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)

LEGAL SUBMISSIONS OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS

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TO: **THE SERVICE LIST**

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1. These submissions are made on behalf of The Official Committee of Equity Security Holders of the Applicants (the "**Equity Committee**").

2. The Applicants have asked this Court to grant an Order approving the payment of additional severance amounts owing to certain former non-insider employees on account of termination or severance obligations owed (the "**Severance Obligations**").

3. The Equity Committee objects to the payment of the pre-filing Severance Obligations as requested by the Applicants because:

(a) the Applicants have failed to demonstrate that the immediate payment of these pre-filing amounts is necessary or appropriate;

(b) the payment of the Severance Obligations violates the scheme of priorities under the CCAA;

(c) the payment of the Severance Obligations is premature. To the extent that the Applicants are seeking to make the severance payments, they can do so as part of a retention plan to be considered on its merits; and

(d) the incurrence of additional costs to the estate in borrowing this amount under the Applicant's debtor in possession facilities is prejudicial and inappropriate.

I. BACKGROUND AND CCAA PROCEEDINGS

4. On October 31, 2016, the Applicants filed and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an initial order was granted (the "**Initial Order**"). On the same date, the Applicants also filed for creditor protection in the United States Bankruptcy Court for the District of Delaware under Chapter 11 of Title 11 of the U.S. Code.

5. Under the Initial Order, the Applicants were authorized to enter into a ABL Superpriority Debtor-In-Possession Credit Agreement (the "**ABL Agreement**") and a Term Loan Superpriority Debtor-In-Possession Credit Agreement (the "**Term Loan Agreement**", together with the ABL Agreement, the "**DIP Facilities**"), pursuant to which the Applicants were authorized to borrow up to $200,000,000 under the ABL Agreement and $361,000,000 under the Term Loan Agreement.

6. On November 30, 2016, the Applicants obtained an Order amending and restating the Initial Order to provide, *inter alia*, the authorization of the Applicants to pay pre-filing severance obligations for certain former non-insider employees up to the amount of US$12,850 per employee on account of termination or severance obligations owing to such employee.

7. At this time, the Applicants are seeking authorization by this Court to make additional severance payments on the basis that all of the Canadian employees obtaining severance payments pursuant to the Initial Order will have reached their $12,850 cap or have already reached their cap. The Applicants advise that paying more than $12,850 per employee is necessary to sustain the morale of current employees.

II. ARGUMENT

8. The payment of the Severance Obligations violates the priority scheme of the CCAA.

9. As noted by numerous courts, including the Court in *Re: Canwest Global Communications,* the purpose of the CCAA is to facilitate a compromise between a company and its creditors. A key feature of this purpose is found in the court's power to stay the payment of obligations including the payment of severance payments. The intent of the stay of proceedings is to afford a debtor company breathing space to restructure its affairs while at the same time protecting the relative priorities of the pre-filing claims of creditors.

> *Re: Canwest Global Communications*, 2010 CarswellOnt 3948
> *Re: Windsor Machine & Stamping Ltd.* 2009 CarswellOnt 4471.

10. The CCAA provides no statutory justification for giving former employees priority of payment of their severance amounts over secured creditors or over other unsecured creditors. The effect of the Applicants payment of the Severance Obligations would be to accord the claims of former employees special status over the claims of other unsecured and secured creditors. While the Applicants have already obtained approval by the Court for payment of a small portion of the Severance Obligations, the further request for payment of additional amounts represents a more blatant disregard for the priority scheme of the CCAA.

> *Re: Canwest Global Communications,* 2010 CarswellOnt 3948

11. In addition, the payment of the Severance Obligations at this time is entirely premature. The essential nature of severance pay is rooted in the provision of employment service, which in this case has occurred in the pre-filing period. While terminated employees may be entitled to a claim for severance, payment of those obligations are not immediate; rather they are stayed pursuant to the provisions of the CCAA. The claims of former employees with respect to severance obligations are subject to compromise in a plan or may be payable on a pro rata basis in the event monies are available to be distributed to unsecured creditors. Further, if the sale process being implemented in these proceedings is successful, it may be possible that employee severance claims will be paid in full.

> *Re: Canwest Global Communications*, 2010 CarswellOnt 3948

12. The payment of the Severance Obligations results in the Applicants incurring additional cost and expense associated with the borrowings under the DIP Facilities to cover these payments. These unnecessary costs further diminish recovery that may be available for equity holders and accordingly, prejudices not only creditors of the Applicants, but its shareholders.

13. There is no apparent justification for the Applicant's request to pay the Severance Obligations. The Applicants assertion (unsupported by any evidence) that the payments are necessary to sustain the morale of current employees does not satisfy this burden. Further, there are alternative methods for sustaining the morale of current employees to preserve their employment with the Applicants during the CCAA proceedings, including the approval of an employee retention plan. In circumstances where an employee retention plan is sought, the Applicants will have to demonstrate to the Court the merits of such retention plan, including whether the continued employment of the certain employees is important for the stability of the business.

III. REQUESTED RELIEF

14. The Equity Committee believes that the payment of the Severance Obligations should be stayed until such time as they are dealt with in a plan or paid out in distribution to unsecured creditors. Accordingly, the Equity Committee requests that this Court deny the Order providing authorization for payment of the Severance Obligations.

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Proceeding commenced at Toronto

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