Court File No. ________________

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 A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

FACTUM OF THE APPLICANTS
(Returnable October 31, 2016)

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TO: THE SERVICE LIST

Court File No. ________________

ONTARIO
SUPERIOR COURT OF JUSTICE
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Applicants

FACTUM OF THE APPLICANTS
(Returnable October 31, 2016)

PART I - OVERVIEW

1. Performance Sports Group Ltd. ("**PSG**") and the other Applicants listed above (collectively, the "**Applicants**" or the "**PSG Entities**") seek protection from their creditors and other relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. The PSG Entities are world-class designers, developers and manufacturers of high performance sports equipment and apparel, primarily in the hockey, baseball/softball and lacrosse markets.

3. In the past 18 months, the PSG Entities have been affected by a confluence of significant adverse events, which have precipitated a severe liquidity crisis. Most critical of these events has been the inability of PSG to file its audited financial statements and related materials (as detailed and defined below, the Reporting Materials) by August 29, 2016 due to an internal investigation relating to PSG's finalization of audited financial statements and the related certification process. The failure to file the Reporting Materials constituted an event of default under the Applicants' secured loan documents. Despite an extension of the time in

which to file the Reporting Materials to October 28, 2016, the Applicants have been unable to complete the investigation and file the Reporting Materials. The Applicants are now in default under their secured loan documents and do not have the ability to extend, repay or refinance their secured debt, which is approximately $489.4 million.[1] Other events contributing to this liquidity crisis include weakness in the hockey and baseball/softball markets, the insolvency of a number of key customers, and considerable time and money spent relating to regulatory investigations and a securities class action lawsuit, and are described in greater detail below.

4. The PSG Entities' efforts to avoid this liquidity crisis have been unsuccessful. Concurrently with this CCAA application, on October 31, 2016, the PSG Entities filed for creditor protection in the U.S. Bankruptcy Court for the District of Delaware under Chapter 11 of Title 11 of the U.S. Code. The first day hearing in respect of the Chapter 11 Proceedings is expected to take place on November 1, 2016. Without CCAA protection, a shutdown of the PSG Entities' operations is inevitable, which outcome would be extremely detrimental to their 728 employees and their numerous customers, creditors and other stakeholders.

5. In response to the myriad issues leading to the current liquidity crisis, the PSG Entities evaluated the strategic alternatives and determined that course of action which would best maximize value would be a going concern sale through CCAA and Chapter 11 proceedings. The PSG Entities have developed a sale process and complementary to the process, have entered into an agreement for the sale of substantially all of their assets to a group of investors led by Sagard Capital Ltd ("**Sagard**"). CCAA protection will allow the PSG Entities to maintain operations while providing them with the time necessary to implement a going-concern sale of their businesses and assets pursuant to a court-supervised sales process.

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[1] All financials USD unless otherwise noted.

PART II - THE FACTS

6. The facts underlying this Application are more fully set out in the Affidavit of Mark Vendetti sworn October 31, 2016 (the "**Vendetti Affidavit**"). All capitalized terms used but not defined herein have the meaning ascribed to them in the Vendetti Affidavit.

A. Structure of the PSG Entities

7. PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the within proceedings.

Vendetti Affidavit, paras. 11-12, Application Record, Tab 2.

8. The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities.

Vendetti Affidavit, para. 17, Application Record, Tab 2.

B. The PSG Entities' Business and Operations

9. The PSG Entities focus on designing, developing and manufacturing high performance sports equipment and apparel for hockey, baseball/softball, and lacrosse. The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses.

Vendetti Affidavit, para. 23, Application Record, Tab 2.

a. The Hockey Business Line: BAUER, MISSION and EASTON

10. The PSG Entities' hockey business lines – and its corporate history – traces back to the iconic hockey equipment business started by the Bauer family in Kitchener, Ontario in 1927.

Today this business (the "**Bauer Business**") focuses on ice, roller and street hockey equipment and apparel. BAUER is a leading brand name in the industry.

Vendetti Affidavit, para. 24, 26, Application Record, Tab 2.

11. Within the Bauer Business, the BAUER, MISSION and EASTON brands offer performance-driven equipment for players and enthusiasts in every major market in the world including: skates, sticks, protective equipment, helmets and goalie equipment for ice, roller and street hockey.

Vendetti Affidavit, para. 28, Application Record, Tab 2.

12. The PSG Entities carry on the Bauer Business through Bauer Hockey Corp. ("**Bauer Canada**") and Bauer Hockey, Inc. ("**Bauer U.S.**") which sell products in the Canadian and U.S. markets, respectively. Bauer Canada also performs the majority of the research and development for the PSG Entities from its facility in Blainville, Quebec and performs limited management functions for other PSG Entities, including risk management. Bauer U.S. also provides executive management services for the PSG Entities. The majority of the PSG Entities' senior management is employed by Bauer U.S.

Vendetti Affidavit, para. 18, Application Record, Tab 2.

13. The PSG Entities sell hockey equipment in Europe through a number of European-incorporated subsidiaries which are not parties to this application. The structure of these entities is described in greater detail in the Vendetti affidavit.

Vendetti Affidavit, para. 20, Application Record, Tab 2.

b. The Baseball/Softball Business Line: EASTON and COMBAT

14. The PSG Entities offer a broad line of baseball and softball equipment for all ages and level of play through their EASTON and COMBAT brands (the "**Easton Business**"). The baseball/softball business line consists of equipment and accessories for athletes and

enthusiasts and serves professional, inter-scholastic, and recreational levels of the market across several price points.

Vendetti Affidavit, paras. 30-31, Application Record, Tab 2.

15. The PSG Entities primarily carry on the Easton Business through Easton Baseball/Canada Corp. ("**Easton Canada**") and Easton Baseball/Softball Inc. ("**Easton U.S.**"), which sell products to the Canadian and U.S. markets, respectively. Easton U.S. also designs and manufactures equipment for the Easton Business, such as apparel, bags, helmets and bats.

Vendetti Affidavit, para. 18, Application Record, Tab 2.

16. The PSG Entities formerly carried on operations through BPS Diamond Sports Corp. ("**BPS Canada**") and BPS Diamond Sports Inc. ("**BPS U.S.**") which sold COMBAT-branded products into Canada and the U.S., respectively. Effective September 30, 2016, the functions performed by BPS Canada was combined with Easton Canada and the function performed by BPS U.S. was combined with Easton U.S. The BPS entities now have limited operations and employees, but retain intellectual property assets relating to the COMBAT brand.

Vendetti Affidavit, paras. 18, 30, Application Record, Tab 2.

c. The Lacrosse Business Line: MAVERIK and CASCADE

17. The PSG Entities offer a comprehensive line of lacrosse equipment for all skill levels by way of the MAVERIK and CASCADE brands.

Vendetti Affidavit, para. 35, Application Record, Tab 2.

18. The PSG Entities primarily carry on the lacrosse business (the "**Lacrosse Business**") through Performance Lacrosse Group Corp., which sells products in the Canadian market, and Performance Lacrosse Group Inc., which sell products in the U.S. market and also designs, develops and manufactures equipment for the Lacrosse Business at a facility in Liverpool, New York.

Vendetti Affidavit, paras. 18, Application Record, Tab 2.

d. The Uniform Business Line

19. The PSG Entities sell pro-style jerseys, practice jerseys, socks, warm-up suits and training apparel through the INARIA Brand.

Vendetti Affidavit, para. 37, Application Record, Tab 2.

20. The PSG Entities carry on their uniform business (the "**Uniforms Business** ") through Bauer Performance Sports Uniforms Corp., which sources and customizes team sports and active apparel for soccer and each of the business lines and is responsible for distribution and sales of the Uniforms Business in the Canadian and U.S. markets.

Vendetti Affidavit, para. 18, Application Record, Tab 2.

e. Other Business Lines

21. The PSG Entities operate two retail stores in the U.S. which sell BAUER branded products directly to the end-users, with an additional store planned to open in Canada in summer 2017. These stores are operated by Bauer Hockey Retail Inc. (for the U.S.) and Bauer Hockey Retail Corp. (for Canada).

Vendetti Affidavit, para. 44, Application Record, Tab 2.

22. PSG Innovation Corp. holds the PSG Entities' non-controlling interest in Q30 Sports Science, LLC ("**Q30 Sports Science**") as well as a perpetual licence from a subsidiary of Q30 Sports Science, to use certain of its patents and technology assets in the development of products that are intended to address the issue of mild traumatic brain injury in sports and athletic activity.

Vendetti Affidavit, para. 39, Application Record, Tab 2.

23. The PSG Entities also have interests in other sports-related technology companies and intellectual property, events managements groups and sporting development projects, all of which are described in greater detail in the Vendetti Affidavit.

Vendetti Affidavit, para. 39, Application Record, Tab 2.

C. Stakeholders

a. Customers and Consumers

24. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

Vendetti Affidavit, para. 40, Application Record, Tab 2.

25. The PSG Entities sell their products through diverse channels of distribution including to: specialty retailers, national and regional full-line sporting goods retailers and distributors, institutional buyers, mass retailers, and directly to consumers through the PSG Entities' owned and operated retail stores and e-commerce channels.

Vendetti Affidavit, para. 41, Application Record, Tab 2.

b. Employees

26. As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

Vendetti Affidavit, para. 51, Application Record, Tab 2.

27. The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

Vendetti Affidavit, para. 52, Application Record, Tab 2.

28. The PSG Entities provides certain defined contribution pension plans to certain employees and non-registered, non-funded supplemental pension plans to certain employees, but does not have any defined benefit pension plans at this point.

Vendetti Affidavit, paras. 55-58, Application Record, Tab 2.

c. Suppliers and Landlords

29. The PSG Entities have an established and comprehensive manufacturing platform with key third party suppliers, which primarily have their facilities located in China, Thailand and Vietnam and which together produce the vast majority of PSG Entities' manufactured products. Many of these suppliers are legally or functionally exclusive to the PSG Entities such that their businesses are dependent on the Applicants. The PSG Entities also have some third party suppliers located in Canada.

Vendetti Affidavit, para. 61, Application Record, Tab 2.

30. The PSG Entities produce some products at Applicant-operated facilities in Canada and the U.S., including elite hockey equipment (Quebec), bats (California), lacrosse equipment (New York) and uniforms (Toronto).

Vendetti Affidavit, paras. 62-65, Application Record, Tab 2.

31. The PSG Entities lease 17 facilities across the globe for various functions, including sales, marketing, research and development, warehousing and distribution and retail stores. The PSG Entities' global headquarters is located in Exeter, New Hampshire and another nine leased facilities are located in the U.S. Six facilities are located in either Ontario or Quebec, including the research and development centre in Blainville, Quebec. One facility leased by Bauer U.S. is located in Taiwan.

Vendetti Affidavit, para. 73, Application Record, Tab 2.

D. Assets and Liabilities

32. As detailed in the Vendetti Affidavit, as at September 30, 2016, the Applicants had assets with a book value of approximately $594 million and liabilities with a book value of approximately $608 million.

Vendetti Affidavit, paras. 99-100, Application Record, Tab 2.

33. The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses, The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines.[2] In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.[3]

Vendetti Affidavit, paras. 69-72, 99, Application Record, Tab 2.

34. The major liabilities of the PSG Entities are obligations under:

(a) the term loan facility (the "**Term Loan Facility**"): PSG is the borrower with a syndicate of lenders (the "**Term Lenders**") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "**Term Loan Agreement**"). As at October 28, 2016, approximately $330.5 million plus $1.4 million accrued interest was outstanding under the Term Loan Facility.

Vendetti Affidavit, paras. 101, Application Record, Tab 2.

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[2] A more thorough review of the PSG Entities' patent portfolio is set out at para. 70 of the Vendetti Affidavit. The PSG Entities protect their technologies, products and brands under the patent, copyright and trademark laws of each country in which they do business to maintain a competitive advantage with respect to the technology and design incorporated into its products.

[3] The trademarks have been registered in each of the jurisdictions in which the PSG Entities operate and are typically held by the legal entity that operates the business line that uses the trademark.

(b) the Asset-based revolving facility (the "**ABL Facility**" and together with the Term Loan Facility, the "**Facilities**"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "**ABL Lenders**" and, together with the Term Lenders, the "**Secured Lenders**") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "**ABL Agreement**"). As at October 28, 2016, approximately $159 million was outstanding under the ABL Facility.

Vendetti Affidavit, para. 112, Application Record, Tab 2.

35. The Secured Lenders are secured over all of the assets of the PSG Entities (with the exception of the assets of PSG Innovation Corp. and PSG Innovation Inc., neither of which are parties to or obligors under the Facilities). Pursuant to an intercreditor agreement between, among others, the Term Loan Lenders and the Secured Lenders, the Term Lenders have first-ranking security over the Applicants' fixed assets and second ranking security over the working capital assets, while the ABL Lenders have first-ranking security over the Applicants' working capital assets and second ranking security over the Applicants' fixed assets.

Vendetti Affidavit, paras. 106, 107, 117, 118, Application Record, Tab 2.

36. Repayment of the Facilities may be accelerated upon occurrence of an event of default, which includes non-payment of the principal or interest when due, failure to file financial statements, defaults under any other indebtedness to which the PSG Entities and PSG's other restricted subsidiaries are subject and the commencement of insolvency proceedings by any of those entities.

Vendetti Affidavit, paras. 109, 120 Application Record, Tab 2.

37. As discussed above, PSG failed to file its annual financial statements and thus all of the PSG Entities (aside from PSG Innovation Corp. and PSG Innovation Inc.) are in default under the Facilities, which has caused an acceleration of debt.

Vendetti Affidavit, paras. 110, 121, Application Record, Tab 2.

E. Financial Difficulties and the Need for CCAA Protection

38. A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

(a) **Customer Bankruptcies and Liquidation:** Several key customers – retailers of sports equipment and apparel and sporting goods stores– abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable. Compounding the negative impact on receivables is the fact that as these customers have entered into restructuring and/or liquidating proceedings, they have reduced purchase orders from the PSG Entities and their unsold existing inventory is being liquidated in the market.

Vendetti Affidavit, paras. 126-133, Application Record, Tab 2.

(b) **Below-Target Performance of Key Business Lines:** A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines has had an extremely negative effect on the PSG Entities' overall profitability. First, the PSG Entities experienced lower than expected sales in the Bauer Business, in part due consolidation of hockey retailers in the U.S. and the insolvency of the hockey equipment retailers noted above. Second, the Easton Business suffered from a reduction in sales attributed to weakness in the baseball/softball market generally and the above-noted challenges faced by the PSG Entities' customers. The underperformance in the two most significant of the PSG Entities' business lines has negatively affected the PSG Entities' overall profitability.

Vendetti Affidavit, paras. 134-138, Application Record, Tab 2.

(c) **Unfavourable Exchange Rates:** The PSG Entities' financial results have been negatively affected by currency fluctuations.

Vendetti Affidavit, paras. 139-141, Application Record, Tab 2.

(d) **Substantial Professional Fees:** The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

Vendetti Affidavit, paras. 141-144, Application Record, Tab 2.

(e) **Default under the Credit Facilities:** The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Vendetti Affidavit, paras. 147-151, Application Record, Tab 2.

PART III - ISSUES

39. The issues on this application are as follows (as each capitalized term is defined below):

(a) Whether to grant the Applicants CCAA protection;

(b) Whether to approve the Applicants' DIP Facilities;

(c) Whether to authorize the Applicants to pay certain pre-filing debts;

(d) Whether to approve the Applicants' use of their transfer pricing model;

(e) Whether to grant the following CCAA Charges:

(i) the Administration Charge;

(ii) the DIP Charges;

(iii) the Directors' Charge;

(iv) the Intercompany Charge; and

(f) Whether to approve the CRO's appointment and the CRO Engagement Letter.

PART IV - THE LAW

A. The PSG Entities should be Granted CCAA Protection

ii. The PSG Entities are "Debtor Companies" to which the CCAA Applies

40. The CCAA applies to a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as amended, the "**BIA**").[4]

> CCAA s. 2(1), "debtor company", and s. 3(1).
>
> *Timminco Limited (Re)*, 2012 ONSC 106 at para. 11, PSG Entities' Brief of Authorities ["**Applicants' BOA**"], Tab 1.

41. The CCAA defines "company" as, among other things,

> any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated…
>
> CCAA s. 2(1), "company".

(a) Each of the PSG Entities is a "Company"

42. PSG is a "company" as it is a public company incorporated under the laws of British Columbia with assets in Canada. PSG's direct and indirect wholly-owned Canadian subsidiaries, being private companies incorporated under the *Canada Business Corporations Act* with nominal assets in Canada, are each a "company" by definition.[5]

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[4] The definition and proper construction "affiliated debtor companies" is discussed in the next section in detail.
[5] The Canadian PSG Subsidiaries are: KBAU Holdings Canada, Inc., Bauer Hockey Retail Corp. (Canada), Easton Baseball/Softball Corp. (Canada), Bauer Hockey Corp. (Canada), BPS Canada Intermediate Corp., BPS Diamond

Vendetti Affidavit, paras. 11, Application Record, Tab 2.

43. PSG's direct and indirect wholly-owned U.S. subsidiaries, each being private companies incorporated under the laws of the State of Delaware or the laws of the State of Vermont, as the case may be, are each a "company" by definition (by virtue of having nominal assets or doing business in Canada).[6]

Exhibit "B" to the Vendetti Affidavit, para. 17, Application Record, Tab 2.

44. The definition of "company" in section 2(1) of the CCAA is disjunctive: a company will qualify by either "having assets" or "doing business in Canada". The former clause is applied literally. The latter clause should be applied and interpreted liberally. The PSG Entities, when assessed as an integrated cross-border business group, carry on significant business in Canada, by engaging in active management of their cross-border business lines.

Re Cinram, 2012 ONSC 3767 (S.C.J. [Comm. List]) ["***Cinram***"], paras. 46 and 47, Applicants' BOA, Tab 2.

CanaSea Petrogas Group Holdings Limited (Re), 2014 ONSC 6116, paras. 33, Applicants' BOA, Tab 3.

45. The PSG Entities are part of a consolidated business with significant operations in Canada and the United States. The PSG Entities are operationally and functionally integrated in several significant respects (being organized along business lines rather than by jurisdiction of incorporation). Where the applicants are an integrated but international group of companies, all of whom are integrated across business lines and all of whom have at least nominal Canadian operations, the CCAA should be interpreted in a manner that permits a coherent resolution of claims in a forum.

Yukon Zinc Corporation (Re), 2015 BCSC 836, at para. 83. Applicants BOA, Tab 4.

Sports Corp. (Canada), Bauer Performance Sports Uniforms Corp. (Canada), Performance Lacrosse Group Corp. (Canada) and PSG Innovation Corp. (Canada).

[6] The U.S. PSG Subsidiaries are: BPS US Holdings Inc. (Delaware), Bauer Hockey Retail Inc. (Delaware), Eaton Softball Inc. (Delaware), Bauer Hockey, Inc. (Vermont), Bauer Hockey Retail Inc., (Delaware), Bauer Performance Sports Uniforms Inc. (Delaware), Performance Lacrosse Group Inc. (Delaware), BPS Diamond Sports Inc. (Delaware), Mission ITECH Hockey Inc. (Delaware) and PSG Innovation Inc. (Delaware).

See also *Montréal, Maine & Atlantique Canada Co. (Arrangement relatif à)* 2013 QCCS 4039, paras. 24-26, Applicants' BOA, Tab 5 (unofficial English translation).

46. In addition, all U.S. PSG Entities have a bank account in Canada. In *Re Cinram*, Morawetz J. (as he then was) unequivocally held that holding only nominal funds in a Canadian bank account met the test for being a "company" within the meaning of the CCAA:

> Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.
>
> [Emphasis added.]

Cinram,, para. 47, Applicants BOA, Tab 2.

47. When determining whether an applicant is a debtor company on the basis of having nominal assets in Canada, courts will not engage in a qualitative or quantitative analysis of an applicant's assets, as doing so would undermine the effectiveness of the CCAA. Here, the U.S. subsidiaries are in compliance with the CCAA on the basis of having nominal deposits in Canadian bank accounts. The efficacy of "instant assets" – transactions entered into by the debtor for the purpose of qualifying under the CCAA definition of "company" – is well-established. Thus, the U.S PSG Entities are "companies" within the meaning of the CCAA.

Re Global Light Telecommunications Inc., 2004 BCSC 745 at para. 17, Applicants' BOA, Tab 6.

See also *Cadillac Fairview Inc. (Re)*, [1995] O.J. No. 273 (S.C.J. [Comm. List]) at paras. 5-6, Applicants' BOA, Tab 7 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (S.C.J. [Comm. List]) ["***Canwest Global***"] at para. 30, Applicants' BOA, Tab 8.

48. Accordingly, each of the PSG Entities is a "company" as defined in the CCAA.

(b) Each of the PSG Entities is a Debtor Company

49. Companies are entitled to CCAA protection if they are "debtor companies" whose liabilities exceed $5 million. As set out above, pursuant to s. 2 of the CCAA, a "debtor company" is defined as, *inter alia*, a company that is "insolvent".

> CCAA s. 2(1) "debtor company", "company" and CCAA s. 3(1)

50. Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established to be the governing definition in applications under the CCAA. The definition of "insolvent person" in the BIA is as follows:

> ... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.
>
> BIA, s. 2, "insolvent person".
>
> *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List]) [***"Stelco"***], paras 21-22, Applicants' BOA, Tab 9.

51. In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying part (a) of the BIA's definition of "insolvent person" to include a financially troubled corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

> *Stelco* at paras. 25 and 26, Applicants' BOA, Tab 9.

52. The PSG Entities' highly precarious financial situation has rendered them insolvent within the definition contemplated in the BIA and under the expanded definition

in *Stelco*. The PSG Entities face a liquidity crisis due to a cascade of adverse events afflicting them. Quite apart from their liquidity crisis, almost all the PSG Entities are insolvent due to a recent credit default under their secured credit facilities.

Vendetti Affidavit, para. 155, Application Record, Tab 2.

53. PSG Innovation Corp. and PSG Innovation Inc., while not borrowers under a guarantor of the Credit Facilities, have no independent capacity to finance their ordinary operations. Each is insolvent due to an inability to satisfy its ordinary course obligations, including repaying intercompany payables, without ongoing cash infusions from their respective parent companies.

Vendetti Affidavit, paras. 158, Application Record, Tab 2.

54. Finally, and as canvased in greater detail in the Vendetti Affidavit, the PSG Entities, individually and as a whole, have debts in excess of $5 million.

Vendetti Affidavit, paras. 100-110, Application Record, Tab 2.

55. For all of the foregoing reasons, the PSG Entities are debtor companies to which the CCAA applies and are eligible for protection under the CCAA.

ii. An Order Granting a Stay of Proceedings is Appropriate

56. The PSG Entities seek a stay of proceedings in order to maintain operations while providing them with the time necessary to implement their proposed restructuring strategy: the going concern sale of substantially all of their business and assets pursuant to a court-supervised sales process. Section 11.02 of the CCAA provides the Court with the power to impose a stay of proceeding if it is satisfied that circumstances exist that make the order appropriate.

CCAA ss. 11.02(1) and 11.02(3)

Vendetti Affidavit, paras. 159-162, Application Record, Tab 2.

57. A stay of proceeding is appropriate relief in circumstances where a debtor intends to seek approval of a going concern sale of all or substantially all of its assets for the ultimate result of preserving its business for the benefit of its stakeholders. It is well-settled that the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership. As Morawetz J. explained in *Re Nortel Networks Corp*, restructuring by way of a going concern sale is consistent with the objectives of the CCAA:

> …The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.
>
> *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]), para. 47, Applicants' BOA, Tab 10.
>
> *First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299, at para. 32, Applicants' BOA, Tab 11.

58. In summary, the PSG Entities qualify as "debtor companies" to which the CCAA applies and circumstances exist such that an order granting a stay of proceeding appropriate. Without CCAA protection, the PSG Entities will be unable to pursue a going concern sale of their business to the substantial detriment of their stakeholders. For the foregoing reasons, a stay of proceedings should be granted on the terms sought in the draft Initial Order.

iii. Ontario is the Appropriate CCAA Filing Jurisdiction

59. The PSG Entities operate an integrated cross-border business that is organized along functional business lines rather than by jurisdiction of incorporation. In Canada, the PSG Entities' operations center around Toronto, Ontario. For that reason, the PSG Entities invoke the jurisdiction of the Ontario courts.

> Exhibit "B" to the Vendetti Affidavit, para. 17, Application Record, Tab 2.

60. A company may bring its application either in the province where it has its registered head office or its "chief place of business" or, if the company has no place of business in Canada, in whichever province it has assets. As "chief place of business" is not expressly

defined in the CCAA, courts have consider several factors in determining its location. The precise weight given to any one factor is fact-specific. In this case, the relevant factors are:

(a) Location of the registered/*de facto* head office;

(b) Location of the stock exchange(s) it is listed on;

(c) Location of its principal securities regulator;

(d) Location and centralization of key operations; and

(e) Location (and relative distribution) of its assets.

CCAA s. 9(1)

Cash Store Financial Services (Re), 2014 ONSC 2372 at paras. 12, 26-27, Applicants' BOA, Tab 12.

61. The nexus of the PSG Entities' operations in Canada is Ontario, as evidenced by the following factors:

(a) Nearly every Canadian PSG Entity has its registered head office in Toronto;[7]

(b) PSG shares trade on the TSX and its principal securities regulator is the Ontario Securities Commission ("**OSC**"), and PSG is working closely with the OSC in order to resolve the regulatory issues detailed in the within application;

(c) The Canadian PSG Entities centralize their cash management system around Toronto, Ontario, maintaining all their Canadian operating and receipt accounts with a Toronto branch of Bank of America[8]; and

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[7] KBAU, Easton Baseball/Softball Corp., BPS Diamond Sports Corp., Bauer Hockey Retail Corp., Bauer Performance Sports Uniforms Corp., Performance Lacrosse Group Corp., and BPS Canada Intermediate Corp. all have their registered head office in Toronto. PSG has its registered head office in Vancouver and Bauer Canada has its registered head office in Blainville. PSG has no operations in British Columbia.

[8] The Canadian PSG Entities maintain the following bank accounts in Toronto: (a) Two bank accounts for Bauer Canada; (b) Two bank accounts for Bauer Performance Lacrosse Corp.; (c) Two bank accounts for Bauer Performance Sports Uniforms Corp.; (d) One bank account for BPS Diamond Sports Corp.; (e) Four bank accounts for Easton Canada; (f) Two bank accounts for Performance Sports Group Ltd.; and (g) Two bank accounts for PSG Innovation Corp.

(d) All PSG Entities have assets in Ontario (some PSG Entities have leased properties; while others have operational receipts in their accounts).

Exhibit "B" to the Vendetti Affidavit, para. 17, Application Record, Tab 2.

Vendetti Affidavit, paras. 13, 18, 78, Application Record, Tab 2.

B. The Applicants' DIP Facilities Should be Approved and the DIP Charges Granted

i. Overview of the PSG Entities' Proposed DIP Financing

62. The PSG Entities seek approval of two separate but coordinated debtor-in-possession ("**DIP**") interim credit facilities: (i) an asset-based revolving credit facility (the "**ABL DIP Facility**"); and (ii) a new money term loan facility (the "**Term Loan DIP Facility**"). After extensive good faith negotiations, and in consultation with their legal and other professional advisors, the PSG Entities have determined, in their business judgement, that these two DIP facilities represent the best available path to securing the liquidity necessary to fully finance this CCAA proceeding and any court-supervised sale process.

Vendetti Affidavit, paras. 213-215, Application Record, Tab 2.

63. An essential condition of the ABL DIP Facility is that advances thereunder are secured by a super-priority charge (the "**ABL DIP Charge**"), whose priority status depends on the collateral at issue. The sought-after priority is set out in greater detail in the Vendetti Affidavit. Accordingly, the PSG Entities request that this Court grant the charges with the priority described in the Vendetti Affidavit and set out in the draft Initial Order. The PSG Entities are only seeking Court approval of the Term Loan DIP Facility at this time; however, a super-priority DIP charge will be sought on the comeback motion.

Vendetti Affidavit, paras. 229-233, Application Record, Tab 2.

ii. The Court has the Jurisdiction to Approve the PSG Entities' Proposed DIP Financing

64. In order to permit a debtor to secure sufficient financing to fund its operations pending its restructuring, section 11.2 of the CCAA provides the Court with the express

jurisdiction to approve a DIP facility and to grant a super-priority DIP charge. Section 11.2(4) lists the factors Courts must consider in deciding whether to approve super-priority charge:

> **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.
>
> CCAA, s. 11.2(4).

65. In *Canwest Global*, Justice Pepall highlighted the importance of meeting the criteria set out in section 11.2(1) in addition to those found in section 11.2(4), namely:

(a) whether notice has been given to secured creditors likely to be affected by the security or charge;

(b) whether the amount to be granted under a DIP facility is appropriate and required having regard to the debtors' cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the order approving the DIP was made.

> *Canwest Global*, paras. 31-34, Applicants' BOA, Tab 8.

iii. The Criteria Set out in Section 11.2(1) and (4) of the CCAA are Satisfied

66. It is critical that the PSG Entities access DIP financing under the ABL DIP Facility and Term Loan DIP Facility to continue operating their business in the ordinary course, preserve the going-concern value of their assets, and proceed with their proposed post-filing, court-supervised sales process. As set out below, the PSG Entities' proposed DIP financing satisfies the criteria set out in Section 11.2(1) and (4) of the CCAA.

> Vendetti Affidavit, paras. 158, 220, 225, Application Record, Tab 2.

a) The ABL DIP Facility and ABL DIP Charge Satisfy the Criteria in Sections 11.2(1) and (4) of the CCAA

67. The criteria from section 11.2(1) and 11.2(4) support approving the ABL DIP Facility and granting the ABL DIP Charge on the terms sought in the Initial Order:

(a) the ABL DIP Charge does not prime any secured party who has not received notice of this Application;

(b) the PSG Entities urgently require interim financing under the ABL DIP Facility to continue to operate as a going concern. Without immediate access to interim financing, the PSG Entities would eventually be forced to cease operations, to the clear detriment of their stakeholders;

(c) the ability to borrow funds immediately under the ABL DIP Facility is crucial to retaining the confidence of the PSG Entities' stakeholders by clearly evidencing they have the means to satisfy their obligations in the ordinary course, conveying a clear message regarding the stability of operations for the pendency of these proceeding;

(d) the ABL DIP Facility's terms – including its proposed structure, the collateral pledged, the principal amount, and the pricing and fee structure – are more favourable than what the PSG Entities could have obtained from the limited alternative lenders available to them;

(e) the ABL DIP Lenders, by virtue of being the PSG Entities' pre-filing ABL Facility lenders, are intimately familiar with its business and operations of the PSG Entities, substantially reducing the administrative costs that would otherwise arise in connection with an interim DIP facility;

(f) the management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility; and

(g) the proposed Monitor is supportive of the ABL DIP Facility and the ABL DIP Charge.

Vendetti Affidavit, paras. 208-213, 218-221, Application Record, Tab 2.

Pre-Filing Report at para. [**61**].

68. Section 11.2 of the CCAA also permits DIP facilities to be structured to allow debtors to use their post-filing operating receipts to reduce the balance of a pre-existing asset-based credit facility if it accords with a debtor's historical practices. Such sweeping is permitted because the relative pre-filing position of secured creditors over the debtors' assets has not been changed. Courts have considered several non-exhaustive factors in approving asset-based DIP facilities structured in this manner:

(a) whether the DIP facility only authorizes the debtor to pay pre-filing debts owing to the DIP lender(s) out of operating cash receipts;

(b) whether the DIP facility prohibits the debtor from using DIP proceeds to pay down any pre-filing indebtedness;

(c) whether payments to the DIP lender regarding its pre-filing debt are made in a manner consistent with the pre-filing *status quo* (e.g., following the cash dominion arrangement agreed to as part of the subject ABL facility).

Comark Inc., (Re), 2015 ONSC 2010 at paras. 40-41, , Applicants' BOA, Tab 13.

> *Golf Town Canada Holdings Inc., (Re)*, (14 September 2016), Toronto, CV-16-11527-00CL (Ontario Superior Court of Justice) [Commercial List] ("***Golftown***"), Initial Order, Applicants' BOA, Tab 14.
>
> *Golftown*, Endorsement, Applicants' BOA, Tab 15.
>
> *Re Cow Harbour Construction Ltd.*, (28 April 2010), Edmonton 1003 05560, EVQ10COWHARB (Alta QB) ("***Cow Harbour***"), Oral Reasons for Judgement, Applicants' BOA, Tab 16.
>
> *Cow Harbour* (7 April, 2010), Initial Order, Applicants' BOA, Tab 17.

69. The structure and terms of the ABL DIP Facility accord with the express terms of and the policy underlying section 11.2 of the CCAA. The ABL DIP Facility preserves the pre-filing *status quo* by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. As relative priorities are preserved, the *status quo* – creditors' relative pre-stay position – is undisturbed.

> Vendetti Affidavit, para. 217, Application Record, Tab 2.

70. Ultimately, it is essential that the ABL DIP Facility is granted, so that the PSG Entities may be certain that adequate financing is available from the first day of these CCAA proceedings to support operation of the business, vendor and customer relationships, and execution of the sale process to completion.

> Vendetti Affidavit, paras. 216, Application Record, Tab 2.

iv. The PSG Entities Urgently Require Proposed DIP Financing

71. Ultimately, interim DIP relief is critical to prevent any value destruction that could diminish the likelihood of receiving bids in connection with the proposed court-supervised sales process. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. To ensure value for stakeholders is preserved throughout these proceedings, this Court should approve the DIP Facilities and grant the DIP charges on the terms sought.

> *Canwest Global*, at paras. 31, Applicants' BOA, Tab 8.

C. The PSG Entities Should Be Authorized to Pay Certain Pre-Filing Amounts

i. The PSG Entities' Operations Depend on Continued Supply of Certain Goods and Services

72. The PSG Entities' operations depend on timely and continuous supply from certain domestic and international suppliers of goods and services. Continued supply of goods and services during the CCAA proceedings is vital to PSG Entities' efforts to preserve and to ensure an uninterrupted supply chain during their CCAA proceedings. The PSG Entities are seeking an authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

(a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations (the "**Foreign Suppliers**");

(b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services (the "**Critical Suppliers**");

(c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers ("**Shippers and Warehousemen**");

(d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 – all of whom are entitled to be paid for their services under U.S. bankruptcy law (the "**20 Day Goods Suppliers**"); and

(e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities (the "**Lien Claimants**").

Vendetti Affidavit, paras. 171-188, Application Record, Tab 2.

73. In addition, the PSG Entities' business relies on the loyalty, support and goodwill of their wholesale and retail customers. To preserve these customer relationships, the PSG Entities use a wide-reaching customer incentive program. To preserve their competitive advantage, the PSG Entities seek an order authorizing them to continue to honour those programs during filing.

> Vendetti Affidavit, paras. 193-195, Application Record, Tab 2.

ii. The Court has the Jurisdiction to Authorize Payment of Pre-Filing Amounts

74. The jurisdiction to permit the discretionary payment of pre-filing arrears to persons whose services are critical to a debtor's operations is well-settled. Both prior to and after the enactment of critical supplier provisions in the CCAA, CCAA courts have approved such relief where appropriate.

> *Canwest Global*, at paras. 41-43, Applicants BOA, Tab 8.
>
> *Canwest Publishing Inc.*, 2010 ONSC 222 ["***Canwest Publishing***"], at paras. 41 and 43, Applicants BOA, Tab 19.
>
> *Cinram*, at para. 68, Applicants BOA, Tab 2.

75. Courts have frequently exercised the jurisdiction to authorize a debtor to satisfy pre-filing obligations. The factors courts consider in granting this relief includes:

(a) whether the goods and services are integral to the debtor's business;

(b) whether the debtor depends on the uninterrupted supply of such goods or services;

(c) whether such payment could be made without the Monitor's consent;

(d) the Monitor's support and willingness to work with the debtor to minimize the payments to suppliers for pre-filing obligations;

(e) whether the debtor had sufficient inventory of the goods on hand to meet its needs; and

(f) the effect on the debtor's ongoing operations and ability to restructure if they were unable to make pre-filing payments for which authorization is sought.

Cinram, at para. 68, Applicants BOA, Tab 2.

Canwest Global, at paras. 41 and 43, Applicants BOA, Tab 8.

Priszm Income Fund, 2011 ONSC 2061 at paras. 29-34; Applicants BOA, Tab 18.

76. Courts have also granted relief where the imposition of a critical supplier charge on a supplier would be time and cost intensive to enforce.

Canwest Publishing, at paras. 41 and 43, Applicants BOA, Tab 19.

iii. An Order Authorizing Payment of Pre-Filing Amounts is Appropriate

a) The Critical Suppliers

77. In the present matter, the following factors support this Court's exercise of discretion to authorize the PSG Entities to pay pre-filing arrears on the terms set out in the draft Initial Order in favour of all of the Critical Suppliers:

(a) Any interruption of supply or service by the Critical Suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern;

(b) Certain of the Critical Suppliers may not be able to continue to operate if not paid for pre-filing goods and services;

(c) The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services;

(d) There is a substantial risk that certain of the Critical Suppliers will interrupt supply if the pre-filling arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns; and

(e) Payment of amounts in excess of $10,000 requires Monitor approval;

Vendetti Affidavit, paras. 174-179, Application Record, Tab 2.

b) The Foreign Suppliers

78. If they are not paid their pre-filing arrears, the Foreign Suppliers may refuse to deliver goods critical to the PSG Entities' ongoing business. The PSG Entities rely the Foreign Suppliers, as they lack sufficient inventory to complete their restructuring proceedings.

Vendetti Affidavit, para. 172, Application Record, Tab 2.

79. The PSG Entities have no efficient recourse against certain of their Foreign Suppliers. Attempting to replace the foreign suppliers would interrupt operations and involve a lengthy qualification process. Enforcing a Canadian Court order against an unwilling Foreign Supplier would involve a costly and time-consuming legal action, during which time the PSG Entities would be left unsupplied.

Vendetti Affidavit, paras. 171-172, Application Record, Tab 2.

80. In the circumstances, it is appropriate for the Court to exercise its discretion and authorize the PSG Entities to pay pre-filing arrears in favour of the Foreign Suppliers. The Monitor will be kept apprised of any payments on a weekly basis, and Monitor approval is required for any payment in excess of $10,000. The proposed Monitor supports the relief.

Vendetti Affidavit, paras. 173, Application Record, Tab 2

c) Shippers and Warehousemen

81. The PSG Entities rely on Shippers and Warehousemen to provide the inventory necessary to continue their business without interruption. The PSG Entities depend on Shippers and Warehousemen to operate their shipping, warehousing and distribution network. If the PSG Entities' fail to pay these suppliers for charges incurred in transportation or storage of any goods or materials, the Shippers and Warehousemen may assert possessory liens against the assets, property and undertakings of the PSG Entities' ("**Property**"). If custom duties on those same goods are not paid, then the shipments may be stopped in transit to the Applicants and their stakeholders' detriment.

Vendetti Affidavit, paras. 183-185, Application Record, Tab 2.

82. In these circumstances, it is appropriate for this Court to exercise its discretion and authorize the PSG Entities to pay the Shippers and Warehousemen to enable the PSG Entities to realize the value of their merchandise and other property.

Vendetti Affidavit, paras. 188, Application Record, Tab 2.

d) Lien Claimants

83. The Applicants also routinely transact with the Lien Claimants, who may be able to assert statutory or possessory liens against the Applicants' Property without violating the automatic stay in the Chapter 11 Proceedings. These statutory or possessory liens could cause interruptions to the Applicants' business. In these circumstances, it is appropriate for this Court to exercise its discretion and authorize the Applicants to pay the Lien Claimants, as necessary to ensure that they will not assert liens against the Applicants' Property. The draft Initial Order provides for an aggregate maximum of $3 million that is payable to this class of pre-filing creditor, with the prior consent of the Monitor.

Vendetti Affidavit, paras. 189-190, Application Record, Tab 2.

e) Customer Programs

84. The PSG Entities depend on the customer programs to maintain critical customer relationships. In *Cinram*, payments of pre-filing arrears were authorized to permit the applicants to comply with their customer programs and to ensure that they were able to maintain their customer relationships. The principle applies in this case with equal force.

Cinram, at paras 23-24, 66 and 70, Applicants BOA, Tab 2.

D. The Transfer Pricing System should be Approved

85. The PSG Entities are seeking approval to continue the use of their current Transfer Pricing Model. The Transfer Pricing Model ensures that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business.

Vendetti Affidavit, paras. 95-97, 199-200, Application Record, Tab 2.

86. The general power in section 11 of the CCAA grants the Court broad jurisdiction to make any order appropriate in the circumstances, which includes the jurisdiction to approve the continued use of the Applicants' Transfer Pricing Model.

CCAA, section 11.

Nortel Networks Corp. (Re) (2009), 50 C.B.R. (5th) 77 (Ont. S.C.J. [Comm List]) ["***Nortel***"] at paras. 14, 16, 46, Applicants' BOA, Tab 20.

87. The PSG Entities require continued use of their Transfer Pricing Model to operate their business in the ordinary course. The PSG Entities' Transfer Pricing Model ensures that intercompany transactions are recorded at fair market value and a PSG Entity providing goods or services to a related entity receives fair value for those goods or services. The Transfer Pricing Model provides a reasonable measure of arm's length prices, as evidenced by annual audits carried on by independent accounting firms. To ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model.

Vendetti Affidavit, paras. 200-201, Application Record, Tab 2.
Nortel at paras. 14, 16, 46, Applicants' BOA, Tab 20.

E. The PSG Entities' Other Requested CCAA Charges Should be Granted

i. The Administration Charge Should be Granted

88. The PSG Entities seek a charge on the Property in the amount of $7.5 million to secure the fees and disbursements incurred in connection with services rendered to them before and after start of these proceedings by its counsel, the proposed Monitor and its counsel and the CRO (as further defined below) (the "**Administration Charge**").

Vendetti Affidavit, paras. 201-202, Application Record, Tab 2.

89. The Administration Charge is proposed to rank ahead in priority to all existing security interests with notice of this application, but behind all other security interests, trusts,

liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the "**Encumbrances**").

> Vendetti Affidavit, paras. 204, Application Record, Tab 2.

90. Section 11.52 of the CCAA expressly provides for the jurisdiction to grant the Administration Charge.

91. The PSG Entities worked with the proposed monitor to estimate the quantum of the Administration Charge, which is reasonable and appropriate in view of the complexities of the anticipated CCAA proceedings and the services provided by beneficiaries of the same.

> Vendetti Affidavit, para. 203, Application Record, Tab 2.

92. The appropriate quantum of an administration charge is a question of fact to be assessed in the totality of the circumstances. In *Re Canwest Publishing Inc.*, Justice Pepall considered several factors in addition to the considerations enumerated in section 11.52:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

> CCAA, s. 11.52.
>
> *Canwest Publishing* at para 54, Applicants' BOA, Tab 19.

93. These factors have been met in this instance:

(a) the PSG Entities operate a complex, multi-jurisdictional business and have substantial operations in North America and across the world;

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings, without which the Applicants will not be able to successfully navigate the CCAA proceeding;

(c) the beneficiaries of the Administration Charge each provide unique services, and there is no anticipated unwarranted duplication of their roles;

(d) the quantum of the administration charge was determined following careful consultation with the proposed Monitor and discussions with other key financial stakeholders of the PSG Entities;

(e) the Administration Charge does not purport to prime any secured party who has not received notice of this Application; and

(f) the proposed monitor supports the Administration Charge on the terms sought herein.

Vendetti Affidavit, paras. 201-203, Application Record, Tab 2.

Pre-Filing Report of the Monitor ("**Pre-Filing Report**") at para. 70.

ii. The Directors' Charge Should be Granted

94. The Applicants seek a charge over the Property in favour of the PSG Entities' former and current directors in the amount of $7.5 million (the "**Directors' Charge**") in order to protect their directors and officers from the risk of significant personal exposure. The priority of the Directors' Charge depends on the nature of the collateral at issue.

Vendetti Affidavit, paras. 235-237, Application Record, Tab 2.

95. The CCAA has codified the jurisdiction to order and approve the Directors' Charge on a super-priority basis in section 11.51.

CCAA, s. 11.51.

96. In *Canwest Global Communications Corp. (Re)*, Justice Pepall applied s. 11.51 at the debtor company's request for a directors' charge, noting that the Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings. In approving the directors' charge, Justice Pepall held:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring.
>
> *Canwest Global* at para 48, Applicants' BOA, Tab 8.

97. The PSG Entities require the continued involvement of their directors and officers in order to finalize the sales process to be commenced immediately. The directors and officers of the PSG Entities have indicated that, due to the significant personal exposure associated with the PSG Entities aforementioned liabilities, they will resign from their positions with the PSG Entities unless the Initial Order grants the sought after Directors' Charge.

Vendetti Affidavit, paras. 234, Application Record, Tab 2.

98. The global Directors' Charge will allow the PSG Entities to continue to benefit from the expertise and knowledge of their directors and officers. The quantum of the requested Directors' Charge is reasonable given the complexity of PSG Entities' business and the potential exposure of its directors and officers to personal liability.

Vendetti Affidavit, paras. 240, Application Record, Tab 2.

99. The proposed Monitor is supportive of the Directors' Charge, including the quantum.

iii. The Intercompany Charge Should be Granted

100. The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of these monies will be used to fund the deficit expected to be

experienced by the U.S. PSG Entities during the same period. The Applicants are seeking authorization to effect intercompany advances, secured by a charge (the "**Intercompany Charge**") on the Property. The provision of an Intercompany Charge will minimize the amounts that must be borrowed under the DIP Facilities.

> Vendetti Affidavit, para. 241, Application Record, Tab 2.

101. The Courts invoke their general power under section 11 of the CCAA in order to grant charges beyond those expressly enumerated in the CCAA provided that circumstances exist to make the order appropriate. Courts have granted intercompany charges to help ensure the stability of the debtor companies and preserve value for stakeholders.

> *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107 ["***Walter Energy***"] at para. 56, Applicants' BOA, Tab 21.
>
> *Fraser Papers Inc. (Re),* 2009 CanLII 32698 (CV-09-8241-00CL) ["***Fraser Papers***"] at paras. 31 and 44, Applicants' BOA, Tab 22.

102. The PSG Entities' business is highly integrated and depends on intercompany transfers. In *Fraser Papers*, Justice Morawetz granted an intercompany charge in recognition of the scope of integration between affiliated U.S. and Canadian debtors. Similarly, in *Walter Energy*, Justice Fitzpatrick granted an intercompany charge "on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of [the debtor entities'] funds."

> *Walter Energy* at para. 67, Applicants' BOA, Tab 21.
>
> *Fraser Papers* at paras. 31 and 44, Applicants' BOA, Tab 22.

103. The Intercompany Charge is necessary to preserve the *status quo* between PSG Entities. The net positive cash flows of the Canadian PSG Entities permit the Applicants to finance their U.S. subsidiaries' operations without having to draw down on the DIP Facility. By reducing reliance on the DIP Facility and using cash receipts to finance the operations of the U.S. PSG Entities, value for stakeholders will be enhanced. In this way, the Intercompany Charge is in the best interest of the PSG Entities' stakeholders and should be approved. The proposed Monitor supports the relief sought and the priority of the Intercompany Charge.

Vendetti Affidavit, para. 240, Application Record, Tab 2.

F. The CRO Engagement Should be Approved and the CRO be Appointed

104. The PSG Entities seek an order approving the engagement letter dated as of October 24, 2016 (the "**CRO Engagement Letter**"), which provides *inter alia*:

(a) that Brian J. Fox of Alvarez & Marsal North America, LLC ("**A&M**") will serve as the PSG Entities' Chief Restructuring Officer ("**CRO**"); and

(b) that the CRO and his team at A&M will be compensated for services provided based on their hourly rates.

Vendetti Affidavit, paras. 196-198, Application Record, Tab 2.

105. In *ICR Commercial Real Estate (Regina) Ltd.* the Court of Queen's Bench of Saskatchewan held that appoint a CRO is sometimes necessary to give effect to the CCAA's remedial purpose. Section 11 of the CCAA grants the Court the jurisdiction to make any order appropriate in the circumstances.

CCAA section 11.

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd., 2007 SKQB 121, ("***ICR Commercial***") at para. 19, Applicants BOA, Tab 23, aff'd 2007 SKCA 72.

See *Timminco Limited (Re),* August 17, 2012, CV-12-9539-00C Ont. S.C.J. [Comm. List] (CRO Appointment Order), Applicants' BOA, Tab 24.

See also, *Timminco Limited (Re),* (CRO Appointment Order Endorsement), Applicants' BOA, Tab 25.

106. The PSG Entities require the CRO's services in order to successfully complete their contemplated restructuring plan. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO. In virtue of an earlier retainer, the CRO is intimately familiar with the PSG Entities' operations and with the steps required to ensure orderly operations during these CCAA proceedings.

Vendetti Affidavit, paras. 196-198, Application Record, Tab 2.

107. The CRO has the skills and experience necessary to manage the PSG Entities in a demanding turnabout situation. The CRO's appointment will allow the PSG Entities' operations to continue in an orderly fashion through the anticipated court-supervised sales process, maximizing the realizable return for all stakeholders. The proposed Monitor supports the relief sought in respect of the CRO. For all of the foregoing reasons, this Court should approve the CRO Engagement Letter and the CRO's appointment.

> *Walter Energy* at para. 31, Applicants' BOA, Tab 21.
>
> Vendetti Affidavit, paras. 196-198, Application Record, Tab 2.

PART V - ORDER SOUGHT

124. For all of the foregoing reasons, the PSG Entities request an Order substantially in the form of the draft Initial Order attached as Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2016.

/s/ *Stikeman Elliott*
Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Timminco Limited (Re)*, 2012 ONSC 106

2. *Re Cinram*, 2012 ONSC 3767 (S.C.J. [Comm. List])

3. *CanaSea Petrogas Group Holdings Limited (Re)*, 2014 ONSC 6116

4. *Yukon Zinc Corporation (Re),* 2015 BCSC 836

5. *Montréal, Maine & Atlantique Canada Co. (Arrangement relatif à)* 2013 QCCS 4039

6. *Re Global Light Telecommunications Inc.*, 2004 BCSC 745

7. *Cadillac Fairview Inc. (Re)*, [1995] O.J. No. 273 (S.C.J. [Comm. List])

8. *Canwest Global Communications Corp.(Re)*, [2009] O.J. No. 4286 (S.C.J. [Comm. List]

9. *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List])

10. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])

11. *First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299

12. *Cash Store Financial Services (Re),* 2014 ONSC 2372

13. *Comark Inc., (Re)*, 2015 ONSC 2010

14. *Golf Town Canada Holdings Inc., (Re)*, Initial Order (14 September 2016), Toronto, CV-16-11527-00CL (Ontario Superior Court of Justice)[Commercial List]

15. *Golf Town Canada Holdings Inc., (Re)*, Endorsement (27 October 2016), Toronto, CV-16-11527-00CL (Ontario Superior Court of Justice)[Commercial List]

16. *Re Cow Harbour Construction Ltd.*, Oral Reasons for Judgment (7 April 2010), Edmonton 1003 05560, EVQ10COWHARB (Alta QB)

17. *Re Cow Harbour Construction Ltd.*, Initial Order, (28 April 2010), Edmonton 1003 05560, EVQ10COWHARB (Alta QB)

18. *Priszm Income Fund,* 2011 ONSC 2061

19. *Canwest Publishing Inc.,* 2010 ONSC 222

20. *Nortel Networks Corp. (Re)* (2009), 50 C.B.R. (5th) 77 (Ont. S.C.J. [Comm List])

21. *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

22. *Fraser Papers Inc. (Re),* 2009 CanLII 32698 (CV-09-8241-00CL)

23. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.,* 2007 SKQB 121

24. *Timminco Limited (Re)*, August 17, 2012, CV-12-9539-00C Ont. S.C.J. [Comm. List] (CRO Appointment Order)

25. *Timminco Limited (Re)*, August 17, 2012, CV-12-9539-00C Ont. S.C.J. [Comm. List] (CRO Appointment Order Endorsement)

SCHEDULE "B"
RELEVANT STATUTES

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

Definitions

2 (1) In this Act,

[…]

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

[…]

debtor company means any company that

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

[…]

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[…]

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[…]

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.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was 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.

[…]

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

2. Definitions

In this Act,

…

"**insolvent person**" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

Court File No: ______________________

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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(RETURNABLE OCTOBER 31, 2016)

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