Court File No. CV-23-00697284-00CL

**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 LTL MANAGEMENT LLC

APPLICATION OF LTL MANAGEMENT LLC
UNDER SECTION 46 OF THE
*COMPANIES' CREDITORS ARRANGEMENT ACT*

# FACTUM OF THE FOREIGN REPRESENTATIVE
(Recognition of Foreign Main Proceeding)

April 12, 2023


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## PART I – OVERVIEW

1. On April 4, 2023, LTL Management LLC ("**LTL**" or the "**Debtor**") commenced a case (the "**2023 Chapter 11 Proceeding**") by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code with the United States Bankruptcy Court for the District of New Jersey (the "**New Jersey Bankruptcy Court**").

2. LTL was appointed to act as the foreign representative of itself (in such capacity, the "**Foreign Representative**") by the New Jersey Bankruptcy Court in order to, among other things, bring this Application pursuant to section 46 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985 ("**CCAA**"), for:

   (a) an order recognizing the 2023 Chapter 11 Proceeding as a "foreign main proceeding" under the CCAA (the "**2023 Initial Recognition Order**"); and

(b) an order granting various supplemental relief in respect of the 2023 Chapter 11 Proceeding (the "**2023 Supplemental Recognition Order**"), including:

i. recognizing and giving full force and effect in all provinces and territories of Canada to the 2023 Foreign Representative Order and the 2023 TRO (the "**Foreign Orders**"); and

ii. appointing E&Y as information officer in connection with this proceeding.

3. Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to them in the affidavit of John Kim sworn April 12, 2023 (the "**Kim Affidavit**").

## PART II – SUMMARY OF THE FACTS

### A. BACKGROUND

4. The Debtor in this proceeding is an indirect subsidiary of Johnson & Johnson ("**J&J**"). J&J is a global innovator and leader in public health.[1]

5. The J&J group of companies (the "**J&J Group**") includes approximately 250 subsidiary companies with operations in 60 countries, including Canada. The J&J Group's operations in Canada include the subsidiary Johnson & Johnson Inc. ("**J&J Canada**"). [2]

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[1] Kim Affidavit at para 18.
[2] Kim Affidavit at para 19.

6. The Debtor's roots can be traced back to Johnson & Johnson Baby Products Company ("**J&J Baby Products**").[3] Through a series of name changes and intercompany transactions occurring between 1981 and 1997, J&J Baby Products ultimately became known as Johnson and Johnson Consumer Companies Inc. ("**J&J Consumer Companies**"). In 2015, J&J Consumer Companies merged with and into an affiliate resulting in an entity known as Johnson & Johnson Consumer Inc. (including all former names and corporate predecessors, "**Old JJCI**"). Old JJCI became responsible for all claims in respect of JOHNSON'S® Baby Powder and other talc-containing products. [4]

7. In 2021, Old JJCI implemented a corporate restructuring (the "**2021 Corporate Restructuring**") through a series of sequential corporate steps, including a divisional merger under the Texas Business Organizations Code. Upon the effectiveness of the 2021 Corporate Restructuring, Old JJCI ceased to exist and two new entities were created: (a) the Debtor, and (b) another new entity which ultimately changed its name to Johnson & Johnson Consumer Inc. ("**New JJCI**"). As a result of the 2021 Corporate Restructuring, the Debtor holds certain of Old JJCI's assets and is responsible for all talc-related claims against Old JJCI.[5]

8. The stated purpose for the 2021 Corporate Restructuring was to create a new entity, i.e., LTL, that would file for Chapter 11 protection and to seek to a permanent a resolution of all talc liabilities pursuant to a plan of reorganization, without involving thousands of unrelated parties (including employees, creditors and contract counterparties).[6]

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[3] Kim Affidavit at para 23.
[4] Kim Affidavit at para 25.
[5] Kim Affidavit at paras 34-36.
[6] Kim Affidavit at para 37.

## B. FINANCIAL CHALLENGES & TALC CLAIMS

9. On October 14, 2021, the Debtor commenced a case (the "**2021 Chapter 11 Proceeding**") under chapter 11 of title 11 of the United States Code with the North Carolina Bankruptcy Court.[7] The 2021 Chapter 11 Proceeding was precipitated by the filings of thousands of talc-related lawsuits in the United States against, among others, Old JJCI and J&J, which allege that JOHNSON'S® Baby Powder purportedly causes ovarian cancer and mesothelioma.[8]

10. In addition to the talc claims faced by Old JJCI in the United States, Old JJCI, J&J, J&J Canada and Valeant Pharmaceuticals International, Inc. ("**Valeant**"), now Bausch Health Companies Inc. ("**Bausch**"), are named co-defendants (collectively, the "**Canadian Co-Defendants**") in some or all of the talc lawsuits commenced in Canada (collectively, the "**Canadian Actions**").[9] The Canadian Actions consist of a certified class action, three proposed class actions and one individual action in four provinces (Alberta, British Columbia, Ontario and Quebec) as well as certain individual actions commenced in violation of the stay of proceedings granted in connection with the 2021 CCAA Recognition Proceeding.[10]

11. Prior to the commencement of the 2021 Chapter 11 Proceeding, Old JJCI incurred nearly $1 billion in costs to defend personal injury lawsuits relating to alleged talc exposure, nearly all of which was spent in the five years prior to the 2021 Chapter 11 Proceeding. In the months prior to the commencement of the 2021 Chapter 11 Proceeding, Old JJCI was paying defense costs in the range of $10 million to $20 million a month. In addition to these costs, Old JJCI had incurred

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[7] Kim Affidavit at para 48.
[8] Kim Affidavit at para 26.
[9] Kim Affidavit at para 28.
[10] Kim Affidavit at para 28.

settlement costs and jury verdicts of approximately $3.5 billion in the five years prior to the 2021 Chapter 11 Proceeding (all amounts in USD).[11]

**C. SUMMARY OF THE 2021 CHAPTER 11 CASE**

12. The procedural history of the 2021 Chapter 11 Proceeding and the 2021 CCAA Recognition Proceeding leading up to the Dismissal Order is set out below:

13. October 14, 2021: the Debtor commenced the 2021 Chapter 11 Proceeding by filing a voluntary petition for Chapter 11 relief in the North Carolina Bankruptcy Court.[12]

14. November 15, 2021: the North Carolina Bankruptcy Court entered the 2021 U.S. Preliminary Injunction Order, declaring that the automatic stay applies to prohibit, and preliminarily enjoining, the commencement or continuation of Debtor Talc Claims against certain Protected Parties, as set out in that order, for 60 days. On that same day, the North Carolina Bankruptcy Court transferred the 2021 Chapter 11 Proceeding to the New Jersey Bankruptcy Court.[13]

15. December 1, 2021: the TCC filed Motions to Dismiss which asserted, among other things, that the 2021 Chapter 11 Proceeding was not filed in good faith and that the plaintiffs should be permitted to pursue their claims against the Debtor and its non-debtor affiliates in the tort system.[14]

16. December 15, 2021: the New Jersey Bankruptcy Court entered the 2021 Foreign Representative Order authorizing the Debtor to act as the 2021 Foreign Representative on behalf

[11] Kim Affidavit at para 27.
[12] Kim Affidavit at para 48.
[13] Kim Affidavit at paras 50-51.
[14] Kim Affidavit at para 52.

of its estate.[15]

17. December 16, 2021: the 2021 Foreign Representative sought to have the 2021 Chapter 11 Proceeding recognized by the CCAA Court as a foreign main proceeding.[16]

18. December 17, 2021: the CCAA Court issued two orders pursuant to Part IV of the CCAA:

(i) an initial recognition order (Foreign Main Proceeding), which, *inter alia*, recognized the Debtor as the "foreign representative" and the 2021 Chapter 11 Proceeding as a "foreign main proceeding", as defined in section 45 of the CCAA, and stayed all proceedings in Canada against the Debtor; and

(ii) a supplemental order (Foreign Main Proceeding) which, *inter alia*, recognized the 2021 U.S. Preliminary Injunction Order and the 2021 Foreign Representative Order, gave the 2021 U.S. Preliminary Injunction Order and the 2021 Foreign Representative Order full force and effect in all provinces and territories in Canada pursuant to section 49 of the CCAA, and appointed E&Y as the 2021 Information Officer in the 2021 CCAA Recognition Proceeding.[17]

19. February 25, 2022: the New Jersey Bankruptcy Court released the Dismissal Opinion, denying the Motions to Dismiss.[18]

20. May 11, 2022: on an appeal by certain talc claimants to the United States Court of Appeals

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[15] Kim Affidavit at para 53.
[16] Kim Affidavit at para 54.
[17] Kim Affidavit at para 55.
[18] Kim Affidavit at para 58.

for the Third Circuit (the "**Third Circuit**"), the Third Circuit entered an order granting permission to appeal the Dismissal Opinion.[19]

21. September 19, 2022: the Third Circuit heard the appeal of the Dismissal Opinion.[20]

22. January 30, 2023: the Third Circuit issued the Third Circuit Opinion which held that the 2021 Chapter 11 Proceeding should be dismissed and the related injunction in favour of the Protected Parties should be dissolved.[21]

23. April 4, 2023: pursuant to the mandate issued by the Third Circuit, the New Jersey Bankruptcy Court entered the Dismissal Order. The Dismissal Order provided that upon the Debtor filing a notice with the New Jersey Bankruptcy Court indicating that it will not pursue appeals of the Third Circuit Judgement, Third Circuit Opinion or the Dismissal Order, the TCC shall be automatically dissolved, and all members and professionals retained by the TCC shall be discharged from all duties and obligations related to the TCC.[22] On April 4, 2023, the Debtor filed the requisite notice indicating it would not pursue such appeals and the TCC was accordingly dissolved.[23]

## D. THE 2023 CHAPTER 11 PROCEEDING

24. In December 2022, New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc., a New Jersey Corporation ("**Holdco**"). In early January 2023, Holdco transferred its consumer business assets to its parent entity. Holdco is the direct parent of the Debtor, and the Debtor

[19] Kim Affidavit at paras 65-66.
[20] Kim Affidavit at para 67.
[21] Kim Affidavit at para 68.
[22] Kim Affidavit at para 76.
[23] Kim Affidavit at para 77.

remains the direct parent of Royalty A&M. Holdco is a holding company with ownership interests in various subsidiaries.[24]

25. Following the Third Circuit Opinion, the Debtor, J&J, Holdco, and various US based plaintiff law firms, with the assistance of the court-appointed mediators, negotiated Plan Support Agreements in respect of a plan of reorganization that would fully resolve all the Debtor's liability for talc-related claims.[25]

26. The Plan Support Agreements provide for the establishment of a trust funded, over 25 years, in the amount of $8.9 billion on a net present value basis (the "**Trust**"). The Plan Support Agreements represent significant progress towards a consensual resolution of the Debtor's current and future talc claims. The Debtor believes the terms of the plan contemplated by the Plan Support Agreements are equitable and in the best interests of all parties, including current and future talc claimants. Although there is significant work to be done, with a number of parties, the Debtor has undertaken to use reasonable best efforts to finalize to file a plan contemplated by the Plan Support Agreements by May 14, 2023, or as soon thereafter as is feasible.[26]

27. The Debtor, J&J and Holdco have entered into new financing arrangements which requires HoldCo: (i) to fund amounts necessary to satisfy the Debtor's talc-related liabilities at any time when there is no bankruptcy case; and (ii) to fund the Trust, in both situations to the extent that any cash distributions received by the Debtor are insufficient to pay such costs and expenses, and in the case of funding the Trust, the Debtor's other assets are insufficient to provide that funding.

[24] Kim Affidavit at para 78.
[25] Kim Affidavit at para 79.
[26] Kim Affidavit at paras 80-81.

Accordingly, the Debtor believes that the new financing arrangements do not harm talc claimants.[27]

28. The Debtor believes that these new financing arrangements resolve the concerns that led the Third Circuit to dismiss the 2021 Chapter 11 Proceeding.[28]

29. Similar to the 2021 Chapter 11 Proceeding, the stated purpose of the 2023 Chapter 11 Proceeding is to fully, equitably, and efficiently resolve all current and future talc-related claims against the Debtor. Further, this filing is supported by law firms on behalf of tens of thousands of claimants in the 2021 Chapter 11 Proceeding.[29]

30. On April 10, 2023, the New Jersey Bankruptcy Court issued the 2023 TRO which prohibits all plaintiffs, including the plaintiffs in the Canadian Actions, from commencing or continuing any action or claim, seeking to hold the Protected Parties liable for Debtor Talc Claims.[30]

31. On April 12, 2023, the New Jersey Bankruptcy Court granted the 2023 Foreign Representative Order authorizing the Debtor to act as foreign representative on behalf of its estate.[31]

32. The Foreign Representative seeks recognition of the 2023 Chapter 11 Proceeding in Canada in order to, among other things: (a) obtain the benefit of a stay of proceedings for itself and the Canadian Co-Defendants, and (b) provide a venue to ultimately seek recognition in Canada

[27] Kim Affidavit at para 86.
[28] Kim Affidavit at para 89.
[29] Kim Affidavit at para 9.
[30] Kim Affidavit at para 94.
[31] Kim Affidavit at para 97.

of an order confirming a plan of reorganization to facilitate a global resolution to talk-related claims against the Debtor.[32]

**PART III – ISSUES AND THE LAW**

33. This factum addresses the following issues:

(a) should the 2023 Chapter 11 Proceeding be recognized as a "foreign main proceeding"?

(b) should LTL be granted the relief requested in the 2023 Supplemental Recognition Order, including:

i. granting the stay of proceedings, including in respect of the Canadian Actions and Canadian Co-Defendants;

ii. recognition of the Foreign Orders;

iii. appointment of E&Y as Information Officer;

iv. dispensing with the requirement under section 53(b) of the CCAA to publish notice of the 2023 CCAA Recognition Proceeding in one or more Canadian newspapers; and

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[32] Kim Affidavit at para 13.

v. adopting the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters issued by the Judicial Insolvency Network (the "**JIN Guidelines**").

34. For the reasons that follow, the Foreign Representative submits that each of the foregoing questions should be answered in the affirmative and that it is appropriate to grant the relief requested on this Application.

## A. THE 2023 CHAPTER 11 CASE IS A FOREIGN MAIN PROCEEDING

### *i) The 2023 Chapter 11 Proceeding is a Foreign Proceeding*

35. Pursuant to Section 46(1) of the CCAA, a foreign representative may apply to the court for recognition of a foreign proceeding, in respect of which that person is a foreign representative.[33]

36. Section 47 of the CCAA provides that the Court shall make an order recognizing a foreign insolvency proceeding if the following two requirements are met:

(i) the application for recognition of a foreign proceeding relates to a "foreign proceeding" within the meaning of the CCAA; and

(ii) the applicant is a "foreign representative" within the meaning of the CCAA in respect of that foreign proceeding.[34]

37. Section 45(1) of the CCAA defines a "foreign proceeding" as "a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada

[33] CCAA, s. 46(1).
[34] CCAA, s. 47.

dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization." Canadian courts have generally considered it self-evident that proceedings pursuant to the US Bankruptcy Code under the supervision of a US bankruptcy court, satisfy these criteria. Canadian courts have consistently recognized such proceedings to be "foreign proceedings" for the purposes of the CCAA.[35]

38. Further, LTL is a debtor company within the meaning of the CCAA. The definition of a debtor company in the CCAA includes any "company" that is "insolvent." Under the CCAA, a "company" includes any incorporated company having assets in Canada.[36]

39. LTL's only assets in Canada is a retainer held by its legal counsel.[37]

40. Such funds held by counsel are sufficient for the purposes of satisfying the requirement to "have assets in Canada", as the court need not engage in a qualitative or quantitative analysis of Canadian assets in order to decide whether or not a company qualifies for relief under the CCAA.[38]

41. The CCAA does not define insolvency. In addition to the well known balance sheet test and cash flow test, *Re Stelco,* provides that a company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they

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[35] CCAA, s. 45(1), "foreign proceeding"; *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238 [*Hollander*] at para 27; *Payless Holdings LLC (Re)*, 2017 ONSC 2242 at para 22; *Horsehead Holdings Corp. (re)*, 2016 ONSC 958 at para 20.

[36] CCAA, s. 2(1) "company" and "debtor company".

[37] Kim Affidavit at para 43.

[38] *Global Light Telecommunication Inc.* Re, 2004 BCSC 745, at para 17.

generally become due if a stay of proceedings and ancillary protection are not granted by the court.[39]

42. Although the Debtor does not believe it was balance sheet insolvent for the purposes of applicable US law, it was in financial distress and just prior to the time it filed its petition to commence the 2023 Chapter 11 Proceeding the Debtor faced a looming liquidity crisis.[40] Accordingly, the Applicant meets the expanded test for insolvency.

### *ii) LTL is a Foreign Representative*

43. The second requirement under section 47 of the CCAA is that the applicant is a "foreign representative" in respect of the foreign proceeding.

44. The CCAA defines a "foreign representative" as:

> a person or body, including one appointed on an interim basis, who is authorized in a foreign proceeding in respect of a debtor company, to (a) monitor the debtor's business and financial affairs for the purpose of reorganization, or (b) act as a representative in respect of the foreign proceeding.[41]

45. LTL was appointed by the New Jersey Bankruptcy Court to act as a representative of the Debtor in respect of the 2023 Chapter 11 Proceeding and with respect to the 2023 Chapter 11 Proceeding by way of the 2023 Foreign Representative Order.[42] Therefore, LTL meets the CCAA definition of a "foreign representative" in respect of the foreign proceeding.

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[39] *Stelco* at para 40.
[40] Kim Affidavit at para 92.
[41] CCAA, s. 45 "foreign representative".
[42] Kim Affidavit at para 97.

***iii) The 2023 Chapter 11 Proceeding is a "Foreign Main Proceeding"***

46. If the Court grants an order under section 47(1) of the CCAA, section 47(2) requires that the Court specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding."[43]

47. Section 45(1) of the CCAA provides that a "foreign main proceeding" is "a foreign proceeding in a jurisdiction where the debtor company has the "centre of its main interests" ("**COMI**")."[44]

48. While the CCAA does not define what constitutes a debtor's COMI, pursuant to section 45(2) of the CCAA, in absence of proof to the contrary, a debtor company's COMI is presumed to be the location of its registered office.[45]

49. In circumstances where it has been necessary to go beyond the presumption in section 45(2) to determine the debtor's COMI, Canadian courts have also taken into account certain factors, including (i) the location of the debtor that is readily ascertainable by creditors, (ii) the location of the debtor's principal assets or operations, and (iii) the location where management of the debtor takes place.[46]

50. The Debtor maintains its registered head office in New Jersey.[47] Additionally, all members of the Debtor's board of directors and management reside in the United States.[48] Pursuant to a

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[43] CCAA, s. 47.
[44] CCAA, s. 45(1).
[45] CCAA, s. 45(2).
[46] *Lightsquared LP (Re)*, 2012 ONSC 2994 [*Lightsquared*] at para 25.
[47] Kim Affidavit at para 38.
[48] Kim Affidavit at para 39.

services agreement, Johnson & Johnson Services, Inc., a non-debtor affiliate of the Debtor, has agreed to provide the Debtor with certain corporate and administrative services, including treasury and procurement, corporate finance, accounting, human resources, information technology, legal, risk management, tax and other support services. These services are all provided out of the United States.[49]

51. The granting of an order recognizing the 2023 Chapter 11 Proceeding as a foreign main proceeding is also appropriate for the following reasons:

(a) given the close connection between the Debtor and the United States, it is reasonable for the New Jersey Bankruptcy Court to have principal control over the insolvency process; and

(b) coordination of proceedings in the two jurisdictions will better ensure equal and fair treatment of all stakeholders.

52. Accordingly, the Foreign Representative submits that the Debtor's COMI is the United States and the 2023 Chapter 11 Proceeding is a "foreign main proceeding" under section 47(2) of the CCAA.

## B. THE RELIEF SOUGHT SHOULD BE GRANTED

### *i) The stay of proceedings is necessary and appropriate*

53. Section 48(1) of the CCAA requires the Court to grant mandatory relief once a proceeding is found to be a foreign main proceeding, including:

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[49] Kim Affidavit at paras 40-41.

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, unless otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.[50]

54. The 2023 Initial Recognition Order sought by the Foreign Representative is based on the Court's Model CCAA Initial Recognition Order (Foreign Main Proceeding) and provides for all the relief required by section 48 of the CCAA.

***ii) Recognition of the Foreign Orders is necessary and appropriate***

55. In addition to the mandatory relief provided for in section 48, section 49 of the CCAA grants this Court broad discretion to make any order necessary for the protection of the debtor company's property or the interests of a creditor or creditors.[51]

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[50] CCAA, s. 48(1).

[51] CCAA, s. 49 and 50; *Purdue Pharma L.P., Re*, 2019 ONSC 7042 [*Purdue*] at para 22.

56. To that end, the Foreign Representative is also seeking an order recognizing and giving effect to the 2023 TRO and 2023 Foreign Representative Order entered by the New Jersey Bankruptcy Court in Canada to coordinate these proceedings with the 2023 Chapter 11 Proceeding.

**1. The 2023 TRO**

57. The 2023 TRO prohibits all plaintiffs, including the plaintiffs in the Canadian Actions, from continuing or commencing any action or claim, seeking to hold the following entities liable for any Debtor Talc Claims against any Protected Parties. The 2023 TRO is effective until April 18, 2023 at 10:00 a.m. Eastern Time, at which time the New Jersey Bankruptcy Court will hold a hearing on the Debtor's request for an order granting the injunctive relief being sought in the Complaint with respect to the Protected Parties for the duration of the 2023 Chapter 11 Proceeding.[52]

58. If an order recognizing a foreign proceeding is made, the CCAA Court is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court in the foreign proceeding. The principles of comity, cooperation and accommodation with foreign courts guide the CCAA courts in the exercise of their discretion in cross-border insolvency cases.[53]

59. Comity mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.[54]

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[52] Kim Affidavit at para 96.

[53] CCAA s. 52(1); *Purdue* at para 21; *Morguard Investments Ltd. v De Savoye* (1990) 76 D.L.R. (4th) 256.

[54] *Hollander* at para 41.

60. The draft 2023 Supplemental Recognition Order specifically provides that all of the Canadian Actions are stayed from continuing against the Canadian Co-Defendants for the duration of the 2023 TRO. This relief is intended to provide clarity for the Debtor and its stakeholders that the Canadian Actions are stayed by the 2023 TRO as a result of the issuance of the 2023 Initial Recognition Order and 2023 Supplemental Recognition Order, if granted by this Court.[55]

61. Other than to (i) capture certain actions filed against the Canadian Co-Defendants in violation of the stay and served subsequent to the entering of the 2023 TRO and (ii) for logistical reasons, provide an extension of the 2023 TRO for a short period of time following its expiry in the 2023 Chapter 11 Case (to allow the Foreign Representative to prepare and serve materials in connection with any injunction of Debtor Talc Claims granted by the New Jersey Bankruptcy Court for the duration of the proceedings) the Foreign Representative is not asking this Court to exercise its autonomous jurisdiction to extend the stay of proceedings to third parties.[56] Rather, it is requesting that this Court recognize the 2023 TRO which will have the effect of staying the Canadian Actions against the Canadian Co-Defendants. Nevertheless, the Foreign Representative submits that the principles relevant to extending the stay of proceedings to third parties are satisfied in this case.

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[55] 2023 Supplemental Recognition Order at section 7.

[56] See for example *Purdue*; *Pacific Exploration & Production Corp. (Re)*, 2016 ONSC 5429 [*Pacific Exploration*] at para 26; *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 [*JTI-Macdonald*]; *Muscletech Research & Development Inc. (Re)*, 2006 19 C.B.R. (5th) 51 at para 3; *4519922 Canada Inc. (re)*, 2015 ONSC 124 at para 54.

62. Where the court has exercised its autonomous jurisdiction to extend the stay of proceedings to third parties in both plenary CCAA proceedings and recognition proceedings, they have done so on the basis that it was "fair and reasonable" to do so under the circumstances.[57]

63. In that regard, the Foreign Representative notes that recognition of the 2023 TRO does not impact any party's substantive rights. No releases are being sought at this time. No determination of the merits of Canadian Actions is being sought at this time. No compromise or settlement is being proposed. The Foreign Representative also observes that (i) the plaintiffs, known to the Debtor at the relevant time, in the Canadian Actions were named in the 2023 Complaint filed in the 2023 Chapter 11 Proceeding to obtain the 2023 TRO; (ii) the Canadian Co-Defendants were included as Protected Parties to whom the 2023 TRO applies; (iii) the plaintiffs in the Canadian Actions have asserted claims which are intended to be resolved as part of the 2023 Chapter 11 Proceeding; (iv) the 2023 Chapter 11 Proceeding presents a unique opportunity for the parties to explore resolution of the claims instead of the current litigious path, which is costly and time consuming.[58]

64. The Foreign Representative therefore submits that recognition and enforcement of the 2023 TRO in Canada is, consistent with the principles of comity and is fair and reasonable in the circumstances.

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[57] *Pacific Exploration* at para 26; *JTI-Macdonald.*

[58] Kim Affidavit at para 103.

**2. <u>The 2023 Foreign Representative Order</u>**

65. The 2023 Foreign Representative Order expressly authorizes the Debtor, in its capacity as Foreign Representative, to (a) seek recognition of the 2023 Chapter 11 Proceeding in Canada, (b) request that the CCAA Court grant comity to the Foreign Representative and the 2023 Chapter 11 Proceeding, (c) seek any other appropriate relief from the Canadian Court that is just and proper in furtherance of the protection of the Debtor's estate, and (d) consistent with any orders of the CCAA Court, pay the costs of the Information Officer and its counsel without further order of the New Jersey Bankruptcy Court.[59]

66. The Foreign Representative submits that it is reasonable and appropriate to recognize and give effect to the 2023 Foreign Representative Order and confirm in Canada the authority granted to it by the New Jersey Bankruptcy Court.

***iii) The Information Officer should be appointed***

67. E&Y has consented to act as Information Officer and is not conflicted from acting in such capacity.[60]

68. Although the CCAA does not require that an Information Officer be appointed, a practice has developed whereby the court appoints an information officer (typically a financial advisory

[59] 2023 Foreign Representative Order at section 2.
[60] Kim Affidavit at para 107.

firm that is a licensed insolvency trustee) pursuant to its discretionary powers to assist the court and keep the court apprised of the status of the foreign proceedings.[61]

69. In this case, the Foreign Representative requests the appointment of the Information Officer to ensure that this Court is kept apprised of the status of the 2023 Chapter 11 Proceeding by an independent third-party licensed insolvency professional and to assist in providing information to and responding to inquiries from interested parties in Canada.[62] In this case, the Foreign Representative requests the appointment of the Information Officer to ensure that this Court is kept apprised of the status of the 2023 Chapter 11 Case by an independent third-party licensed insolvency professional and to assist in providing information to and responding to inquiries from interested parties in Canada.[63]

70. E&Y is an independent third-party licensed insolvency professional which: (a) is already familiar with both the 2021 Chapter 11 Proceeding and the 2021 CCAA Recognition Proceeding, and (b) will be able to assist in providing information to and responding to inquiries from interested parties in Canada.

***iv) The notice requirement should be dispensed with***

71. Section 53(b) of the CCAA requires the Foreign Representative to "publish, without delay, after the order [recognizing the foreign proceeding is made] once a week for two consecutive

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[61] CCAA, s. 49-50; *Babcock & Wilcox Canada Ltd.*, 18 CBR (4th) 157 (ONSC) at para 22, *Tucker v Aero Inventory (UK) LTd.*, 2009 CanLii 63138 (ONSC) at para 20; *Lear Canada (re)*, 55 CBR (5th) 57 (ONSC) at para 23, *Lightsquared* at paras 35-37.

[62] Kim Affidavit at para 106.

[63] Kim Affidavit at para 106.

weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing certain prescribed information."[64] [*emphasis added*]

72. Section 53(b) of the CCAA therefore allows the court to make any direction it sees fit regarding publication of notice. Therefore, this Court has discretion to make an order exempting the Foreign Representative from the requirements of section 53(b) and this Court has previously exercised such jurisdiction where it has found that affected stakeholders have been provided with ample notice of and information about the foreign proceedings and that compliance with section 53(b) would serve no valuable purpose and would result in unnecessary costs.[65]

73. Such an order is appropriate for the following reasons: (i) a service list has already been established in connection with the 2021 CCAA Recognition Proceeding and the Information Officer intends to use that service list going forward; and (ii) with the exception of the plaintiffs in the Canadian Actions, the Debtor has no stakeholders in Canada who are affected by the 2023 Chapter 11 Proceeding.[66]

74. Additionally, all documents related to the 2023 Chapter 11 Proceeding are available to the public on a website that has been established by the Claims, Noticing and Ballot Agent, Epiq Corporate Restructuring LLC at the following URL: https://dm.epiq11.com/case/ltl/info. All documents related to the 2023 CCAA Recognition Proceeding will be available to the public on a

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[64] CCAA, section 53(b).
[65] *syncreon Group B.V., Re*, 2019 ONSC 5774 at para 45.
[66] Kim Affidavit at para 110.

website established by the Information Officer at the following URL: www.ey.com/ca/ltlmanagement.[67]

### *v) This Court should remain seized of any matters related to these proceedings*

75. The proposed 2023 Supplemental Recognition Order contains certain modifications to the Ontario Model Supplemental Recognition Order, at paragraph 24, to make parties aware that this Court is seized of any matter related to these proceedings and any motion to amend or vary the 2023 Supplemental Recognition Order should be filed with this Court.

76. A fundamental tenant of Canadian insolvency process is the "single control" model that favours consolidating all litigation involving the debtors to a single jurisdiction in order to be addressed. The single proceeding model allows for the insolvency process to move forward in an efficient, collective manner and ensures that the Court most familiar with the debtor hears matters that may impact their business and restructuring efforts.[68]

77. In this case, the Canadian Actions are spread across various provinces and the plaintiffs are located in various jurisdictions. To ensure that there is a "single control" jurisdiction for these recognition proceedings and that matters related to the Debtor are centralized before this Court, the additional language included in the proposed 2023 Supplemental Recognition Order is appropriate.

[67] Kim Affidavit at para 111.

[68] *Eagle River International Ltd., (Re)*, [2001] 3 S.C.R. 978; *Nortel Networks Corp., (Re)*, 2015 ONSC 1354 at paras 20-27.

***vi) This Court should adopt the JIN Guidelines for this case***

78. The JIN Guidelines address key aspects and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings in the interest of preserving enterprise value and reducing legal costs.

79. The Commercial List Users' Committee of the Superior Court of Justice – Ontario (Commercial List) is one of sixteen jurisdictions internationally that have adopted the JIN Guidelines. The JIN Guidelines are accordingly included in the draft 2023 Supplemental Recognition Order for completeness and clarity.

## PART IV – RELIEF REQUESTED

80. Recognition of the 2023 Chapter 11 Proceeding in Canada and granting the relief related thereto is important and appropriate in the context of the Debtor pursuing a truly global resolution of its talc-related liabilities. Accordingly, the Foreign Representative requests that the Court grant the 2023 Initial Recognition Order and 2023 Supplemental Recognition Order in the forms included at Tabs 3 and 5 of the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12th day of April, 2023.

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Blake, Cassels and Graydon LLP

Lawyers for the Debtor and Foreign Representative

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

| **Proceedings** | |
|---|---|
| 1. | *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238 |
| 2. | *Payless Holdings LLC (Re)*, 2017 ONSC 2242 |
| 3. | *Horsehead Holdings Corp. (re)*, 2016 ONSC 958 |
| 4. | *Global Light Telecommunication Inc.* Re, 2004 BCSC 745 |
| 5. | *Re Stelco Inc,* (2004) 48 CBR (4th) 299 |
| 6. | *Lightsquared LP (Re)*, 2012 ONSC 2994 |
| 7. | *Purdue Pharma L.P., Re*, 2019 ONSC 7042 |
| 8. | *Morguard Investments Ltd. v De Savoye* (1990) 76 D.L.R. (4$^{th}$) 256 |
| 9. | *Pacific Exploration & Production Corp. (Re)*, 2016 ONSC 5429 |
| 10. | *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 |
| 11. | *Muscletech Research & Development Inc. (Re)*, 2006 19 C.B.R. (5$^{th}$) 51 |
| 12. | *4519922 Canada Inc. (re)*, 2015 ONSC 124 |
| 13. | *Babcock & Wilcox Canada Ltd.*, 18 CBR (4$^{th}$) 157 (ONSC) |
| 14. | *Tucker v Aero Inventory (UK) LTd.*, 2009 CanLII 63138 (ONSC) |
| 15. | *Lear Canada (re)*, 55 CBR (5$^{th}$) 57 (ONSC) |
| 16. | *syncreon Group B.V., Re*, 2019 ONSC 5774 |

| **Proceedings** | |
|---|---|
| 17. | *Eagle River International Ltd., (Re)*, [2001] 3 S.C.R. 978 |
| 18. | *Nortel Networks Corp., (Re)*, 2015 ONSC 1354 |

## SCHEDULE "B"

## TEXT OF RELEVANT STATUTES AND REGULATIONS

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

**Definitions**

**2(1)** In this Act,

***company*** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

***debtor company*** means any company that

**(a)** is bankrupt or insolvent,

**(b)** has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

**(c)** has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

**(d)** is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

**Definitions**

**45 (1)** the following definitions apply in this Part.

***foreign court*** means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

***foreign main proceeding*** means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (*principale*)

***foreign non-main proceeding*** means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

***foreign proceeding*** means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (*instance étrangère*)

***foreign representative*** means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

> **(a)** monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> **(b)** act as a representative in respect of the foreign proceeding. (*représentant étranger*)

**Centre of debtor company's main interests**

**(2)** For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

**Application for recognition of a foreign proceeding**

**46 (1)** A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

**Documents that must accompany application**

**(2)** Subject to subsection (3), the application must be accompanied by

> (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
>
> (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
>
> (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

**Documents may be considered as proof**

**(3)** The court may, without further proof, accept the documents referred to in paragraphs (2) (a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

**Other evidence**

**(4)** In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

**Order recognizing foreign proceeding**

**47 (1)** If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

**Nature of foreign proceeding to be specified**

**(2)** The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

**Order relating to recognition of a foreign main proceeding**

**48 (1)** Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> **(d)** prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

**Other orders**

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

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

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

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

**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.

**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.

**Obligations of foreign representative**

**53** If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

[…]

**(b)** publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Court File No.: CV-23-00697284-00CL

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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**FACTUM OF THE**
**FOREIGN REPRSENTATIVE**
**(Recognition of Foreign Main Proceeding)**
**Returnable April 13, 2023**

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