors; (b) granted two charges in respect of post filing financing and an administration charge; and (c) appointed Alvarez & Marsal Canada Inc. as the Information Officer in these CCAA Proceedings.¹¹

13. On May 16, 2022, the Court granted an order recognizing additional orders from the U.S. Bankruptcy Court, including, (a) an order setting bar dates for filing proofs of claim; (b) the Bidding Procedures Order; and (c) an order approving the post-petition financing on a final basis.¹²

14. On June 3, 2022, the Debtors filed the Disclosure Statement Motion with the U.S. Bankruptcy Court, seeking, among other things, conditional approval of and authorization to commence solicitation of votes on the Initial Plan and Disclosure Statement.¹³ The Initial Plan and Disclosure Statement incorporated both the Equitization Scenario and the Sale Scenario.¹⁴

⁹ Robinson Affidavit at para 15.

¹⁰ Robinson Affidavit at para 16.

¹¹ Robinson Affidavit at para 16.

¹² Robinson Affidavit at para 17.

¹³ Robinson Affidavit at para 20.

¹⁴ Robinson Affidavit at para 20.

15. The Disclosure Statement Motion before the U.S. Bankruptcy Court was rescheduled several times, and finally heard on September 7, 2022.¹⁵ Throughout this time, the Debtors continued to pursue the sale process pursuant to the Bidding Procedures Order to thoroughly test the market for their assets.¹⁶

16. On August 1, 2022, the Debtors filed the 365 Sale Hearing Notice with the U.S. Bankruptcy Court, disclosing the details of a sale of the Debtors' Bravo assets to 365 Data Centers.¹⁷ On August 24, 2022, the Debtors filed the 11:11 Sale Hearing Notice with the U.S. Bankruptcy Court, disclosing the details of a sale of substantially all of the Debtors' CMS assets to 11:11 Systems.¹⁸

17. On August 31, 2022, the U.S. Bankruptcy Court entered the 365 Sale Order, approving the sale.¹⁹ The sale of the CMS assets to 11:11 Systems was approved by the U.S. Bankruptcy Court on September 14, 2022.²⁰

18. On September 15, 2022, this Court entered an order recognizing both the 365 Sale Order and the 11:11 Sale Order.²¹

19. On September 2, 2022, the Debtors' filed the First Amended Plan and Disclosure Statement, to reflect the sales of the Bravo and CMS businesses while preserving the flexibility to pursue a reorganization through equitization or sale of the remaining Eagle business.²² On September 7, 2022, the U.S. Bankruptcy Court entered the Disclosure Statement Order,

¹⁵ Robinson Affidavit at paras 21 & 22.

¹⁶ Robinson Affidavit at para 23.

¹⁷ Robinson Affidavit at para 24.

¹⁸ Robinson Affidavit at para 25.

¹⁹ Robinson Affidavit at para 26.

²⁰ Robinson Affidavit at para 29.

²¹ Robinson Affidavit at para 29.

²² Robinson Affidavit at para 27.

conditionally approving the First Amended Plan and Disclosure Statement, and on September 15, 2022, this Court entered an order recognizing the Disclosure Statement Order in Canada.²³

20. At the same time, the Debtors' continued their negotiations with 11:11 Systems towards a potential transaction for the Eagle business.²⁴ On September 30, 2022, the Debtors entered into the Eagle APA.²⁵ On October 5, 2022, the Debtors filed the Eagle Sale Hearing Notice which, among other things, summarized the terms of the sale of the Eagle business to 11:11 Systems and reset the date for the Confirmation Hearing to October 17, 2022.²⁶

21. The Eagle APA provides for the sale of substantially all of the assets of the Eagle business, comprising substantially all of the Debtors remaining assets, including: assets, property and business owned, held or used primarily or otherwise necessary for the conduct of (a) disaster recovery services and consulting services related thereto; and (b) colocation services revenue at certain facilities.²⁷ The terms of the Eagle APA include: (a) a purchase price of USD\$60 million in cash; and (b) the assumption by 11:11 Systems of assumed liabilities, including the assumption of the obligation to pay the counterparties of the applicable purchased contracts' Cure Costs, all subject to the terms of the Eagle APA.²⁸

22. The Eagle APA provides two other important benefits: (a) the purchaser will make offers to transferred employees that are substantially similar in the aggregate to each such employee's current employment terms;²⁹ and (b) 11:11 Systems will provide weekly payments in the amount of USD\$ 1.5 million if the transaction does not close by October 18, 2022.³⁰

²³ Robinson Affidavit at para 28.

²⁴ Robinson Affidavit at para 34.

²⁵ Robinson Affidavit at para 34.

²⁶ Robinson Affidavit at para 35.

²⁷ Robinson Affidavit at para 41.

²⁸ Robinson Affidavit at para 42.

²⁹ Robinson Affidavit at para 47.

³⁰ Robinson Affidavit at para 48.

23. On October 7, 2022, the Debtors filed the Eagle Assumption and Assignment Notice, which lists the contracts to be assumed and assigned to 11:11 Systems.³¹ The cure amounts set in the notice had been previously determined pursuant to the Bidding Procedures Order, other than for the contract counterparties who had filed objections.³²

24. The Debtors have received two objections in respect of Sungard AS Canada that relate to contracts designated for assignment to 11:11 Systems under the Eagle APA.³³ Pursuant to the Eagle Sale Order, these objections will be resolved by the U.S. Bankruptcy Court at a future date if they cannot be resolved consensually.³⁴

25. Following the Debtors extensive negotiations with their stakeholders and the decision to enter into the Eagle APA, on October 13, 2022, the Debtors filed the Second Amended Plan and Disclosure Statement, removing reference to the Equitization Scenario.³⁵ The Second Amended Plan provides mechanisms for making distributions to secured creditors and winding down the Debtors' residual businesses.³⁶

26. The Second Amended Plan provides for payment in full in cash for ABL DIP Facility Claims, and grants to holders of Term Loan DIP Facility Claims the right to receive a *pro rata* share of (i) proceeds from third party sales (the Bravo, CMS, and Eagle sale transactions); and (ii) any additional cash or proceeds not included in the Sale Transactions.³⁷ The Second Amended Plan also provides for a limited distribution to holders of First Lien Credit Agreement Claims.³⁸ The Second Amended Plan provides that Second Lien Credit Agreement Claims and Non-

³¹ Robinson Affidavit at para 38.

³² Robinson Affidavit at para 44.

³³ Robinson Affidavit at para 45.

³⁴ Robinson Affidavit at para 45.

³⁵ Robinson Affidavit at para 39.

³⁶ Robinson Affidavit at para 50.

³⁷ Robinson Affidavit at para 54.

³⁸ Second Amended Plan at Article VII.B, Robinson Affidavit at Exhibit F; Plan Supplement at Exhibit D: Sale Consideration Schedule, Robinson Affidavit at Exhibit D.

Extending Second Lien Credit Agreement Claims will be cancelled, released, discharged and extinguished as of the Effective Date, and will be of no further force or effect, and holders thereof will not receive any distribution on account of their claims.³⁹ Similarly, under the Second Amended Plan, General Unsecured Creditors will not be entitled to any distribution or recovery on their claims.⁴⁰

27. The Second Amended Plan⁴¹ received 100% support from the only class entitled to vote – Holders of First Lien Credit Agreement Claims.⁴² Although these claimants are entitled to receive only a limited distribution – anticipated to be approximately \$500,000 to be shared *pro rata* among holders of between \$89,873,000 and \$102,024,000⁴³ in First Lien Credit Agreement Claims (depending on the amount “unrolled” pursuant to the “Roll-Up Recharacterization Provision” (as defined in the Final DIP Order) – the holders unanimously supported the Second Amended Plan and the transactions described therein.⁴⁴

28. The Second Amended Plan also contains detailed release and exculpation provisions in favour of parties including the Debtors, the Foreign Representative, the Information Officer and their professionals.⁴⁵ Following discussions with the U.S. Trustee, the Second Amended Plan was further revised to include a “Gatekeeper Provision”, which requires any party seeking to assert claims against the Covered Parties (as defined in the Second Amended Plan) to seek relief from

³⁹ Robinson Affidavit at para 55.

⁴⁰ Robinson Affidavit at para 56.

⁴¹ Although the First Amended Plan is the version that was sent for solicitation, the Second Amended Plan was amended in accordance with the terms of the First Amended Plan and with the support of the holders of a majority of the First Lien Credit Agreement Claims.

⁴² Sixth Report at para 6.7.

⁴³ Plan Supplement at Exhibit D: Sale Consideration Schedule, Robinson Affidavit at Exhibit D.

⁴⁴ Sixth Report at para 6.7.

⁴⁵ Second Amended Plan and Disclosure Statement, Robinson Affidavit at Exhibit F.

the U.S. Bankruptcy Court before commencing any such claims, including a determination of whether such claims are released pursuant to the Second Amended Plan.⁴⁶

29. The Second Amended Plan contemplates the dismissal of the CCAA Proceedings following the Effective Date and the appointment of a Plan Administrator to wind down the Debtors, including Sungard AS Canada.⁴⁷

30. Following a hearing on October 17, 2022, the U.S. Bankruptcy Court approved the Eagle Sale Order, authorizing the sale of substantially all of the Eagle business to 11:11 Systems, and thereby effectively authorizing the Debtor to sell all of its remaining assets.⁴⁸ At the hearing, the Debtors advised the U.S. Bankruptcy Court that a revised schedule of contracts to be assumed and assigned had been filed, but that amendments to the schedule were being made at the request of the contract counterparties.⁴⁹

31. At the same hearing, the U.S. Bankruptcy Court granted the Confirmation Order approving the Second Amended Plan, with limited modifications to address (i) outstanding objections and (ii) an error in the Debtors' service of notice of the revised date of the Confirmation Hearing.⁵⁰ More specifically, to ensure that parties who may not have received notice of the revised Confirmation Hearing are provided with an opportunity to object, the U.S. Bankruptcy Court set a new objection deadline of October 24, 2022 to allow any party not having notice of the October 17, 2022 hearing to file an objection. The U.S. Bankruptcy Court is scheduled to hold a further hearing on October 26, 2022 to address any objections filed.

⁴⁶ Sixth Report at para 6.6.

⁴⁷ Second Amended Plan and Disclosure Statement, Article XVII, Section L, Robinson Affidavit at Exhibit F.

⁴⁸ Sixth Report at para 5.5.

⁴⁹ Sixth Report at para 5.4(c).

⁵⁰ Sixth Report at para 6.2(c).

C. The Proposed Order

32. On October 14, 2022, the Foreign Representative served a Notice of Motion on the Service List.⁵¹ In addition, the Foreign Representative served a copy of the Notice of Motion on the parties identified in the Eagle Assumption and Assignment Notice as counterparties to a contract with Sungard AS Canada.⁵² The parties without email addresses were provided with overnight or priority mail notice including a letter directing the parties to the Information Officer's website.⁵³ After additional documents were filed with the U.S. Bankruptcy Court, including the proposed forms of the Eagle Sale Order and the Confirmation Order, on October 15, 2022 the Foreign Representative served a Motion Record containing the Robinson Affidavit on the Service List and the parties on the Eagle Assumption and Assignment Notice for whom email addresses were available.⁵⁴

33. On October 18, 2022, the Information Officer served its Sixth Report, among other things, recommending that the Court grant the Draft Order.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

34. The sole issue to be addressed on this motion is whether the court should grant the relief requested in the Draft Order which:

- (a) recognizes and gives full force and effect in all provinces and territories of Canada to the Confirmation Order and the Eagle Sale Order; and
- (b) provides for the termination of the CCAA Proceedings, including, among other things, discharging the Court-ordered charges, discharging the Information Officer,

⁵¹ Affidavit of Service of William Onyeaju, sworn October 14, 2022 (the "**Onyeaju Affidavit**").

⁵² Onyeaju Affidavit.

⁵³ Affidavit of Service of Alec Hoy, sworn October 15, 2022; Affidavit of Service of Alec Hoy sworn October 18, 2022.

⁵⁴ Affidavit of Service of William Onyeaju, sworn October 15, 2022.

approving the fees of the Information Officer and its counsel, approving the activities of the Information Officer and releasing the Canadian professionals.

A. The Confirmation Order and the Eagle Sale Order should be Recognized

35. The Foreign Representative is seeking recognition of the Confirmation Order and the Eagle Sale Order under section 49 of the CCAA. Such recognition is consistent with the CCAA and case law in Ontario.

36. As this court has noted, “[t]he purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada.”⁵⁵ Part IV of the CCAA is intended, among other things, to promote (i) cooperation between Canadian courts and courts in foreign jurisdictions, and (ii) promote fair and efficient administration of cross-border insolvencies, which protects the interests of debtors, creditors and other interested persons.⁵⁶

37. Once an order recognizing a foreign proceeding is made, the Court is required 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. Part IV of the CCAA allows this Court to make any order it considers appropriate for the protection of a debtor company’s property or that is in the interest of a creditor or creditors.⁵⁷

38. When deciding whether to recognize a foreign order, Canadian courts have considered, among other factors: (i) the promotion of comity and cooperation between the courts; (ii) respect

⁵⁵ *Zochem Inc. (Re)*, [2016 ONSC 958](#) at para 15.

⁵⁶ CCAA, s. 44.

⁵⁷ CCAA, ss. 49, 50, 52(1) and 61(2).

of the “overall thrust of foreign bankruptcy and insolvency legislation in any analysis,” unless it diverges radically from the process in Canada; (iii) the equitable and, to the extent reasonably possible, equal treatment of common or like stakeholders regardless of their location; (iv) permitting the enterprise to reorganize as a global entity, including allowing for one jurisdiction to take charge of the principal administration of the enterprise's reorganization; and (v) the notice given to creditors.⁵⁸

39. In considering certain of the *Babcock* factors, this Court in *Xerium*⁵⁹ held that it had the “authority and indeed obligation” to recognize the U.S. bankruptcy court's confirmation order and that such recognition is “precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.”⁶⁰ The Court noted that in recognizing the order, it “not only helps to ensure the orderly completion to the Chapter 11 Debtors’ restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.”⁶¹

40. Courts in this jurisdiction have routinely granted orders recognizing and enforcing both sale orders (including in these CCAA Proceedings) and confirmation orders granted by United States Bankruptcy Courts.⁶²

41. In this CCAA Proceeding, the Court made an order on April 14, 2022 recognizing the Chapter 11 Case of Sungard AS Canada as a foreign main proceeding. Since that time, the Court has facilitated the cross-border restructuring by granting numerous orders under section 49 of the

⁵⁸ *Babcock & Wilcox Canada Ltd., Re*, [2000 OJ No 786](#) (QL) at para 21 (“*Babcock*”). See also *Xerium Technologies Inc., Re*, [2010 ONSC 3974](#) at paras 26 and 27 (“*Xerium*”).

⁵⁹ *Xerium*.

⁶⁰ *Xerium* at para 23.

⁶¹ *Xerium* at para 29.

⁶² See, e.g., *Re Sungard Availability Services Canada Ltd. et al.*, [Order of Conway J dated September 15, 2022](#) (Ont Sup Ct J (Commercial List)), Court File No. CV-22-00679628-00CL; *Re Knotel Canada, Inc. et al.*, [Recognition Order of Cavanagh J dated June 30, 2021](#) & [Recognition Order of Cavanagh J dated March 23, 2021](#) (Ont Sup Ct J (Commercial List)), Court File No. CV-21-00658434-00CL (“*Re Knotel Canada*”).

CCAA recognizing and giving full force and effect to orders of the U.S. Bankruptcy Court. The Court has already granted recognition orders in respect of the 365 Sale Order and the 11:11 Sale Order.⁶³ Recognition of the Eagle Sale Order permits the subject Canadian assets to be sold as part of the larger corporate restructuring, among other things, permitting continued employment for some of the Canadian employees. Appropriate notice was provided in the Chapter 11 Cases pursuant to the Bidding Procedures Order and in the CCAA Proceedings. Recognition of the Eagle Sale Order is consistent with this Court's prior orders and with the principles of comity already demonstrated in these CCAA Proceedings

42. Similarly, recognition of the Confirmation Order is necessary and appropriate under section 49 of the CCAA for the protection of creditor interests. The Confirmation Order, and its recognition in Canada, are necessary to permit the final steps in this cross-border restructuring, including distributions to the secured lenders, administrative creditors and priority creditors. The Second Amended Plan is a liquidating plan, similar to plans recognized by this Court in prior cross border proceedings.⁶⁴ Canadian stakeholders were permitted to participate in the Chapter 11 Cases and are not treated differently based on their jurisdiction. Further, it is a condition precedent to the implementation of the Second Amended Plan that this Court shall have entered an order recognizing the Confirmation Order and giving it full force and effect in Canada.

B. The Termination Provisions

43. The Applicant also seeks this Court's authorization to terminate the within recognition proceedings upon the occurrence of the Effective Date and the Information Officer filing the Termination Certificate. In connection with the termination of these CCAA Proceedings, the Draft Order also contains: (i) a release in favour of the Information Officer, its counsel and counsel to

⁶³ Robinson Affidavit at paras 26 & 29.

⁶⁴ See, e.g., *Re Knotel Canada*, [Recognition Order of Cavanagh J dated June 30, 2021](#).

the Foreign Representative relating to claims arising out of these recognition proceedings (except for any claim arising out of gross negligence or wilful misconduct); (ii) a release of the court-ordered charges; and (iii) approval of the fees and activities of the Information Officer and its counsel.

44. Canadian courts commonly employ section 49 of the CCAA to terminate cross-border recognition proceedings when appropriate, including when all matters requiring relief from the Canadian court have been completed.⁶⁵

45. The Draft Order proposes a termination mechanism that will allow the Debtors to terminate the CCAA Proceedings and limit future costs if a closing occurs. The filing of the Termination Certificate, the specific confirmation of the release of the Canadian professionals, the discharge of the Information Officer, and the authority of the Plan Administrator will provide clarity and certainty going forward and are consistent with the terms of the Second Amended Plan. These provisions are consistent with recent termination orders granted in Part IV of the CCAA proceedings.⁶⁶

46. The Foreign Representative is supportive of the request for approval of the Information Officer's reports and of the fees set out in the fee affidavits.

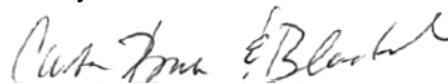
PART IV - ORDER REQUESTED

47. The Foreign Representative respectfully requests that this Court grant the relief requested in the Draft Order.

⁶⁵ See, e.g., *Re Knotel Canada*, [Recognition Order of Cavanagh J dated June 30, 2021](#); and *Re GNC Holdings*, [Recognition Order of Conway J dated October 30, 2022](#).

⁶⁶ See, e.g., *Re Knotel Canada*, [Recognition Order of Cavanagh J dated June 30, 2021](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2022.



Cassels Brock & Blackwell LLP

CASSELS BROCK & BLACKWELL LLP

Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2

Ryan Jacobs LSO#: 59510J

Tel: 416.860.6465
rjacobs@cassels.com

Jane Dietrich LSO#: 49302U

Tel: 416.860.5223
jdietrich@cassels.com

Natalie E. Levine LSO#: 64908K

Tel: 416.860.6568
nlevine@cassels.com

Lawyers for the Foreign Representative

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Zochem Inc. (Re)*, [2016 ONSC 958](#).
2. *Babcock & Wilcox Canada Ltd., Re*, [2000 OJ No 786](#) (Ont Sup Ct J (Commercial List)).
3. *Xerium Technologies Inc., Re*, [2010 ONSC 3974](#).
4. *Re Sungard Availability Services Canada Ltd. et al.*, [Order of Conway J dated September 15, 2022](#) (Ont Sup Ct J (Commercial List)), Court File No. CV-22-00679628-00CL.
5. *Re Knotel Canada, Inc. et al.*, [Recognition Order of Cavanagh J dated June 30, 2021](#) (Ont Sup Ct J (Commercial List)), Court File No. CV-21-00658434-00CL.
6. *Re Knotel Canada, Inc. et al.*, [Recognition Order of Cavanagh J dated March 23, 2021](#) (Ont Sup Ct J (Commercial List)), Court File No. CV-21-00658434-00CL.
7. *Re GNC Holdings, Inc. et al.*, [Termination Order of Conway J dated October 30, 2020](#) (Ont Sup Ct J (Commercial List)), Court File No. CV-20-00642970-00CL.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

PART IV – CROSS-BORDER INSOLVENCIES

PURPOSE

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company’s property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

RECOGNITION OF FOREIGN PROCEEDING

Other orders

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

- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
- (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company’s property, business and financial affairs, debts, liabilities and obligations; and
- (c) authorizing the foreign representative to monitor the debtor company’s business and financial affairs in Canada for the purpose of reorganization.

Restriction

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

Application of this and other Acts

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

Terms and conditions of orders

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

OBLIGATIONS

Cooperation — court

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

MISCELLANEOUS PROVISIONS

Court not prevented from applying certain rules

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

Public policy exception

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

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

AND IN THE MATTER OF SUNGARD AVAILABILITY SERVICES (CANADA) LTD./SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES (CANADA) LTEE

APPLICATION OF SUNGARD AVAILABILITY SERVICES (CANADA) LTD./SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES (CANADA) LTEE UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

Court File No. CV-22-00679628-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE FOREIGN REPRESENTATIVE

CASSELS BROCK & BLACKWELL LLP

Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2

Ryan Jacobs LSO#: 59510J

Tel: 416.860.6465
rjacobs@cassels.com

Jane Dietrich LSO#: 49302U

Tel: 416.860.5223
jdietrich@cassels.com

Natalie E. Levine LSO#: 64908K

Tel: 416.860.6568
nlevine@cassels.com

Lawyers for the Foreign Representative