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 THE APPLICANTS
(Re: Inaria Sale Approval)

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TO: THE SERVICE LIST

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(Applicants)

PART I - INTRODUCTION

1. Performance Sports Group Ltd. ("**PSG**"), 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., and PSG Innovation Inc. (collectively, the "**Applicants**" or the "**PSG Entities**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an Order (as amended and restated, the "**Initial Order**") of this Court (the "**Canadian Court**") dated October 31, 2016. On the same date, the PSG Entities also filed for creditor protection (the "**Chapter 11 Proceedings**") in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**" and together with the

Canadian Court, the "**Courts**") under the U.S. Bankruptcy Code. Ernst & Young Inc. was appointed as monitor (the "**Monitor**") of the Applicants in these CCAA proceedings (the "**CCAA Proceedings**" and together with the Chapter 11 Proceedings, the "**Restructuring Proceedings**").

2. This motion is brought by the Applicants seeking an Approval and Vesting Order substantially in the form of the draft Order included at Tab 3 of the Applicants' Motion Record seeking, among other things:

(a) approval of the asset purchase agreement dated December 30, 2016 (the "**Inaria APA"**) between Bauer Performance Sports Uniforms Corp. ("**BPSU Corp.**") and Bauer Performance Sports Uniforms Inc. ("**BPSU Inc.**" and together with BPSU Corp., the "**Sellers**"), Saverio Michielli and a company to be formed by Mr. Michielli (the "**Buyer**") for the sale (the "**Inaria Sale**") of the Sellers' soccer uniform business (the "**Inaria Business**"); and

(b) assignment of the Sellers' rights and obligations under certain contracts (the "**Assumed Contracts**") to the Buyer on the closing of the Inaria Sale, which are considered critical to the continued operations of the Inaria Business.

PART II - THE FACTS

3. The facts with respect to this application are more fully set out in the affidavit of Brian J. Fox, sworn January 3, 2016 (the "**Fox Affidavit**").

4. In October 2012, BPSU Corp. acquired substantially all of the assets of Inaria International Inc., a Toronto-based designer and manufacturer of soccer apparel. Since the

acquisition, PSG has found it difficult to win market share from other, well-established competitors and as a result, the Inaria Business has never realized its anticipated growth.

Fox Affidavit at para. 9; Applicants' Motion Record, Tab 2.

5. The Inaria Business is a non-core component of the Applicants' business that typically generates negative EBITDA annually. Due to losses incurred by the Inaria Business and the attention it requires from the Applicants' management team relative to its size, prior to the Restructuring Proceedings the Applicants considered winding down the Inaria Business as a cost-saving initiative. As an alternative to liquidation, the Applicants also considered a sale transaction whereby the Inaria Business would be sold back to its original owner and current general manager, Saverio Michielli. PSG began discussions with Mr. Michielli regarding a transaction structure that would allow PSG to retain apparel making portions of the business related to hockey, baseball, and lacrosse.

Fox Affidavit at paras. 10 – 12, Applicants' Motion Record, Tab 2.

6. After the commencement of the Restructuring Proceedings, the parties continued arm's length negotiations on a sale structure. Once the Inaria APA was substantially finalized, the Applicants presented the Inaria APA to the special committee of the PSG board of directors (the "**Special Committee**") for consideration and independent approval. The Special Committee approved the terms of the Inaria Sale. On December 30, 2016, the parties finalized the terms of the Inaria Sale and the Inaria APA was executed by the Sellers, Mr. Michielli and the Buyer.

Fox Affidavit at paras. 15 - 16, Applicants' Motion Record, Tab 2.

PART III - ISSUES

7. The two issues on this motion are:

(a) Whether the Court should approve the Inaria Sale and vest the Purchased Assets in the Buyer; and

(b) Whether the rights and obligations of the Sellers under the Assumed Contracts should be assigned to the Buyer.

PART IV - LAW AND ARGUMENT

A. The Inaria Sale should be approved

8. Pursuant to s. 36 of the CCAA, this Court has the jurisdiction to approve a sale of assets outside of the ordinary course of business. Section 36(3) sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

(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.

CCAA, s. 36.

9. CCAA courts have noted that the s. 36 criteria largely correspond with *Soundair* principles for approval of a sale of assets in an insolvency scenario, being:

(a) Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) The interests of all parties;

(c) The efficacy and integrity of the process by which offers have been obtained; and

(d) Whether there has been unfairness in the working out of the process.

Re Canwest Publishing Inc. (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List]) at para. 13, Applicants' Book of Authorities, Tab 1.

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) at para. 16, Applicants' Book of Authorities, Tab 2.

10. For the reasons that follow, the Inaria Sale satisfies each of the s. 36(3) criteria and the *Soundair* principles:

(a) Due to the small size and unprofitability of the Inaria Business, and the discrete nature of the proposed transaction, the Applicants did not conduct a marketing process. The decision was reasonable in the circumstances as the Applicants believed in their business judgment, after consultation with their investment banker, Centerview Partners LLC, that conducting a marketing process would be costly and time consuming compared to any benefit gained. The Applicants also determined that any subsequent marketing efforts were unlikely to yield superior offers for the Inaria Business and could jeopardize the proposed transaction with the Buyer. The Monitor has noted that "the limited marketing process leading to the proposed sale is reasonable in the circumstances";

(b) The Applicants' liquidation analysis, based on a recent appraisal of inventories from a third party firm, demonstrated that the consideration received from the Inaria Sale resulted in greater proceeds than could be realized in a liquidation. The Monitor has reviewed the analysis and noted in its report that it believes "the proposed transaction is more beneficial for the creditors than a sale or disposition in a bankruptcy context";

(c) The Applicants reviewed the Inaria Sale with the advisors of the statutory committee of the unsecured creditors and the statutory committee of equity security holders (collectively, the "**Committees**") to explain the background, substance and rationale of the Inaria Sale. The Committees have not objected to approval of the Inaria Sale;

(d) The Inaria Sale offers a going concern solution for an unprofitable non-core business of the Applicants, which will preserve jobs related to the Inaria Business and provide customers with continued access to INARIA branded products;

(e) The Inaria Sale is expected to enhance recoveries for the Applicants' stakeholders as the consideration received is greater than what would otherwise be realized in a liquidation and it will allow the Applicants to avoid liabilities that would otherwise be incurred if the Inaria Business was wound down. Further, the Inaria Sale is additive to proceeds realized from the broader sale of PSG's business as the assets used in connection with the Inaria Business are excluded under the stalking horse agreement; and

(f) The consideration is fair and reasonable in light of the arm's length negotiations that occurred prior to execution of the Inaria APA which resulted in consideration being received higher than the liquidation value.

Fox Affidavit at paras. 12 – 17, 28, Applicants' Motion Record, Tab 2.

Fifth Report of the Monitor dated January 13, 2017 (the "**Fifth Report**") at paras. 35 - 38.

11. Section 36(4) of the CCAA states that the court may only grant authorization of sale to a person related to the debtor company if it is satisfied of additional factors. Though Michielli is the former co-owner of Inaria International Inc. and the general manager of the Inaria Business, he is not a director or officer of any of the Applicants or control of the Sellers which are wholly owned indirect subsidiaries of PSG. Since Mr. Michielli is not a person enumerated by s. 36(5) of the CCAA, the Applicants should not be required to demonstrate that the additional factors in s. 36(4) have been satisfied.

Fox Affidavit at para. 19, Applicants' Motion Record, Tab 2.

CCAA, s. 36(4) and 36(5).

B. The assignment of the Assumed Contracts should be approved

12. Section 11.3 of the CCAA authorizes the Court to make an order assigning the rights and obligations of a debtor company under an agreement to any person specified by the Court and

agreeable to the assignment, notwithstanding a restriction or prohibition on assignment in the contract, provided that none of the exclusions in s. 11.3(2) apply.

> CCAA, s. 11.3.
>
> *Re TBS Acquireco Inc.*, 2013 ONSC 4663 at para. 25, Applicants' Book of Authorities, Tab 3.

13. Section 11.3(3) of the CCAA sets out the following non-exhaustive list of factors to consider in determining whether to order the assignment of a debtor company's rights and obligations under an agreement:

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

> CCAA, s. 11.3(3).

14. In the present case, the s. 11.3(3) factors have been satisfied and it is appropriate to assign the rights and obligations under the Assumed Contracts for the following reasons:

(a) The Monitor supports approval of the Inaria Sale and recommends the Court grant the relief sought, which includes the assignment of the Assumed Contracts;

(b) The Buyer intends to continue to operate the Inaria Business in the ordinary course and accordingly, will be in a position to continue fulfilling the obligations under the Assumed Contracts;

(c) The counterparties to the Assumed Contracts will remain in a similar position as they are now if the contracts are assigned as the Buyer intends to continue to operate the Inaria Business in the ordinary course and further, as former owner and current general manager, the Buyer's principal is very familiar with the operations of the Inaria Business, the counterparties to the Assumed Contracts and the obligations under the Assumed Contracts; and

(d) The assignment of the Assumed Contracts will allow the Buyer to carry on the business of the Sellers in the same manner in which it has been carried out thus far, thereby ensuring an orderly transition from the Sellers to the Buyer for the Inaria Business' stakeholders.

Fox Affidavit at para. 12, Applicants' Motion Record, Tab 2.

Fifth Report at para. 45.

15. Furthermore, the assignment of the Assumed Contracts is also beneficial to the counterparties given that their assignment will allow for continuation of the Inaria Business and fulfillment of the obligations thereunder rather than being stranded as unsecured liabilities with the Sellers. Pursuant to the draft Approval and Vesting Order, the Buyer will also pay any outstanding cure costs to the counterparties where applicable.

16. Lastly, the assignment of the Assumed Contracts is a condition precedent to the closing of the Inaria Sale. Without such an assignment, the Sellers would be at risk of being unable to close the Inaria Sale, to the detriment of the Applicants' stakeholders.

PART V - ORDER REQUESTED

17. For all of the foregoing reasons, it is appropriate for the Court to grant the Approval and Vesting Order substantially in the form of the draft Order included in the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of January, 2017.

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.)

2. *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)

3. *Re TBS Acquireco Inc.*, 2013 ONSC 4663

SCHEDULE "B"
RELEVANT STATUTES

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

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

[…]

Restriction on disposition of business assets

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

36(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

36(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.

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

(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.

Related persons

(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).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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Proceeding commenced at Toronto

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