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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
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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 “**Canadian Debtors**”) and several other of their affiliates (collectively the “**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 Debtors (collectively the “**Cyxtera**”).
3. Communications ULC operates four (4) data centres under the Cyxtera brand in Vancouver, British Columbia and Montreal, Quebec (the “**Vancouver and Montreal Data Centres**”), and Mississauga and Markham, Ontario (the “**Ontario Data Centres**”, with the “Vancouver and Montreal Data Centres”, the “**Canadian Data Centres**”, and the Canadian Data Centres’ associated personal property, executory contracts and leases, the “**Canadian Assets**”).
4. Pursuant to first day motions filed by the 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**”). Certain First Day Orders were interim but would become final orders on or before subsequent hearings before the US Bankruptcy Court.

5. Pursuant to an originating application by the Foreign Representative, on behalf of the Canadian Debtors, the Foreign Representative applied to this Honourable Court 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**"), and on June 7, 2023 this Honourable Court granted an Initial Recognition Order – Foreign Main Proceedings (the "**Initial Recognition Order**") and a Supplemental Order – Foreign Main Proceeding, recognizing the First Day Orders.
6. 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:

The Plan and Brookfield Orders

- (a) an Order of this Honourable Court, substantially in the form attached to the Application as **Schedule "A"** (the "**Confirmation Recognition Order**"), recognizing and giving effect in Canada to an Order of the US Bankruptcy Court (the "**Confirmation Order**") (1) making findings of fact, conclusions of law, and (2) confirming the fourth amended joint Chapter 11 plan reorganization of CTI and its Debtor Affiliates pursuant to Chapter 11 of the US Bankruptcy Code (the "**Plan**"), which, among other things:
 - (i) (x) confirms the Plan together with the Plan Supplement (as defined in the Plan), (y) declares that the Plan, the Plan Supplement, and the Confirmation Order shall be effective and binding as of the Effective Date (as defined in the Plan) on all parties in interest including (1) the Debtors, (2) the Holders of DIP Claims (as defined in the Plan), (3) the Holders of the Receivables Program Claims (as defined in the Plan), (4) the Holders of First Lien Claims (as defined in the Plan), (5) the Holders of General Unsecured Claims (as defined in the Plan), (6) the Committee (as defined in the Plan), Phoenix (as defined below), (7) Phoenix (as defined below) and (8) all other Holders of Claims and Interests (as defined in the Plan), and (z) overrules in their entirety all Objections (as defined in the Plan), responses, reservations and comments in opposition to the Plan;

- (ii) authorizes the Debtors to enter into and perform their obligations under an asset purchase agreement dated as of October 31, 2023 (the “**Brookfield APA**”, and the purchase and sale transaction thereunder the “**Brookfield Transaction**”) by and among Phoenix Data Center Holdings LLC as purchaser (“**Phoenix**”) and CTI, the Canadian Debtors, certain other Debtors and affiliates of Cyxtera who sign, or deliver joinders to, the Brookfield APA as sellers (collectively, the “**Sellers**”);
 - (iii) approves the sale of the Acquired Assets (as defined in the Brookfield APA), free and clear of all Encumbrances (as defined in the Brookfield APA) other than Permitted Encumbrances (as defined in the Brookfield APA);
 - (iv) approves the assumption and assignment of Assigned Contracts and Acquired Leases (as defined in the Brookfield APA) attached to this Affidavit or otherwise designated in accordance with the Brookfield APA; and
 - (v) grants related relief; and
- (b) an Order of this Honourable Court that, upon the filing of a certificate of the Chief Restructuring Officer (“**CRO**”) or Deputy Chief Restructuring Officer (“**DCRO**”) that all conditions precedent to the closing of the Brookfield Transaction have been satisfied or waived (the “**Brookfield Closing Certificate**”):
- (i) all of Communications ULC’s right, title and interest in and to the Acquired Assets (as defined in the Brookfield APA) shall vest absolutely in the name of Phoenix, free and clear of and from any and all Encumbrances (as defined in the Brookfield APA) other than Permitted Encumbrances (as defined in the Brookfield APA); and
 - (ii) all of the rights and obligations of Communications ULC under the Assigned Contracts and Acquired Leases (as defined in the Brookfield APA) shall be assigned, conveyed and transferred to and assumed by

Phoenix pursuant to section 11.3 of the CCAA, with such the assignment of the Acquired Contracts and Acquired Leases being declared valid and binding upon all of the Counterparties to the Assigned Contracts and Acquired Leases notwithstanding any restriction, condition or prohibition contained in any Assigned Contracts and Acquired Leases relating to the assignment thereof, including any provision requiring the consent to any assignment by a Counterparty,

but subject to the provisions of the Cologix Recognition Order described in paragraph 6(d)(iii) of this Affidavit;

- (c) an Order that upon the filing of the Brookfield Closing Certificate, the Canadian Debtors are authorized and directed to deliver to the Registrar of Corporations (“**Registrar**”) appointed under the *Business Corporations Act* of Alberta (the “**ABCA**”) the Brookfield Closing Certificate, the Confirmation Recognition Order, the Initial Recognition Order – Foreign Main Proceeding Dated June 7, 2023, and Articles of Reorganization of each of Communications ULC and TRS ULC under sections 173(1) and 192(1) and (4) of the ABCA to change the names of Communications ULC and TRS ULC to numbered corporations having numbers assigned by the Registrar and in the style of “[*assigned number*] Alberta Inc.”, and authorizing the Registrar to issue certificates under sections 172 and 192 making such changes of corporate names effective;

Cologix Orders¹

- (d) an Order, substantially in the form attached to the Application as **Schedule “B”** (the “**Cologix Recognition Order**”):
 - (i) recognizing and giving effect in Canada to the Order of the US Bankruptcy Court (the “**Canada Sale Order**”), which, among other things, authorizes and approves the entry into and performance by

¹ Unless otherwise defined herein the definitions in this section shall have the meaning under the asset purchase agreement dated October 30, 2023 between Communications ULC and Cologix Canada, Inc – Li Affidavit para 48, Exhibit “F”.

Communications ULC of the asset purchase agreement dated October 30, 2023 (the “**Cologix APA**”) between Communications ULC and Cologix Canada, Inc. (“**Cologix**”) and the sale thereunder of the Acquired Assets (as defined in the Cologix APA) and the assignment and assumption of the Assigned Contracts and Acquired Leases (as defined in the Cologix APA) and granting related relief; and

- (ii) recognizing and giving effect in Canada to the Order of the US Bankruptcy Court, which, among other things, approves the assumption and assignment of certain additional Assigned Contracts and Acquired Leases in connection with the sale of the Acquired Assets (as defined in the Cologix APA) (the “**Supplemental Assignment of Acquired Agreements Order**”) as provided for under the Cologix APA; and;
- (iii) upon the satisfaction or waiver of the conditions precedent in the Cologix APA (the “**Conditions**”), other than the vesting and conveyance of the Acquired Assets (as defined in the Cologix APA) and the assignment and transfer of the Assigned Agreements and Acquired Leases (as defined in the Cologix APA) (such conditions being the “**Vesting Conditions**”), and the delivery by the Chief Restructuring Officer or Deputy Chief Restructuring Officer of a certificate (a “**Closing Certificate**”) confirming such satisfaction or waiver either before the closing of the Brookfield Transaction (the “**Brookfield Closing**”), or after the Brookfield Closing but prior to the date that is ninety (90) days following the Brookfield Transaction Closing (the “**Specified Date**”):
 - (1) all of Communications ULC’s right, title and interest in and to the Acquired Assets shall vest absolutely in the name of Cologix if the Cologix Transaction closes before the Brookfield Transaction or prior to the Specified Date, free and clear of and from any and all Encumbrances (as

defined in the Cologix APA) other than Permitted Encumbrances (as defined in the Cologix APA); and

- (2) all of the rights and obligations of Communications ULC under the Assigned Contracts and Acquired Leases (as defined in the Cologix APA) shall be assigned, conveyed and transferred to and assumed by Cologix pursuant to section 11.3 of the CCAA, with such assignment of the Assigned Contracts and Acquired Leases Contracts being declared valid and binding upon all of the Counterparties to the Assigned Contracts and Acquired Leases notwithstanding any restriction, condition or prohibition contained in any Assigned Contracts and Acquired Leases relating to the assignment thereof, including any provision requiring the consent to any assignment by a Counterparty,

which vesting, assigning, conveying and transferring in favour of Cologix is deemed to be effective immediately upon the delivery of the Closing Certificate to Cologix and Phoenix, if the Conditions other than the Vesting Conditions are satisfied before the Brookfield Closing, or as of the Brookfield Closing if the Conditions other than the Vesting Conditions are satisfied or waived after the Brookfield Closing but before the Specified Date, provided that if the Conditions other than the Vesting Conditions are not satisfied before the Specified Date, the provisions of the Cologix Recognition Order, *inter alia*, vesting, assigning, conveying and transferring in favour of Cologix under the Cologix Recognition Order will be deemed to be of no force and effect; and

Miscellaneous Recognition Order

- (e) an Order of this Honourable Court, substantially in the form attached to the Application as **Schedule “C”** (the “**Miscellaneous Recognition Order**” and with

the Confirmation Recognition Order and the Cologix Recognition Order, the **“Recognition Orders”**):

(i) recognizing and giving effect in Canada to the following Orders of the US Bankruptcy Court:

- (1) an Order of the US Bankruptcy Court entered on June 29, 2023 (i) authorizing and approving procedures to reject or assume executory contracts and unexpired leases and (ii) granting related relief (the **“Contract Rejection/Assumption Procedures Order”**);
- (2) a sixth interim Order entered on September 21, 2023 (i) authorizing the Debtors to (A) continue using the cash management system, (B) honour certain prepetition obligations related thereto, (C) maintain existing Debtor bank accounts, business forms, and books and records, and (D) continue intercompany transactions, and (ii) granting related relief (the **“Sixth Interim Cash Management Order”**);
- (3) an Order entered on November 13, 2023 by a certificate of no objection (the **“Bid Protections Order”**) approving a break-up fee in the amount of \$23,250,000 and an expense reimbursement provision in an amount not to exceed \$7,750,000 granted in favour of Phoenix pursuant to section 8.2 of the Brookfield APA (the **“Bid Protections”**);
- (4) an Order Authorizing the (I) Retention of AP Services, LLC, (II) Designation of Eric Koza as CRO and Raymond Li as DCRO Effective as of the Petition Date, and (III) Granting Related Relief (**“Retention of AP Services Order”**);

- (ii) approving the professional fees, costs and disbursements of Gowling WLG (Canada) LLP (“**Gowling**”) for the period up to and including November 14, 2023;
 - (iii) approving the professional fees and disbursements of Alvarez & Marsal Canada Inc. as information officer in these proceedings (the “**Information Officer**”) for the period of October 1, 2023, up to and including October 31, 2023; and
 - (iv) approving the professional fees and disbursements of McMillan LLP (“**McMillan**”) as counsel for the Information Officer for the period of October, 2023, up to and including October 31, 2023; and
 - (f) granting such further and other relief as this Honourable Court may deem appropriate.
7. The US Bankruptcy Court has also issued or is expected to issue the following Orders, among others, during the Chapter 11 Cases as defined in the Affidavit of Raymond Li, sworn November 17, 2023, which are relevant to the relief the CTI and the Canadian Debtors seek herein:
- (a) the Bar Date Order;
 - (b) the Bidding Procedures Order; and
 - (c) the Retention of AP Services Order.
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**”), 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**”) and the Affidavit of Raymond Li sworn November 17, 2023 (the “**Li Affidavit**” and with the Koza Affidavit #1, the Koza Affidavit #2, the Koza Affidavit #3, the Koza

Affidavit #4 and the Koza Affidavit #5 the “**Affidavits**”). The facts in support of this application are more particularly set out in the Affidavits. Capitalized terms not defined herein have the meanings given to them in the Li Affidavit. All references to monetary amounts referenced herein are in United States dollars, unless otherwise stated.

II. LAW AND ARGUMENT

9. The primary issues to be determined on this application are as follows:
- (a) whether this Honourable Court should grant the Confirmation Order;
 - (b) whether this Honourable Court should grant the Cologix Recognition Order; and
 - (c) whether this Honourable Court should grant the Miscellaneous Recognition Order.

Part IV of the CCAA

10. 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.²
11. 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.³

² CCAA, Part IV [Tab 1]

³ CCAA, s. 44 [Tab 1]

12. 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.⁴
13. 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.⁵

Recognition of the Recognition Orders is Appropriate

14. Under section 49 of the CCAA, the court has the authority on an 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.⁶
15. 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. But 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.⁷

⁴ *Babcock & Wilcox Canada Ltd., Re*, 2000 CanLII 22482 (ON SC), [*Babcock*] at para 21(b) [Tab 2]

⁵ *MtGox Co., Ltd (Re)*, 2014 ONSC 5811, at paras 10-12 [Tab 3]; *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, [*Hollander*] at paras 41 & 42 [Tab 4]

⁶ CCAA, sections 52 and 61 [Tab 1]

⁷ CCAA, sections 52 and 61 [Tab 1]

16. Hence, once the Canadian court gives an order recognizing a foreign proceeding, it 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.⁸
17. A Canadian court, in determining whether to recognize a foreign order made in foreign proceedings, will consider factors such as the following⁹:
 - (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 it is in substance generally so different from the bankruptcy and insolvency laws of Canada, or diverges so radically from the processes in Canada, that the Canadian court's ability or willingness to provide such cooperation is limited;
 - (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 the enterprises to reorganize globally, especially where there is an established transnational interdependence within the enterprises, and of permitting one jurisdiction, to the extent reasonably practical, to take "charge" of the principal administration of the enterprise's reorganization, where this approach facilitates a potential reorganization 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 has an ancillary role, the court in that jurisdiction should on an ongoing basis be provided with information and be kept apprised of

⁸ CCAA, sections 49 and 50 [**Tab 1**]; *Purdue Pharma L.P., Re*, 2019 ONSC 7042 at para 22 [**Tab 5**]

⁹ *Babcock* at para 21 [**Tab 2**]

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.
18. 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.¹⁰
19. It is therefore respectfully submitted that this Honourable Court should continue to allow the US Bankruptcy Court to exercise principal control over the Chapter 11 Cases, given that it has the closest connection to the proceeding and the CCAA promotes such cooperation to the maximum extent possible.
20. As more particularly described below, recognition of the Recognition 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.
21. Recognition of the Recognition Orders is also important to ensuring the equal treatment of Canadian stakeholders and the coordination of the Chapter 11 Cases and the Recognition Proceedings, and to ensuring that Holders of Claims (as defined in the Plan) against the Canadian Debtors, whether they be Holders of First Lien Claims (as defined in the Plan), Holders of General Unsecured Claims (as defined in the Plan), post-petition date employees, suppliers or trade creditors, or any other stakeholders in the Canadian Debtors, receive the benefit of the Recognition Orders. 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

¹⁰ *Hollander* at para 41 [**Tab 4**]

is or could be independent of or separate from the other 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 Debtors;¹¹

- (b) the Canadian Debtors' centre of main interest is in the United States and therefore any plan of reorganization or sale transaction must be within the overall Chapter 11 Cases, subject to obtaining the necessary recognition orders and other relief from this Honourable Court in these Recognition Proceedings, and to satisfying this Honourable Court that such relief is appropriate;
- (c) if the Recognition Orders are not recognized and given effect in Canada by this Honourable Court, substantial professional costs would have to be incurred by the Canadian Debtors, amongst others, to achieve substantially the same result, without any benefit to the creditors and stakeholders in the Chapter 11 Cases and these Recognition Proceedings;
- (d) the recognition and giving effect in Canada of the Recognition 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 Canadian Debtors and other Debtors being successfully restructured; and
- (e) the Recognition Orders are intended to protect and maximize the value of the properties, business and estates of the Canadian Debtors and other Debtors' property in both the United States and Canada.

¹¹ Koza Affidavit #2, para 36

This Court has jurisdiction to grant the Confirmation Recognition Order

22. Because this Court in its June 7, 2023 Initial Recognition Order recognized the Chapter 11 Cases as a “foreign main proceeding” pursuant to sections 47 and 48 of the CCAA., under section 49 this Court is has a broad discretion to make any order that it considers appropriate in the circumstances to protect the debtor’s property or the interests of one or more creditors.¹² Hence, this Court has jurisdiction to grant the Confirmation Recognition Order.
23. The Confirmation Recognition Order provides for the recognition of the Confirmation Order which order, among other things:
- (a) approves the Plan, and authorizes its implementation, which includes, among other things contemplates,
 - (i) eight (8) classes of creditors and their respective treatment and voting rights under the Plan;¹³
 - (ii) a priority for Allowed Administrative Claims in full as defined under the Plan;¹⁴
 - (iii) a global sales transactions for the sale of substantially all of Cyxtera’s assets;¹⁵
 - (iv) the repayment of the DIP Loan or as otherwise agreed to by the Consenting Term Lenders;¹⁶
 - (v) the vesting of the Debtors’ assets in Phoenix pursuant to the Brookfield APA;¹⁷

¹² CCAA ss. 49(1) & 50.

¹³ Li Affidavit, para 71.

¹⁴ Li Affidavit, para 73.

¹⁵ Li Affidavit, para 37.

¹⁶ Li Affidavit, para 75.

¹⁷ Li Affidavit, para 58.

- (vi) the approval of the assumption and assignment of certain executory contracts and unexpired leases;¹⁸
 - (vii) a trust in favour of unsecured creditors guaranteeing that they will, on a pro rata basis, recover a portion of their unsecured claims, in circumstances where liquidation would leave unsecured creditors (including those of the Canadian Debtors) with no recoveries whatsoever;¹⁹
 - (viii) a distribution of funds from the proceeds of sale of the Debtors' assets;²⁰
 - (ix) the paying of cure costs resulting from the assumption of executory contracts and unexpired leases;²¹
 - (b) authorizes and approves the Brookfield APA and the sale of substantially all of the Debtors' assets to Phoenix, including, a minimum the Ontario Data Centres.
24. The Plan was the result of months of diligent effort and represents the best means to maximize the value of the Debtors' assets, including Communications ULC's assets, for the benefit of its creditors.²² In particular the Debtors, with the assistance of Guggenheim launched the Marketing Process on March 27, 2023 prior to the commencement of the Chapter 11 Cases.²³ The Marketing Process conducted by Guggenheim and the Debtors was extensive, and once the Chapter 11 Cases commenced was approved by the US Bankruptcy Court pursuant to the Bidding Procedures Order. The steps taken by the Debtors and Guggenheim under the Marketing Process included the following:
- (a) contacting seventy-five (75) potential strategic partners to solicit interest in a potential sale of the Debtors' assets outside of a chapter 11 proceeding or under a chapter 11 plan;

¹⁸ Li Affidavit, para 54.

¹⁹ Li Affidavit, para 30.

²⁰ Li Affidavit, paras 65, 72(c).

²¹ Li Affidavit, para 60.

²² Li Affidavit, paras 24-27.

²³ Li Affidavit, para 11.

- (b) engaging with approximately eighty-eight (88) potential financial and strategic parties (“**Potential Purchasers**”) following the commencement of the Chapter 11 Cases in accordance with the Bidding Procedures Order;
 - (c) executing forty-five (45) non-disclosure agreements with Potential Purchasers;
 - (d) creating and operating a comprehensive virtual data room which was constantly updated with relevant financial, legal and business information;
 - (e) communicating with Potential Purchasers;
 - (f) receiving seven (7) non-binding written proposals in advance of the deadline set in the Bidding Procedures Order; and
 - (g) negotiating terms of definitive asset purchase agreements with Phoenix and Cologix.²⁴
25. The Information Officer recommends that this Honourable Court grant the Confirmation Recognition Order recognizing the Plan.
26. The Confirmation Recognition Order benefits all of the Debtors', including the Canadian Debtors, stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.²⁵ CCAA courts in Part IV proceedings have held that these factors justify recognition of a plan previously approved by a US Court order.²⁶
27. It is the informed business judgment of the Debtors, including Canadian Debtors, that the Confirmation Recognition Order is necessary to protect the interests of creditors.²⁷ This business judgment is supported by the expert advice of Guggenheim²⁸ and reflects the input of the numerous parties including the Consenting Term Lenders, the Debtors’

²⁴ Li Affidavit, paras 24-27.

²⁵ *Xerium, Technologies Inc, Re*, 2010 ONSC 3974 [*Xerium*] at para 20 [**Tab 6**].

²⁶ *Xerium* at para 28 [**Tab 6**].

²⁷ Li Affidavit, para 102, Exhibit “J” at page 44, para 79.

²⁸ Li Affidavit, paras 94, 95.

secured creditors and the official committee of unsecured creditors in the Chapter 11 Cases (the “**Committee**”). In the absence of any indication that the Debtors have acted improvidently or that the sale process was unfair, their business judgment should be entitled to deference by this Court.²⁹

Canadian Courts have recognized US Plans and Sale Orders in CCAA Part IV Proceedings

28. Comity, cooperation, and accommodation with US Courts have guided CCAA courts in cross-border insolvency proceedings.³⁰ Canadian courts will generally recognize sale and plan approval orders granted by US Courts in Chapter 11 cases that are foreign main proceedings.³¹
29. Where a US bankruptcy court in a foreign main proceeding has approved a plan, recognizing and implementation of that plan promotes the purposes of Part IV of the CCAA. Canadian courts have held that the plan approval criteria considered in a US bankruptcy proceeding are consistent with those of the CCAA.³² In *Xerium*, Campbell J. ordered the recognition of a plan that had been approved by a US bankruptcy court in a foreign main proceeding for this reason.
30. The Plan in this case satisfies the same criteria Campbell J. referred to *Xerium*³³:
 - (a) it is made in good faith;
 - (b) it does not breach applicable law;
 - (c) it is in the interests of the Debtors’ creditors and other stakeholders; and
 - (d) it will not likely be followed by the need for liquidation or further financial reorganization of the Debtors.

²⁹ *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742 at paras. 70-72 [Tab 7].

³⁰ *Payless Holdings Inc LLC, Re*, 2017 ONSC 2242 at para 35 [Tab 8]; *Ultra Petroleum Corp, Re*, 2017 YKSC 23 [Ultra Petroleum] at para 8 [Tab 9].

³¹ *Lightsquared Inc. (Re)*, 2015 ONSC 2309 [Tab 10] and *Xerium* [Tab 6].

³² *Xerium* at para 28 [Tab 6].

³³ *Xerium* at paras 28 [Tab 6], citing CCAA ss. 44 and 61(1) [Tab 1].

31. More broadly, the Confirmation Recognition Order satisfies many of the contextual factors Canadian courts have considered when recognizing US court orders in a Part IV proceeding.³⁴ These factors support granting the Confirmation Recognition Order with respect to the Debtors:

- (a) the Confirmation Recognition Order is critical to the restructuring of the Debtors as a global corporate unit. Obtaining the Confirmation Recognition Order from this Court is a condition of closing the Brookfield APA and the closing of the Brookfield Transaction is a condition for completion of the Plan;
- (b) the Required Consenting Term Lenders, representing a minimum of 66.7% of the claims under the First Lien Term Facilities' have consented to approval of the Plan and resulting sale under the Brookfield APA³⁵;
- (c) the Brookfield APA is the only means by which unsecured creditors of the Debtors can hope to obtain recoveries in the Chapter 11 Cases;
- (d) the Canadian Debtors' operations are closely integrated with those of the other Debtors. Implementing the Plan and Brookfield APA is essential for the Debtors, including the Canadian Debtors, to emerge from restructuring;
- (e) the Plan was confirmed by the US Bankruptcy Court on November 16, 2023 in accordance with well-established procedures and practices, including the court-approved Disclosure Statement and Bidding Procedures;
- (f) the Canadian Data Centres are Acquired Assets under the Brookfield APA, the Brookfield APA is being implemented pursuant to the Plan, and therefore it is neither possible at this point to separate the Brookfield APA from the Plan itself, nor to separate the Canadian Data Centres from the Brookfield APA;
- (g) Canada is an ancillary jurisdiction in the reorganization of the Debtors;

³⁴ *Xerium* at para 27 [**Tab 6**]; *Ultra Petroleum* at para 9 [**Tab 9**]; *Babcock* at para 21 [**Tab 2**].

³⁵ Li Affidavit, paras 34, 37.

- (h) the Confirmation Recognition Order is necessary to ensure the fair and efficient administration of this cross-border insolvency. The Plan provides for full recoveries to Classes of creditors ranking in priority to the First Lien Lenders and General Unsecured Creditors, and a guaranteed level of partial recovery for both the First Lien Lenders and General Unsecured Creditors. Canadian creditors who are members of those Classes are in no way discriminated against but rather are able to fully participate; and
- (i) it is in the interests of all stakeholders that there be a coordinated cross-border approach to ensure that the recoveries of creditors and other stakeholders are maximized in the circumstances, and that the business of the Debtors be continued by Phoenix and Cologix upon the completion of the Brookfield Transaction and Cologix Transaction; and
- (j) the Confirmation Recognition Order will permit the Debtors can emerge from the Chapter 11 Cases and continue operating, winding up, liquidating and distributing their property amongst the creditors in accordance with the terms and provision of the Plan.³⁶

The Confirmation Order meets the standards for sale approval under the CCAA

32. When considering whether to recognize a sale approval order granted by a foreign court in a proceeding under Part IV of the CCAA, section 49(1) requires Canadian courts to determine whether the order is “necessary for the protection of the debtor company’s property or the interests of a creditor or creditors”.³⁷ In making this determination, courts may consider the factors governing sale approval under section 36(3) of the CCAA³⁸:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

³⁶ Li Affidavit, Section E. Summary of the Brookfield APA, paras 49-66 and Section F. Summary of the Plan, paras 67-83.

³⁷ CCAA s. 49(1) [Tab 1].

³⁸ CCAA s.36(3) [Tab 1].

- (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.
33. These factors overlap to a certain degree with the *Soundair*³⁹ factors that govern sales transactions under 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 US foreign main proceeding.⁴⁰ The *Soundair*⁴¹ test considers: (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.
34. 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) of the CCAA, the Confirmation Order in substance satisfies the standard for a sale approval in a foreign main proceeding under Part IV of the CCAA.
35. First, the Marketing Process was broad, reasonable and efficient and the Debtors were assisted by Guggenheim, an investment banker with extensive experience in the

³⁹ *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 [*Soundair*] [Tab 11].

⁴⁰ *Re Digital Domain Media Group Inc*, 2012 BCSC 1567 at para 15 [Tab 12].

⁴¹ *Soundair* at para 16 [Tab 11].

insolvency industry.⁴² As described above, the Debtors and Guggenheim undertook significant efforts to engage the interest of bidders, contacting eighty-eight (88) potential financial and strategic parties in an effort to obtain the best possible price for the Debtors' assets.⁴³ After receiving expressions of interest, the Debtors worked diligently to expedite diligence and undertake negotiations with prospective buyers. Throughout, the Debtors acted in accordance with the bidding procedures approved by the US Bankruptcy Court pursuant to the Bidding Procedures Order.⁴⁴

36. Second, the interests of all parties were considered. In tandem with the sale process, the Debtors undertook extensive good-faith negotiations with the Ad Hoc Group of First Lien Term Lenders providing the First Lien Term Facilities (the "**Ad Hoc Group**") and Committee. In particular, the Debtors in consultation with the Ad Hoc Group and the Committee determined it was necessary to extend deadlines under the Bidding Procedures Order to allow for additional time to receive and evaluate bids.⁴⁵
37. An overwhelming majority of stakeholders entitled to vote upon the Plan (Classes 3 and 4) voted in favour of the Plan and thereby by extension the implementation of the Brookfield APA. Importantly, notice of the Plan and the Brookfield APA was provided to the Debtors' creditors.⁴⁶ The Holders of First Lien Claims will receive their *pro rata* share of approximately 67.6 percent recovery on account of their First Lien Claims in return from the Plan, while the proceeds of the Brookfield Transaction will fund a trust in the approximate amount of USD\$8.65 million for the Holders of General Unsecured Claims against the Debtors, which Class includes the unsecured creditors of Communications ULC.⁴⁷
38. Third, potential alternatives to the Brookfield APA were reviewed by the Ad Hoc Group, the Required Consenting Lenders and the Committee and their respective legal and

⁴² Declaration of Ronen Bojmel filed November 14, 2023, attached to the Li Affidavit as Exhibit "I".

⁴³ Li Affidavit, para 25.

⁴⁴ Li Affidavit, paras 24, 26.

⁴⁵ Li Affidavit, para 26.

⁴⁶ Li Affidavit, paras 41, 42.

⁴⁷ Li Affidavit, para 47.

financial advisors and each group supports the Brookfield Transaction.⁴⁸ In this respect, the Brookfield Transaction is more value maximizing than a Recapitalization Transaction, and creates more value than a hypothetical liquidation of the Debtors' assets, including the Canadian Assets, under chapter 7 of the US Bankruptcy Code.⁴⁹

39. Recognition of the Confirmation Order, which encompasses approval of the Brookfield Transaction, is also recommended by the Information Officer.
40. Under the terms of the Brookfield APA, Phoenix is required to issue offers to each of the Debtors' employees, including those in Canada, at least ten (10) days prior to Closing for a period of not less than one (1) year from Closing at substantially similar terms.⁵⁰ In addition, cure costs for Assigned Contracts and Acquired Leases (as these terms are defined in the Brookfield APA), must be paid by the Debtors at Closing in order to permit their assumption by the Debtors and assignment to Phoenix.⁵¹ Further, the Brookfield APA will allow the Debtors' landlords to retain viable tenants and Phoenix to continue providing services to the Debtors' customers and to pay suppliers and vendors pursuant to the Assigned Contracts.
41. Fourth, the consideration of US\$775,000,000 to be received for the Acquired Assets under the Brookfield APA is appropriate and the best price available for those assets.
42. Fifth, additional assurance is available that the Purchase Price is appropriate. Under section 5.1(j) of the Brookfield APA (as defined in the Brookfield APA), the Debtors designated Phoenix as Stalking Horse Bidder under the Bidding Procedures Order.⁵² On November 2, 2023, the Debtors issued a Notice of Bid Protections, giving notice of the designation of Phoenix as a stalking horse bidder and setting out the Break Up Fee and Expense Reimbursement, that the Debtors would be seeking an Order of the US Bankruptcy Court approving such designation together with the amount of the Break Up Fee and Expense Reimbursement, attaching thereto a copy of the Brookfield APA, and

⁴⁸ Li Affidavit, para 30.

⁴⁹ Li Affidavit, paras 27, 65.

⁵⁰ Li Affidavit, para 61(a).

⁵¹ Li Affidavit, para 54.

⁵² Li Affidavit, para 59.

stipulating that parties in interest wishing to object to the designation of Phoenix as the stalking horse bidder must file an objection with the US Bankruptcy Court by 4:00 pm (ET) on November 6, 2023. No objections were received to the Bid Protections Order which was granted by way of certificate of no objection.⁵³

43. Sixth, the payments as required under section 6(5)(a) of the CCAA will be made as part of the Brookfield Transaction and there are no pension payments required to be made under section 6(6)(a) of the CCAA.⁵⁴ The Debtors exercised their business judgment to conclude that the consideration received was fair and reasonable. This conclusion was approved by the US Bankruptcy Court and is supported by the Information Officer in this proceeding. The consideration offered in the Brookfield APA is the highest or otherwise best offer for the assets, and will provide a greater recovery for the Debtors' creditors than would be provided in a liquidation.
44. Finally, the Plan and the Brookfield APA represent the best result for all stakeholders, achieved fairly through cooperative negotiation and compromise. As a result of these negotiations, the Plan incorporates a global compromise with the Committee and provides guaranteed recoveries to unsecured creditors. Importantly, to reach this extensively-negotiated global resolution, many of the Debtors' senior stakeholders made concessions and forfeited recoveries for the benefit of other junior creditor constituencies. These hard-won compromises are reflected in other components of the Plan, which are integral, non-severable, and essential to plan implementation.

The Releases are appropriate and should be approved

45. As described in more detail above, the Confirmation Recognition Order seeks to validate and make effective all elements of the Plan, including the Releases. Releases, including third-party releases, are a common feature of CCAA proceedings, and courts have acknowledged that they may form an integral part of a successful restructuring.⁵⁵ CCAA

⁵³ Li Affidavit, para 137.

⁵⁴ CCAA ss.6(5)(a) and 6(6)(a); Li Affidavit, paras 61(a), 124, 125.

⁵⁵ *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at paras 73-74.

courts have granted orders containing equivalent releases to those the Debtors seek to be affirmed in the Confirmation Order.⁵⁶

46. Under the terms of the Plan, a “**Released Party**” includes, among others, each of the Debtors, including the Canadian Debtors, the DIP Lenders, the purchaser, the Committee and each member of the Committee and holders of claims who do not opt out.⁵⁷
47. As part of the voting process for the Plan, holders of claims were provided with a ballot containing an option to opt out of Plan Releases. Also, non-voting Holders of Claims and Interests were given notice of the Plan, the Releases and the Confirmation Hearing, and were given the option of expressly opting out of or objecting to the releases. 190 holders of existing equity interest claims elected to opt out of the Plan Releases.⁵⁸
48. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, the Ontario Court of Appeal considered whether courts have jurisdiction to sanction a CCAA plan containing releases in favour of third parties, notwithstanding that the CCAA does not expressly contemplate granting such releases. The Ontario Court of Appeal held that the court has jurisdiction under the CCAA to approve a plan that includes third party releases, and listed the following factors to be considered in determining whether to approve third-party releases:
 - (a) the parties to be released are necessary and essential to the restructuring of the debtor;
 - (b) the claims to be released are rationally related to the purpose of the Plan and are necessary for it;
 - (c) the Plan cannot succeed without the releases;
 - (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

⁵⁶ See for example *In the matter of Voyager Digital* (11, August, 2022), Ont Sup Ct, CV-22-00683820-00CL (Order (Plan Recognition Order)), at para 3(i) [**Tab 13**]; *Lightsquared* at para 9 [**Tab 10**].

⁵⁷ Li Affidavit, para 81(c).

⁵⁸ Li Affidavit, paras 41 and 81.

- (e) the Plan will benefit not only the debtor companies but creditors generally;
 - (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
 - (g) the releases are fair and reasonable and not overly broad or offensive to public policy.⁵⁹
49. The above considerations are not mandatory criteria and no individual factor is determinative of the issue of approval of a release.⁶⁰
50. In *Re Muscletech Research & Developments Inc.*, Ground J. of the Ontario Superior Court of Justice approved releases in favour of third parties, including insurers who were funding the proposed plan of compromise that provided for a global resolution of a large number of product liability cases. In *Re Angiotech Pharmaceuticals Inc.*, Walker J. of the British Columbia Supreme Court sanctioned a plan that contained a release in favour of a third party on the basis that:⁶¹
- “...the proposed release contained in the plan is rationally connected to the purpose of the plan, it is necessary for the implementation of the plan, and it meets the tests ...The creditors who are protected by the release were instrumental in facilitating the reorganization of the petitioners' affairs...”
51. The basis for including the Plan Releases in the immediate case include, among other things:
- (a) each Released Party has made a substantial contribution to the Debtors' estates;
 - (b) the Plan Releases are essential to the success of the Plan because they constitute an integral term of the Plan;

⁵⁹ *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 4811 (C.A.) at para 113 [Tab 14].

⁶⁰ *Kitchener Frame Ltd., Re* (2012), 86 CBR (5th) 274 at para 82 [Tab 15].

⁶¹ *Re Muscletech Research & Developments Inc.*, 2007 CarswellOnt 1029 at paras 23-27 [Tab 16].

- (c) the Released Parties would not likely have been willing to participate in the process and make substantial contributions to the Plan's success without the Plan Releases; and
- (d) the Plan provides for meaningful consideration under the circumstances for all creditors potentially giving up colorable claims under the releases.⁶²

52. The Foreign Representative respectfully submits that the Plan, including the Plan Releases, exculpations and injunctions, should be recognized, implemented and given full effect in Canada, as the releases and injunctions in favour of the Released Parties satisfy the common law tests set out above, as:

- (a) the Released Parties are necessary and essential to the restructuring of the Debtors, including the Canadian Debtors;
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases, as they were a component of the agreement reached that resulted in the Released Parties providing support to the Debtors, including the Canadian Debtors;
- (d) the Released Parties contributed in a tangible and realistic way to the Plan by providing, among other things, substantial concessions and support to the Debtors, including the Canadian Debtors;
- (e) the Plan will benefit not only the Debtors, including the Canadian Debtors, but creditors generally, as it likely provides for greater recovery for the claimants than otherwise would have been possible;
- (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and

⁶² Li Affidavit, para 100.

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

53. More specifically, the Releases in the Plan were the result of extensive negotiations and concessions between stakeholders, and are integral to the agreements among various parties and integral to obtaining consent to the Plan. They are therefore significantly connected to the Plan so as to be permitted under the CCAA. On November 16, 2023 the US Bankruptcy Court approved the Releases.⁶³
54. Furthermore, the Releases provided for in the Plan are integral to the framework of compromises in the Plan and are fair and reasonable in the circumstances. In the absence of the releases, the Debtors, including the Canadian Debtors, would not expect to have been able to achieve the support from its stakeholders that now exists in favour of the Plan. Nine formal objections to confirmation of the Plan were filed, including one by the U.S. Trustee regarding the provision of the Releases.⁶⁴ Notwithstanding the objection of the U.S. Trustee, the US Bankruptcy Court granted the Confirmation Order.⁶⁵
55. The Information Officer supports the relief sought by the Foreign Representative. Accordingly, it is submitted that it is appropriate for the Court to recognize the Confirmation Order and as a result, the Releases provided for in the Plan.

The Cologix Recognition Order should be approved

56. As more particularly described in paragraph 32 above in making a determination whether to approve a sale, courts may consider the factors under section 36(3) of the CCAA.⁶⁶
57. With respect to the Cologix APA, when taking into account the *Soundair* test and the relevant factors in section 36(3) of the CCAA, and the requirement to protect the interest of creditors pursuant to section 49(1) of the CCAA, the Cologix Recognition Order satisfies the standard for a sale approval in a foreign main proceeding under Part IV of the CCAA.

⁶³ Li Affidavit, paras 100, 102.

⁶⁴ Li Affidavit, para 101.

⁶⁵ Li Affidavit, para 102.

⁶⁶ CCAA s.36(3) [**Tab 1**].

58. First, after a robust Marketing Process, the Debtors, including the Canadian Debtors, were not aware of any potential alternative purchasers interested in the Acquired Assets under the Cologix APA (consisting of the Vancouver and Montreal Data Centres and their associated personal property, executory contracts and leases, and referred to herein as the “**Vancouver and Montreal Data Centres Assets**”). While the Vancouver and Montreal Data Centres Assets are included as Acquired Assets under the Brookfield APA, the Brookfield APA provides that if the Cologix Transaction closes either before the closing of the Brookfield Transaction, or within ninety (90) days thereafter (the Specified Date), the Vancouver and Montreal Data Centres Assets ceased to be Acquired Assets under the Brookfield APA. The Vancouver and Montreal Data Centres Assets are then deemed to be Excluded Assets under the Brookfield APA effective on the earlier of the closing of the Cologix Transaction or the closing of the Brookfield Transaction. However, if the Cologix Transaction does not close by the Specified Date, the Vancouver and Montreal Data Centres Assets remain with Phoenix as Acquired Assets under the Brookfield APA. However, because there is no price adjustment under the Brookfield APA in those circumstances, the closing of the Cologix Transaction is the only way for the Debtors’ estates to receive additional benefit from the Vancouver and Montreal Data Centres Assets – namely, the \$10 million cash component of the purchase price under the Cologix APA.⁶⁷
59. Second, the Cologix Transaction was reviewed by the Committee, the Ad Hoc Group and their respective legal and financial advisors and has been approved by the Required Consenting Term Lenders. No party has objected to the Cologix Transaction and the Canada Sale Order was approved on November 16, 2023.⁶⁸
60. The Vancouver and Montreal Data Centres Assets under the Cologix APA include the Acquired Leases and Assigned Contracts, the latter of which include Contracts with customers, distributors, resellers, channel partners and leases governing tangible assets included in the Vancouver and Montreal Data Centres Assets. Communications ULC is required to assume the Assigned Contracts and Acquired Leases and assign the Assigned

⁶⁷ Li Affidavit, paras 105, 121.

⁶⁸ Li Affidavit, para 126.

Contracts and Acquired Leases to Cologix. Communications must pay any amounts required to pay the amounts required to cure the defaults under the Assigned Contracts and Acquired Leases, if any, to the counterparties thereof.⁶⁹ Notices of Assumption and Assignment of Certain Executory Contracts and/or Unexpired Leases dated November 3, 2023 to each of the Counterparties, which was filed with the US Bankruptcy Court on that date.⁷⁰ No formal objections to the assignments were filed with the US Bankruptcy Court; however, three (3) Notice Parties provided responses to the Informal Assignment Letter to the assignment and/or assumption of the Assigned Contracts relating to the Canadian Debtors' assets.⁷¹

61. All amounts owing to employees of Communications ULC are to be paid on the implementation of the Chapter 11 Plan and there are no pension plan payments required.⁷²
62. Third, there are no potential alternatives to the Cologix Transaction with the exception of the inclusion of the Vancouver and Montreal Data Centres Assets as Acquired Assets if the Cologix Transaction does not close before the Brookfield Transaction, or close by the Specified Date, whereupon the Cologix APA remains and Assigned Contract under the Brookfield APA and the Vancouver and Montreal Data Centres Assets remain as Acquired Assets under the Brookfield APA, but in the latter case, for no additional consideration.⁷³

The Assignment of Contracts under the Brookfield APA and the Cologix APA should be approved

63. Under both the Brookfield APA and the Cologix APA, subject to their terms, including the payment of any Cure Costs, Phoenix or Cologix (as applicable) are to assume the Assigned Contracts. The Assumed Contracts are contracts where: (a) consent to

⁶⁹ Li Affidavit, paras 87, 131.

⁷⁰ Li Affidavit, paras 115, 119, Exhibit "O".

⁷¹ Li Affidavit, para 122.

⁷² Li Affidavit, para 92.

⁷³ Li Affidavit, paras 110-113.

assignment is required under the terms of the contract; and (ii) no consent has been returned at this time.

64. The Plan and the Confirmation Order provide a process for approval of the assumption or assignment, or determining the amount of cure costs.⁷⁴
65. On or about November 3 and 9, 2023 counterparties to agreements with the Debtors, including Canadian counterparties were sent Notices of Assumption and Assignment of Certain Executory Contracts and/or Unexpired Leases and a supplemental notice (collectively, the “**Assumption and Assignment Notices**”), both of which were filed with the US Bankruptcy Court.⁷⁵ The Assumption and Assignment Notices set out the process for a counterparty to object to the proposed assumption or assignment of any Assigned Contracts and Acquired Leases and the proposed cure amount.⁷⁶
66. As set out above no formal objections were received by the objection deadline and on November 16, 2023 the US Bankruptcy Court approved the Confirmation Order and the Canada Sale Order, authorizing the assumption of the Assigned Contracts.⁷⁷
67. In addition to supporting the assignments pursuant to the principles of comity, section 11.3 of the CCAA provides that this Court may grant an order assigning the rights and obligations of the Canadian Debtors to “any person who is specified by the court and agrees to the assignment”, with certain limited exceptions.⁷⁸ In deciding whether to exercise its discretion under s. 11.3, this Court must consider, among other things, three statutory factors:
- (a) whether the Monitor approved the proposed assignment, which is satisfied in substance because the Information Officer supports the assignment of the Assumed Contracts;

⁷⁴ Li Affidavit, paras 76.

⁷⁵ Li Affidavit, para 117, 118, Exhibit “N”.

⁷⁶ Li Affidavit, para 117.

⁷⁷ Li Affidavit, para 122.

⁷⁸ CCAA s.11.3 [**Tab 1**].

- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations:
- (i) with respect to Phoenix, the US Bankruptcy Court granted the Confirmation Order confirming the Plan on November 16, 2023 which order confirmed, among other things, that the Marketing Process was fair, open, adequate, non-collusive, duly noticed and provided a full, fair and reasonable opportunity for any entity to make an offer, and obtained the highest or best value for the Debtors' estates.⁷⁹ In addition, the US Bankruptcy Court further confirmed that the Brookfield Transaction represents the best opportunity to realize the maximum value of the Debtors' estates;⁸⁰
- (ii) with respect to Cologix, Cologix is a sophisticated purchaser operating in 11 markets across North America with over 40 data centres. Cologix is responsible for the payment of the purchase price contemplated in the Cologix APA and for the performance of the obligations under the same.⁸¹ Where the assignee is a sophisticated entity, courts have found comfort in the viability and likely success of the proposed assignment⁸²; and
- (c) whether it would be appropriate to assign the rights and obligations to that person. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA, which are "avoiding the social and economic losses resulting from liquidation of an insolvent company".⁸³ Thus, where an assignment is necessary for the business to continue as a going-concern, Courts have found the assignment to be appropriate.⁸⁴ In this case, the Assumed Contracts are necessary for the continued operation of the Canadian Data Centres. The assignment of the Assumed Contracts will benefit the

⁷⁹ Li Affidavit, para 102(f), Exhibit "J" at page 44, paras 78, 86.

⁸⁰ Li Affidavit, para 102(g), Exhibit "J" at page 45, para 79 ; page 50, 51, para 88.

⁸¹ Li Affidavit, para 117.

⁸² *UrtheCast Corp., Re*, 2021 BCSC 1819 at para. 50 [Tab 17].

⁸³ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70 [Tab 18].

⁸⁴ *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at paras 49 and 50 [Tab 19]

Canadian Debtors' stakeholders by providing for the continuation of the Canadian Debtors contractual relationships, including ongoing landlord-tenant, trade and employment relationships.⁸⁵

68. The Canadian Debtors have provided notice to each counterparty in the CCAA Proceedings and in the Chapter 11 Cases.⁸⁶
69. This Court may not make an order under s. 11.3 of the CCAA unless it is satisfied that all monetary defaults in relation to the assigned contracts, with certain exceptions, will be remedied on or before the day fixed by this Court. To satisfy this requirement, the Assignment Order expressly provides that such assignment is subject to, among other things, the payment of any amounts required to be paid under s. 11.3 of the CCAA.

Approval of the Miscellaneous Order is Appropriate

70. Recognition of the Miscellaneous Recognition Order 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. Recognition of the Miscellaneous Recognition Order is also important to ensuring the equal treatment of Canadian stakeholders and the coordination of the Chapter 11 Cases and the Recognition Proceedings, and to ensuring that Canadian trade creditors, suppliers and stakeholders receive the benefit of the Miscellaneous Recognition Order.

Contract Rejection/Assumption Procedures Order

71. The Cologix APA requires the assumption of the Executory Contracts and Unexpired Leases specified thereunder, which will be carried out in accordance with the Contracts Rejection/Assumption Procedures Order. Accordingly, it is necessary that the Contracts Rejection/Assumption Procedures Order be recognized in these Recognition Proceedings by this Honourable Court in these Recognition Proceedings.⁸⁷

⁸⁵ Li Affidavit, para 127(d); Li Affidavit, para 102(g), Exhibit "J" at page 24, para 40; Bomjel Declaration para 14.

⁸⁶ Li Affidavit, paras 117, 118.

⁸⁷ Li Affidavit, para 132.

Sixth Interim Cash Management Order

72. On October 11, 2023, this Honourable Court granted an Order recognizing and giving effect in Canada to a fifth interim cash management order (the “**Fifth Interim Cash Management Order**”) and a cash transfer order⁸⁸.
73. On or around September 21, 2023, the US Bankruptcy Court granted a sixth interim cash management order (the “**Sixth Interim Cash Management Order**”) on a certificate of no objection filed by the Debtors. The Sixth Cash Management Order was granted as a result of Bank of America not having finalized Communications ULC’s United States banking arrangements prior to the expiry of the Fifth Interim Cash Management Order and the Debtors’ requirement to obtain a final cash management order.⁸⁹
74. CTI and the Canadian Debtors request that the Sixth Interim Cash Management Order be recognized and given effect in Canada by this Honourable Court pursuant to section 49 of the CCAA so that the Debtors’ cash management system can continue to be utilized in Canada pending the Bank of America accounts being finalized and the Debtors obtaining a final cash management order in the Chapter 11 Cases.

Bid Protection Order

75. On July 12, 2023, this Honourable Court recognized a Bid Procedures Order of the US Bankruptcy Court. The Bid Procedures Order set out, among other things, the procedure for Cyxtera designating bids as stalking horse bids, and providing for break fees and reimbursement of costs in respect thereof.⁹⁰
76. Brookfield required that the Debtors, in consideration for Brookfield having expended considerable time and expense in connection with the Brookfield APA and its negotiation, provide compensation in the event that a superior bid was received by the Debtors in the period between the entering of the Confirmation Order and the closing of the Brookfield Transaction which resulted in the Brookfield Transaction not being

⁸⁸ Li Affidavit, para 133.

⁸⁹ Li Affidavit, para 134.

⁹⁰ Li Affidavit, para 135, Exhibit “W”.

completed or in the event that the Brookfield Transaction fails to close other than as a result of a breach by Phoenix. In that scenario, under section 8.2 of the Brookfield APA, Phoenix is entitled to a Break Up Fee in the amount of \$23,250,000 and an Expense Reimbursement in an amount not to exceed \$7,750,000, and the Break-up Fee and Expense Reimbursement are to be treated as an Administration Claim in the Chapter 11 Cases. In order to accomplish this, it was necessary for the Debtors, with the concurrence of the Ad Hoc Committee, to designate Phoenix as a stalking horse purchaser under Bidding Procedures Order.⁹¹

77. On November 3, 2023, the Debtors issued a Notice of Bid Protections, giving notice of the designation of Phoenix as a stalking horse bidder and setting out the Breakup Fee and Expense Reimbursement, that the Debtors would be seeking an Order of the US Bankruptcy Court approving such designation and the Breakup Fee and Expense Reimbursement, attaching thereto a copy of the Brookfield APA, and stipulating that parties in interest wishing to object to the designation of Phoenix as the stalking horse bidder must file an objection with the US Bankruptcy Court by 4:00 pm (ET) on November 6, 2023. On November 13, 2023, the US Bankruptcy Court entered an order approving the bid protections and granting related relief on a certificate of no objection filed by the Chapter 11 Debtors.
78. The Canadian Assets will form part of the assets to be purchased by Phoenix under the Brookfield APA. Accordingly, it is respectfully submitted that recognition of the Bid Protections Order is appropriate and should be granted by this Honourable Court.

Retention of AP Services Order

79. On July 19, 2023, pursuant to the Retention of AP Services Order AlixPartners LLP was approved by the US Bankruptcy Court as financial advisor of the Debtors, and Eric Koza and myself were approved as CRO and DCRO respectively. I am advised by Gowling that the proposed Canadian recognition orders for the Confirmation Order and Canada

⁹¹ Li Affidavit, para 136.

Sale Order include closing certificates from the CRO or DCRO of the Canadian Debtors.⁹²

80. Gowling has prepared the certificates attached to the Confirmation Recognition Order and Cologix Recognition Order for the CRO or DCRO to sign as it is customary in Canadian insolvency proceedings for a court officer to file and serve such certificates once all of the conditions precedent to the closing of a court supervised transaction have been completed in order for assets to vest in a purchaser, and the CRO or DCRO is the closest equivalent to a court officer in the Chapter 11 Cases.⁹³
81. It is therefore submitted that recognition of the Retention of AP Services Order is appropriate and necessary in the circumstances.

Approval of the Accounts of the Professionals

Jurisdiction

82. 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.”⁹⁴

⁹² Li Affidavit, para 138.

⁹³ Li Affidavit, para 138.

⁹⁴ Supplemental Order, para 17.

Fair and Reasonable Test

83. 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.⁹⁵
84. 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.⁹⁶
85. 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 Monitor’s knowledge, experience and skill;
 - (f) the diligence and thoroughness displayed;
 - (g) the responsibilities assumed;
 - (h) the results achieved; and

⁹⁵ *Nortel Networks Corp. (Re)*, 2017 ONSC 673, [*Nortel*] at paras 14-15 [**Tab 20**].

⁹⁶ *Nortel* at paras 15 and 21 [**Tab 20**].

- (i) the cost of comparable services when performed in a prudent and economical manner.⁹⁷
86. 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 fees in the Recognition Proceedings were approved by this Honourable Court on July 12, 2023, August 1, 2023, September 6, 2023 and on October 13, 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, negotiating the terms of the Brookfield APA and the Cologix APA and continuing to work with the US counsel and the restructuring advisor to the Debtors respecting all matters in these CCAA Proceedings particularly including providing guidance respecting Canadian law to aid the ongoing sales process;
 - (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 DCRO who has confirmed that they are fair and reasonable.

⁹⁷ *Nortel* at para 14 [**Tab 20**]

87. 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.

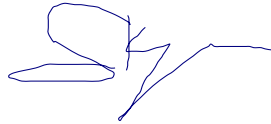
III. CONCLUSION AND RELIEF SOUGHT

88. CTI and the Debtors seek the granting of the Confirmation Recognition Order, the Cologix Recognition Order, and the Miscellaneous Recognition Order under the CCAA substantially in the forms as attached to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2023.

GOWLING WLG (CANADA) LLP

Per:

A handwritten signature in blue ink, appearing to be 'S. F.', is written over a horizontal line.