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.

(**Applicants**)

FACTUM OF SAGARD CAPITAL PARTNERS LP

November 28, 2016

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I. INTRODUCTION

1. The Applicants seek an Order from this Court, approving:

   a) The Stalking Horse Asset Purchase Agreement;

   b) The Bidding Procedures; and

   c) The priority and payment of the Expense Reimbursement and Break-Up Fee to the Stalking Horse Bidder.

2. The Stalking Horse Asset Purchase Agreement (the "**APA**") and the Bidding Procedures (together, the "**Stalking Horse Procedures**")[1], ensure the Applicants' business will continue as a going concern under new ownership, the secured debt will be repaid in full, and a substantial portion of the trade debt will be paid in the ordinary course.

3. The Stalking Horse Procedures, which provide for an open auction process, have been considered by Applicants, their CRO, their restructuring advisors and the Monitor, all of whom support the proposed Order.

4. For the reasons set out below, Sagard Capital Partners LP. (" **Sagard**") respectfully submits that the overriding purposes of the *Companies' Creditors Arrangement Act* ("**CCAA**") favour this Court's exercise of its discretion to grant the requested Order.

II. THE SAGARD'S PURPORTED INSIDER STATUS

5. In its objection, the Unsecured Creditors Committee has expressed concerns about the fact that the buyer would be controlled by an insider. As a starting point, the purchaser is not controlled by Sagard. In fact, the purchaser is co-owned by Sagard and Fairfax. Moreover, this statement is totally inaccurate for the following reasons.

6. On March 28, 2016 Sagard entered into a nomination and confidentiality agreement with PSG and Sagard's nominee Mr. Daniel M. Friedberg was appointed to the board of PSG. At the time Mr. Friedberg joined the PSG Board, and as publicly disclosed in a press release and related Canadian and U.S. securities filings on that date, Sagard already owned 15.1% of PSG's equity.

7. On May 17, 2016. Mr, Friedberg left Sagard management. From that moment on, Mr. Friedberg was no longer employed by Sagard and therefore could not be regarded as being a Sagard "insider" on the board of PSG.

8. On July 25, 2016, Mr. Friedberg resigned from the PSG Board. At that time, it was intended- and announced- that Mr. Friedberg would be replaced by Mr. Paul Desmarais III, the Chairman of Sagard Capital Partners Management Corp.,a related company to Sagard. However, Mr. Desmarais was never appointed to the PSG Board. Thus, since May 17th , there has been no one on the Board of PSG having a connection with Sagard.

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[1] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Order.

9. On August 30th, 2016, PSG issued a press release and announced that its Board of Directors has formed a special committee comprised of independent directors, and that such committee has retained Centerview Partners LLC as its independent financial advisor to assist in the review and evaluation of strategic alternatives and in the Company's ongoing discussions with its lenders. The issuance of such press release indicated clearly to the market that PSG was willing to consider various options including a sale of its business

10. On September 2. 2016, PSG and Sagard terminated the shareholder nomination and non-disclosure agreement. The parties then entered into a new non-disclosure agreement with Sagard. The execution of the agreement was disclosed in Sagard's Canadian and U.S. public filings. Thus, since that date, any prior information which may have been obtained in the past by Sagard became irrelevant since it, and more current information, could be obtained pursuant to that agreement.

11. The Stalking Horse APA contains customary representations and warranties by PSG to the purchaser and disclosures pursuant to those representations and warranties. Section 3.3 (b) of the APA provides that the Purchaser has not relied on any information from PSG in determining whether to enter into the APA other than the representations and warranties set forth in the APA, including an upper cased statement to that effect in section 3.3(c) of the APA.

12. Thus, the Stalking Horse APA is clearly not based on information that would have been improperly obtained by Sagard.

III. STALKING HORSE BIDS IN THE CONTEXT OF CCAA PROCEEDINGS

13. In recent years, stalking horse arrangements have emerged as an advantageous practice to sell debtors' assets as a going concern while maximizing value for creditors.

- Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act,* (Toronto: Carswell, 2007), at p. 118-19 **[Tab 1]**:

  > Stalking horse processes under the CCAA are a relatively new phenomenon. The term "stalking horse" comes originally from using a horse or a painted screen of a horse to serve as a screen to camouflage hunters as they stalked their prey. In the insolvency context, it is used to signify a situation where the debtor makes an agreement with a potential bidder for a sale of the debtor's assets or business, and that agreement forms part of a process whereby an auction or tendering process is conducted to see if there is a better and higher bidder that will result in greater returns to creditors. The premise is that the stalking horse has undertaken considerable due diligence in determining the value of the debtor corporation, and other potential bidders can rely, to an extent, on the value attached by that bidder based on that due diligence.

14. While they began in the United States under Chapter 11 filings, stalking horse bids are increasingly used in Canada, specifically in cross-border insolvencies, in order to sell the business as a going concern. In doing so, stalking horse bids support the CCAA's overarching policy objective of maintaining the business as a going concern.

- *Nortel Networks Corporation (Re),* 2009 CanLII 39492 (ON SC) at para. 32-33 **[Tab 2]**

15. There are an increasing number of examples of the successful use of stalking horse bids in Canadian CCAA proceedings, where the open auction process allowed stakeholders to recover and the business to continue as a going concern. Recent examples include Timminco, White Birch Paper Holding Company, Canwest Global Communications Corp., Brainhunter Inc. and Stelco, to name a few. Indeed, in the Nortel proceedings, numerous separate stalking horse auctions were held.

16. This recent case law demonstrates the advantages of stalking horse bid processes. First, the floor price and bidding parameters established by the stalking horse bid lead to a potentially increased price for the assets and consequently higher recovery for creditors. Second, stalking horse bids set out the broad structure and parameters for the subsequent bids that will be made by other interested parties, simplifying the eventual sale and bid comparison process. Finally, the stalking horse bid signals that the business will continue as a going concern, which provides necessary comfort to creditors, suppliers, employees, and other stakeholders.

17. The presence of Stalking Horse Bidder triggers a competitive market by suggesting that there is established and verifiable value in the Applicants' assets. The established price floor necessarily requires higher bids from all other interested bidders.

- *Stelco Inc. (Re),* 2004 CanLII 45462 (ON SC), at para. 6-7 **[Tab 3]**:

> [6] The DB bid has been reviewed by S's management, its Board of Directors and restructuring committee as well as the Monitor, the CRO and UBS. They all recommend it as a *bona fide* stalking horse and the better of those put forward. [...]
>
> [7] DB's $900 million stalking horse bid will provide S with much needed stability, required by its employees, retirees, suppliers and customers. <u>It will as well provide a floor benchmark for others to better if they wish. It should encourage very competitive bidding in these circumstances, all to the benefit of S and its stakeholders.</u> The DB bid is supported by S's bondholders, who hold substantial debt. It provides $200 million for strategic capital projects. It also lengthens the maturity date of the debt and so provides S with a "debt breather". The DB fees are considered by UBS to be at the lower end of the range for same. The Monitor considers these fees to be a good insurance premium.

18. Indeed, while courts first approved the use of stalking horse bids in insolvency proceedings, their success in financing distressed companies in the insolvency context has recently led this Court to approve such bids within bankruptcy actions as well.

- *CCM Master Qualified Fund v. blutip Power Technologies,* 2012 ONSC 1750, at para. 7 **[Tab 4]**:

  > [7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

- *Danier Leather Inc. (Re),* 2016 ONSC 1044, at para. 20 **[Tab 5]**:

  > [20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties.

IV. LAW APPLICABLE TO THE APPROVAL OF A STALKING HORSE SALES PROCESS

19. In approving the Stalking Horse Procedures, this Court must determine whether the proposed sale is fair and reasonable in the circumstances.

20. Section 36 of the CCAA now sets out the factors that a Court must consider in approving a sale out of the ordinary course of business:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> > (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> >
> > (b) whether the monitor approved the process leading to the proposed sale or disposition;
> >
> > (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> >
> > (d) the extent to which the creditors were consulted;
> >
> > (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> >
> > (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

21. In *Brainhunter Inc.*, Justice Morawetz drew a distinction between the criteria for approval of a sale, in which case the criteria outlined in subsection 36(3) of the CCAA need be considered, and the criteria applicable to a sales process. In terms of approving sales process, Justice Morawetz held that the factors outlined in *Nortel* must be considered.

- *Brainhunter Inc., Re*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List], at para. 13-17 **[Tab 6]**:

  [13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. 2009 CanLII 39492 (ON SC), [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

  > (a) Is a sale transaction warranted at this time?
  >
  > (b) Will the sale benefit the whole "economic community"?
  >
  > (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
  >
  > (d) Is there a better viable alternative?

  [14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

  [15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

  [16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

  [17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

22. In *CCM Master Qualified Fund v. blutip Power Technologies*, Justice Brown outlined a similar test for approving a stalking horse sales process.

- *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, at para. 6 **[Tab 4]**.

> [6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> > (i) the fairness, transparency and integrity of the proposed process;
> >
> > (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
> >
> > (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

- *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 2840, at para. 17 **[Tab 7]**.

23. While there are variations and overlap in the factors set out in s.36(3) CCAA, *Nortel* and *CCM Master,* in substance, all the factors aim to determine whether the proposed sales process as a whole is appropriate, fair and reasonable. Indeed, the fairness of the process is a criterion the Court will later consider in approving the actual sale, as per section 36(3) of the CCAA.

24. In summary, the general criteria that the Court must consider in approving a sales process are:

    i) whether a sale transaction is warranted at this time;

    ii) whether the sale benefits the whole "economic community";

    iii) whether any of the debtors' creditors have a *bona fide* reason to object to a sale of the business;

    iv) whether there is a better viable alternative;

    v) the fairness, transparency and integrity of the proposed process;

    vi) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

vii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

25. However, these factors need not all necessarily be fulfilled.

- *White Birch Paper Holding Company (Arrangement relatif à),* 2010 QCCS 4915, at para. 49 **[Tab 8]**

> [49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

26. In the context of a stalking horse sale process specifically, the Court must also be satisfied that the proposed bid protections, including any break-up fee, expense reimbursement, as well as the bid deadlines, are reasonable and fair in the circumstances.

- *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, at para. 15-17 **[Tab 4]**.

27. Finally, in approving the details of the sales process, the Court must consider the business judgement of the debtor company and of its advisors. In general, a court should approve a sales process under the CCAA when it has been recommended by a Monitor.

- *Re Ivaco Inc.* (2004), 2004 CarsewellOnt 2397, 3 C.B.R. (5th) 33 (Ont S.C.J. [Commercial List]), at para. 21 **[Tab 9].**

- *Brainhunter Inc., Re*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), at para. 20 **[Tab 6]**.

V. APPLICATION TO THE FACTS AT HAND

28. The Applicants, in conjunction with their restructuring advisors, have negotiated an asset purchase agreement with the Stalking Horse Bidder, which will serve as the stalking horse bid in the CCAA and Chapter 11 proceedings. The Stalking Horse APA provides for the sale of substantially all of the Applicants' business for a base purchase price of $575 million plus Assumed Liabilities. Assumed Liabilities include, among other liabilities, trade obligations arising in the ordinary course of business, liabilities for any assigned contracts, as well as liabilities for any transferred employee plan.

- Section 2.3 of the Stalking Horse APA.

29. As such, the Stalking Horse APA contemplates that the Applicants' secured debt will be fully repaid, as well as the preservation of trade creditors' debt, through the Assumed Liabilities. Perhaps most significantly, the Stalking Horse APA contemplates that the Applicants' will continue as a going concern under new ownership, thereby preserving a significant number of jobs in Canada and the United States.

30. By initiating the sales process early in the proceedings, the stalking horse process provides comfort for stakeholders, preserves the Applicants' business as a going concern and ensures the preservation of the Applicants' brands' image.

31. A number of facts support the proposed Stalking Horse Procedures:

a) The Applicants have been working diligently, along with their legal and financial advisors, on a plan to reorganize the business. In the exercise of business judgment, the Applicants have concluded that they cannot effectively operate the business for any length of time within the CCAA framework. Unless a sale is undertaken at this time, the long-term viability of the business will be in jeopardy, and the value of the business will continue to decline.

b) The Stalking Horse process is advantageous to the greatest number of affected stakeholders. The Stalking Horse APA presents the best value maximizing path for the Applicants and satisfies all applicable legal standards.

c) The Stalking Horse Procedures ensure the highest potential realization for creditors. Indeed, the Stalking Horse bid, with a base purchase price of $575 million plus the Assumed Liabilities., covers all of the Applicants' secured debt, ensuring that existing secured creditors will be able to recover, while providing for the assumption of the various liabilities set forth in section 2.3(a) (i) of the Stalking Horse APA, the latter including all trade obligations arising in the ordinary course of business.

d) The Stalking Horse Procedures ensure a fair and open process. They represent the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets, or to produce an offer that is superior to the Stalking Horse APA. The public disclosure of the Stalking Horse APA and Bidding Procedures, the eventual open auction, and the opportunity for third parties to submit bids, all promote the CCAA's goals of fairness and transparency within the sale process.

e) Absent the certainty that the Applicants' business will continue as a going concern, which is created by the Stalking Horse Procedures, substantial damage would result to the Applicants' business due to the potential loss of customers, contractors, suppliers, employees and business relationships.

f) By establishing a price floor and bidding guidelines, the Stalking Horse Procedures will simplify and expedite the sales process. Stakeholders can also take comfort in the minimum sale price and parameters established by the Stalking Horse APA.

g) The presence of Stalking Horse Bidder triggers a competitive market by suggesting that there is established and verifiable value in the Applicants' assets. The established price floor necessarily requires higher bids from all other interested bidders.

h) The Monitor supports the Stalking Horse Process.

32. In *White Birch*, Justice Mongeon, in approving a sale of assets resulting from a stalking horse process, found that it was unnecessary for the Court to ensure that all creditors are

repaid. In the context of restructuring proceedings, the Court must, rather, show deference to the Monitor who is responsible for supervising the process and ensuring a fair and reasonable attempt to maximize value for all stakeholders.

- *White Birch Paper Holding Company (Arrangement relatif à),* 2010 QCCS 4915, at para. 51-52 (leave for appeal denied: 2010 QCCA 1950) **[Tab 8]**

  [51] Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

  [52] In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

33. Finally, certain creditors have raised objections on the grounds that the Sagard Group, made up of Sagard Capital Partners, L.P. and Fairfax Financial Holdings Ltd., is acting as both DIP Lender and Stalking Horse Bidder. However, it is not unusual in Canadian bankruptcy and restructuring proceedings to have a single party act as both a DIP lender and stalking horse bidder. Indeed, exactly such a situation occurred in *PCAS Patient Care Automation Services Inc., Timminco* and *Mustang GP Ltd.*, without there being any concerns raised in any of those cases about the fairness of the process.

- *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 2840, at para. 11 **[Tab 7]**

- *Timminco Limited (Re),* Order, (March 9, 2012), Toronto 12-CL-9539-00CL, (Ont. S.C.J.) [Commercial List], at page 1 of Schedule A **[Tab 11]**

- *Mustang GP Ltd. (Re),* 2015 ONSC 6562, at para. 15, 17 and 40 **[Tab 12]**

VI. THE TIMEFRAME FOR THE SALES PROCESS IS FAIR AND REASONABLE

34. In the case at hand, the total time between the Initial CCAA Order and the bid deadline is 64 days. The time between the potential approval of the bid procedures and the bid deadline is 35 days.

35. A chart summarizing the key dates is set out below:

Target Date	Milestone
October 31, 2016	Initial Order
November 30, 2016	Potential approval of bidding procedures and Stalking Horse Agreement

January 4, 2017	Deadline to submit a qualified bid
January 9, 2017	Auction
January 11, 2017	Sale hearing
February 28, 2017	Closing of Stalking Horse Transaction

36. The proposed timelines are consistent with other stalking horse sales processes that have been approved in CCAA proceedings. Indeed, as appears from paragraphs 25 to 29 of the Report of the Proposed Monitor, dated October 31, 2016, such timelines are not uncommon.

37. The timeframe between the Initial Order and bid deadline falls within the range of reasonable timeframes previously approved in CCAA proceedings. While the parties have proposed a 35-day window for bid solicitation, on average, the timeframe between approval of stalking horse bid procedures and the bid deadline is much shorter, usually running from a week to about a month. In recent stalking horse processes under the CCAA, the timeframe between approval of bid procedures and the bid deadline were as follows: 7 days in *White Birch*; 8 days in *Nortel*; 22 days in *Northstar*; 10 days in *PCAS*; 17 days in *Timminco*; 12 days in *Indalex*; and 8 days in *AbitibiBowater*.

- *White Birch Paper Holding Company (Arrangement relatif à),* 2010 QCCS 4382, at para. 7-8 **[Tab 8]**

- *Nortel Networks Corporation (Re),* 2009 CanLII 39492 (ON SC), at para. 18 **[Tab 2]**

- *Northstar Aerospace, Inc. (Re),* (June 27, 2012), Toronto CV-12-9761-00CL (Ont. S.C.J.), at page 1 and 2 of Schedule A **[Tab 10]**

- *PCAS Patient Care Automation Services Inc. (Re),* Order (May 14, 2012) Toronto CV-12-9656-00CL, (Ont. S.C.J.) [Commercial List], at para. 7(i) **[Tab 7]**

- *Timminco Limited (Re),* Order, (March 9, 2012), Toronto 12-CL-9539-00CL, (Ont. S.C.J.) [Commercial List], at page 1 of Schedule A **[Tab 11]**

- *Indalex Limited (Re),* Bidding Procedures Order (July 2, 2012), Toronto 12-CL-9539-00CL, (Ont. S.C.J.) [Commercial List], page 1 of Bidding Procedures **[Tab 13]**

- *AbitibiBowater inc. (Arrangement relatif à),* 2010 QCCS 2556, at para. 11 **[Tab 14]**

38. By comparison, the 35 days provided in the present case is highly reasonable, and ensures that potential bidders will have the opportunity to come forward, perform necessary due diligence and submit higher bids.

39. Further, the Applicants' appointment of Centerview Partners LLC ("**Centerview**") to perform a strategic review of the business was publically announced in August 2016, which consequently made it known to the industry that the Applicants' were looking for a transaction of some kind.

40. Since its appointment, Centerview has been responsible for undertaking a marketing process and generating interest from potential bidders as quickly as practicable. Centerview has a mandate to ensure a broad publicity to generate interest from additional bidders. Centerview began communicating with directly prospective purchasers as of October 31, 2016, when the Initial Order was issued. At that time, Centerview had already identified 90 potential prospects who were to be offered the opportunity to sign a non-disclosure agreement so as to obtain confidential information on the Applicants and their operations. Given Centerview's mandate and proactive efforts in soliciting interest in the Applicants' business, bidders have already had the opportunity to enter into the due diligence process and begin preparing their bids in advance of the court hearing on the bid procedures.

- Report of the Proposed Monitor, October 31, 2016, at para. 24

41. As of November 11, 2016, the number of parties who have been contacted had risen to 105 parties.

- Applicants' Factum, dated November 23, 2016, at para. 24

42. Crucially, none of the parties currently performing due diligence and considering participating in the auction has raised objections to the timeline or requested longer delays.

43. A number of important business reasons exist to support the proposed timeline. As of the time of the Initial Order, the Applicants were entering their busiest sales period of the year, a period when people purchase new sporting equipment for the beginning of the hockey season. In order to generate sales in this critical retail period in November and December, the Applicants must provide certainty to the marketplace that the business is stable and that the brand remains valuable.

44. A number of top professional NHL athletes act as brand ambassadors for the Applicants. Such athletes may become reluctant to act as brand ambassadors in the context of a protracted restructuring process, which inevitably leads to uncertainty and decreased value in the brand and its public image. The proposed timelines take into account the importance of maintaining the brands' value while also allowing sufficient opportunity for interested parties to come forward with a superior offer.

45. Finally, the monitor is committed to closely observing the sales process to ensure fairness and "so as to be in a position to comment definitively on the efficacy and robustness of the market canvass and the results thereof".

- Report of the Proposed Monitor, October 31, 2016, at para 29

46. Given their current financial circumstances, the Applicants, in consultation with their financial advisors, have determined that it is necessary to proceed as quickly as possible to protect the interests of the greatest number of stakeholders and ensure the business continues as a going concern. The Monitor is present to ensure that the entire stalking horse process will be conducted fairly and openly in order to provide the highest possible return for stakeholders.

VII. THE BREAK-UP FEE AND EXPENSE REIMBURSEMENT ARE FAIR AND REASONABLE

47. The Stalking Horse APA provides for a break-up fee of $20,125,000 (or 3.5% of the base purchase price), and an expense reimbursement of $3.5 million.

48. Because of the risk taken by the Stalking Horse Bidder, who may not become the successful purchaser despite incurring substantial expenses and expending considerable time and effort in the process, a "break-up fee" is almost always included in the initial sales agreement to compensate the stalking horse bidder for its expenses and the risk it took in acting as the stalking horse bidder.

- *Danier Leather Inc. (Re),* 2016 ONSC 1044, at para. 41-42 **[Tab 5]**:

  > [41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected.
  >
  > [42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.,* [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J.) [Commercial List], where a 4% break fee was approved.
  >
  > [emphasis added, references omitted]

- Ashley Taylor and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings" Journal of the Insolvency Institute of Canada, Vol 2, 2013, p. 110 **[Tab 15]**.

49. Break-up fees serve a number of important functions: (1) they attract bidders; (2) they help to ensure that a bidder does not withdraw its bid; and (3) they help to establish a bid standard for other bidders.

50. In the case at hand, the proposed fees are fair in that they seek to compensate the Stalking Horse Bidder for creating a competitive atmosphere and certainty around the Applicants' assets. They are justified in that the Stalking Horse Bidder has taken a risk and incurred significant expenses in a process that may ultimately only advantage a competitor who could win the auction, and the Applicants, who will likely receive a higher bid as a result of the Stalking Horse Bidder's participation.

51. More specifically, the Stalking Horse Bidder has taken on a significant amount of risk by entering into the APA without the benefit of audited financial statements. The break-up fee negotiated between the parties reflects the increased risk associated with the fact that the proposed APA does not include many of the standard representations and warranties normally made by public companies with respect to their audited financial statements.

52. The proposed break-up fee of 3.5% of the base purchase price and the expense reimbursement of $3.5 million (or 0.61% of the base purchase price) are consistent with parameters set out by this Court's jurisprudence.

53. Indeed, a break-up fee of 3.5% of the Stalking Horse purchase price, or higher, was approved in the following instances, among others: in *W.C. Wood Corp. Ltd.*, where a 4% break-up fee was approved; *Northstar Aerospace Inc.,* where a 3.5% break-up fee was approved; *Indalex Limited (Re),* where a 3.5% break-up fee was approved; and *Nortel* (sale of 4-7 business), where a 3.7% break-up fee was approved.

- Ashley Taylor and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings" Journal of the Insolvency Institute of Canada, Vol. 2, 2013, at p. 110[2] **[Tab 15]**

- *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 (S.C.J.)[Commercial List], at para. 3 **[Tab 16]**

- *Northstar Aerospace, Inc. (Re)* (June 27, 2012), Toronto CV-12-9761-00CL (Ont. S.C.J.), at para. 7 **[Tab 10]**

- *Indalex Limited (Re)*, Bidding Procedures Order (July 2, 2009), Toronto CV-09-8122-00CL, page 9 of Bidding Procedures **[Tab 13]**

- *Nortel Networks Corporation (Re),* Order (Layer 4-7 Application Delivery Bidding Procedures Order), (February 27, 2009), Toronto 09-CL-7950 (Ont. S.C.J.), page 7 of Bidding Procedures **[Tab 17]**

54. Further, at $3.5 million, the expense reimbursement represents a mere 0.61% of the $575 million base purchase price.

55. This expense reimbursement serves to compensate the Stalking Horse Bidder for actual costs, specifically due diligence costs, incurred in pursuing the bid. Indeed, it is in large part this due diligence that other bidders will be able to rely on for commercial certainty in entering the bidding process.

56. In fact, the average expense reimbursement is about 1.7%.

- Ashley Taylor and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings" Journal of the Insolvency Institute of Canada, Vol 2, 2013, at p. 110 **[Tab 15]**.

57. Both the break-up fee and expense reimbursement have been considered and approved by the Applicants, their advisors, and the Monitor, in the exercise of their business judgment.

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[2] In 2012, Taylor and Katirai found that the average break-up fee, alone, was 3.2%. In cases where both break fees and expense reimbursement were paid to the stalking horse bidder, the average aggregate payment was 3.7% of the stalking horse bid.

- *Brainhunter Inc., Re*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) **[Tab 6]**:

  [20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

VIII. CONCLUSION

58. The Applicants will return to Court following the auction to obtain approval of the most favorable transaction to emerge from the process. At that time the court will have the opportunity to ensure that the process itself was conducted fairly and that the eventual sale will comply with the conditions of s. 36(3) of the CCAA.

59. For the reasons outlined above, the Sagard Capital Partners LP. respectfully requests that this Honourable Court grant the Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November, 2016.

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SCHEDULE "A"
LIST OF AUTHORITIES

Tab	Authority
1.	Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Toronto: Carswell, 2007).
2.	*Nortel Networks Corporation (Re),* 2009 CanLII 39492 (ON SC)
3.	*Stelco Inc. (Re),* 2004 CanLII 45462 (ON SC)
4.	*CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750
5.	*Danier Leather Inc. (Re),* 2016 ONSC 1044
6.	*Brainhunter Inc., Re*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J.) [Commercial List]
7.	*PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 2840
8.	*White Birch Paper Holding Company (Arrangement relatif à),* 2010 QCCS 4915
9.	*Re Ivaco Inc.* (2004), 2004 CarsewellOnt 2397, 3 C.B.R. (5^{th}) 33 (Ont S.C.J. [Commercial List])
10.	*Northstar Aerospace, Inc. (Re),* (June 27, 2012), Toronto CV-12-9761-00CL (Ont. S.C.J.)
11.	*Timminco Limited (Re),* Order, (March 9, 2012), Toronto 12-CL-9539-00CL, (Ont. S.C.J.) [Commercial List]
12.	*Mustang GP Ltd. (Re),* 2015 ONSC 6562
13.	*Indalex Limited (Re)*, Bidding Procedures Order (July 2, 2009), Toronto CV-09-8122-00CL
14.	*AbitibiBowater inc. (Arrangement relatif à),* 2010 QCCS 2556
15.	Ashley Taylor and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings" Journal of the Insolvency Institute of Canada, Vol. 2, 2013.
16.	*Re W.C. Wood Corp. Ltd.,* [2009] O.J. No. 4808 (S.C.J.) [Commercial List]
17.	*Nortel Networks Corporation (Re),* Order (Layer 4-7 Application Delivery Bidding Procedures Order), (February 27, 2009), Toronto 09-CL-7950 (Ont. S.C.J.)

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 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.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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