

**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 TK HOLDINGS INC., AND THOSE OTHER COMPANIES  
LISTED ON SCHEDULE "A" HERETO (the "Chapter 11 Debtors")**

**AND IN THE MATTER OF TAKATA CORPORATION, AND THOSE OTHER  
COMPANIES LISTED ON SCHEDULE "B" HERETO (the "Japanese Debtors", and  
collectively with the Chapter 11 Debtors, the "Debtors")**

**APPLICATION OF TK HOLDINGS INC. AND TAKATA CORPORATION  
UNDER SECTION 46 OF THE  
*COMPANIES' CREDITORS ARRANGEMENT ACT***

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**FACTUM OF THE JAPANESE FOREIGN REPRESENTATIVE  
(re: Order Recognizing the Japanese Sale Approval)  
(Returnable May 17, 2018)**

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May 10, 2018

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TO: The Service List

AND TO: List of Plaintiffs – Japanese Debtors

## **PART I—OVERVIEW**

1. This is a motion brought by the Japanese Foreign Representative<sup>1</sup> for an order that, among other things, recognizes and gives full force and effect in all provinces and territories of Canada to the Japanese Sale Approval. The Japanese Sale Approval authorized the Japanese Debtors to proceed with the sale of non-PSAN Inflator assets to KSS in accordance with the Japan APA. The transfer of assets pursuant to the Japan APA is a key element of the complex sale and reorganization of Takata.

2. The Japanese Court approved the transfer of non-PSAN assets pursuant to the Japan APA in the Japanese Proceedings, which have been recognized as “foreign main proceedings” by this Court. It is appropriate in accordance with Part IV of the CCAA and as a matter of comity and cooperation for this Court to recognize and give effect to the Japanese Sale Approval in Canada.

## **PART II—FACTS**

3. Takata is a manufacturer of automotive safety components, including seatbelts and airbags. Takata experienced financial distress as a result of issues relating to certain airbags containing PSAN Inflators.<sup>2</sup>

4. While Takata has no assets (other than retainers with professionals, including counsel) or operations in Canada, its products appear in vehicles in Canada since Takata sells its products to original equipment manufacturer customers (the “OEMs”), who in turn manufacture and sell

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<sup>1</sup> All capitalized terms used but not otherwise defined herein have the meanings given to them in the Affidavit of Hiroshi Kasuya, sworn April 9, 2018 (“**Kasuya Affidavit**”), Amended Motion Record of the Japanese Foreign Representative (Re: Order Recognizing Japan Sale Approval), dated May 10, 2018 (“**Motion Record**”), Tab 2.

<sup>2</sup> Fourth Report of the Information Officer, dated May 8, 2018, at paras. 18 and 20 (“**Fourth IO Report**”).

automobiles in Canada.<sup>3</sup> In addition, Takata entities were named as defendants in various actions in Canada, including purported economic loss class actions relating to the PSAN inflators.<sup>4</sup>

5. On June 25, 2017, the Chapter 11 Debtors commenced proceedings in the United States Bankruptcy Court, District of Delaware (the “**U.S. Bankruptcy Court**”) under Chapter 11 of the U.S. Bankruptcy Code (together with the Japanese Proceedings, the “**Foreign Proceedings**”).<sup>5</sup>

6. Concurrently, albeit on June 26, 2017 in Japan, the Japanese Debtors initiated the Japanese Proceedings under the Civil Rehabilitation Act of Japan. The Japanese Court issued orders on June 26, 2017 and June 28, 2017 (i) appointing a supervisor, and (ii) approving the commencement of the Japanese Debtors’ proceedings under the Civil Rehabilitation Act and establishing a schedule for the civil rehabilitation proceedings (the “**Japanese Orders**”).<sup>6</sup>

7. On September 1, 2017, this Court issued an order recognizing the Japanese Proceedings as “foreign main proceedings” under the CCAA and recognizing the aspects of the Japanese Orders for which recognition was sought.<sup>7</sup> The Japanese Debtors also initiated proceedings for recognition of the Japanese Proceedings under Chapter 15 of the U.S. Bankruptcy Code and, on November 14, 2017, the Japanese Proceedings were recognized as “foreign main proceedings” in the United States.<sup>8</sup>

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<sup>3</sup> Fourth IO Report at para. 19. Affidavit of Hiroshi Shimizu, sworn August 24, 2017, attached as Exhibit “B” to the October 2, 2017 Affidavit of Hiroshi Kasuya (“**October Kasuya Affidavit**”) which in turn is attached as Exhibit “A” to the Kasuya Affidavit (“**Shimizu Affidavit**”) at para. 31, Motion Record, Tab 2A, p. 165.

<sup>4</sup> Fourth IO Report at para. 21; Shimizu Affidavit at paras. 32-37, Motion Record, Tab 2A, p. 166-67.

<sup>5</sup> Fourth IO Report at para. 1.

<sup>6</sup> Fourth IO Report at paras. 2-3; Declaration of Nobuaki Kobayashi in support of the Verified Petition for Recognition and Chapter 15 Relief (“**Kobayashi Declaration**”) at paras. 33-34, attached as Exhibit “A” to the October Kasuya Affidavit, Motion Record, Tab 2A, pp. 40-41; Japanese Orders, Exhibits “A” and “B” to Kobayashi Declaration, Motion Record, Tab 2A, pp. 49-71.

<sup>7</sup> Fourth IO Report at para. 7.

<sup>8</sup> Fourth IO Report at para. 8 and Shimizu Affidavit at para. 18, Motion Record, Tab 2A, p. 162.

8. On October 13, 2017, this Court issued an order recognizing the claims process provisions in the Japanese Orders.<sup>9</sup>

***Sale Process and Global Transaction***

9. Prior to the commencement of the Foreign Proceedings, the Debtors had conducted a marketing and sale process, which identified KSS, collectively with one or more of its current or newly-formed subsidiaries and/or affiliates (the “**Plan Sponsor**”), as the purchaser of substantially all of Takata’s worldwide assets (excluding PSAN Inflator-related assets) (the “**Global Transaction**”).<sup>10</sup>

10. The USD\$1.588 billion purchase price offered by the Plan Sponsor considerably exceeded the price offered by other sponsor candidates and is sufficient to fulfill the Debtors’ obligation to pay USD\$850 million pursuant to a restitution order with the U.S. Department of Justice (the “**DOJ Restitution Order**”).<sup>11</sup> Satisfaction of the plea agreement with the DOJ is a closing condition for the Global Transaction that will be used in providing restitution to the OEMs.<sup>12</sup>

11. The Global Transaction involved the transfer of non-PSAN Inflator assets to KSS as follows, among other things:

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<sup>9</sup> Fourth IO Report at para. 9.

<sup>10</sup> Fourth IO Report at para. 24. See also “Petition for Approval of Business Transfer “ [Unofficial English Translation] (“**Petition**”), Exhibit “C” to Kasuya Affidavit, pp. 2-6, Motion Record, Tab 2C, pp. 238-242.

<sup>11</sup> Fourth IO Report at para. 25 and Petition, pp. 5, 8, Motion Record, Tab 2C, pp. 241, 244.

<sup>12</sup> Petition, pp. 4-5, Motion Record, Tab 2C, pp. 240-41.

- (a) by Takata entities in Japan and other Asian countries pursuant to the Japan APA, which is a transfer that occurs outside of the rehabilitation plan in the Japanese Proceedings but is approved by the Japanese Court in the Japanese Proceedings;
- (b) by Takata entities in the United States, Mexico and South America pursuant to an asset purchase agreement and the Chapter 11 Plan (defined below); and,
- (c) by Takata entities in Europe and Africa pursuant to an asset purchase agreement outside of an insolvency process.<sup>13</sup>

12. On March 14, 2018, this Court recognized the Findings of Fact, Conclusions of Law, and Order Confirming the Fifth Amended Joint Chapter 11 Plan of Reorganization (as amended, restated, or supplemented from time to time, the “**Chapter 11 Plan**”) of TK Holdings Inc. and its Affiliated Debtors granted by the U.S. Bankruptcy Court (the “**Confirmation Order**”). The Canadian Court’s recognition of the Confirmation Order in Canada was an important element required for implementation of the Global Transaction, which approved of the transfer of non-PSAN Inflator assets by Takata entities in the United States, Mexico and South America to the Plan Sponsor.<sup>14</sup>

13. With respect to the transfer of non-PSAN inflator assets by Takata entities in Japan and other Asian countries, the Japanese Debtors filed a Petition for Approval for Business Transfer (the “**Petition**”) with the Japanese Court seeking approval of the Japan APA. In an official

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<sup>13</sup> Fourth IO Report at para. 26; Petition, pp. 9-10, Motion Record, Tab 2C, pp. 245-46; Kasuya Affidavit at para. 6, Motion Record, Tab 2, p. 13.

<sup>14</sup> See Confirmation Recognition Order, Order of the Ontario Superior Court of Justice dated March 14, 2018 (excluding schedules) (“**Confirmation Recognition Order**”), Book of Authorities of the Japanese Foreign Representative (“**BOA**”), Tab 1.

opinion hearing proceeding for creditors held at Tokyo District Court on February 7, 2018, no party raised any objections to the relief sought.<sup>15</sup>

14. The practice in Japan is for the Japanese Court to stamp the petition filed by the debtors in order to certify that the sale is approved; no separate written order is issued. In this case, the Japanese Court approved the Petition and by stamping the Petition, the Court thereby authorized the Japanese Debtors, pursuant to Article 42(1) of the Civil Rehabilitation Act, to proceed with the sale of their non-PSAN Inflator assets to KSS in accordance with the Japan APA.<sup>16</sup>

15. To approve a business transfer, the Japanese Court must find that it was necessary for the rehabilitation of the debtors' business, that the process of selecting the buyer was fair and that the purchase price and the terms and conditions of the Japan APA were reasonable. In addition, for a business transfer outside a civil rehabilitation plan, the Japanese Court considers whether there is an urgent need for the business transfer prior to the confirmation of the plan.<sup>17</sup>

16. The Global Transaction successfully closed on April 10, 2018, with the relevant Takata entities transferring substantially all of their non-PSAN assets worldwide to KSS.<sup>18</sup>

17. KSS has requested that the Japanese Sale Approval be recognized in Canada and the United States. In light of the importance to KSS of obtaining recognition of the Japanese Sale Approval and the integrated nature of the global transaction, the Japanese Foreign Representative

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<sup>15</sup> Kasuya Affidavit at para. 4, Motion Record, Tab 2, p. 12.

<sup>16</sup> Kasuya Affidavit at para. 6, Motion Record, Tab 2, p. 13.

<sup>17</sup> Kasuya Affidavit at para. 5, Motion Record, Tab 2, p. 12-13.

<sup>18</sup> Fourth IO Report at para. 27.

determined, in consultation with KSS, to seek recognition of the Japanese Sale Approval in both Canada and the United States.<sup>19</sup>

### **PART III – ISSUES**

18. The key issue on this motion is whether the Court should recognize and give effect to the Japanese Sale Approval in Canada.

19. The Japanese Foreign Representative submits that recognizing the Japanese Sale Approval, which was granted by the Japanese Court in the “foreign main proceeding”, is appropriate and consistent with the principles of cooperation and comity.

### **PART IV – THE LAW**

20. The stated purpose of Part IV of the CCAA is to “provide mechanisms for dealing with cases of cross-border insolvencies” and to promote, among other things:

- (a) cooperation between Canadian and foreign courts in cross-border insolvencies;
- (b) greater legal certainty for trade and investment; and
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of debtors, creditors and other stakeholders.<sup>20</sup>

21. Pursuant to subsection 49(1) of the CCAA, once the Canadian Court has recognized a foreign proceeding, it may make any order that it considers appropriate if the court is satisfied

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<sup>19</sup> Kasuya Affidavit at para. 7, Motion Record, Tab 2, p. 13.

<sup>20</sup> *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s 44 [“CCAA”] and *Ultra Petroleum Corp., Re*, 2017 YKSC 23 at para. 7 [*Ultra Petroleum*], Brief of Authorities of the Japanese Foreign Representative (“BOA”), Tab 2.



that the order is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.<sup>21</sup> Such an order may be made on any terms and conditions that the Court considers appropriate in the circumstances.<sup>22</sup>

22. The CCAA also provides that once 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.<sup>23</sup>

23. It is customary for a CCAA court to recognize orders made by courts in foreign proceedings so long as those orders are not contrary to public policy or the purposes of the CCAA.<sup>24</sup>

24. The principle guiding the exercise of the court's jurisdiction under Part IV of the CCAA is comity.<sup>25</sup> Comity, cooperation and accommodation between courts in cross-border proceedings is increasingly important to enable companies to restructure on a cross-border basis.<sup>26</sup> Without efforts to complement, coordinate and, where appropriate, accommodate proceedings of other jurisdictions, "there would be multiple proceedings, inconsistent judgments and general uncertainty."<sup>27</sup>

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<sup>21</sup> CCAA, s. 49(1).

<sup>22</sup> CCAA, s. 50.

<sup>23</sup> CCAA, s. 52(1).

<sup>24</sup> CCAA, s. 61. *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964 at paras. 15-19, BOA, Tab 3 [*Hartford*]; *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 at para. 39, BOA, Tab 4.

<sup>25</sup> *Payless Holdings LLC, Re*, 2017 ONSC 4607 at para. 13, BOA Tab 5 [*Payless*].

<sup>26</sup> *Payless* at para. 13, BOA, Tab 5; *Ultra Petroleum* at para. 8, BOA, Tab 2.

<sup>27</sup> *Ultra Petroleum* at para. 8, BOA Tab 2; See also *Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704 at paras. 9-10 (SCJ), BOA, Tab 6; *Xerium Technologies Inc., Re*, 2010 ONSC 3974 at para. 23, BOA, Tab 7; *Matlack Inc., Re*, 2001 CarswellOnt 1830 at paras. 5-10 (SCJ), BOA, Tab 8.

25. In this case, this Court has demonstrated comity and cooperation in recognizing orders issued by both the Japanese Court and the U.S. Bankruptcy Court. This includes recognizing the Confirmation Order, relating to the sale of non-PSAN Inflator assets in the United States, Mexico and South America pursuant to the Global Transaction.<sup>28</sup>

26. This Court is now asked to recognize the Japanese Sale Approval, another integral part of the Global Transaction. The Japanese Sale Approval was granted in the Japanese Proceedings that have been recognized by this Court as “foreign main proceedings”. The Japanese Sale Approval authorized the Japanese Debtors, pursuant to Article 42(1) of the Civil Rehabilitation Act, to proceed with the sale of their non-PSAN Inflator assets to KSS in accordance with the Japan APA.<sup>29</sup>

27. Sale orders, similar to a business transfer pursuant to Article 42 of the Civil Rehabilitation Act, have previously been recognized by this Court.<sup>30</sup> It is appropriate to recognize the Japanese Sale Approval in this case as well. Among other things:

- (a) The transfer of non-PSAN Inflator assets to KSS pursuant to the Japan APA is an integral part of the highly complicated Global Transaction with the aim of achieving a cross-border restructuring of the Debtors through a sale to KSS;<sup>31</sup>
- (b) The Global Transaction, of which the business transfer is a key part, is the best option to maximize the value of the Debtors’ assets for the benefit of their

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<sup>28</sup> See Confirmation Recognition Order, BOA, Tab 1.

<sup>29</sup> Kasuya Affidavit at para. 3, Motion Record, Tab 2, p. 12.

<sup>30</sup> See excerpt from *In re Allied Systems Holdings Inc.*, Sale Approval Recognition and Vesting Order (First Lien Agents’ Transaction) at para. 3, Order of the Ontario Superior Court of Justice dated October 10, 2013, Court File No. 12-CV-9575-00CL, BOA, Tab 9. See also Kobayashi Declaration at para. 15, Motion Record, Tab 2A, p. 32.

<sup>31</sup> Petition, pp. 9-10, Motion Record, Tab 2C, pp. 245-46.

creditors, satisfy the Debtors' obligations under the DOJ Restitution Order and facilitate continued recalls of airbags with PSAN Inflators;<sup>32</sup>

- (c) The Japanese Proceedings have been recognized as "foreign main proceedings" and the Japanese Debtors have no assets (other than retainers with counsel) or business in Canada, which is an ancillary jurisdiction in the reorganization;<sup>33</sup>
- (d) For the Japanese Court to approve the business transfer, it must have found the business transfer to KSS was necessary for the rehabilitation of the Japanese Debtors' business and been convinced that the process of selecting the buyer was fair and that the purchase price and the terms and conditions of the sale were reasonable;<sup>34</sup> and
- (e) There were no objections raised to the requested business transfer at an official opinion hearing proceeding for creditors held at Tokyo District Court on February 7, 2018.<sup>35</sup>

28. While the Global Transaction has now closed, recognition of the Japanese Sale Approval in Canada is important to KSS, the purchaser in that Global Transaction.<sup>36</sup>

29. In light of that and the integrated nature of the Global Transaction, it is in the interests of the creditors that the Japanese Sale Approval be recognized pursuant to Part IV of the CCAA and as a matter of comity.

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<sup>32</sup> Petition, pp. 8-9, 13, 26-27, Motion Record, Tab 2C, pp. 244-45, 250, 262-63.

<sup>33</sup> Fourth IO Report at paras. 7 and 19.

<sup>34</sup> Kasuya Affidavit at para 5, Motion Record, Tab 2, p. 12-13.

<sup>35</sup> Kasuya Affidavit at para 4, Motion Record, Tab 2, p. 12.

<sup>36</sup> Kasuya Affidavit at para 7, Motion Record, Tab 2, p. 13 and Fourth IO Report at para. 27.

30. There is no basis for this Court to second-guess the Japanese Sale Approval or to refuse to recognize it pursuant to the public policy exception in section 61(2) of the CCAA, which should be read restrictively.<sup>37</sup>

31. Accordingly, recognizing the Japanese Sale Approval, like recognition of the Confirmation Order, is appropriate and in the interests of creditors. It is also a form of comity and cooperation in furtherance of the cross-border insolvency proceedings that were commenced to consummate the globally-integrated Global Transaction.

#### **PART V – ORDER REQUESTED**

32. For the reasons set out above, the Japanese Foreign Representative requests that this Court make an order, substantially in the form of the Order included at Tab 3 of its Motion Record, recognizing the Japanese Sale Approval.

ALL OF WHICH IS RESPECTIVELY SUBMITTED this 10th day of May, 2018.



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**McCarthy Tétrault LLP**  
Lawyers for the Foreign Representatives

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<sup>37</sup> *Hartford* at para. 17, BOA, Tab 2, CCAA, s. 61(2).

**Schedule “A”**

**List of Authorities**

1. *Ultra Petroleum Corp., Re*, 2017 YKSC 23
2. *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964
3. *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201
4. *Payless Holdings LLC, Re*, 2017 ONSC 4607
5. *Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704
6. *Xerium Technologies Inc., Re*, 2010 ONSC 3974
7. *Matlack Inc., Re*, 2001 CarswellOnt 1830
8. *In re Allied Systems Holdings Inc.*, Sale Approval Recognition and Vesting Order (First Lien Agents’ Transaction), Order of the Ontario Superior Court of Justice dated October 10, 2013, Court File No. 12-CV-9575-00CL.

## Schedule "B"

### RELEVANT STATUTES

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

#### **PART IV Cross-border Insolvencies**

##### **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.

##### **Other orders**

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

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

##### **Restriction**

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

### **Application of this and other Acts**

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

### **Terms and conditions of orders**

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

### **Obligations**

#### **Cooperation — court**

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

#### **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.

### **Court not prevented from applying certain rules**

61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition

of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

**Public policy exception**

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



IN THE MATTER OF APPLICATION OF AN APPLICATION BY TK HOLDINGS INC.  
AND TAKATA CORPORATION UNDER SECTION 46 OF THE *COMPANIES'*  
*CREDITORS ARRANGEMENT ACT*

Court File No. CV-17-11857-00CL

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

Proceeding Commenced at Toronto

**FACTUM  
(Japan Sales Recognition Order)  
(Returnable May 17, 2018)**

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