

**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 KIDKRAFT, INC., SOLOWAVE
DESIGN HOLDINGS LIMITED, SOLOWAVE DESIGN INC.,
SOLOWAVE INTERNATIONAL INC. AND SOLOWAVE
DESIGN LP

APPLICATION OF KIDKRAFT, INC. UNDER SECTION 46 OF
THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, AS AMENDED

APPLICANT

**FACTUM OF THE APPLICANT
(Initial Recognition Order and Supplemental Order,
returnable May 17, 2024)**

May 16, 2024

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PART I - NATURE OF THE MOTION

1. This factum is filed in support of an application by KidKraft, Inc. (“**KidKraft**,” and together with its debtor and non-debtor affiliates, the “**Company**”), in its capacity as the proposed foreign representative (in such capacity, the “**Foreign Representative**”) of Solowave Design Holdings Limited, Solowave International Inc., and Solowave Design Inc. (collectively, the “**Canadian Corporate Debtors**”), Solowave Design LP (together with the Canadian Corporate Debtors, the “**Canadian Debtors**”), and itself, for:¹

- (a) an order (the “**Initial Recognition Order**”), among other things:
 - (i) recognizing the Chapter 11 Cases (as defined below) in respect of KidKraft and the Canadian Debtors as “foreign main proceedings” pursuant to Part IV of the *Companies’ Creditors Arrangement Act*² (the “**CCAA**”); and
 - (ii) recognizing KidKraft as the “foreign representative” in respect of the Chapter 11 Cases (as defined below) of KidKraft and the Canadian Debtors;³ and

- (b) an order (the “**Supplemental Order**”), among other things:
 - (i) recognizing certain other First Day Orders issued by the U.S. Court in the Chapter 11 Cases, including the Foreign Representative Order (each as defined below);

¹ Capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Affidavit of Geoffrey Walker sworn May 15, 2024 (the “**Second Affidavit**”) [Supplemental Application Record of the Applicant dated May 15, 2024 (“**Supp AR**”), Volume 1, Tab 1]. All dollar references herein are in U.S. dollars unless otherwise specified.

² R.S.C. 1985, c. C-36, as amended.

³ Draft Initial Recognition Order [Supp AR, Volume 2, Tab 2].

- (ii) granting a stay of proceedings in respect of KidKraft and the Canadian Debtors and their respective directors and officers (the “**Canadian Stay**”);
- (iii) appointing KSV Restructuring Inc. (“**KSV Restructuring**”) as the information officer in this proceeding (in such capacity, the “**Information Officer**”);
- (iv) granting a Court-ordered charge on the present and future assets, property and undertakings of KidKraft located in Canada and of the Canadian Debtors (the “**Canadian Property**”) to secure:
 - (A) the professional fees and disbursements incurred in respect of this proceeding by the Information Officer, its counsel and KidKraft and the Canadian Debtors’ Canadian counsel (up to a maximum amount of CAD\$750,000) (the “**Administration Charge**”);
 - (B) the indemnity granted by KidKraft and the Canadian Debtors in favour of their respective directors and officers in respect of obligations and liabilities in Canada that they may incur as directors or officers after the commencement of this proceeding (up to a maximum amount of CAD\$100,000) (the “**D&O Charge**”); and
 - (C) advances under a debtor-in-possession credit facility (the “**DIP Charge**”).⁴

2. On May 10, 2024 (the “**Petition Date**”), KidKraft, the Canadian Debtors, and six other debtors and debtors in possession (collectively, the “**Chapter 11 Debtors**”) filed voluntary petitions for relief (the “**Petitions**”) pursuant to Chapter 11 of the U.S. Bankruptcy Code and

⁴ Draft Supplemental Order [Supp AR, Volume 2, Tab 3].

several first day motions and applications (collectively, the “**First Day Motions**”) with the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “**U.S. Court**”), commencing the “**Chapter 11 Cases**.”⁵

3. Also on May 10, 2024, KidKraft, as the proposed Foreign Representative of itself and the Canadian Debtors in respect of the Chapter 11 Cases, successfully applied before this Court for an order (the “**Interim Stay Order**”) pursuant to Part IV of the CCAA and section 106 of the *Courts of Justice Act*,⁶ among other things, granting a stay of proceedings in respect of KidKraft, the Canadian Debtors, and their respective directors and officers (the “**Interim Stay**”).⁷

4. The U.S. Court heard the First Day Motions on May 13, 2024 and entered orders (the “**First Day Orders**”) on May 13 and 14, including an order authorizing KidKraft to act as the Foreign Representative on behalf of itself and the Canadian Debtors in these CCAA proceedings (the “**Foreign Representative Order**”) and the Interim DIP Order (as defined below).⁸

5. Now that the First Day Orders have been granted, the Foreign Representative seeks the proposed Initial Recognition Order and Supplemental Order from this Court. This Court has the authority under Part IV of the CCAA to grant this requested relief, in its discretion.

6. The Foreign Representative submits that this Court should exercise its discretion to grant the requested orders because this relief is necessary to protect and preserve the operations and value of the Company’s business in Canada, while the Chapter 11 Debtors, including the Canadian

⁵ Second Affidavit at paras. 6, 9.

⁶ R.S.O. 1990, c. C.43.

⁷ Second Affidavit at para. 10.

⁸ Second Affidavit at paras. 11, 13, 44.

Debtors, pursue a comprehensive and coordinated restructuring in the Chapter 11 Cases. Granting the requested orders is also consistent with the principles of comity that underlie the provisions of Part IV of the CCAA. The requested relief will assist in providing the Company with the breathing room to restructure its business and emerge as a strong and sustainable enterprise for the benefit of a broad range of stakeholders.⁹

PART II - THE FACTS

7. In addition to the facts set out below, the Foreign Representative relies on the facts set out in its factum of May 10, 2024 in support of the Interim Stay Order (the “**Interim Stay Factum**”).

A. The Canadian Debtors’ integrated operations with the U.S.

8. The Canadian Debtors are fully integrated with the Chapter 11 Debtors’ U.S. operations and are managed by senior leadership from the U.S. on a consolidated basis. The Canadian Debtors’ corporate structure, funded debt, and operations show their close connection with the other Chapter 11 Debtors, whom they wholly rely on for corporate, administrative, and back-office support.¹⁰

B. The Canadian Debtors’ creditors

9. In addition to their obligations as guarantors of the Chapter 11 Debtors’ indebtedness under the Prepetition Credit Agreement (as defined below), the Canadian Debtors (on a consolidated basis) had total liabilities of approximately CAD\$998,000 as of April 30, 2024, comprising (in approximate amounts):

(a) Accounts payable:	CAD\$834,500
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⁹ Second Affidavit at para. 109.

¹⁰ Second Affidavit at paras. 26, 36.

- (b) Canadian sales tax accruals: CAD\$27,800
- (c) Canadian income tax accruals: CAD\$136,000.¹¹

10. As of April 30, 2024, KidKraft owed certain amounts to Mainfreight Inc., the third-party logistics provider for the Canadian business, but KidKraft made payment to bring its account current immediately prior to the Petition Date.¹²

C. The DIP Facility

11. The Chapter 11 Debtors' funded secured debt arises under an Amended and Restated First Lien Credit Agreement dated as of April 3, 2020 (as amended, restated, extended, supplemented or otherwise modified, the "**Prepetition Credit Agreement**"). KidKraft and KidKraft Netherlands B.V., a private company incorporated under the laws of The Netherlands, are borrowers.¹³ The Canadian Debtors are guarantors under the Prepetition Credit Agreement and entered into several agreements as security for the guarantees.¹⁴ 1903 Partners, LLC (the "**Prepetition and DIP Lender**") subsequently reached an agreement to purchase the existing debt under the Prepetition Credit Agreement (the "**Debt Sale**"), which closed on January 31, 2024.¹⁵

12. All of the Chapter 11 Debtors' cash on hand as of the Petition Date (the "**Cash Collateral**") and any proceeds of the Chapter 11 Debtors' assets and property other than Excluded Assets, Excluded Receivables and Consumer Goods (as each such term is defined in the Prepetition Credit

¹¹ Second Affidavit at para. 31.

¹² Second Affidavit at para. 33.

¹³ Affidavit of Geoffrey Walker sworn May 10, 2024 (the "**Initial Affidavit**") [Application Record of the Applicant dated May 10, 2024, Tab 2] at para. 36; Second Affidavit at para. 80.

¹⁴ Initial Affidavit at para. 37.

¹⁵ Initial Affidavit at paras. 46, 87.

Agreement) are subject to the first-ranking liens of the Prepetition and DIP Lender and GB Funding, LLC as administrative agent under the Prepetition Credit Agreement (together, “**Gordon Brothers**”).¹⁶

13. The Chapter 11 Debtors require immediate access to debtor-in-possession financing and authority to use cash collateral to maintain sufficient liquidity to continue to operate and consummate the sale of a substantial majority of the Company’s assets (the “**Sale Transaction**”) to Backyard Products, LLC (the “**Purchaser**”) to maximize value for their stakeholders. Pursuant to a restructuring support agreement entered into on April 25, 2024 among the Chapter 11 Debtors, MidOcean Partners IV, L.P., the Purchaser, and Gordon Brothers, among other things, Gordon Brothers agreed to provide such debtor-in-possession financing (the “**DIP Facility**”).¹⁷

14. Among the First Day Orders, the U.S. Court issued an order (the “**Interim DIP Order**”), among other things, authorizing: (a) KidKraft as borrower to receive a senior secured superpriority multi-draw debtor-in-possession term loan credit facility (the DIP Facility) from the Prepetition and DIP Lender; and (b) the Chapter 11 Debtors to use, on a consensual basis, the Cash Collateral of Gordon Brothers under the Prepetition Credit Agreement.¹⁸

15. Each of the Canadian Debtors, as well as other affiliates of KidKraft, are guarantors and pledgors under the DIP Facility.¹⁹ The DIP Facility consists of an aggregate principal amount of:

- (a) \$10.5 million, consisting of (i) \$4.0 million of interim commitment (available upon entry of the Interim DIP Order) (the “**Interim DIP Commitment**”) and (ii) an

¹⁶ Second Affidavit at para. 80.

¹⁷ Second Affidavit at para. 82.

¹⁸ Second Affidavit at para. 83.

¹⁹ Second Affidavit at para. 84.

incremental \$6.5 million of final commitment (available upon entry of a final order) (the “**Final DIP Commitment**,” and, together, the “**New Money DIP Loans**”); and

- (b) \$23.3 million of roll-up loans (the “**Limited Roll-Up**”), plus the consensual use of the Cash Collateral.²⁰

16. In exchange for the essential liquidity provided by the New Money DIP Loans and the Cash Collateral, the Chapter 11 Debtors agreed to certain protections for Gordon Brothers, including superpriority liens on collateral, and payment of interest and fees on amounts borrowed. These protections also include a Limited Roll-Up of approximately \$23.3 million (the “**Limited Roll-Up Amount**”) of prepetition financing under the Prepetition Credit Agreement.²¹

17. The Limited Roll-Up is a material component of the structure of the DIP Facility and was required by the Prepetition and DIP Lender as a condition to its commitment to provide postpetition financing and its consent to the Chapter 11 Debtors’ use of Cash Collateral. The proposed Limited Roll-Up Amount is limited to the new capital the prepetition secured parties (Gordon Brothers) provided to the Chapter 11 Debtors after the Debt Sale closed on January 31, 2024. This liquidity provided a runway for the Chapter 11 Debtors to commence the sale process that led to the proposed Sale Transaction. It has also allowed the Chapter 11 Debtors to maintain their operations and preserve the value of their estates.²²

²⁰ Second Affidavit at para. 85.

²¹ Second Affidavit at para. 87.

²² Second Affidavit at para. 87.

18. The Interim DIP Order only authorizes borrowing of the New Money DIP Loans up to an aggregate amount equal to the Interim DIP Commitment. Once a final order providing for the borrowing of the Final DIP Commitment and the Limited Roll-Up Amount in respect of the DIP Facility (the “**Final DIP Order**”) is obtained and issued in the U.S. Court, the Foreign Representative intends to return to this Court to seek recognition of such order.²³

19. The amounts owing by the Chapter 11 Debtors under the DIP Facility are proposed to be secured in Canada by the DIP Charge on the Canadian Property, ranking in priority to all secured and unsecured claims in Canada and subject to the relative priority of liens as set forth in the Interim DIP Order on the Canadian Property, but subordinate to the proposed Administration Charge and D&O Charge.²⁴

20. KidKraft and Solowave Design LP are parties to “**Receivables Sales Agreements**” dated August 4, 2021 and April 21, 2022 , respectively, with Coface Finanz GmbH (“**Coface**”), pursuant to which Coface purchases accounts receivable from KidKraft and Solowave Design LP. Coface registered financing statements against two of the Canadian Debtors, covering the accounts receivable and other assets. The Chapter 11 Debtors do not dispute that the sales of accounts receivable to Coface under the Receivables Sales Agreements were “true sales” under which such receivables became the property of Coface and not the Chapter 11 Debtors.²⁵

²³ Second Affidavit at para. 95.

²⁴ Second Affidavit at paras. 92, 108.

²⁵ Second Affidavit at paras. 28, 93.

PART III - THE ISSUES

21. The issues to be determined on this motion are:
- (a) Are the Chapter 11 Cases a “foreign main proceeding” pursuant to Part IV of the CCAA?
 - (b) If so, are the Chapter 11 Debtors entitled to the relief sought in the Initial Recognition Order and Supplemental Order? This relief includes:
 - (i) recognizing certain First Day Orders issued by the U.S. Court in the Chapter 11 Cases;
 - (ii) granting the Canadian Stay;
 - (iii) appointing the Information Officer; and
 - (iv) granting the Administration Charge, the D&O Charge, and the DIP Charge.

PART IV - THE LAW

A. The Chapter 11 Cases should be recognized as foreign main proceedings

(a) The statutory requirements are satisfied

22. The purpose of Part IV of the CCAA is to “provide mechanisms for dealing with cases of cross-border insolvencies” and promote cooperation between Canadian and foreign courts.²⁶ Pursuant to section 46(1) of the CCAA, a person who is a foreign representative may apply for recognition of the foreign proceeding in respect of which that person is a foreign representative.²⁷
23. An application for recognition of a foreign proceeding must be accompanied by certified copies of the instruments that commenced the foreign proceeding and authorized the foreign representative to act in such a capacity, as well as a statement identifying all foreign proceedings

²⁶ CCAA, s. 44.

²⁷ CCAA, s. 46(1).

in respect of the debtor company that are known to the foreign representative.²⁸ The Foreign Representative has confirmed that, other than the Chapter 11 Cases, no other foreign proceeding in respect of KidKraft and the Canadian Debtors has been commenced.²⁹

24. Certified copies of the Petitions and the Foreign Representative Order will be provided to this Court as soon as they are available.³⁰ In exercising its power to consider appropriate alternative evidence under section 46(4) of the CCAA, this Court has concluded that uncertified copies of relevant court documents are sufficient to grant foreign recognition orders where certified copies are unavailable.³¹

25. Section 47(1) provides that the Court must recognize a foreign proceeding if two requirements are met: the proceeding is a “foreign proceeding,” and the applicant is a “foreign representative” in respect of that foreign proceeding. The Foreign Representative has satisfied these requirements.

26. With respect to the first requirement, a “foreign proceeding” is defined as a judicial 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.”³² Canadian courts have consistently held that proceedings under Chapter 11 of

²⁸ CCAA, s. 46(2).

²⁹ Second Affidavit at para. 37.

³⁰ Second Affidavit at paras. 7-8.

³¹ See, for instance, *David’s Bridal, LLC (Re)* (18 April 2023), Toronto CV-23-00698107-00CL (ONSC) ([Endorsement](#)) at para. 13.

³² CCAA, s. 45(1).

the U.S. Bankruptcy Code, like those before the U.S. Court in these proceedings, are “foreign proceedings” for the purposes of the CCAA.³³ The Chapter 11 Cases clearly qualify.

27. With respect to the second requirement, a “foreign representative” is defined as a person authorized, in a foreign proceeding in 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.³⁴ On May 14, 2024, the U.S. Court granted the Foreign Representative Order authorizing KidKraft to act as the Foreign Representative on behalf of itself and the Canadian Debtors in these CCAA Part IV proceedings.³⁵

(b) The Chapter 11 Cases are foreign main proceedings

28. In its order recognizing the foreign proceeding, the Court must specify whether the proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.”³⁶ A “foreign main proceeding” is defined as a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests” (“COMI”).³⁷

29. The CCAA does not provide a formal definition of the COMI. Moreover, as “Part IV of the CCAA does not specifically consider the circumstances facing corporate groups,” it is “necessary to conduct the COMI analysis on an entity-by-entity basis.”³⁸

³³ See, for instance, *Hollander Sleep Products, LLC et al., Re*, [2019 ONSC 3238](#) at para. 27 [*Hollander*]; *In the matter of CURO Canada Corp. and LendDirect Corp.*, [2024 ONSC 1989](#) at para. 19 [*CURO*]; *Hornblower Cruises and Events Canada Ltd.*, [2024 ONSC 1209](#) [*Hornblower Cruises*] at para. 21.

³⁴ CCAA, s. 45(1).

³⁵ Second Affidavit at paras. 13, 44.

³⁶ CCAA, s. 47(2).

³⁷ CCAA, s. 45(1).

³⁸ *Hollander* at para. 30.

30. Under section 45(2) of the CCAA, in the absence of proof to the contrary, the location of a debtor company's registered office is deemed to be its COMI. This statutory presumption may be rebutted, however, by evidence of the debtor's operational realities.³⁹

31. Here, the registered offices of all of the Chapter 11 Debtors are situated in the U.S., with the exception of the Canadian Debtors. The presumption in section 45(2) of the CCAA therefore deems the COMI for each of these entities to be the U.S., a conclusion that is consistent with the reality of their U.S.-centred operations.⁴⁰

32. With respect to the Canadian Debtors, while their registered offices are located in Canada through the services of a registered agent for compliance purposes only, they are wholly reliant on the other, U.S.-based Chapter 11 Debtors for corporate, administrative, and back-office support. They would not be able to function independently without such support.⁴¹

33. Several Canadian authorities have considered how Canadian debtors' COMI should be determined where they are operating as part of a larger corporate group. The following principal factors tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI:

- a) the location is readily ascertainable by creditors;
- b) the location is one in which the debtor's principal assets or operations are found; and
- c) the location is where the management of the debtor takes place.⁴²

³⁹ *Hornblower Cruises* at para. 25.

⁴⁰ Second Affidavit at para. 35.

⁴¹ Second Affidavit at para. 36.

⁴² *Hornblower Cruises* at para. 26, citing *Lightsquared LP (Re)*, [2012 ONSC 2994](#) at para. 25. See also *CURO* at para. 24. See also *Hollander* at para. 33 for a slightly different formulation.

34. Courts have also considered the following factors in the COMI analysis:

- a) the location where corporate decisions are made;
- b) the location of employee administrations, including human resource functions;
- c) the location of the company's marketing and communication functions;
- d) whether the enterprise is managed on a consolidated basis;
- e) the extent of integration of an enterprise's international operations;
- f) the centre of an enterprise's corporate, banking, strategic and management functions;
- g) the existence of shared management within entities and in an organization;
- h) the location where cash management and accounting functions are overseen;
- i) the location where pricing decisions and new business development initiatives are created; and
- j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.⁴³

35. Here, the following factors support a finding that the Canadian Debtors' COMI is in the U.S.:

- (a) the Canadian Debtors are wholly-owned subsidiaries of KidKraft, a Delaware corporation;
- (b) each of the Canadian Corporate Debtors' directors and officers are U.S. residents and are directors or officers of KidKraft;
- (c) KidKraft and the Canadian Debtors' senior leadership is located in the U.S. and exercises primary strategic management and control of the Chapter 11 Debtors, including all of the Canadian Debtors;
- (d) Canadian sales make up approximately 7% of the Company's annual net revenue;

⁴³ *Hollander* at para. 32, citing *Angiotech Pharmaceuticals Ltd. (Re)*, [2011 BCSC 115](#) at para. 7. See also *CURO* at para. 25; *Hornblower Cruises* at para. 27.

- (e) the Chapter 11 Debtors' only employee in Canada is employed by KidKraft, and not by any of the Canadian Debtors;
- (f) payroll processing for the one Canadian employee of KidKraft is processed in the U.S. through KidKraft's third-party payroll services provider, directed by U.S.-based employees at KidKraft's headquarters in Dallas, Texas;
- (g) the Canadian Debtors' overall financial position is managed on a consolidated basis by the Company's management team located in the U.S.;
- (h) the Chapter 11 Debtors (including the Canadian Debtors) operate an integrated, centralized cash management system through a total of 16 bank accounts (collectively, the "**Bank Accounts**") to collect, transfer and disburse funds generated by their operations;
- (i) the controllers and administrators of all Bank Accounts, including Solowave Design LP's accounts, are not in Canada and are primarily based in the U.S.;
- (j) much of the Company's funded indebtedness is owed to U.S.-based lenders and governed by U.S. law;
- (k) the Canadian Debtors primarily rely on the purchasing power and supplier relationships of the Chapter 11 Debtors in the U.S.; and
- (l) the Chapter 11 Debtors periodically make intercompany transactions among one another in relation to their expenditures and transfer cash to run their operations and financing activities from a centralized Bank Account.⁴⁴

⁴⁴ Second Affidavit at paras. 17, 19, 25, 26.

B. The Initial Recognition Order and Supplemental Order should be granted

36. The Foreign Representative submits that it has met the criteria established under section 47(1) and is therefore entitled to the recognition of the Chapter 11 Cases as a foreign main proceeding, as contemplated by the Initial Recognition Order.

37. This Court should grant the Initial Recognition Order and Supplemental Order under its jurisdiction pursuant to section 49 of the CCAA to “make any order that it considers appropriate” provided that it is “necessary for the protection of the debtor company’s property or the interests of a creditor or creditors.” In addition to recognizing the Chapter 11 Cases, the proposed Initial Recognition Order and Supplemental Order also recognize the First Day Orders, grant the Canadian Stay, appoint the Information Officer, and grant the Administration Charge, D&O Charge, and DIP Charge.

(a) Recognition of the First Day Orders is appropriate

38. Principles of comity and cooperation can favour the recognition of first day orders in Chapter 11 proceedings.⁴⁵ Section 52(1) of the CCAA requires that, if an order recognizing a foreign proceeding is made, the Court “shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.”⁴⁶ The “central principle” of comity under Part IV of the CCAA likewise “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.”⁴⁷ Comity and cooperation in cross-border insolvency proceedings “avoid multiple

⁴⁵ *Hollander* at paras. 41-43; *CURO* at paras. 36-39.

⁴⁶ CCAA s. 52(1).

⁴⁷ *Hollander* at para. 41.

proceedings, inconsistent judgments and general uncertainty” while “ensuring the equal and fair treatment of creditors regardless of their location.”⁴⁸

39. The First Day Orders will protect the Canadian Debtors’ property and the interests of creditors. They authorize KidKraft to act as Foreign Representative, authorize borrowing in respect of the DIP Facility (discussed in further detail below), and consolidate the administration of the Chapter 11 Cases for procedural purposes. The First Day Orders also appoint a claims, noticing, and solicitation agent; provide for the payment of certain amounts; and ensure the continuity of critical elements of the Company’s operations.⁴⁹

40. This Court should recognize the First Day Orders, because:

- (a) the Canadian and U.S. operations of the Company are highly integrated;
- (b) the U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases such that comity will be furthered by this Court’s recognition of and support for the Chapter 11 Cases already underway in the U.S.;
- (c) coordination of proceedings in the two jurisdictions will ensure fair treatment of all stakeholders, whether they are located in the U.S. or Canada;
- (d) the First Day Orders were obtained to preserve and maximize the value of the Chapter 11 Debtors’ estates; and

⁴⁸ *Hollander* at para. 42.

⁴⁹ The First Day Orders that the proposed Supplemental Order would recognize are described in detail in the Second Affidavit at paras. 42-97.

- (e) given the close connection between the Canadian Debtors and the U.S., it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process, which will produce the most efficient restructuring for the benefit of all stakeholders.⁵⁰

(b) The Canadian Stay is required and appropriate

41. Section 48(1) of the CCAA provides that, once the Court has identified a “foreign main proceeding,” it must grant certain mandatory relief, including a stay of proceedings. While an initial stay under a plenary CCAA proceeding is limited to ten days pursuant to section 11.02, the mandatory stay in Part IV proceedings is not limited in duration. Once an application for an Initial Recognition Order is granted, this Court must grant a stay under section 48(1)(a) “until otherwise ordered by the court, for any period that the court considers necessary.” Accordingly, this Court has granted initial recognition orders extending a stay in favour of Chapter 11 Debtors “until otherwise ordered by this Court.”⁵¹

42. The Canadian Stay requested under the proposed Supplemental Order applies in favour of KidKraft and the Canadian Debtors (including Solowave Design LP) and their respective officers and directors, in respect of their business and property in Canada. While broader than the mandatory stay imposed under section 48, this relief is similar in scope to the Interim Stay. In requesting the Canadian Stay, the Company relies on its submissions in support of extending the Interim Stay to Solowave Design LP and KidKraft in the Interim Stay Factum at paras. 45-51.

⁵⁰ See *Hornblower Cruises* at para. 39; *Hollander* at para. 43; *CURO* at para. 38.

⁵¹ See, e.g., *David's Bridal, LLC (Re)* (18 April 2023), Toronto CV-23-00698107-00CL (ONSC) ([Initial Recognition Order](#)) at para. 4; *Revlon, Inc. (Re)* (20 June 2022), Toronto CV-22-00682880-00CL (ONSC) ([Initial Recognition Order](#)) at para. 4.

43. The Canadian Stay, if granted, will ensure that the Canadian Debtors are protected from any stakeholder exercising enforcement rights in Canada pursuant to a Canadian court order. The Canadian Stay is critical to the preservation of the value of the business in Canada and to the Chapter 11 Debtors' overall efforts to proceed with the Chapter 11 Cases and the completion of the Sale Transaction.⁵²

(c) KSV Restructuring should be appointed Information Officer

44. This Court has recognized that it has “become common practice in this Court to appoint an information officer in proceedings under Part IV of the CCAA, pursuant to [its] discretion that flows from s. 49.”⁵³ The “information officer’s role is to help effect cooperation between the Canadian proceeding, the foreign representative and the foreign court, including to keep this Court apprised of the status of the foreign proceedings.”⁵⁴

45. The Foreign Representative seeks to appoint KSV Restructuring as the Information Officer in this proceeding. KSV Restructuring is a licensed trustee in bankruptcy in Canada and its principals have acted as information officers in several previous ancillary proceedings (both under Part IV of the CCAA as well as the former section 18.6 of the CCAA). KSV Restructuring has consented to acting as Information Officer in this proceeding.⁵⁵

⁵² Second Affidavit at para. 41.

⁵³ *Instant Brands Acquisition Holdings Inc. et al.*, [2023 ONSC 3645](#) at para. 20.

⁵⁴ *CURO* at para. 42.

⁵⁵ Second Affidavit at paras. 98-99.

(d) The Administration Charge should be granted

46. The proposed Supplemental Order provides that the Information Officer, along with its counsel, and KidKraft and the Canadian Debtors' Canadian counsel will be protected by the Administration Charge with respect to their fees and disbursements up to a maximum amount of CAD\$750,000 on the Canadian Property. The Administration Charge is proposed to have first priority over all other charges on the Canadian Property.⁵⁶

47. Administration charges have frequently been granted in Part IV proceedings.⁵⁷ The amount of the Administration Charge is reasonable in the circumstances, having regard to the size and complexity of these proceedings and the roles that will be required of the proposed Information Officer, its legal counsel, and KidKraft and the Canadian Debtors' Canadian counsel.⁵⁸

(e) The D&O Charge should be granted

48. Directors and officers of an insolvent corporation may become exposed to significant liabilities.⁵⁹ While the directors and officers of the Canadian Corporate Debtors are potential beneficiaries of director and officer liability insurance maintained by the Company for itself and its subsidiaries (the "**D&O Insurance**") with an aggregate coverage limit of \$21 million, that coverage is not absolute.⁶⁰

49. In light of the potential insufficiency or unavailability of the D&O Insurance and the need for the continued service of the directors and officers of the Canadian Corporate Debtors in this

⁵⁶ Second Affidavit at para. 100.

⁵⁷ See, for instance, *Hollander* at para. 56; *CURO* at paras. 45-50; *Hornblower Cruises* at paras. 44-46.

⁵⁸ Second Affidavit at para. 101. See *CURO* at paras. 45, 50; *Hornblower Cruises* at paras. 45-46.

⁵⁹ Second Affidavit at para. 102

⁶⁰ Second Affidavit at para. 103

proceeding, the Foreign Representative seeks the D&O Charge. The D&O Charge would charge the property and assets of the Canadian Debtors in favour of the directors and officers of the Canadian Corporate Debtors (and by extension, in effect, Solowave Design LP) in the maximum amount of CAD \$100,000.⁶¹ The D&O Charge is proposed to rank in priority to all other secured and unsecured claims over the Canadian Property, other than the Administration Charge.⁶²

50. The D&O Charge is necessary to secure the indemnity obligations of KidKraft and the Canadian Debtors to their directors and officers in respect of obligations and liabilities that such directors and officers may incur during this proceeding in their capacities as directors and officers. The D&O Charge would only be relied upon to the extent of the insufficiency of the existing D&O Insurance.⁶³

51. D&O Charges are frequently granted in Part IV proceedings.⁶⁴ The amount of the proposed D&O Charge is reasonable in the circumstances. It has been estimated, in consultation with the proposed Information Officer, with reference to the Canadian Debtors' federal and provincial tax liability exposure.⁶⁵

(f) The Interim DIP Order should be recognized and the DIP Charge granted

52. Access to cash is essential to ensure the viability of the Company as a going concern and to preserve the value of the estates of the Chapter 11 Debtors, who will otherwise have insufficient liquidity to continue operations in the ordinary course while funding the expenses associated with

⁶¹ Second Affidavit at para. 104

⁶² Second Affidavit at para. 106

⁶³ Second Affidavit at para. 105

⁶⁴ See, for instance, *CURO* at paras. 51-57; *Hornblower Cruises* at paras. 50-53.

⁶⁵ Second Affidavit at para. 107.

the Chapter 11 Cases and these CCAA Part IV proceedings. This Court should recognize the Interim DIP Order and grant the associated DIP Charge to avoid destabilizing the Company's business operations and jeopardizing the Sale Transaction to the Purchaser.⁶⁶

53. Courts have established various factors relevant in considering whether to approve a Canadian guarantee of a cross-border debtor-in-possession financing.⁶⁷ Many of these apply here, demonstrating that the guarantee contemplated by the Interim DIP Order is appropriate:

- (a) the DIP Facility furthers the objectives of the CCAA and enables the Chapter 11 Debtors to fund their operations and administrative costs during the Chapter 11 Cases and these Part IV proceedings, preserve the value of their estates, and maximize that value by consummating the Sale Transaction;
- (b) the DIP Facility represents the best available option for the Chapter 11 Debtors;
- (c) the Canadian Debtors' creditors are not prejudiced, as the Canadian Debtors' assets were already encumbered as security for their guarantees for the Prepetition Credit Agreement,⁶⁸ and there is no dispute as to the priority of Coface's liens on its separate collateral (*i.e.*, the accounts receivable that it purchased and are its property);
- (d) funds available under the DIP Facility will indirectly flow to the Canadian Debtors to enable their continued operation during these CCAA Part IV proceedings; and

⁶⁶ Second Affidavit at para. 81.

⁶⁷ See *Hollander* at para. 50; *Indalex Limited (Re)*, [2009 CanLII 17351](#) (ONSC) at para. 8.

⁶⁸ Initial Affidavit at para. 37.

- (e) a failure to meet liquidity needs could destabilize the Company's business operations and jeopardize the Sale Transaction to the Purchaser.⁶⁹

54. The factors in section 11.2(4) of the CCAA, while not directly applicable in a Part IV proceeding, also indicate that the DIP Charge is reasonable in the circumstances, particularly in light of the time-sensitive nature of these proceedings, the Chapter 11 Debtors' need to access liquidity to continue their operations, and the lack of material prejudice to Canadian creditors.⁷⁰

55. While the Final DIP Order is not presently before the Court for recognition, the Foreign Representative expects that it will include the Limited Roll-Up.⁷¹ The Limited Roll-Up contemplated by the DIP Facility would be no obstacle to this Court's recognition of the Final DIP Order. Section 11.2(1) of the CCAA, which applies in a plenary CCAA proceeding, provides that an interim financing charge may not secure an obligation that existed prior to the granting of an initial order under the CCAA. By contrast, rolling up "prepetition debt into post-petition super priority financing can, and in appropriate circumstances should, be approved in the context of foreign recognition proceedings pursuant to Part IV of the CCAA."⁷² On a number of occasions, this Court has recognized U.S. court orders regarding DIP financing that included partial and full roll-up provisions.⁷³ In so doing, this Court has emphasized the importance of comity, finding no

⁶⁹ Second Affidavit at paras. 81, 88-91, 93.

⁷⁰ See *CURO* at paras. 60-61; *YRC Freight Canada Company (Re)*, [2023 ONSC 4834](#) at para. 43.

⁷¹ These arguments with respect to the Limited Roll-Up are included for completeness, as the Foreign Representative intends to seek recognition of the Final DIP Order in this Court once it has been obtained and issued in the U.S. Court: Second Affidavit at para. 95.

⁷² *Instant Brands Acquisition Holdings Inc. et al.*, [2023 ONSC 4252](#) at paras. 20-21 [*Instant Brands*].

⁷³ See, for example, *Hartford Computer Hardware Inc. (Re)*, [2012 ONSC 964](#) at paras. 6, 15 [*Hartford*] (a partial roll-up); *Xinergy Ltd., Re*, [2015 ONSC 2692](#) at paras. 18-23 [*Xinergy*] (a full roll-up); *Hollander* at paras. 45-48 (a creeping roll-up); *Instant Brands* at paras. 19-22 (a full roll-up).

basis to “second guess the decision of the U.S. Court.”⁷⁴ The absence of material prejudice to Canadian creditors, as here, favours recognition of a foreign roll-up DIP facility in this Court.⁷⁵

PART V - RELIEF REQUESTED

56. For the foregoing reasons, the Foreign Representative requests that this Honourable Court grant the Initial Recognition Order and the Supplemental Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of May, 2024.



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Lawyers for the Applicant

⁷⁴ *Hartford* at para. 14.

⁷⁵ *Hollander* at para. 53; *Hartford* at para. 13; *Xinergy* at para. 22.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Angiotech Pharmaceuticals Ltd. (Re)*, [2011 BCSC 115](#)
2. *David’s Bridal, LLC (Re)* (18 April 2023), Toronto CV-23-00698107-00CL (ONSC) ([Endorsement](#))
3. *David’s Bridal, LLC (Re)* (18 April 2023), Toronto CV-23-00698107-00CL (ONSC) ([Initial Recognition Order](#))
4. *Hartford Computer Hardware Inc. (Re)*, [2012 ONSC 964](#)
5. *Hollander Sleep Products, LLC et al., Re*, [2019 ONSC 3238](#)
6. *Hornblower Cruises and Events Canada Ltd.*, [2024 ONSC 1209](#)
7. *In the matter of CURO Canada Corp. and LendDirect Corp.*, [2024 ONSC 1989](#)
8. *Indalex Limited (Re)* (2009), [52 C.B.R. \(5th\) 61](#)
9. *Instant Brands Acquisition Holdings Inc. et al.*, [2023 ONSC 3645](#)
10. *Instant Brands Acquisition Holdings Inc. et al.*, [2023 ONSC 4252](#)
11. *Lightsquared LP (Re)*, [2012 ONSC 2994](#)
12. *Revlon, Inc. (Re)* (20 June 2022), Toronto CV-22-00682880-00CL (ONSC) ([Initial Recognition Order](#))
13. *Xinergy Ltd., Re*, [2015 ONSC 2692](#)
14. *YRC Freight Canada Company (Re)*, [2023 ONSC 4834](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the 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 company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

...

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

...

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company’s business and financial affairs are to be managed during the proceedings;

(c) whether the company’s management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

...

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.

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 in 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.

Translation

(5) The court may require a translation of any document accompanying the application.

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.

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.

...

Courts of Justice Act, R.S.O. 1990, c C.43

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED Court File No: CV-24-00720035-00CL
AND IN THE MATTER OF KIDKRAFT, INC., SOLOWAVE DESIGN HOLDINGS LIMITED., SOLOWAVE DESIGN INC., SOLOWAVE INTERNATIONAL INC.
AND SOLOWAVE DESIGN LP
APPLICATION OF KIDKRAFT, INC. 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
(Initial Recognition Order and Supplemental Order,
returnable May 17, 2024)**

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