Court File No. CV-16-11582-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF 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.

(the "Applicants")

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BPS US HOLDINGS INC., ET AL., TO THE DEBTORS' PROPOSED BIDDING PROCEDURES AND STALKING HORSE AGREEMENT

November 21, 2016

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TO: SERVICE LIST

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(the "Applicants")

NOTICE OF FILING IN THE CHAPTER 11 CASES OF BPS US HOLDINGS INC., ET AL. OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BPS US HOLDINGS INC., ET AL., TO THE DEBTORS' PROPOSED BIDDING PROCEDURES AND STALKING HORSE AGREEMENT

The Official Committee of Unsecured Creditors of BPS US Holdings Inc., *et al.* hereby files the *Objection of The Official Committee of Unsecured Creditors of BPS US Holdings Inc., et al., to the Debtors' Proposed Bidding Procedures and Stalking Horse Agreement*, attached as Schedule "A" hereto, which has also been filed with the United States Bankruptcy Court for the District of Delaware in the Applicants' cases under Chapter 11 of Title 11 of the United States Code.

November 21, 2016

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SCHEDULE "A"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
BPS US Holdings Inc., *et al.*,[1]	)	Case No. 16-12373 (KJC)
Debtors.	)	Jointly Administered
	)	**Related Docket No.: 16**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BPS US HOLDINGS INC., ET AL., TO THE DEBTORS' PROPOSED BIDDING PROCEDURES AND STALKING HORSE AGREEMENT

The Official Committee of Unsecured Creditors (the "***Committee***") of the above-captioned debtors and debtors in possession (collectively, the "***Debtors***") hereby submits this objection (the "***Objection***") to the *Debtors' Motion for (I) An Order (A) Establishing Bidding Procedures for the Sale of All, or Substantially All, of the Debtors' Assets; (B) Approving Bid Protections; (C) Establishing Procedures Relating to the Assumption and Assignment of Executory Contracts and Unexpired Leases; (D) Approving Form and Manner of the Sale, Cure and Other Notices; and (E) Scheduling an Auction and Hearing to Consider Approval of the Sale; (II) An Order (A) Approving the Sale of the Debtors' Assets Free and Clear of Claims, Liens and Encumbrances; (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number or Canadian equivalent, are as follows: BPS US Holdings Inc. (8341); Bauer Hockey, Inc. (3094); Easton Baseball / Softball Inc. (5670); Bauer Hockey Retail Inc. (6663); Bauer Performance Sports Uniforms Inc. (1095); Performance Lacrosse Group Inc. (4200); BPS Diamond Sports Inc. (5909); PSG Innovation Inc. (9408); Performance Sports Group Ltd. (1514); KBAU Holdings Canada, Inc. (5751); Bauer Hockey Retail Corp. (1899); Easton Baseball / Softball Corp. (4068); PSG Innovation Corp. (2165); Bauer Hockey Corp. (4465); BPS Canada Intermediate Corp. (4633); BPS Diamond Sports Corp. (8049); Bauer Performance Sports Uniforms Corp. (2203); and Performance Lacrosse Group Corp. (1249). The Debtors' headquarters are located at 100 Domain Dr., Exeter, New Hampshire 03833.

Related Relief [D.I. 16] (the "***Bidding Procedures Motion***"). In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT[2]

By the Bidding Procedures Motion, the Debtors seek to establish Bidding Procedures to govern the sale of all or substantially all of their Assets free and clear of claims, liens and encumbrances. Among other things, the proposed Bidding Procedures provide for the scope of bidding and designation of the Stalking Horse Agreement as the baseline for a proposed sale transaction, including bid protections and milestones sought therein. The Committee is not opposed to the sale of the Debtors' Assets through a fair and robust process that maximizes value for the Debtors' estates and their creditors. However, the Committee objects to the Court's approval of the proposed Bidding Procedures and Stalking Horse Agreement because, taken together, they would foster a sale process that runs afoul of the Bankruptcy Code's primary goal of maximizing value for a debtor's estate and all of its creditors and instead seek to lock in the transaction for an insider Stalking Horse Purchaser. When coupled with the absence of prepetition marketing, the relief requested by the Bidding Procedures Motion, which must be examined under heightened scrutiny, should be denied unless materially modified.

BACKGROUND

A. General

1. On October 31, 2016 (the "***Petition Date***"), each of the Debtors filed a voluntary petition (collectively, the "***Chapter 11 Cases***") under title 11 of the United States Code (11 U.S.C.

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[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Bidding Procedures Motion.

§§ 101 _et_ _seq_., the "***Bankruptcy Code***"). The Chapter 11 Cases are jointly administered and no trustee or examiner has been appointed.

2. Contemporaneously with the filing of the Chapter 11 Cases, each of the Debtors also made an application for protection from their creditors under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, (the "***CCAA***") as amended with the Ontario Superior Court of Justice (Commercial List) (the "***Canadian Court***"). A monitor (the "***Monitor***") has been selected in the proceedings under the CCAA (the "***Canadian Proceedings***") and its appointment has been approved by the Canadian Court.

3. The Committee was appointed on November 10, 2016 and consists of the following three members: (i) Wilmington Savings Fund Society, FSB; (ii) VNSH, LLC; and (iii) Denlea & Carton LLP. *See* D.I. 116.

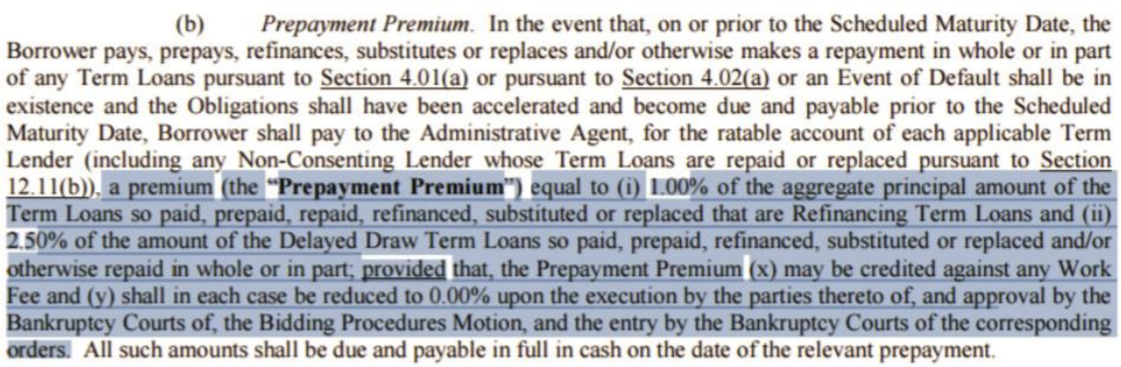
B. Proposed DIP Financing

4. On the Petition Date, the Debtors filed their *Motion (A) for Interim and Final Orders (I) Authorizing the Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. § 364, (II) Authorizing the Debtors' Use of Cash Collateral Pursuant to 11 U.S.C. § 363, and (III) Granting Adequate Protection to Prepetition Secured Creditors Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; (B) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001; and (C) Granting Related Relief* [D.I. 14] (the "***DIP Motion***") seeking authority to enter into the (i) ABL DIP Credit Agreement and (ii) Term Loan DIP Credit Agreement. An interim order [D.I. 69] (the "***Interim DIP Order***") approving the DIP Motion was entered on November 1, 2016.

5. As described in the DIP Motion, the Debtors seek final approval of, among other things, a senior secured new money multiple draw term loan facility under the Term Loan DIP Credit Agreement (the "***Term Loan DIP Facility***") to be provided by affiliates of the Stalking

Horse Purchaser of up to $361.3 million, with $30 million available to fund working capital needs and approximately $331.3 million available to repay in full obligations under the Debtors' prepetition term loan facility. The DIP Motion states "the primary focus of [these Chapter 11 Cases] is to facilitate an orderly sale of substantially all of the Debtors' assets as a going concern following a fair and robust sale process." D.I. 14 at p. 2.

6. The terms of the Term Loan DIP Credit Agreement create economic leverage in favor of the Stalking Horse Purchaser and pressure(s) to insulate the sale process from prospective competition and scrutiny of parties in interest by, among other things, (i) adopting overly-aggressive sale milestones (the "***Sale Milestones***") and (ii) increasing financing fees by an additional $4 million (the "***DIP Sale Termination Fee***") if this Court does not approve the proposed Bidding Procedures:


(b) *Prepayment Premium*. In the event that, on or prior to the Scheduled Maturity Date, the Borrower pays, prepays, refinances, substitutes or replaces and/or otherwise makes a repayment in whole or in part of any Term Loans pursuant to Section 4.01(a) or pursuant to Section 4.02(a) or an Event of Default shall be in existence and the Obligations shall have been accelerated and become due and payable prior to the Scheduled Maturity Date, Borrower shall pay to the Administrative Agent, for the ratable account of each applicable Term Lender (including any Non-Consenting Lender whose Term Loans are repaid or replaced pursuant to Section 12.11(b)), a premium (the "**Prepayment Premium**") equal to (i) 1.00% of the aggregate principal amount of the Term Loans so paid, prepaid, repaid, refinanced, substituted or replaced that are Refinancing Term Loans and (ii) 2.50% of the amount of the Delayed Draw Term Loans so paid, prepaid, refinanced, substituted or replaced and/or otherwise repaid in whole or in part; provided that, the Prepayment Premium (x) may be credited against any Work Fee and (y) shall in each case be reduced to 0.00% upon the execution by the parties thereto of, and approval by the Bankruptcy Courts of, the Bidding Procedures Motion, and the entry by the Bankruptcy Courts of the corresponding orders. All such amounts shall be due and payable in full in cash on the date of the relevant prepayment.

C. Proposed Bidding Procedures

7. On the Petition Date, the Debtors filed the Bidding Procedures Motion. The salient terms of the requested Bidding Procedures include:

- A sale of substantially all of the Debtors' assets, including assets not previously encumbered by the Debtors' prepetition secured financing;
- Designation of the group of investors led by Sagard Capital Partners, L.P. ("***Sagard***") as the Stalking Horse Purchaser;
- Deposit from third parties of 5% of the Purchase Price (approximately $30 million);

- Stalking Horse Purchaser's credit bid of obligations outstanding under the Term Loan DIP Facility;
- Establishment of a sale objection deadline of January 4, 2017
- Establishment of a bid deadline of January 4, 2017;
- Scheduling of an Auction for January 9, 2017;
- Establishment of a sale hearing on January 11, 2017;
- Approval of a $20.125 million Break-Up Fee;
- Approval of Expense Reimbursement up to $3.5 million;
- Approval of an initial allocation of the Purchase Price for U.S. Debtors in a range of 55-67%; and
- Establishment of certain other bidding conditions.

OBJECTION

A. Proposed Sale Transaction Is Subject to Heightened Scrutiny

8. Bankruptcy Code section 101 (31)(E) defines "insider" as an "affiliate or insider of an affiliate [of the debtor] as if such affiliate were the debtor." 11 U.S.C. § 101(31)(E). A director of the debtor is an insider. *See* 11 U.S.C. § 101(31)(B)(i). The Stalking Horse Purchaser and the lender under the DIP Term Loan Credit Agreement are affiliates of the largest holder of the Debtors' stock, Sagard Capital Partners, L.P. ("***Sagard***"). Sagard increased its equity interests in the Debtors up to 17% after Sagard's President and CEO was appointed to and remained on the Debtors' Board of Directors in 2016.[3] The proposed sale to the Stalking Horse Purchaser should receive heightened scrutiny as an insider transaction.

9. As stated by courts in this and other circuits, transactions involving insiders are subject to a heightened level of scrutiny. *See Crown Vill. Farm, LLC v. Arl. L.L.C.* (*In re Crown Vill. Farm, LLC*), 415 B.R. 86, 93 (Bankr. D. Del. 2009) (holding that "[t]he sale process will be

[3] *See Declaration of Brian J. Fox in Support of Debtors' Chapter 11 Petitions and First Day Motions* [D.I. 15 at para. 9] (group of investors led by Sagard, which owns approximately 17% of the Debtors' stock); *also* Form 8-K, Performance Sports Group Ltd., dated March 28, 2016 (Sagard's President and CEO appointed to Board of Directors); Schedule 13D, Performance Sports Group Ltd., dated May 4, 2016 (ownership interest of 16.4%); Schedule 13D, Performance Sports Group Ltd., dated July 21, 2016 (ownership interest of 16.9%); Form 8-K, Performance Sports Group Ltd., dated July 25, 2016 (Sagard's President and CEO resigns from Board of Directors).

under the close scrutiny of the Court as required where the stalking horse is an insider"); *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims* (*In re Papercraft Corp.*), 211 B.R. 813, 823 (W.D. Pa. 1997), *aff'd*, 160 F.3d 982 (3d Cir. 1998) ("[I]nsider transactions are subjected to rigorous scrutiny and when challenged, the burden is on the insider not only to prove the good faith of a transaction but also to show the inherent fairness from the viewpoint of the corporation and those with interests therein."); *see also Brouwer v. Ancel & Dulap* (*In re Firstmark Corp.*), 46 F.3d 653, 656 (7th Cir. 1995) (citing with approval the district court's statement that "sale of a debtor's property to an insider is subject to close scrutiny"), *on subsequent appeal*, 132 F.3d 1179 (7th Cir. 1997); *Sltuck v. Seminole Oil & Gas Corp.* (*In re Seminole Oil & Gas Corp.*), No. 91-1636 (HEW), 1992 WL 110720, at *6 (4th Cir. May 22, 1992) ("[Transactions involving insiders should be closely scrutinized") (*quoting Harman v. First Am. Rank* (*In re Jeffrey Bigelow Design Grp., Inc.*), 956 F.2d 479, 484 (4th Cir. 1992) (internal citations omitted). Insider transactions cannot be approved unless they are the product of an "arm's length bargain" with "inherent fairness" from the viewpoint of interested parties. *Pepper v. Litton*, 308 U.S. 295, 306-07 (1939); *see also Brewer v. Erwin & Erwin PC.* (*In re Marquam Inv. Corp.*), 942 F.2d 1462, 1466 (9th Cir. 1991) (applying "rigorous scrutiny" to an insider's transactions with a bankrupt corporation).

10. In Canada, transactions with "related persons" are also subject to a heightened level of scrutiny. See CCAA s. 36(4).[4] A related person includes a director or officer of the company

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[4] Section 36 of the CCAA sets out the factors a CCAA court must consider in relation to a proposed disposition of a debtor's assets. Subsection (4) sets forth two additional factors that must be considered by a CCAA court when a disposition is to a "related person" Those additional factors are:

> Additional factors — related persons
> (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

or a person related to a director or officer. See CCAA s.36(5).[5] The Canadian Court has interpreted these requirements to mean the Court must be satisfied that "sufficient safeguards were adopted to ensure that a related party transaction is in the best interest of stakeholders". See *Target Canada Co.*, Re, 2015 ONSC 2066, 2015 CarswellOnt 5211, at para. 15.

11. Here, a representative of Sagard served as a fiduciary of the Debtors while Sagard materially increased its equity holdings in the Debtors. And, with possible prior access to insider information by virtue of its representative's appointment to the Debtors' Board, Sagard later negotiated agreements (the Stalking Horse Agreement and DIP Term Loan Credit Agreement) that heavily impact the proposed sale process. The Stalking Horse Purchaser appears to be an insider (under applicable U.S. bankruptcy law) controlled by the single largest shareholder of the Debtors (who is itself an "insider" of the Debtors under applicable Canadian securities laws,[6] and has been a "related person" to the Debtors under the CCAA). Accordingly, both this Court and the Canadian Court must evaluate the proposed sale transaction under heightened scrutiny. The Committee respectfully submits the proposed sale transaction with the Stalking Horse Purchaser (i) contains material flaws, (ii) is unfairly favorable to the Stalking Horse Purchaser and (iii) is designed in a manner that suppresses rather than encourage competitive bidding, in order to lock in the

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(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[5] Section 36(5) defines a related person as follows:

(5) For the purpose of subsection (4), a person who is related to the company includes
(a) a director or officer of the company;
(b) a person who has or has had, directly or indirectly, control in fact of the company; and
(c) a person who is related to a person described in paragraph (a) or (b).

[6] Under Canadian securities laws, an "insider" includes a shareholder that owns more than 10% of the shares of a company. *See, e.g.*, *Securities Act* (British Columbia), R.S.B.C. 1996, c. 418 s. 1; *Securities Act* (Ontario), R.S.O. 1990, c. S.5.

transaction for the insider bidder. As a result, the Bidding Procedures and Stalking Horse Agreement as currently proposed fall short of the requisite "inherent fairness" standard and must be modified.

B. Bidding Procedures and Stalking Horse Agreement Will Discourage Alternative Proposals and Should Not Be Approved Without Modification

12. As currently proposed, the Bidding Procedures and Stalking Horse Agreement do not provide the best means to maximize the value of the Debtors' estates. The purpose of bidding procedures is to facilitate the fair sale of a debtor's assets through a process that will maximize the value of such assets for the benefit of the debtor's creditors. *See Four B. Corp. v. Food Barn Stores, Inc.* (*In re Food Barn Stores, Inc.*), 107 F.3d 558, 564-65 (8th Cir. 1997); *In re Reading Broad., Inc.*, 386 B.R. 562, 575 (Bankr. E.D. Pa. 2008) (noting that the purpose of a bankruptcy sale is to obtain the highest and best price for the estate and thus for its creditors); *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 54 (Bankr. M.D.N.C. 2003) (denying approval of a sale on the grounds that the auction procedures were "patently unfair and inequitable"); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.").

13. As fiduciaries for their estates, the Debtors have an obligation to develop a marketing and bid process that will maximize the value of their assets. *In re Metaldyne Corp.*, 409 B.R. 661, 667-68 (Bankr. S.D.N.Y. 2009) ("It is the overarching objective of sales in bankruptcy to maximize value to the estate.") (*citing Official Comm. Of Subordinated Bondholders v. Integrated Res., Inc.* (*In re Integrated Res., Inc.*), 147 B.R. 650, 659 (S.D.N.Y. 1992)). Here, the Debtors have done no pre-bankruptcy marketing of their assets.

14. In addition, courts have consistently held that mechanisms having a chilling effect on the bidding process should not be approved. *See In re President Casinos, Inc.*, 314 B.R. 784,

786 (Bankr. E.D. Mo. 2004) (permitting debtor to conduct sale of assets, but declining to approve bidding procedures that could have hampered the bidding process); *see also In re Jon J. Peterson, Inc.*, 411 B.R. 131, 137 (Bankr. W.D.N.Y. 2009) (denying approval of bid procedures and noting that unless the bid process "remains fair and equitable, competitors will refrain from the type of full participation that is needed to assure bids for the highest reasonable value"); *In re APP Plus, Inc.*, 223 B.R. 870, 875 (Bankr. E.D.N.Y. 1998) (rejecting a proposed "topping fee" because it found that such fee would only serve to discourage other bidders from entering the auction, and that the stalking horse bidder was adequately incentivized by a break-up fee).

15. Canadian courts have similarly scrutinized proposed sale processes that would "unnecessarily [tie] up the hands" of a debtor in considering other potential solutions. See *Mecachrome Canada Inc., Re*, 2009 CarswellQue 9963, 58 C.B.R. (5th) 49, at paras. 37, 53 and 54 (refusing to approve a plan funding agreement that was intended to facilitate an acquisition, but which limited the debtor's ability to obtain competing proposals); *Boutique Euphoria Inc.*, Re, 2007 QCCS 7129, 2007 CarswellQue 14279, at para. 74 (refusing to approve a stalking horse bid that was presented as a "fait accompli" and was burdened by excessive fees); *Essar Steel Algoma Inc. et al, Re*, Endorsement of the Honourable Mr. Justice Newbould dated November 16, 2015, Court File No. CV-15-000011169-00CL (Ont SCJ [Comm List]) (refusing to approve an initially proposed DIP loan that dictated the terms of a sales process including strict milestones without modifications necessary to run a robust sales process).

16. The Bidding Procedures proposed by the Debtors, together with the Stalking Horse Agreement, will not facilitate a fair sale of the Assets or encourage bidding. In light of the lack of pre-bankruptcy marketing of the Assets, the Bidding Procedures must be modified. As detailed below, these modifications include, but are not limited to: (i) extending the time period available

to prospective bidders to submit their bids; (ii) reducing the aggregate amount of the deal protections (the "***Deal Protections***"), including reducing the risk of double payment of the Stalking Horse Purchaser in connection with the Expense Reimbursement; and (iii) protecting the value of unencumbered assets in connection with the Stalking Horse Purchaser's credit bid. Absent the modifications discussed herein, the Committee believes approval of the Bidding Procedures and Stalking Horse Agreement will discourage competing bids, thereby diminishing the likelihood of a competitive sale process which maximizes the value of the Debtors' estates.

i. Compressed Sale Milestones Will Stifle Bidding

17. In connection with the DIP Motion, the Stalking Horse Purchaser imposes aggressive Sale Milestones resulting in a seventy-two (72) day sale process running through the November and December holiday season.[7] The proposed timing in the Bidding Procedures is insufficient to afford third parties a fair opportunity to participate in the sale process. As currently formulated, the proposed Bidding Procedures contemplate (i) a bid deadline on January 4, 2017, approximately 35 days after this Court's prospective entry of the Bidding Procedures Order, (ii) an auction on January 9, 2017, five days after the bid deadline, and (iii) a hearing to consider approval of any sale to the successful bidder on January 11, 2017. *See* Bidding Procedures at pp. 3, 11 and 16; Bidding Procedures Order at ¶¶ 5, 10 and 15.

18. The Committee submits the Sale Milestones in combination must be extended for an additional thirty (30) day period to allow for reasonable diligence and formulation of competing offers. Although courts in this jurisdiction and elsewhere have permitted sale processes with aggressive milestones, those cases generally involve debtors with assets akin to a "melting ice

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[7] Contemporaneous with the filing of this Objection, the Committee is filing an objection to the DIP Motion on several bases, including objecting to the Sale Milestones.

cube" or in connection with scenarios where debtors have undertaken an extensive prepetition marketing processes. That is not the case here. Here, the Sale Milestones establish an unreasonably short period under the circumstance because: (i) there was no prepetition marketing process; (ii) the ongoing investigation by governmental regulators regarding accounting irregularities, including the lack of audited financials; (iii) the complicated nature of the Debtors' businesses, which includes multiple foreign subsidiaries and operations; and (iv) the Committee's limited time to investigate the validity, priority and extent of the DIP Liens (as defined in the Interim Order) of the Term Loan DIP Agent (as defined in the Interim Order). The consequence of such compressed timing is that only a bidder with a working knowledge of the relevant information regarding the Debtors and their businesses will have adequate time to formulate a reasoned bid for the Assets. Interested third parties must be afforded adequate time to conduct proper and fulsome due diligence, formulate bids and procure any necessary financing to participate in the sale process.

ii. Excessive Deal Protections Must Be Modified

19. When triggered, the Debtors are seeking authority to pay $27.65 million in Deal Protections to the Stalking Horse Purchaser, comprised as follows: (i) a $20.125 million Break-Up Fee; (ii) a $3.5 million Expense Reimbursement; and (iii) a $4.05 million DIP Sale Termination Fee. Accordingly, the Stalking Horse Purchaser seeks entitlement to fees aggregating 4.8% of the proposed $575 million purchase price. *See* Stalking Horse APA, § 9.2(b), (c); DIP Term Loan Agreement § 3.01. Such an amount, as a percentage of the Purchase Price, exceeds the median comparable percentage for deal protection fees approved in Delaware and, therefore, must be

modified.[8] Indeed, the fact that the Stalking Horse Purchaser is an equity owner whose bid was produced from a non-competitive argument suggests that the Deal Protections must be correspondingly modest to meet requisite strict scrutiny under U.S. and Canadian law.

20. Similarly, Canadian courts have carefully evaluated proposed deal protections to determine if those protections are of a "magnitude high enough to chill out the other bidders." *See Boutique Euphoria Inc., Re*, 2007 QCCS 7129, 2007 CarswellQue 14279, at para. 74. Canadian courts have acknowledged that deal protections may represent some premium over the cost of putting together the stalking horse bid, but the amount of such protections must be evaluated on a case by case basis and be reasonable and appropriate in the circumstances. *See Danier Leather Inc., Re*, 2016 ONSC 1044, 2016 CarswellOnt 2414, at para. 45. The burden lies with the debtor to establish that the proposed deal protections being afforded to a stalking horse purchaser are reasonable. See *Mecachrome Canada Inc., Re,* 2009 CarswellQue 9963, 58 C.B.R. (5th) 49, at para. 64 (finding that a break fee was excessive under the circumstances); *Boutique Euphoria Inc., Re*, 2007 QCCS 7129, 2007 CarswellQue 14279, at paras. 63-65 (rejecting the debtors' business judgment as the standard for evaluating a break fee).

21. Deal protections are governed by Bankruptcy Code section 503(b), which provides for administrative expense status for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b). Governing Third Circuit law places a heavy burden of proof on a party seeking the allowance of deal protections. *In re O'Brien Envtl. Energy*, 181 F.3d 527, 535 (3d Cir. 1999) ("[T]he allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to

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[8] Attached as Exhibit A hereto is a chart that sets forth approved termination fees as a percentage of purchase price in a sampling of recent cases.

preserve the value of the estate."); *In re Reliant Energy Channelview LP*, 594 F. 3d 200, 206 (3d Cir. 2010) ("[A] break-up fee is not necessary to preserve the value of the estate when the bidder would have bid even without the break-up fee.").

22. Under *O'Brien*, the Court must determine whether the award of deal protections is necessary to preserve the value of a debtor's estate. *See Reliant Energy Channelview* 594 F.3d at 206. The Third Circuit recognizes two ways in which deal protections can preserve the value of a debtor's estate: if such fees are needed (1) to induce an initial bid; or (2) to preserve a bid. *Id.* at 207-8. It may be "permissible to offer a break-up fee and reimbursement of expenses to induce an initial bid, provided the allowance of the fee does not give an advantage to a favored purchaser over other bidders by increasing the cost of the acquisition." *Id* at 206.

23. Here, the Deal Protections are unnecessary because the Stalking Horse Purchaser willingly entered into the DIP Term Loan Credit Agreement to fund a proposed sale consistent with the Bidding Procedures Motion and Stalking Horse Agreement without any guarantee its Deal Protections would be approved by this Court. The Debtors cannot now claim the Deal Protections are necessary to induce the Stalking Horse Purchaser to bid. So the Debtors weakly assert in the Bidding Procedures Motion that "the Bid Protections here are a necessary incentive to ensure that the Stalking Horse Purchaser is committed to the Sale process" and that "[w]ithout the Bid Protections, the Stalking Horse Bidder (sic) may not be willing to enter into a Stalking Horse Agreement." Bidding Procedures Motion at ¶ 74. The facts show otherwise. The Stalking Horse Purchaser is an incumbent stakeholder protecting an enormous prepetition equity investment in the Debtors. The Stalking Horse Purchaser is not investing in a new opportunity; it is not engaged in novel diligence in a new investment. And even though it is an incumbent stakeholder that developed its bid in an environment without real market competition, the Stalking Horse Purchaser

has already been paid a Work Fee (as defined in the Stalking Horse Agreement) of $2.5 million, which is supposed to compensate it for its time, opportunity and expense in negotiating its bid without any pressure from any prepetition marketing process – including in respect of its selection by the Debtors as the Stalking Horse Purchaser.

24. Even if this Court finds the Deal Protections are a necessary inducement to create a platform bid, the platform is unfair and improper under *O'Brien* and *Reliance* because the Break-up Fee and Expense Reimbursement is out-sized relative to the transaction value. To be approved, deal protections should encourage, not discourage bidding. *See Integrated Resources*, 147 B.R. 659 (holding that "[i]f the break-up fee encourages bidding it will be approved, if it stifles bidding, it will not be approved."). As such, courts have reduced or disallowed fees when (i) the requested reimbursement of expenses did not represent the actual costs incurred by the Stalking Horse, and/or (ii) they included excessive break-up fees in light of the proposed transaction. *See Reliant Energy* 594 F.3d at 204, 208 (affirming bankruptcy court rejection of bid chilling break-up fee of $15 million). The vast majority of cases permitting deal protections have only allowed fees that do not exceed 3% of the proposed purchase price. *See* Joseph Samet, Use of Break-Up and Topping Fees in Corporate and Bankruptcy Asset Sales, 918 PLI/Comm 3351, 363 (2009). Here, the Deal Protections create an excessively high threshold for an initial competitive bid and will accordingly suppress the competitive bidding process. The proposed Deal Protections aggregating 4.8% are excessive, chill bidding, and must be modified.

iii. Value of Unencumbered Assets Must Be Protected

25. The Court should not pre-approve the Stalking Horse Purchaser's right to credit bid all of the rolled-up portion of the DIP Term Loan Facility without preserving the Committee's ability to challenge the validity, priority and extent of liens subject to the Committee's Challenge

Period (as defined in the Interim DIP Order). Further, as part of a general reservation of the Committee's rights in respect of the allocation of sale value to assets, any order approving the Bidding Procedures (the "***Bidding Procedures Order***") should specifically preserve the Committee's right to allocate the value of a potential credit bid to assets unencumbered prepetition (such as the assets of PSG Innovation, Inc. and PSG Innovation Corp. (the "***Innovation Entities***") and chapter 5 actions (including any such actions against insiders)).

26. First, the Stalking Horse Purchaser's credit bid rights in respect of the Term Loan DIP Facility remain subject to investigation and challenge by the Committee through and including January 16, 2017, which is, at present, after the close of the proposed sale process. *See* Interim DIP Order at ¶ 3. Even if the Stalking Horse Purchaser is allowed to credit bid any portion of claims based on the Term Loan DIP Facility, the Bidding Procedures Order must make clear the Stalking Horse Purchaser's alleged liens and security interests are not *ipso facto* found valid by the entry of the Bidding Procedures Order. *See In re Radnor Holdings Corp.*, 353 B.R. 820 (Bankr. D. Del. 2006) (the entry of an order permitting a credit bid may be tantamount to an order approving the nature, extent and validity of the lien claim and also prevents any litigation against the lender for avoidance, reduction, recharacterization, disallowance, disgorgement, counterclaim, surcharge, subordination, marshalling or other litigation claims). Thus, the Committee requests that if the Stalking Horse Purchaser is allowed to credit bid, the Bidding Procedures Order include the following language:

> The failure of the Committee to object to a bid put forth by the Stalking Horse Purchaser or the Court's approval of any such credit bid shall not (a) prejudice or impair the rights of the Official Committee of Unsecured Creditors (the "Committee") to challenge the nature, extent, validity, priority, perfection or amount of the Lenders' alleged liens, security interests and claims or (b) release the Stalking Horse Purchaser from any causes of action which can be brought by or on behalf of the Debtors' estates.

27. Second, the Stalking Horse Agreement, which of course is the platform model for all bids, causes assets unencumbered prepetition, including chapter 5 actions and property of the Innovation Entities, to be sold but without providing any process for the allocation of value attributable to those unencumbered assets. As it relates to actions, by undertaking the transaction in its proposed form, the Stalking Horse Purchaser, through its credit bid may be obtaining an effective release of potentially significant claims without any consideration to the bankruptcy estates in return. The Committee submits that in any sale process approved by this Court, the value of the unencumbered assets should be paid for with cash consideration, the value of which should be determined by this Court if not agreed by the Debtors, the Stalking Horse Purchaser and the Committee. Indeed, generally the Committee's rights in respect of the allocation of sale proceeds to particular assets and entities must be preserved expressly and fully. *See, e.g., In re Enron*, 291 B.R. 39, 43 (Bankr. S.D.N.Y. 2003) (impressing a duty on the court to make an independent finding on the merits of the allocation of proceeds, rather than deferring to the business judgment of the Debtors, where circumstance dictate). Furthermore, the Stalking Horse Purchase must not be allowed to purchase the Debtors' chapter 5 actions against it, thereby releasing claims of the Debtors' estates against the Stalking Horse Purchaser.

C. The Bidding Procedures and the Stalking Horse Agreement Require Additional Critical Modifications

28. In addition to the above, and as a condition to this Court's approval, it is critical that the Stalking Horse Agreement and the Bidding Procedures be modified to provide for a level playing field for all bidders. The Committee has proposed a revised version of the Bidding Procedures, annexed to this Objection as Exhibit A, which revisions include, inter alia, the following:

- A change to the scope of bidding to allow for the ability of bidders to submit bids for one or more of the Debtors' business lines or businesses related to individual brands;

- Reduction of the deposit requirement from 5% down to 2%;

- Reduction of the Minimum Overbid Increments from $2.5 million to not more than $1 million; and

- A change of the Minimum Bid to equal the Purchase Price, plus (i) the value of the Deal Protections and (ii) a $1 million Minimum Overbid Increment.

29. In addition to the foregoing, the Committee objects to certain provisions contained in the proposed form of the Stalking Horse Agreement. The problems with the Stalking Horse Agreement are both relevant to this Court's consideration of the Bidding Procedures Motion and further support this Objection. The objectionable provisions of the Purchase Agreement relate to, *inter alia*, the following (with respect to which the Committee reserves its rights), including without limitation:

- 2.1(b)(xii) – Assigned Actions must not include any of the Debtors' actions against the Stalking Horse Purchaser or its affiliates;

- 2.1(b)(xvi) – Stalking Horse Purchaser must not purchase Avoidance Actions in respect of the Stalking Horse Purchaser or its affiliates;

- 2.2 (Excluded Assets) – Must be express that cash received by the Debtors in connection with the Stalking Horse Purchaser's payment of the Purchase Price is an Excluded Asset;

- 2.5(c) (Excluding or Adding Assigned Contracts Prior to Closing) – Stalking Horse Purchaser can identify a Designated Seller Contract that it does not wish to assume up and until one (1) day prior to Closing. In a case where there is no provision for a down-side floor for unsecured creditors in a wind down context (see below), it is important that the Stalking Horse Purchaser identify to the Debtors and the Committee any Designated Seller Contract that it does not wish to assume, which, if rejected by the Debtors, will have a material diluting effect on unsecured creditor recoveries at the auction;

- 2.6(b) (Credit Bidding; Deposit) – Stalking Horse Purchaser's right to credit bid must remain subject to Challenge Period (as defined in Interim DIP Order), including disgorgement, if any;

- 2.6(c) (Purchase Price Allocation) – All issues concerning allocation of sale proceeds by and among the Debtors and in respect of the administration of same in this Court and the Canadian Court must remain subject to Committee objection and further order of this Court and the Canadian Court;

- 2.6(c)(iii) – "Response Period" should be 15 days;

- 3.6 (Financing) – The Committee reserves on any issue arising from the provisions of the Commitment Letters because the same have not been provided to the Committee and the Committee must receive copies of all notices and modifications in respect of the same, including in respect of any Alternative Financing (as defined in the Stalking Horse Agreement); and

- 5.19 (Wind Down) – While the Committee is hopeful that the result of any sale process, if it can be improved upon and approved, will generate funds sufficient to enable the wind down of the Debtors and robust distributions in that process to stakeholders, it would be appropriate to have a wind down budget that enables liquidating plan confirmation and funding therefor committed as sale consideration to further evidence fairness.

RESERVATION OF RIGHTS

30. The Committee reserves the right to supplement this Objection at any time prior to the Sale Hearing. The Committee expressly reserves its rights to raise additional or further objections to the Sale Motion, the Stalking Horse Purchaser, the Stalking Horse APA, or proposed Bidding Procedures at or prior to the Sale Hearing or any subsequent hearing.

Dated: November 21, 2016
Wilmington, Delaware

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Proposed Counsel to the Official Committee of Unsecured Creditors of BPS US Holdings Inc., et al

EXHIBIT A

Bid Protection Analysis

($ in millions)

Company	Date	Deal Value	Break-up Fee Value	Break-up Fee % of Deal	Expense Reimbursement Value	Expense Reimbursement % of Deal	Bid Protection[1] Value	Bid Protection[1] % of Deal	Minimum Overbid Increment
Draw Another Circle[2]	6/13/2016	$ 82.5	$ 1.4	1.6%	$ 0.7	0.8%	$ 2.0	2.5%	n/a
Quiksilver[3]	9/9/2015	680.0	20.0	2.9%	-	0.0%	20.0	2.9%	n/a
RS Legacy Corporation[4]	2/5/2015	220.0	6.0	2.7%	2.0	0.9%	8.0	3.6%	1.0
ALCO Stores	10/12/2014	119.0	1.8	1.5%	0.8	0.6%	2.5	2.1%	1.2
Associated Wholesalers	10/3/2014	170.0	5.1	3.0%	1.5	0.9%	6.6	3.9%	0.5
Brookstone Holdings	4/3/2014	146.3	3.7	2.5%	0.5	0.3%	4.2	2.9%	0.3
Mean		236.3	6.3	2.4%	0.9	0.6%	7.2	3.0%	0.7
Median		158.1	4.4	2.6%	0.7	0.7%	5.4	2.9%	0.8
BPS US Holdings Inc.[5]	10/31/2016	$ 575.0	$ 24.2	4.2%	$ 3.5	0.6%	$ 27.7	4.8%	$ 2.5

(1) Bid protection is the amount the Stalking Horse Bidder will be compensated in the event that the Stalking Horse is not the successful bidder, which is the sum of any break-up fees, expense reimbursements, and other applicable fees/expenses.

(2) Expense Reimbursement consists of $150,000 in “reimbursement of expenses” plus $525,000 of “signage costs.”

(3) Per Doc 25 of Case 15-11880-KJC, the $680 million implied value includes the following key elements: (1) satisfaction of the DIP financing, which is estimated to be at least $150 million on exit, (2) converting $280 million of debt into equity, and (3) reinstating the Debtors’ obligations to guaranty the Euro Notes, effectively including the reinstatement of approximately $250 million of debt. Accordingly, the $20 million Break-Up Fee is less than the “traditional Delaware convention of 3%” when analyzed against these elements of value.

(4) According to Debtors' financial advisor, David Kurtz, the purchase price for the stores is "roughly $200 million, comprised of: (1) at least $54 million of Standard General’s letters of credit in the form of the credit bid, (2) the other ABL creditors’ credit bids which will increase the credit bid to $130 million; (3) the $3,000 in cash for each store; and (4) then $75 million of new equity that will be infused into the New Co.” Standard General also agreed to bid at least $20 million for RadioShack's intellectual property rights.

(5) Break-up fee includes $4.1 million of pre-payment penalties associated with the DIP Term Loan facilities.

CERTIFICATE OF SERVICE

I, Stanley B. Tarr, hereby certify that on the 21st day of November, 2016, I served or caused to be served the foregoing ***Objection of the Official Committee of Unsecured Creditors of BPS US Holdings Inc., et al. to the Debtors' Proposed Bidding Procedures and Stalking Horse Agreement*** upon the persons listed on the service list attached hereto in the manner indicated thereon.

/s/ Stanley B. Tarr
Stanley B. Tarr (DE No. 5535)

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Court File No. CV-16-11582-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
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