

**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 HOLLANDER SLEEP PRODUCTS LLC, HOLLANDER SLEEP PRODUCTS CANADA LIMITED, DREAM II HOLDINGS, LLC, HOLLANDER HOME FASHIONS HOLDINGS, LLC, PACIFIC COAST FEATHER, LLC, HOLLANDER SLEEP PRODUCTS KENTUCKY, LLC, AND PACIFIC COAST FEATHER CUSHION, LLC

APPLICATION OF HOLLANDER SLEEP PRODUCTS LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

APPLICANT

**FACTUM OF THE APPLICANT
(Motion for Plan Recognition Order)**

September 9, 2019

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**FACTUM OF THE APPLICANT
(Motion for Plan Recognition Order)**

PART I - NATURE OF THE MOTION

1. Hollander Sleep Products, LLC (the “**Applicant**” or the “**Foreign Representative**”) and the six other debtors in possession that filed voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code (the “**Chapter 11 Debtors**”) recently sought and obtained an order (the “**Confirmation Order**”) from the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Court**”) confirming the *Debtors Modified First Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* ((as approved, confirmed and modified by the Confirmation Order, the “**Confirmed Plan**”) that, among other things, contemplates the sale of substantially all of the Chapter 11 Debtors’ assets (including the assets of Hollander Sleep Products Canada Ltd. (“**Hollander Canada**”)), to Bedding Acquisition, LLC (including its successors and

permitted assigns, the “**Purchaser**”), pursuant to an asset purchase agreement dated as of August 15, 2019 (as may be amended, modified, or supplemented, the “**Asset Purchase Agreement**”).

2. The Confirmed Plan and the Asset Purchase Agreement reflect the culmination of a market-tested, dual-track restructuring process, and months of diligent efforts by the Chapter 11 Debtors and their stakeholders to effect a going concern outcome to the Chapter 11 Cases. The Confirmed Plan and the Asset Purchase Agreement represent the best available result for all parties in interest.

3. Through this motion, the Foreign Representative seeks an Order (the “**Plan Recognition Order**”) pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”):

- (a) recognizing and enforcing the Confirmation Order, together with two other orders recently entered by the U.S. Court, namely the **RSA Order** and the **DIP Term Loan Amendment Order** (both as defined below);
- (b) approving of the Asset Purchase Agreement;
- (c) vesting of the Chapter 11 Debtors’ assets over which this Court has jurisdiction (the “**Canadian Assets**”) in and to the Purchaser; and
- (d) authorizing the Chapter 11 Debtors to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the sale of the Canadian Assets to the Purchaser and to implement the Confirmed Plan.

4. The Confirmed Plan and the Asset Purchase Agreement are fair and reasonable, and represent the best possible outcome for stakeholders in the difficult circumstances facing the Chapter 11 Debtors. The Confirmed Plan reflects a broad consensus among creditors and is the

most appropriate means of maximizing the value of the Chapter 11 Debtors' estate for the benefit of all stakeholders. The Foreign Representative submits that this Court has the jurisdiction to grant the Plan Recognition Order and that it is appropriate to do so in these circumstances.

5. Capitalized terms used herein and not defined have the meanings given to them in the Confirmed Plan, or the affidavit of Marc Pfefferle sworn September 6, 2019 (the "**Fourth Pfefferle Affidavit**").¹ All dollar references are in U.S. dollars unless otherwise specified.

PART II -FACTS

A. Background and Chapter 11 Proceedings

6. The Chapter 11 Debtors are leaders in the bedding products industry. They manufacture bedding, including pillows, comforters and mattress pads, for well-known licensed brands and in partnership with major retailers and hotels.² The Chapter 11 Debtors operate on an integrated basis.

7. Hollander Canada currently operates from leased facilities in Toronto and Montreal. As of the Petition Date, there were approximately 240 employees of Hollander Canada.

8. On May 19, 2019 (the "**Petition Date**"), each of the Chapter 11 Debtors filed voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code with the U.S. Court (the "**Chapter 11 Cases**").³ On May 22 and 23, 2019, the U.S. Court granted certain First Day Orders.⁴

¹ Fourth Pfefferle Affidavit is at Tab 2, page 26 of the Motion Record , which is dated September 6. The Confirmed Plan is appended to the Confirmation Order at Tab 3.B. of the Motion Record]

² *Hollander Sleep Products, LLC et al, Re*, 2019 ONSC 3238 [Hollander Recognition Decision] at paras 4-5.

³ Fourth Pfefferle Affidavit at para 7.

⁴ Fourth Pfefferle Affidavit at para 8.

9. By Orders dated May 23, 2019, the Honourable Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the “**Ontario Court**”) recognized the Chapter 11 Cases as “foreign main proceedings”, appointed KSV Kofman Inc. as Information Officer (the “**Information Officer**”) in these proceedings, and recognized certain of the orders made by the U.S. Court in the Chapter 11 Cases (the “**Initial Recognition Orders**”).⁵

10. The Chapter 11 Cases are funded by two separate debtor-in-possession loan facilities:

(a) a \$90 million asset-based lending credit facility among the Chapter 11 Debtors and their prepetition ABL lenders (the “**DIP ABL Facility**”). The DIP ABL Facility was approved pursuant to a Final Order entered by the U.S. Court on July 3, 2019, which was recognized by the Ontario Court on July 5, 2019; and

(b) a \$28 million DIP facility with the US Chapter 11 Debtors’ prepetition term loan lenders (the “**DIP Term Loan Facility**”). Hollander Canada is not a borrower or guarantor under the DIP Term Loan Facility. The DIP Term Loan Facility was approved pursuant to a Final Order entered by the U.S. Court on July 19, 2019, which was recognized by the Ontario Court on August 6, 2019.⁶

11. On September 5 and 6, 2019, the U.S. Court entered (a) the RSA Order; (b) the Confirmation Order; and (c) the DIP Term Loan Amendment Order.

⁵ Fourth Pfefferle Affidavit at paras 9-10. Since the Initial Recognition Orders, the Ontario Court has recognized several other interim and final orders entered by the U.S. Court.

⁶ Hollander Recognition Decision at para 15.

B. RSA Order

12. The Chapter 11 Debtors commenced the Chapter 11 Cases to facilitate a restructuring of their balance sheets and to stabilize business operations. In this regard, before the Petition Date, the Chapter 11 Debtors negotiated a comprehensive restructuring transaction with holders of 100% in principal amount of loans under the Term Loan Facility and Sentinel, the terms of which were embodied in the Restructuring Support Agreement (the “**RSA**”).⁷

13. Pursuant to the RSA, certain of the Term Loan Lenders committed to finance the Chapter 11 Cases and the Chapter 11 Debtors’ emergence from Chapter 11 through a \$28 million new-money DIP Term Loan Facility, which would be converted into a \$58 million exit term loan facility upon emergence from the Chapter 11 Cases, providing an additional \$30 million of fresh capital to fund go-forward operations.⁸ Additionally, the Term Loan Lenders agreed to convert their existing secured debt of approximately \$166.5 million into equity pursuant to a credit bid.⁹ Sentinel agreed to roll up its \$15 million “last out loans” under the prepetition ABL Facility into the Chapter 11 Debtors’ DIP ABL Credit Facility and any proposed ABL exit facility.¹⁰

14. These commitments were all subject to a sale “toggle” feature included in the solicitation version of the *Debtors’ First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code filed with the U.S. Court on July 25, 2019* (the “**Plan**”), which allowed the

⁷ Fourth Pfefferle Affidavit at para 14.

⁸ Third Report of the Information Officer at page 7.

⁹ Third Report of the Information Officer at page 7.

¹⁰ Fourth Pfefferle Affidavit at para 14.

Chapter 11 Debtors to pursue a potential “value maximizing” sale to a third party through the sale process supported and carried out by Houlihan Lokey, Inc. (“**Houlihan**”).

15. The RSA ensured that the Hollander business would continue to operate uninterrupted through, and after, the Chapter 11 Cases, subject to certain plant closures announced and/or implemented over the course of the Chapter 11 Proceedings. The RSA was negotiated prior to the filing of the Petitions and was designed to provide a degree of certainty to stakeholders and to create a framework for moving forward expeditiously through the Chapter 11 Cases.

16. Following the appointment of the Official Committee of Unsecured Creditors (“**UCC**”),¹¹ the Chapter 11 Debtors, the Consenting Term Loan Lenders, Sentinel, and the UCC engaged in extensive good-faith settlement negotiations over the following two months.¹² These discussions aimed to reach a consensual restructuring transaction so the Chapter 11 Debtors could exit expeditiously from the Chapter 11 Cases.¹³

17. Ultimately, the Chapter 11 Debtors, the Consenting Term Loan Lenders, the UCC, and Sentinel entered into an Amended and Restated Restructuring Support and Settlement Agreement dated as of July 21, 2019 (the “**Amended RSA**”).¹⁴ On August 15, 2019, the U.S. Court entered an Order (a) authorizing the Chapter 11 Debtors to assume the Amended RSA, (b) approving the settlements and compromises contained therein, and (c) granting related relief (the “**RSA Order**”).

¹¹ Three of the five members of the UCC are creditors and vendors of Hollander Canada. As such, the interests of Hollander Canada’s creditors were meaningfully represented in these discussions. Fourth Pfefferle Affidavit at para 17.

¹² Fourth Pfefferle Affidavit at para 17; Third Report of the Information Officer at page 7.

¹³ Fourth Pfefferle Affidavit at para 17.

¹⁴ Fourth Pfefferle Affidavit at para 18.

18. The Amended RSA includes the terms of a global settlement that establishes three possible guaranteed recovery scenarios for unsecured creditors, including those of Hollander Canada:

- (a) In a **reorganization**, the Chapter 11 Debtors would fund a reorganization recovery pool with \$600,000 in cash for the benefit of general unsecured creditors. If the reorganized Chapter 11 Debtors are sold within 24 months of the effective date of the Plan, and the Consenting Term Loan Lenders receive more than a 30% recovery on the Term Loan Claims, the general unsecured creditors would received 5% of each dollar in excess of such 30% recovery (referred to as the Future Sale Consideration).¹⁵
- (b) In a **sale transaction**, the Chapter 11 Debtors would fund a sale transaction recovery pool for the benefit of general unsecured creditors containing (i) \$600,000 in cash, plus (ii) if the Term Loan Lenders receive more than a 30% recovery on account of their Term Loan Claims, 5% of each dollar in excess thereof, plus (iii) if the Term Loan Lenders received more than 50% recovery on account of their Term Loan Claims, 7.5% of each dollar in excess thereof.¹⁶
- (c) In a **liquidation**, a liquidation recovery pool with cash in the amount of \$250,000 would be funded and, in the case of a conversion to a Chapter 7 proceeding or, solely with respect to Hollander Canada, a proceeding under the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”), the applicable amounts would be distributed

¹⁵ Fourth Pfefferle Affidavit at para 20(a).

¹⁶ Fourth Pfefferle Affidavit at para 20(b).

to the chapter 7 trustee or, to the extent applicable, the trustee under the BIA, to be distributed in accordance with applicable bankruptcy law.¹⁷

19. Each of these guaranteed recovery scenarios was supplemented by two further additions that would be available in all three scenarios (reorganization, sale transaction, or liquidation):

(a) In addition to any recovery pool established by the Chapter 11 Debtors, Sentinel would fund up to a total of \$650,000 for the benefit of general unsecured creditors. This amount would be paid from (i) the first \$200,000 of any proceeds distributed in satisfaction of DIP Last Out Loan Claims, plus (ii) 50% of each dollar received in excess of the first \$200,000 of any proceeds distributed in satisfaction of DIP Last Out Loan Claims, up to a combined total maximum of \$650,000.¹⁸

(b) Additionally, the Chapter 11 Debtors (and any successors thereto) would assign and transfer any outstanding commercial tort claims or causes of action owned by the Chapter 11 Debtors arising on or before the Petition Date (the “**Commercial Tort Claims**”), and all cash proceeds of any Commercial Tort Claims, for the benefit of general unsecured creditors.¹⁹

20. The UCC agreed to support confirmation of the Plan on these terms.²⁰

¹⁷ Fourth Pfefferle Affidavit at para 20(c).

¹⁸ Fourth Pfefferle Affidavit at para 20(d).

¹⁹ Fourth Pfefferle Affidavit at para 22.

²⁰ Fourth Pfefferle Affidavit at para 23.

C. Sale Process and Asset Purchase Agreement

21. In parallel with the settlement negotiations, which culminated in the Amended RSA, the Chapter 11 Debtors and Houlihan undertook a comprehensive sale process to market the business of the Chapter 11 Debtors. This process was successful.

22. In accordance with the Bidding Procedures approved by the U.S. Court and recognized by the Ontario Court on July 5, 2019, the Chapter 11 Debtors and Houlihan contacted more than 150 prospective buyers to gauge their interest in acquiring all or part of the Chapter 11 Debtors' businesses (including, if desired, the business of Hollander Canada on a standalone basis).²¹ As a result of these efforts, the Chapter 11 Debtors received 10 non-binding indications of interest for part or all of the Chapter 11 Debtors' businesses and assets.²² The Chapter 11 Debtors, Houlihan, and the Chapter 11 Debtors' other advisors worked extensively with the various interested parties to progress diligence and provide other relevant information with the goal of receiving qualified bids by the final bid deadline.²³ To further the goal of obtaining the highest or otherwise best offer for their assets, the Chapter 11 Debtors extended the final bid deadline (and proposed a later date for the Auction, if any), permitting continued negotiations with potential bidders.²⁴

23. Ultimately, the Chapter 11 Debtors received one Qualified Bid, namely the proposed agreement submitted by the Purchaser.²⁵ The Purchaser is an arm's length third party and is not

²¹ Fourth Pfefferle Affidavit at para 25.

²² Fourth Pfefferle Affidavit at para 26.

²³ Fourth Pfefferle Affidavit at para 26.

²⁴ Fourth Pfefferle Affidavit at para 27.

²⁵ Fourth Pfefferle Affidavit at para 28.

affiliated with the Chapter 11 Debtors.²⁶ The Chapter 11 Debtors did not receive any other bids at or after the final bid deadline.²⁷

24. The Chapter 11 Debtors concluded, in consultation with the Consultation Parties, that the Purchaser's Qualified Bid constituted the highest and best offer and would provide a greater recovery for the Chapter 11 Debtors' estates than would be provided by any other alternative.²⁸ Accordingly, the Chapter 11 Debtor entered into the Asset Purchase Agreement with the Purchaser and cancelled the Auction.²⁹

25. Pursuant to the Asset Purchase Agreement, the Purchaser will purchase substantially all of the Chapter 11 Debtors' assets for \$102 million in cash and certain other consideration, including warrants to be distributed to Holders of DIP Term Loan Claims, and subject to certain adjustments for net working capital and similar transaction costs.³⁰

26. As part of the Asset Purchase Agreement, the Purchaser has agreed to extend offers of employment to all employees of the Chapter 11 Debtors.³¹ The Ontario Court's recognition of the Confirmation Order is a condition precedent for the closing of the Asset Purchase Agreement.³²

27. The Asset Purchase Agreement is the product of arm's-length negotiations and was entered into in consultation with the Consultation Parties. It is the business judgment of the Chapter 11

²⁶ Fourth Pfefferle Affidavit at para 34.

²⁷ Fourth Pfefferle Affidavit at para 28.

²⁸ Fourth Pfefferle Affidavit at paras 32, 34, and 49(h); Third Report of the Information Officer at page 5.

²⁹ Fourth Pfefferle Affidavit at para 28.

³⁰ Fourth Pfefferle Affidavit at para 30; Third Report of the Information Officer at page 6.

³¹ Fourth Pfefferle Affidavit at para 32(e).

³² Fourth Pfefferle Affidavit at para 33; Third Report of the Information Officer at page 6.

Debtors the sale of the purchased assets to the Purchaser (the “**Sale Transaction**”) is the most efficient and appropriate means to maximize value for stakeholders.³³

D. Confirmed Plan

28. As a result of the events described above, the Chapter 11 Debtors modified the Plan to incorporate the principal elements of the Amended RSA, including to provide for the Sale Transaction and the related general unsecured creditor recoveries.³⁴

29. Key elements of the Confirmed Plan include:

- (a) The Confirmed Plan reflects the global compromise of claims and guaranteed recoveries for general unsecured creditors reached in the Amended RSA (described more fully above) in the context of a sale transaction;
- (b) The Confirmed Plan incorporates the Sale Transaction, which will provide sufficient liquidity to fund the Chapter 11 Debtors’ performance and distributions under the Confirmed Plan;³⁵
- (c) The claims of the DIP ABL Lenders will be fully repaid on the Effective Date;³⁶
- (d) The Chapter 11 Debtors will distribute the warrants received as additional consideration from the Purchaser to the Holders of DIP Term Loan Claims, granting

³³ Fourth Pfefferle Affidavit at para 34.

³⁴ Fourth Pfefferle Affidavit at para 35.

³⁵ Fourth Pfefferle Affidavit at para 37.

³⁶ Fourth Pfefferle Affidavit at para 38(b).

such holders the right to purchase 7.5% of the common equity in the Purchaser;³⁷

- (e) The Chapter 11 Debtors will provide a \$1 million reserve to fund the Plan Administrator to: (i) wind down the Chapter 11 Debtors' businesses; (ii) resolve any Disputed Claims; (iii) pay Allowed Claims; (iv) litigate any remaining causes of action; (v) file tax returns; (vi) administer the Confirmed Plan; and (vii) consult with the Information Officer in respect of any matters to the foregoing as related to Canada;³⁸
- (f) The Post-Effective Date Chapter 11 Debtors shall be deemed to be substituted as party-in-lieu of the Chapter 11 Debtors in all matters, and the Plan Administrator, as representative of the Post-Effective Date Chapter 11 Debtors, shall have the right to retain the services of professionals required to perform its duties, whose reasonable fees shall be paid by the Post-Effective Date Chapter 11 Debtors.³⁹

30. In total, under the Confirmed Plan, general unsecured creditors will achieve an estimated recovery of at least 1% of their unsecured claims, not including any value that may be generated from potential tort claims.⁴⁰ This guaranteed recovery exceeds what unsecured creditors (including unsecured creditors of Hollander Canada) would likely attain in a liquidation.⁴¹

31. Multiple stakeholders collaborated and made significant concessions to ensure the success of the Confirmed Plan. In particular, the DIP Term Loan Lenders consented to a recovery that does

³⁷ Fourth Pfefferle Affidavit at para 38(a).

³⁸ Fourth Pfefferle Affidavit at para 38(c).

³⁹ Fourth Pfefferle Affidavit at para 38(d).

⁴⁰ Fourth Pfefferle Affidavit at para 21.

⁴¹ Third Report of the Information Officer at page 8; Fourth Pfefferle Affidavit at para 24.

not repay the DIP Term Loan Claims in full in cash and allow Claims senior to the Term Loan Claim (other than the DIP Term Loan Claims) to recover ahead of the DIP Term Loan Lenders.⁴² To that end, the Chapter 11 Debtors sought, and the U.S. Court granted, an order amending the terms of the DIP Term Loan Facility (the “**DIP Term Loan Amendment Order**”) to reflect the DIP Term Loan Lenders’ consent to this reduced recovery. Although Hollander Canada is neither a borrower nor a guarantor under the DIP Term Loan Facility, the Foreign Representative also seeks to recognize the DIP Term Loan Amendment Order through this motion as a matter of completeness.⁴³

32. The Confirmed Plan also provides for certain releases, exculpations, and injunctions (together, the “**Releases**”) that will take effect on the Effective Date. The Releases were heavily negotiated and are collectively an indispensable component of the Confirmed Plan, achieving a final resolution of matters that would otherwise have been subject to potentially expensive litigation:⁴⁴

- (a) The **Debtor Release** involves releases by the Chapter 11 Debtors of claims and causes of action against the Released Parties, including among others, the Purchaser and the parties to the Amended RSA. The Debtor Release was critical to obtaining support for the Confirmed Plan, reflecting the contribution of the Released Parties to the success of the Confirmed Plan.
- (b) The **Third Party Release** releases certain non-debtor, third-party claims against other non-debtor third parties. The Third-Party Release applies only to parties who

⁴² Fourth Pfefferle Affidavit at para 39.

⁴³ Fourth Pfefferle Affidavit at para 39.

⁴⁴ Fourth Pfefferle Affidavit at para 40(a).

have been instrumental in supporting the Chapter 11 Cases. As with the Debtor Release, the Third-Party Release was a material inducement for the support of the Confirmed Plan and the concessions it contains.

- (c) The **Exculpation** is a customary provision that does not affect the liability of third parties *per se*, but rather establishes a standard of care of actual fraud, gross negligence, or willful misconduct in future litigation by a non-releasing party against an “Exculpated Party” for acts arising out of a debtor’s restructuring. Here, the Exculpation provision is appropriately tailored to the facts and circumstances of the Chapter 11 Cases and was critical and indispensable to obtaining the support of the various constituencies for the Confirmed Plan.
- (d) The **Injunction** enjoins persons who hold Claims or Interests that are fully satisfied pursuant to the Confirmed Plan, or who hold Claims that were subject to the Debtor Release, Third Party Release, or Exculpation listed above, from pursuing any setoff or relief with respect to those Claims other than the payments or distributions contemplated by the Confirmed Plan. The Injunction is necessary to enforce the releases contained in the Confirmed Plan. Without the Injunction, the finality of the Confirmed Plan will be substantially weakened.⁴⁵

33. Pursuant to the Disclosure Statement Order, each Claimholder was provided with a notice containing, in bold font, the express language of the Releases.⁴⁶

⁴⁵ Fourth Pfefferle Affidavit at para 40(d).

⁴⁶ Fourth Pfefferle Affidavit at para 40(d).

E. Plan Voting

34. Pursuant to the voting procedure approved by the U.S. Court on July 25, 2019 (and recognized by the Ontario Court on August 6, 2019),⁴⁷ the Chapter 11 Debtors divided creditors into Voting Classes (comprising Class 4 Term Loan Claims and Class 5 General Unsecured Claims) and Non-Voting Classes (comprising creditors not entitled to vote on the Confirmed Plan or whose votes were deemed).⁴⁸

35. Voting Creditors overwhelmingly supported the Confirmed Plan, as 100% of Class 4 Term Loan creditors and 96% of Class 5 General Unsecured Creditors voted to accept the Plan.⁴⁹

36. As a result, on September 5, 2019, the U.S. Court entered the Confirmation Order authorizing the Confirmed Plan and making certain findings of fact.⁵⁰ The Foreign Representative seeks recognition of the Confirmation Order on this motion.

37. Key elements of the Confirmation Order include the following:

- (a) All requirements for the confirmation of the Confirmed Plan have been satisfied.⁵¹

⁴⁷ Fourth Pfefferle Affidavit at para 42.

⁴⁸ The Non-Voting Classes either (i) are not impaired under the Plan and, therefore are conclusively presumed to have accepted the Plan, (ii) will not receive any distributions under the Plan and, therefore are deemed to reject the Plan, or (iii) are subject to a pending objection by the Chapter 11 Debtors and are, therefore, not entitled to vote the disputed portion of their claim. Fourth Pfefferle Affidavit at para 43.

⁴⁹ Fourth Pfefferle Affidavit at paras 46-47. The Chapter 11 Debtors received eight (8) limited objections to confirmation of the Plan, primarily related to the reconciliation of outstanding cure amounts for executory contracts and unexpired leases. The Chapter 11 Debtors believe that each objection has been resolved or relates to cure amounts that will be addressed independently.

⁵⁰ Fourth Pfefferle Affidavit at para 48.

⁵¹ Fourth Pfefferle Affidavit at para 49(a).

- (b) The Releases are fair, equitable and reasonable; were given in exchange for valuable and adequate consideration; were integral to gaining support for and are essential to the implementation of the Confirmed Plan; and are in the best interests of the Chapter 11 Debtors and other stakeholders in this restructuring.⁵²
- (c) The liquidation analysis attached to the Disclosure Statement and other evidence establishes that each Claimholder in each Class will recover at least as much under the Confirmed Plan as they would expect to receive in a liquidation.⁵³
- (d) The Chapter 11 Debtors' marketing process, culminating in the Sale Transaction, afforded a full, fair, and reasonable opportunity for any person or entity to make a higher or otherwise better offer. No other offer to purchase the Chapter 11 Debtors' assets was submitted.⁵⁴
- (e) The Asset Purchase Agreement was negotiated and entered into by the Chapter 11 Debtors and the Purchaser without collusion, in good faith, and from arm's-length bargaining positions.⁵⁵
- (f) The Asset Purchase Agreement constitutes the highest and best offer, and will provide a greater recovery for the Chapter 11 Debtors' estates than would be provided by any other available alternative.⁵⁶

⁵² Fourth Pfefferle Affidavit at para 49(d).

⁵³ Fourth Pfefferle Affidavit at para 49(e).

⁵⁴ Fourth Pfefferle Affidavit at para 49(h).

⁵⁵ Fourth Pfefferle Affidavit at para 49(g).

⁵⁶ Fourth Pfefferle Affidavit at para 49(h).

PART III -ISSUES AND THE LAW

38. The sole issue on this motion is whether this Court should grant the Plan Recognition Order.

A. This Court has jurisdiction to grant the Plan Recognition Order under Part IV of the CCAA

39. As indicated above, this Court has recognized the Chapter 11 Cases as a “foreign main proceeding” pursuant to sections 47 and 48 of the CCAA. When a foreign main proceeding has been recognized under Part IV of the CCAA, section 49 empowers this Court to make any order that it considers appropriate to protect the debtor’s property or the interests of one or more creditors.⁵⁷ The Court’s discretion is broad: an order under Part IV “may be made on any terms and conditions that the Court considers appropriate in the circumstances.”⁵⁸ This Court has jurisdiction to grant the Plan Recognition Order

The Plan Recognition Order satisfies the standard of Part IV of the CCAA

40. Section 49(1) of the CCAA empowers this Court to make any order it considers appropriate in a Part IV proceeding if the order is “necessary for the protection of the debtor company’s property or the interests of a creditor or creditors.” The Plan Recognition Order meets this standard.

41. The central principle animating the exercise of the Court’s discretion under Part IV is comity, which is embodied in sections 44(a) and 52(1) of the CCAA.⁵⁹ Comity mandates that Canadian courts should recognize and enforce the judicial acts of foreign courts, provided that

⁵⁷ CCAA section 49(1).

⁵⁸ CCAA section 50.

⁵⁹ *Babcock & Wilson Canada Ltd, Re*, 2000 CarswellOnt 704 (Ont CJ) [*Babcock & Wilson*] at paras 6, 9-13; *Olympia & York Developments Ltd v Royal Trust Co*, 1993 CarswellOnt 212 (ONSC) at para 5.

those foreign courts have assumed jurisdiction on a basis consistent with the principles of order, predictability, and fairness. To that end, Canadian courts have consistently emphasized comity and cooperation between courts across jurisdictions to facilitate successful cross-border restructurings.⁶⁰ Courts in Canada and the United States have made particular efforts to complement, coordinate and accommodate each other's proceedings.⁶¹

42. The Plan Recognition Order provides for the recognition of three U.S. Court orders: the RSA Order; the Confirmation Order; and the DIP Term Loan Amendment Order. All three orders are necessary for the protection of the interests of creditors:

- (a) The RSA Order establishes a scheme of guaranteed recovery for unsecured creditors, in circumstances where liquidation would leave unsecured creditors (including those of Hollander Canada) with no recoveries whatsoever.⁶²
- (b) The Confirmation Order authorizes the implementation of the Confirmed Plan, including the Asset Purchase Agreement and the sale of the Chapter 11 Debtors' assets to the Purchaser. The Confirmed Plan was the result of months of diligent effort; it represents the best (indeed, the only) means to maximize the value of the Chapter 11 Debtors' assets for the benefit of the Chapter 11 Debtors' creditors.
- (c) The DIP Term Loan Amendment Order reflects the DIP Term Loan Lenders' consent to accept reduced recoveries as negotiated in the Amended RSA.

⁶⁰ *Caesars Entertainment Operating Co, Re*, 2015 ONSC 712 at para 38.

⁶¹ *Hartford Computer Hardware Inc, Re*, 2012 ONSC 964 [*Hartford*] at paras 14-15 and 17; *Massachusetts Elephant & Castle Group Inc, Re*, 2011 ONSC 4201 [*Elephant & Castle*] at para 39; *Babcock & Wilson* at para 9.

⁶² Third Report of the Information Officer at page 8; Fourth Pfefferle Affidavit at para 24.

43. The Plan Recognition Order is acutely important for unsecured creditors, whose only realistic prospect of recovery is embodied in the RSA Order and the Confirmed Plan.

44. The Plan Recognition Order is supported by the Information Officer.⁶³

45. The Confirmation Order “benefits all of the Chapter 11 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”.⁶⁴ CCAA courts in Part IV proceedings have held that these factors justify recognition of a plan previously approved by a U.S. Court order.

46. It is the informed business judgment of the Chapter 11 Debtors that the Plan Recognition Order is necessary to protect the interests of creditors. This business judgment is supported by the expert advice of Houlihan and reflects the input of the Consultation Parties (including the UCC). In the absence of any indication that the Chapter 11 Debtors have acted improvidently or that the sale process was unfair, their business judgment should be entitled to deference by this Court.⁶⁵

Canadian Courts have recognized U.S. Plans and Sale Orders in other Part IV Proceedings

47. Comity, cooperation, and accommodation with U.S. Courts have guided CCAA courts in cross-border insolvency proceedings.⁶⁶ Canadian courts will generally recognize sale and plan

⁶³ Third Report of the Information Officer at pages 8 and 11.

⁶⁴ *Xerium, Technologies Inc, Re*, 2010 ONSC 3974 [*Xerium*] at para 20.

⁶⁵ *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742 at paras. 70-72.

⁶⁶ *Payless Holdings Inc LLC, Re*, 2017 ONSC 2242 at para 35; *Ultra Petroleum Corp, Re*, 2017 YKSC 23 [*Ultra Petroleum*] at para 8;

approval orders granted by U.S. Courts in Chapter 11 cases that are foreign main proceedings.⁶⁷

48. Canadian courts will not lightly second-guess the decisions made by a U.S. court in a foreign main proceeding. In a foreign non-main proceeding under Part IV, Canada has an “ancillary role”.⁶⁸ So long as the U.S. court’s orders are not contrary to public policy or the purposes of the CCAA, Canadian courts will give deference to the judgment of a U.S. court charged with overseeing a restructuring.⁶⁹

49. Where a U.S. bankruptcy court in a foreign main proceeding has approved a plan, recognizing and implementing that plan promotes the purposes of Part IV of the CCAA. Canadian courts have held that the plan approval criteria considered in a U.S. bankruptcy proceeding are consistent with those of the CCAA.⁷⁰ In *Xerium*, Campbell J. ordered the recognition of a plan that had been approved by a U.S. bankruptcy court in a foreign main proceeding for this reason.

50. The Confirmed Plan in this case satisfies the same criteria Campbell J. looked to in *Xerium*:

- (a) It is made in good faith;
- (b) It does not breach applicable law;
- (c) It is in the interests of the Chapter 11 Debtors’ creditors and other stakeholders; and

⁶⁷ See for example *Lightsquared Inc. (Re)*, 2015 ONSC 2309 and *Xerium*.

⁶⁸ *Babcock & Wilson* at para 21.

⁶⁹ *Hartford* at paras 14-15 and 17; *Elephant & Castle* at para 39.

⁷⁰ *Xerium* at para 28.

- (d) It will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.⁷¹

51. More broadly, the Plan Recognition Order satisfies many of the contextual factors Canadian courts have considered when recognizing U.S. court orders in a Part IV proceeding.⁷² These factors support granting the Plan Recognition Order with respect to the Chapter 11 Debtors:

- (a) The Plan Recognition Order is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit. Obtaining the Plan Recognition Order from this Court is a condition of closing the Asset Purchase Agreement. This is significant because monies from the Asset Purchase Agreement, combined with the scheme established under the RSA Order and reflected in the Confirmed Plan, are the only means by which unsecured creditors of the Chapter 11 Debtors can hope to obtain recoveries in this proceeding.
- (b) Hollander Canada's operations are closely integrated with those of the other Chapter 11 Debtors. Implementing the Confirmed Plan and Asset Purchase Agreement is essential for the Chapter 11 Debtors, including Hollander Canada, to emerge from restructuring.
- (c) The Confirmed Plan was confirmed by the U.S. Court in accordance with well-established procedures and practices, including the court-approved Disclosure Statement and Bidding Procedures.

⁷¹ Fourth Pfefferle Affidavit at para 49.

⁷² *Xerium* at para 27; *Ultra Petroleum* at para 9; *Babcock & Wilson* at para 21.

- (d) Canada is an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;
and
- (e) The Plan Recognition Order is necessary to ensure the fair and efficient administration of this cross-border insolvency. The Confirmed Plan and the RSA Order provide guaranteed recoveries to all unsecured creditors, including unsecured creditors of Hollander Canada. It is in the interests of all stakeholders that there be a coordinated cross-border approach to ensure that unsecured creditors obtain some recoveries, and the Chapter 11 Debtors can emerge from the Chapter 11 Cases and continue operating under the auspices of the Purchaser.

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

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

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

53. These overlap to a certain degree with the *Soundair* factors that governed sale transactions under pre-amendment 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 U.S. foreign main proceeding.⁷³ The *Soundair* test considered: (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.

54. 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), the Confirmation Order satisfies the standard for a sale approval in a foreign main proceeding under Part IV of the CCAA.

55. First, the sale process was reasonable and efficient. As described above, the Chapter 11 Debtors and Houlihan undertook significant efforts to engage the interest of bidders, contacting 150 prospective buyers in an effort to obtain the best possible price for the Chapter 11 Debtors' assets. After receiving 10 expressions of interest, the Chapter 11 Debtors worked diligently to expedite diligence and undertake negotiations with prospective buyers. Throughout, the Chapter 11 Debtors acted in accordance with the Bidding Procedures approved by the U.S. Court.

56. Second, the interests of all parties were considered. In tandem with the sale process, the Chapter 11 Debtors undertook extensive good-faith negotiations with the UCC that resulted in the Amended RSA. The Amended RSA includes provisions addressing a potential share in any excess proceeds resulting from a sale of the Chapter 11 Debtors' assets. An overwhelming majority of

⁷³ 2012 BCSC 1567 [*Digital Domain*] at para 15.

Voting Creditors implicitly voted in favour of the Sale Transaction when they voted to implement the Confirmed Plan.

57. Third, the sale process and resultant Asset Purchase Agreement are supported by the Consultation Parties (which includes the UCC) and the Information Officer.

58. Fourth, the consideration to be received for the purchased assets is appropriate. The Chapter 11 Debtors exercised their business judgment to conclude that the consideration received was fair and reasonable. This conclusion was approved by the U.S. Court and is supported by the Information Officer in this proceeding. The consideration offered in the Asset Purchase Agreement is the highest or otherwise best offer for the assets, and will provide a greater recovery for the Chapter 11 Debtors' creditors than would be provided in a liquidation.

59. Finally, the Confirmed Plan and the Asset Purchase Agreement represent the best result for all stakeholders, achieved fairly through cooperative negotiation and compromise. As a result of these negotiations, the Confirmed Plan incorporates a global compromise with the UCC and provides guaranteed recoveries to unsecured creditors. Importantly, to reach this extensively-negotiated global resolution, many of the Chapter 11 Debtors' senior stakeholders made concessions and forfeited recoveries for the benefit of other junior creditor constituencies.⁷⁴ These hard-won compromises are reflected in other components of the Confirmed Plan, which are integral, non-severable, and essential to plan implementation.

⁷⁴ Fourth Pfefferle Affidavit at para 51.

The Releases are appropriate and should be approved

60. As described in more detail above, the Plan Recognition Order seeks to validate and make effective all elements of the Confirmed 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.⁷⁵ CCAA courts, including this Court, have granted orders containing equivalent releases to those affirmed in the Plan Recognition Order.⁷⁶

61. The Releases in the Confirmed 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.⁷⁷ They are therefore significantly connected to the Plan so as to be permitted under the CCAA. Moreover, the Releases are indispensable to achieving a final resolution of potentially extensive litigation that would otherwise negatively affect the impact of the Chapter 11 Debtors and their associates to exit the Chapter 11 Cases.⁷⁸ Finally, the U.S. Court approved the Releases, and acknowledged that the failure to implement the Releases would jeopardize the Chapter 11 Debtors' ability to confirm and implement the Confirmed Plan.⁷⁹

62. For all these reasons, the Foreign Representative submits that this Court should grant the relief sought in the form of the Plan Recognition Order.

⁷⁵ *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at paras 73-74.

⁷⁶ See for example *In the matter of Payless Holdings LLC et al*, (28 July 2017), Ont Sup Ct, CV-17-011758-00CL (Order (Plan Recognition Order)) at para 11; *Lightsquared Inc, Re*, (9 April 2015), Ont Sup Ct, CV-12-9719-00CL (Order (Plan Confirmation)) at para 9.

⁷⁷ Fourth Pfefferle Affidavit at para 40.

⁷⁸ Fourth Pfefferle Affidavit at para 40.

⁷⁹ Fourth Pfefferle Affidavit at para 49(d).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9 day of September, 2019:



for

OSLER, HOSKIN & HARCOURT LLP

Marc Wasserman

Shawn T. Irving

Martino Calvaruso

Lawyers for the Applicant

SCHEDULE A

Companies' Creditors Arrangement Act (RSC 1985, c C-36)

Factors to be considered

36 (3) In deciding whether to grant the authorization [to sell or otherwise dispose of assets], the court is to consider, among other things,

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

Purpose

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

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

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.

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.

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.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every

person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a)** the appointment of a person to act at the direction of the court;
- (b)** the communication of information by any means considered appropriate by the court;
- (c)** the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d)** the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e)** the coordination of concurrent proceedings regarding the same debtor company.

SCHEDULE B

1.	<i>AbitibiBowater Inc, Re</i> , 2010 QCCS 1742
2.	<i>ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp</i> , 2008 ONCA 587
3.	<i>Babcock & Wilson Canada Ltd, Re</i> , 2000 CarswellOnt 704 (Ont CJ)
4.	<i>Caesars Entertainment Operating Co, Re</i> , 2015 ONSC 712
5.	<i>Digital Domain Media Group Inc, Re</i> , 2012 BCSC 1567
6.	<i>Hartford Computer Hardware Inc, Re</i> , 2012 ONSC 964
7.	<i>Hollander Sleep Products, LLC et al, Re</i> , 2019 ONSC 3238
8.	<i>Lightsquared Inc, Re</i> , 2015 ONSC 2309
9.	<i>Lightsquared Inc, Re</i> , (9 April 2015), Ont Sup Ct, CV-12-9719-00CL (Order (Plan Confirmation))
10.	<i>Massachusetts Elephant & Castle Group Inc, Re</i> , 2011 ONSC 4201
11.	<i>Olympia & York Developments Ltd v Royal Trust Co</i> , 1993 CarswellOnt 212 (ONSC)
12.	<i>Payless Holdings Inc LLC, Re</i> , 2017 ONSC 2242
13.	<i>In the matter of Payless Holdings LLC et al</i> , (28 July 2017), Ont Sup Ct, CV-17-011758-00CL (Order (Plan Recognition Order))
14.	<i>Ultra Petroleum Corp, Re</i> , 2017 YKSC 23
15.	<i>Xerium Technologies Inc, Re</i> , 2010 ONSC 3974

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

Court File No: CV-19-620484-00CL

AND IN THE MATTER OF HOLLANDER SLEEP PRODUCTS LLC, HOLLANDER SLEEP PRODUCTS CANADA LIMITED, DREAM II HOLDINGS, LLC, HOLLANDER HOME FASHIONS HOLDINGS, LLC, PACIFIC COAST FEATHER, LLC, HOLLANDER SLEEP PRODUCTS KENTUCKY, LLC, AND PACIFIC COAST FEATHER CUSHION, LLC

APPLICATION OF HOLLANDER SLEEP PRODUCTS LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Motion for Plan Recognition Order)**

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