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: Approval and Vesting Order, Pre-Closing Reorganization, Assignment of Agreements and Stay Extension)

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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.

2. On the same date, the Applicants 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 Chapter 11 of Title 11 of the U.S. Code (the "**U.S. Bankruptcy Code**"). The Applicants incorporated in Canada are referred to herein collectively as the "**Canadian Debtors**."[1] The Applicants incorporated in the United States ("**U.S.**") are referred to herein as the "**U.S. Debtors**."[2]

3. Ernst & Young Inc. was appointed as monitor (the "**Monitor**") of the Applicants in the CCAA proceedings (the "**CCAA Proceedings**" and together with the Chapter 11 Proceedings, the "**Restructuring Proceedings**").

4. This motion is brought by the Applicants for:

(a) An approval and vesting order (the "**Draft Approval and Vesting Order**"), *inter alia*:

(i) approving the asset purchase agreement (the "**Stalking Horse Agreement**") among the Applicants and 9938982 Canada Inc. (the "**Purchaser**" or the "**Stalking Horse Purchaser**"), and approving the sale transaction contemplated by the Stalking Horse Agreement (the "**Sale Transaction**");

(ii) vesting all of the Purchased Assets (as defined in the Stalking Horse Agreement) in the Purchaser free and clear of any security, claims, charges or other restrictions;

[1] The Canadian Debtors are: Performance Sports Group Ltd., KBAU Holdings Canada, Inc.., Bauer Hockey Retail Corp., Easton Baseball / Softball Corp., PSG Innovation Corp., Bauer Hockey Corp., BPS Canada Intermediate Corp., BPS Diamond Sports Corp., Bauer Performance Sports Uniforms Corp., and Performance Lacrosse Group Corp.
[2] The U.S. Debtors are: BPS US Holdings Inc., Bauer Hockey, Inc., Easton Baseball / Softball Inc., Bauer Hockey Retail Inc., Bauer Performance Sports Uniforms Inc., Performance Lacrosse Group Inc., BPS Diamond Sports Inc., and PSG Innovation Inc.

(iii) authorizing the assignment and assumption of the rights and obligations of the Applicants under certain agreements specified in the proposed Approval and Vesting Order to and by the Stalking Horse Purchaser; and

(iv) approving the Pre-Closing Reorganization (defined below) and authorizing the Applicants to complete any steps and transactions necessary or desirable to consummate the Pre-Closing Reorganization; and

(b) An order extending the Stay Period (defined below) to May 1, 2017.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the Affidavit of Brian J. Fox sworn January 24, 2017 (the "**Fox Affidavit**"), the Supplementary Affidavit of Brian J. Fox sworn February 2, 2017 (the "**Supplementary Fox Affidavit**"), the Declaration of Marc D. Puntus in Support of the Debtors' Sale Motion (the "**Puntus Declaration**"), the Declaration of Harlan Kent in Support of the Debtors' Reply to Objection of Q30 (defined below) (the "**Kent Declaration**"), the Declaration of James M. Eno in Support of the Debtors' Reply to Objection of Q30 (the "**Eno Declaration**"), and the Declaration of Neil Augustine ("**Augustine Declaration**") in Support of the Debtors' Sale Motion and Reply to Objection of Q30.

A. Background

6. The PSG Entities design, develop, manufacture, market and sell performance sports equipment and accessories for ice hockey, roller hockey, lacrosse, baseball and softball, as well as related apparel.

Fox Affidavit at para. 4, Applicants' Motion Record, Tab 2.

7. In response to a confluence of significant negative events affecting the Applicants' business and leading to a liquidity crisis, the Applicants sought and obtained creditor protection under the CCAA and U.S. Bankruptcy Code.

Fox Affidavit at paras. 5, Applicants' Motion Record, Tab 2.

8. Prior to commencing the Restructuring Proceedings, the Applicants negotiated the Stalking Horse Agreement for the sale of substantially all of the Applicants' assets to the Stalking Horse Purchaser, an acquisition vehicle co-owned by affiliates of Sagard Capital Partners, L.P. ("**Sagard**") and Fairfax Financial Holdings Limited ("**Fairfax**").

Fox Affidavit at paras. 8, Applicants' Motion Record, Tab 2.

9. As part of the Restructuring Proceedings the Applicants obtained a $200[3] million ABL DIP credit facility (the "**ABL DIP Facility**") provided by the PSG's pre-filing ABL lenders (the "**ABL DIP Lenders**") and a $361.3 million term loan DIP credit facility (the "**Term Loan DIP Facility**") provided by the Stalking Horse Purchaser, which were approved by the Courts on October 31, 2015 and November 30, 2016, respectively.

Fox Affidavit at para. 7, Applicants' Motion Record, Tab 2.

10. On November 30, 2016, the Courts approved a sales process (the "**Sales Process**") for the Applicants' assets, which included bidding procedures governing the Sales Process (the "**Bidding Procedures**") and the Stalking Horse Agreement which established a minimum purchase price.

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

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[3] All dollar values USD unless otherwise noted.

B. Sales Process

11. Prior to filing for creditor protection, the Applicants had insufficient time to conduct a comprehensive marketing process. Accordingly, the Applicants negotiated the terms of the Bidding Procedures and Stalking Horse Agreement so that they were not restricted from seeking a superior offer during the Restructuring Proceedings.

> Puntus Declaration at para. 9, Compendium of Applicants' U.S. Materials, Tab 1(B).

12. The Applicants started the Sales Process immediately upon filing the Restructuring Proceedings, with the assistance of their investment banker, Centerview Partners LLC ("**Centerview**") and other advisors, and with oversight of the Monitor. The bid deadline was established as January 25, 2017.

> Fox Affidavit at paras. 11, 17, Applicants' Motion Record, Tab 2.

13. Centerview, with input from the Applicants' management, identified and solicited potentially interested parties to participate in the Sales Process. Centerview contacted approximately 134 potentially interested parties, including 29 strategic parties and 105 financial parties. Following the initial solicitation, approximately 40 interested parties executed non-disclosure agreements and commenced the due diligence process.

> Fox Affidavit at para. 11, Applicants' Motion Record, Tab 2.
>
> Puntus Declaration at para. 13, Compendium of Applicants' U.S. Materials, Tab 1(B).

14. Centerview requested interested parties deliver non-binding letters of intent prior to December 15, 2016. Of the interested parties, 9 delivered non-binding letters of intent (the "**LOI**

Parties"). The LOI Parties conducted further due diligence including in-person and telephone meetings with the Applicants' management team.

> Fox Affidavit at para. 15, Applicants' Motion Record, Tab 2.
>
> Puntus Declaration at para. 14, Compendium of Applicants' U.S. Materials, Tab 1(B).

15. Despite the interest expressed by potential bidders during the Sales Process, the Applicants did not receive any Qualified Bids (as defined in the Bidding Procedures) other than the Stalking Horse Agreement. In the absence of a Qualified Bid, the Applicants cancelled the auction and, after consulting their advisors, declared the Stalking Horse Agreement the Successful Bid (as defined by the Bidding Procedures). The Applicants then proceeded with this sale approval motion.

> Puntus Declaration at paras. 15, 17, Compendium of Applicants' U.S. Materials, Tab 1(B).

16. Pursuant to the Bidding Procedures, the Applicants consulted with the Official Committee of Unsecured Creditors (the "**UCC**") and the Official Committee of Equity Security Holders (the "**Equity Committee**"), the Monitor and the ABL DIP Lenders (collectively, the "**Consultation Parties**") during the Sales Process.

> Fox Affidavit at paras. 12 - 13, Applicants' Motion Record, Tab 2.
>
> Puntus Declaration at para. 16, Compendium of Applicants' U.S. Materials, Tab 1(B).

17. The Monitor was involved throughout the Sales Process, oversaw the due diligence process and attended management meetings, site visits, and various conversations that were organized with the LOI Parties.

Fox Affidavit at para. 16, Applicants' Motion Record, Tab 2.

Sixth Report of the Monitor dated February 2, 2017 (the "**Sixth Report**") at paras. 27 – 34.

C. Assignment of the Agreements

18. The Stalking Horse Agreement provides that the Applicants will assign, and the Purchaser will assume, the contracts designated by the Purchaser (the "**Assigned Contracts**") under the Stalking Horse Agreement, which constitute Purchased Assets under the Stalking Horse Agreement.

Fox Affidavit at para. 23, Applicants' Motion Record, Tab 2.

19. The closing of the Sale Transaction is conditioned on the Courts having approved the assignment and assumption of all Assigned Contracts, except if the failure to assign certain contracts does not materially and adversely affect the operation of the Applicants' business.

Fox Affidavit at para. 24, Applicants' Motion Record, Tab 2.

20. The Applicants delivered a notice to the counterparties to potential Assigned Contracts on December 12, 2016 to advise them of the potential assignment and the amount of cure costs payable under such contracts according to the Applicants' books and records and seeking their consents. On January 4, 2017, the Applicants filed a revised cure schedule with the U.S. Court and served a copy of the revised cure schedule on each counterparty of a potential Assigned Contract. Each counterparty of a potential Assigned Contract has been given notice of this motion.

Fox Affidavit at para. 24, Applicants' Motion Record, Tab 2.

Sixth Report at para. 49.

21. To date, of the approximately 1,300 contracts to be assigned, 12 consents to agreements have been received and 16 parties have filed objections to the assignment, including in respect of cure cost amounts. The Applicants continue to seek to resolve the outstanding disputes prior to the sale hearing. No response has been received with respect to the other Assigned Contracts, except for parties which the Applicants are in ongoing discussions with.

Sixth Report at paras. 49 – 51.

D. Pre-Closing Reorganization

22. As contemplated by section 5.18 of the Stalking Horse Agreement, the Applicants are seeking approval of number of corporate restructuring transactions that will be completed prior to closing of the Sale Transaction (collectively, the "**Pre-Closing Reorganization**"). The Pre-Closing Reorganization is expected to result in estimated tax savings of up to CAD $10 million, depending on the allocation of the sale proceeds between Canadian Debtors and U.S. Debtors and the magnitude of any stub period losses of the Canadian Debtors.

Fox Affidavit at paras. 32 - 33, Applicants' Motion Record, Tab 2.

23. The contemplated steps to complete the Pre-Closing Reorganization are described in the Fox Affidavit and Supplementary Fox Affidavit.

Fox Affidavit at para. 36, Applicants' Motion Record, Tab 2.

Supplementary Fox Affidavit at paras. 6 - 16, Applicants' Supplementary Motion Record, Tab 1.

PART III - ISSUES

24. The issues on this motion are:

(a) Whether the Court should approve the Sale Transaction and vest the Purchased Assets in the Purchaser;

(b) Whether the rights and obligations of the Sellers under the Assigned Contracts should be assigned to the Purchaser;

(c) Whether the Pre-Closing Reorganization and ancillary relief should be approved;

(d) Whether other ancillary relief in the Approval and Vesting Order should be granted; and

(e) Whether the Stay Period should be extended to May 1, 2017.

PART IV - LAW AND ARGUMENT

A. The Sale Transaction should be approved

i. The Court has jurisdiction to approve a sale of all or substantially all of the assets of a debtor company in a CCAA proceeding

25. It is well-established that the Court has the jurisdiction to approve a sale of all or substantially all of the assets of a debtor company under the CCAA in the absence of a plan of arrangement where the sale is in the best interests of the stakeholders generally.

> *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. Sup. Ct. J. [Commercial List]) at paras. 35-40 and 48 ["***Nortel***"], Applicants' Book of Authorities, Tab 1.

> *Re Brainhunter Inc.*, 2009 CarswellOnt 7627 (Sup. Ct. J. [Commercial List]) at paras. 12-13, Applicants' Book of Authorities, Tab 2.

26. Pursuant to s. 36 of the CCAA, the Court may 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 such a sale:

(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.

27. 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 3.

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

ii. The Sale Transaction meets the requisite criteria and should be approved

28. The Sale Transaction satisfies each of the s. 36(3) criteria and the *Soundair* principles, and is in the best interest of the Applicants' stakeholders generally, and should therefore be approved.

(1) The process leading to the proposed sale or disposition was reasonable in the circumstances

29. The Sale Process has been vetted and approved by the Courts, and the Applicants' stakeholders, who have not raised any objection to the Sales Process. This Court has noted that "once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances."

> *Re Grant Forest Products Inc.* 2010 ONSC 1846 [Comm. List] at para 29, Applicants' Book of Authorities, Tab 5.

30. The Applicants have conducted the Sales Process in accordance with the terms of the Bidding Procedures, which were negotiated between the Applicants and various stakeholders, including the Stalking Horse Purchaser, the UCC and the Equity Committee, in consultation with each of the Office of the United States Trustee for the District of Delaware and the Monitor.

The negotiations resulted in a three week extension to the originally contemplated deadlines in the Bidding Procedures, resulting in a more robust marketing process for the benefit of stakeholders.

> Fox Affidavit at para. 10, Applicants' Motion Record, Tab 2.

31. Conducting the Sales Process in accordance with the Bidding Procedures resulted in a rigorous market testing for the Applicants' business and assets. Centerview actively solicited interested parties over the course of approximately three months, which covered the universe of logical potential purchasers. All interested parties were able to perform comprehensive due diligence on the Applicant's business and assets in order to develop a bid.

> Fox Affidavit at paras. 11 - 12, Applicants' Motion Record, Tab 2.
>
> Puntus Declaration at paras. 13 - 14, Compendium of Applicants' U.S. Materials, Tab 1(B).
>
> Sixth Report at para. 34.

32. The Sales Process was also monitored by the Monitor and advisors to the Consultation Parties, ensuring that the process was fair and robust.

> Fox Affidavit at paras. 13, 16, Applicants' Motion Record, Tab 2.
>
> Puntus Declaration at para. 16, Compendium of Applicants' U.S. Materials, Tab 1(B).

(2) The Courts approved the Sales Process and the Monitor supported its approval

33. As set out above, the Courts approved the Bidding Procedures, which was supported by the Monitor. The Monitor has noted that that it believes "the Sales Process included an appropriate canvassing of the market and that potential purchasers were provided with

sufficient time and information to make an informed decision about the investment opportunity."

Sixth Report at para. 34.

(3) The Monitor believes the Sale Transaction is more beneficial to the Applicants' creditors than a sale or disposition under a bankruptcy

34. The Monitor has noted that it is satisfied that the Sale Transaction is more beneficial than a sale in a bankruptcy. The Monitor has further noted that, while estimates are preliminary, the proceeds arising from the Sale Transaction suggest that the value received might be sufficient to repay all or substantially all of the amounts due to creditors. In addition to the significant value received for stakeholders, the Sale Transaction benefits a broader group of stakeholders as the business is continuing as a going concern, preserving employment for approximately 700 of the Applicants' employees and continuing the supply chain for the company's suppliers.

Sixth Report at paras. 35 – 38.

(4) Stakeholders were consulted during the Sales Process

35. The Applicants' stakeholders were consulted on a regular basis in advance of and throughout the Sales Process to ensure the process was fair, reasonable and resulted in the highest or otherwise best offer for the Applicants' business and assets.

36. The Monitor and financial advisors to the UCC and Equity Committee were consulted on the list of potential purchasers by Centerview to ensure the universe of potential purchasers was canvassed. Centerview contacted all appropriate parties whose names were provided by the Monitor or the advisors of these stakeholders.

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

37. The Applicants, together with Centerview and the Applicants' other advisors, also engaged with the Consultation Parties and their respective advisors throughout the Sales Process delivering regular updates on the status of the Sales Process, including on an *ad hoc basis* when requested by the Consultation Parties. The updates typically provided detail on the status of each prospective bidder, the relative interest shown by prospective bidders, the outcome of management presentations and site visits, and the level of work being done by each prospective bidder.

Fox Affidavit at para. 13, Applicants' Motion Record, Tab 2.

Puntus Declaration at para. 16, Compendium of Applicants' U.S. Materials, Tab 1(B).

(5) The effects of the Sale Transaction on the Applicants' stakeholders are positive

38. The Stalking Horse Agreement will result in the Applicants receiving consideration of approximately $575 million plus the assumption of liabilities, estimated at approximately $50 million as of December 31, 2016 and which includes, ordinary course trade payables, certain employee-related expenses and accrued liabilities. The consideration is sufficient to repay the Applicants' secured debt in full and provide meaningful recoveries to the Applicants' other stakeholders.

Puntus Declaration at para. 18, Compendium of Applicants' U.S. Materials, Tab 1(B).

Sixth Report at paras. 35, 37.

39. The Stalking Horse Agreement also leaves the Applicants' business to continue operating as a going-concern, providing certainty for the Applicants' suppliers and customers.

Maintaining positive relationships with these key stakeholders preserves the going-concern value of the Applicants' business.

> Puntus Declaration at para. 20, Compendium of Applicants' U.S. Materials, Tab 1(B).

40. The Sale Transaction is also expected to preserve employment for 700 employees of the Applicants.

> Sixth Report at para. 35.

(6) The Stalking Horse Agreement provides fair and reasonable consideration for the Purchased Assets

41. The Stalking Horse Agreement was the subject of good faith, arms' length negotiations between the Applicants and the Stalking Horse Purchaser and represents the highest offer for the Applicants' assets after a robust, Court-approved market test. It is the best option available to the Applicants to maximize recoveries for stakeholders.

> Puntus Declaration at para. 18, Compendium of Applicants' U.S. Materials, Tab 1(B).

42. Further, in the circumstances, the Stalking Horse Agreement represents fair and reasonable value for the Purchased Assets. Prior to commencing the Restructuring Proceedings, the Applicants had a highly leveraged financial structure, faced significant competitive pressure in all of their markets and experienced softening market conditions and are the subject of an ongoing internal audit investigation. Despite these challenges, the purchase price to be received by the Applicants results in full repayment of their secured debt and meaningful recoveries for other stakeholders. The purchase price, including assumed liabilities, indicates a 22.5x multiple of the Applicants' annualized publicly-reported adjusted EBITDA for the nine months ending

February 28, 2016 and reflects a valuation much higher than the Applicants' historical average trading multiple.

> Puntus Declaration at para. 19, Compendium of Applicants' U.S. Materials, Tab 1(B).

43. The Stalking Horse Agreement contemplates that the consideration may be satisfied in part by forgiveness under the Term Loan DIP Facility, which was used to refinance the Applicants' pre-filing term loan facility resulting in full repayment of the Applicants' largest pre-filing creditor group. Any amount of the Term Loan DIP Facility applied towards a credit bid will result in a corresponding reduction of the facility, allowing unsecured creditors to recover from the cash portion of the purchase price.

> Fox Affidavit at Exhibit "B" at section 2.6(b), Applicants' Motion Record, Tab 2.

44. The Monitor has indicated that the result of the Sales Process confirms the purchase price offered under the Stalking Horse Agreement is fair and reasonable consideration for the Purchased Assets. The Monitor has noted that the failure of a prospective bidder to make a Qualified Bid was due to the fact that bidders did not believe that they could achieve an appropriate return by paying more than the Stalking Horse Agreement. Receiving no Qualified Bids was not due to a lack of time or information in the Sales Process.

> Sixth Report at para. 40.

B. The assignment of the Assigned Contracts should be approved

45. The Applicants are requesting the Court order the assignment and assumption of the Assigned Contracts. Fifteen parties (other than Q30) objected the assignment of their respective

Assigned Contract. Since receiving the objections the Applicants have been working to resolve them on a consensual basis. The Applicants are continuing to attempt to resolve the objections, and as of the date of this factum, 4 objections are still outstanding. Appendix "A" to this factum sets out a summary of each of the outstanding objections related to the assignment of the Assigned Contracts and the Applicants' specific response to each objection. The objection of Q30 is addressed further below.

i. The Court has jurisdiction to approve the assignment and assumption of the Assigned Contracts

46. 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 Veris Gold Corp.*, 2015 BCSC 1204 at paras. 53-56 ["***Veris***"], Applicants' Book of Authorities, Tab 6
>
> *Re TBS Acquireco Inc.*, 2013 ONSC 4663 at para. 25 ["***Acquireco***"], Applicants' Book of Authorities, Tab 7.

47. In permitting the assignment of contracts, Courts have also ordered that all contract counterparties are deemed to have waived all existing or previously committed non-monetary defaults under assigned contracts.

> *White Birch Paper Holding Company (Re)* (2010), 72 C.B.R. (5th) 63 (Que. S.C.) at para. 16, Applicants' Book of Authorities, Tab 8.

48. 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).

ii. The Court should order the assignment of the Assigned Contracts

49. 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 Assigned Contracts.

(1) The Monitor has approved the assignment and assumption of the Assigned Contracts

50. The Monitor has approved assignment of the Assigned Contracts noting that the assignment is necessary to complete the Sale Transaction. The Monitor has also noted that the assignment requested by the Applicants is in the best interest of stakeholders generally.

Sixth Report at para. 50.

(2) The Purchaser will be able perform the rights and obligations under the Assigned Contracts

51. As an acquisition vehicle of Sagard and Fairfax, two leading Canadian investment funds with various portfolio companies, the Purchaser will be well-capitalized by Sagard and Fairfax able to continue fulfilling its obligations in the ordinary course. The Purchaser is expected to continue operating the Applicants' business in the ordinary course, leaving counterparties in substantially the same position that they were in prior to the Sale Transaction. In effect, the Purchaser will be "stepping into the shoes" of the Applicants, maintaining the *status quo* for contract counterparties. The Applicants' management team and other senior employees are expected to become employees of the Purchaser which will ensure a smooth transition of the Applicants' business following closing of the Sale Transaction.

> Augustine Declaration at paras. 4, 10, Compendium of Applicants' US Materials at Tab 5.

52. Upon its emergence from CCAA protection, the Applicants' business will have a significantly improved financial position, and will be operated by well-capitalized ownership group with experienced management. The Sale Transaction will result in the Applicants' business being significantly less leveraged than upon commencement of the Restructuring Proceedings. Sagard and Fairfax are financing the Sale Transaction with an equity investment anticipated to be $345 million. Upon completion the Sale Transaction, the Purchaser will have access to a $200 million ABL credit facility (with $100 million of availability) and $27 million of cash on hand. The new capital structure significantly improves the Purchasers' ability to fulfill any financial obligations under the Assigned Contracts. Accordingly, the Purchaser will have the capacity to perform its obligations in respect of the Assigned Contracts. Counterparties will not be negatively affected, and may indeed be positively affected, by the change in ownership.

Augustine Declaration at para. 7, Compendium of Applicants' US Materials at Tab 5.

(3) It is appropriate to assign the Assigned Contracts to the Purchaser

53. The Assigned Contracts represent the contracts identified by the Purchaser, with the assistance of the Applicants' management team and their advisors, as critical to operation of the Applicants' business. Assignment of the contracts will assist in the business continuing as a going-concern following the Sale Transaction.

54. The Monitor has noted that none of the Assigned Contracts appear to be agreements that cannot be assigned pursuant to s. 11.3(2) of the CCAA.

Sixth Report at para. 49.

55. Other factors supporting the requested assignment order includes:

(a) the Purchaser is expected to continue operating the Applicants' business in the ordinary course and the Sale Transaction provides a going-concern solution for Applicants and provides the highest available value for the Applicants' stakeholders;

(b) the Purchaser will assume all obligations associated with the Assigned Contracts arising following closing of the Sale Transaction;

(c) the counterparties to Assigned Contracts represent various relationships with suppliers, customers and other business partners, whose relationships are critical to the going concern value of the Applicants' business;

(d) assignment of the Assigned Contracts is a condition to closing under the Stalking Horse Agreement;

(e) the Applicants have made significant efforts to give notice to counterparties of the potential assignment and obtain consents to the assignment where appropriate, however, given the number of contracts in issue, approximately 1,300, the ability to consensually assign all agreements within the available time was difficult; and

Fox Affidavit at paras. 23 - 31, Applicants' Motion Record, Tab 2.

Puntus Declaration at para. 20, Compendium of Applicants' U.S. Materials, Tab 1(B).

Sixth Report at paras. 47 – 50.

56. Section 11.3(4) of the CCAA provides that the Court may not grant an assignment order unless it is satisfied that all monetary defaults in relation to the agreements to be assigned – other than those arising by reason only of the debtor's insolvency, the commencement of the CCAA proceedings or the debtor's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the Court.

CCAA, s. 11.3(4).

57. The Draft Approval and Vesting Order provides that all cure costs will be paid by either the Purchaser or the Applicants prior to closing of the Sale Transaction, or promptly upon receipt of sufficient payment details. The Applicants provided notice of cure cost amount owing under each potential Assigned Contract on December 12, 2016 and January 4, 2017. Each counterparty has had a sufficient opportunity to decide whether to contest the cure cost

amount. The Applicants have worked to resolve the majority of disputed cure cost amounts. As of the date of this factum, there are two disputes related to cure cost amount outstanding. The Applicants position with respect to these disputes is set forth on Appendix "A".

> Fox Affidavit at paras. 26 - 30, Applicants' Motion Record, Tab 2.

58. Based on the submissions in Appendix "A" it is appropriate to fix cure costs to the amounts requested by the Applicants on Appendix "A". Alternatively, the Draft Approval and Vesting Order provides that if a dispute related to cure costs is outstanding a reserve for the disputed cure cost amount will be held pending a final resolution or determination of the cure cost amount. The reserve ensures counterparties will not be prejudiced by the assignment of their Assigned Contract, and the assignments may in turn become effective at Closing.

> Draft Approval and Vesting Order at para. 23, Applicants' Motion Record, Tab 3.

iii. The Court should order the assignment of the Q30 Contracts

59. Q30 Sports LLC, Q30 Sports Science, Bruce Angus and Thomas Hoey (collectively, "**Q30**") object to the assignment of the rights and obligations arising under their contracts with the Applicants on grounds that have no bearing to the application of section 11.3 of the CCAA. The factors set out in section 11.3 of the CCAA all weigh in favour of the assignment of the Q30 Contracts to the Purchaser.

> Objection of Q30 Sports, LLC, Q30 Sports Science, LLC, Bruce Angus and Thomas Hoey to the Sale Motion and the Proposed Assumption and Assignment of the Q30 Agreements [the "**Q30 Objection**"]. Five contracts are at issue (as each is defined in the Q30 Objection): the License Agreement, the Trademark Agreement, the Equity Agreement and two IC Agreements (collectively, the "**Q30 Contracts**").

60. The bulk of the legal argument set out in the Q30 Objection is dedicated to the application of section 365 of the U.S. Bankruptcy Code and focuses on whether the proposed assignment satisfies certain technical requirements. The objection is largely immaterial to the CCAA. For the purpose of s. 11.3 of the CCAA, the various objections raised by Q30 can be reduced to three:[4]

(a) that certain of the Q30 Contracts are "executory contracts" subject to special considerations and restrictions vis-à-vis their assignment and assumption, whereas others are not executory contracts and thereby not assignable at all;

(b) that the Q30 Contracts have material non-monetary defaults that Q30 alleges cannot be cured and thereby should not be assigned; and

(c) that the Q30 Contracts (or some of them) fall into one of the section 11.3(2) statutory exceptions to assignment and thereby cannot be assigned.

Q30 Objection at paras. 39 to 66.

(1) The classification of the Q30 Contracts for purposes of the U.S. Bankruptcy Code is irrelevant to the CCAA

61. Whether the Q30 Contracts are "executory contracts" for the purpose of section 365 of the U.S. Bankruptcy Code has no bearing on whether they are assignable pursuant to section 11.3 of the CCAA. The technical American concept of "executory contracts" does not exist in the CCAA and the Courts have refused to import it. In *Allarco*, the Court cautioned against importing the concept of "executory contracts" into the CCAA, stressing that "it is more

[4] Q30 also disputes whether the Applicants have accurately valued the monetary defaults under the Q30 Contracts, but this is not a grounds on which to object to an assignment pursuant to section 11.3.

appropriate to rely on Canadian law and on first principles." In *Welcome Ford*, the Court held that the interpretation of the BIA counterpart to section 11.3 of the CCAA requires "the application of basic principles of Canadian law to the evidence presented in this case."

> *Re Allarco Entertainment Inc.*, 2009 ABQB 503 at para. 44, Applicants' Book of Authorities, Tab 9 (with respect to the issue of whether the Court should unilaterally vary certain contracts and/or stay their termination).
>
> *Ford Credit Canada Limited v. Welcome Ford Sales Ltd.*, 2010 ABQB 798 at para. 67 ["***Welcome Ford* ABQB**"] aff'd 2011 ABCA 158, Applicants' Book of Authorities, Tab 10 (wherein the Courts declined to apply American law to determine if personal contracts were assignable under section 81.4 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("**BIA**")).
>
> *Re West Bay SonShip Yachts Ltd.*, 2009 BCCA 31, Applicants' Book of Authorities, Tab 11 (where the Court of Appeal declined to adopt the narrow and technical definition of "executory contract' under U.S. bankruptcy law when interpreting the meaning of the term in a plan of arrangement (instead favouring a more general Canadian meaning derived from Canadian first principles and case law)).

62. In this case, the well-settled Canadian authorities on section 11.3 of the CCAA, referred to above, provide a complete answer to the Q30 Objection.

(2) Section 11.3 does not require the debtor company to cure non-monetary defaults

63. Contrary to the Q30 Objection, curing non-monetary defaults is not a condition precedent to the Court-ordered assignment of the Q30 Contracts to the Purchaser. Section 11.3 of the CCAA only requires that the Court be satisfied that certain pre-filing monetary defaults will be cured which, as set out above, will be satisfied.

64. The legislative history of the CCAA makes clear that curing non-monetary defaults is not a precondition the assignment of contracts under section 11.3 of the CCAA. The Senate Standing Committee on Banking, Trade and Commerce, Debtors and Creditors, after consulting

with numerous stakeholders, concluded that counterparties to a contract "suffer no prejudice" if monetary defaults alone are cured. Industry Canada states the purpose underlying section 11.3(4) of the CCAA as follows:

> Subsection (4) is amended to ensure that the agreement may only be assigned if the court is satisfied that, if a monetary default has occurred, it will be remedied within a time frame set by the court. It also clarifies that monetary defaults do not include those that arise merely by virtue of the fact that the debtor company is insolvent or failed to perform a non-monetary obligation. This amendment is required to ensure that agreements may not be drafted so as to be rendered unassignable, or assignable only at excessive cost, thereby defeating the purpose of the provision and providing the other party to the agreement a means of obtaining greater recovery than can be expected by other creditors of the same class.
>
> Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause-by-Clause Analysis, Applicants' Book of Authorities, Tab 12.
>
> See also The Report of the Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors sharing the Burden: a review of the Bankruptcy and Insolvency Act and the *Companies Creditors Arrangement Act* [the **"Senate Report"**] (November 2003), Section J: "Executory Contracts" at 138, Applicants' Book of Authorities, Tab 13.

65. This Court has routinely ordered the assignment of contracts without imposing a particular resolution or curing as to non-monetary defaults on the parties as a precondition to the ordering the assignment.

> *Golf Town Canada Holdings Inc., (Re)*, (27 October 2016), Toronto, Ontario, Court File No. CV-16-11527-00CL (Ontario Superior Court of Justice) [Commercial List], Assignment Order, Applicants' Book of Authorities, Tab 14.
>
> *Acquireco* at paras. 24 - 25, Applicants' Book of Authorities, Tab 7 (where the Court approved a provision curing any non-monetary defaults unless such default continued after the assignment to the purchaser).

(3) The Q30 Contracts are assignable and their assignment is appropriate

66. Section 11.3 of the CCAA is a complete code that overrides the common law of assignment and empowers the CCAA Court to assign any rights or obligations arising under a contract (subject to the limited exceptions in section 11.3(2)). In this case, none of the exceptions set out in section 11.3(2) apply to the Q30 Contracts. Section 11.3(2) provides:

> 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.
>
> CCAA, s. 11.3(2).
>
> *Ford Credit Canada Limited v. Welcome Ford Sales Limited* (sub nom. *Ford Motor Company of Canada Limited. v. Welcome Ford Sales Ltd.*), 2011 ABCA 158 ["***Welcome Ford* ABCA**"] at paras. 28-29, Applicants' Book of Authorities, Tab 15 (with respect to the BIA counterpart section to 11.3 of the CCAA).

67. The exclusions in subsections 11.3(2)(a)-(c) are clearly inapplicable. The sole issue on this motion is whether the rights and obligations under Q30 Contracts are not "assignable by reason of their nature". This category is meant to apply contextually, with its underlying purpose being to "provide flexibility to the court to review each agreement in light of the circumstances and determine whether it would be appropriate to allow the assignment."

> Office of the Superintendent of Bankruptcy Canada, Bill C-55: Clause-by-clause analysis, Applicants' Book of Authorities, Tab 16. Section 11.3(2) at the time read: "Subsection (1) does not apply in respect of rights and obligations(a) under an eligible financial contract within the meaning of

> subsection 11.05(3);(b) under a collective agreement; or (c) that are not assignable by reason of their nature."
>
> *Welcome Ford* ABCA at paras. 33, Applicants' Book of Authorities, Tab 15 (where the Court endorsed this interpretation as a valid interpretive aid.)

68. The Monitor has noted that the Assigned Contracts, including the Q30 Contracts, do not appear to fall within any of the exceptions set out in section 11.3(2).

> Sixth Report at para. 49.

69. The Alberta Court of Appeal stressed that in determining whether rights or obligations under a contract "are not assignable by reason of their nature", courts should be consider the factors under section 11.3(3) of the CCAA, as supplemented by the following:

(a) whether the objecting counterparty unreasonably withheld its consent to the assignment;

(b) whether the "rights and remedies" of the objecting counterparty assigned will be preserved against the proposed assignee; and

(c) whether the proposed assignee can perform the obligations arising under the contract to be assigned "in the same manner" as the assignor.

> *Welcome Ford* ABCA at paras. 60 - 71, Applicants' Book of Authorities, Tab 15 (with respect to the counterpart to section 11.3 of the CCAA section 84.1(3) of the BIA).

70. The record establishes that the section 11.3(3) factors are satisfied and that assigning each of the Q30 Contracts to the Stalking Horse Purchaser is appropriate:

(a) generally, the Q30 Contracts are effectively commercial agreements designed to commercialize certain intellectual property, with proceeds to be shared between the parties. These are precisely the kinds of contract that, as a whole, are deemed to be assignable by their virtue of their nature for the purpose of section 11.3 of the CCAA. As in *Welcome Ford*, there is nothing in the record to support the inference that the Q30 Contracts could only be performed by the Applicants rather than by another entity with sufficient capital and experience in the sports equipment industry, such as the Purchaser;

Welcome Ford ABCA at paras. 49-58, Applicants' Book of Authorities, Tab 15

(b) the Monitor has noted that the Q30 Contracts have a significant value for the Applicants' business and are considered critical. The assignment of the Q30 Contracts is essential in the context of the Sale Transaction. Further, the assignment of the Q30 Contracts is a condition precedent to the Sale Transaction and thereby important to the restructuring process. In *Nexient,* the Court noted that whether the assignment was important to the "reorganization process" is a consideration in deciding whether to assign a contract under the CCAA and the Court should have regard to the overall purpose of the CCAA of allowing a business to continue in the ordinary course after completing its restructuring;

Sixth Report at para. 53.

Re Nexient Learning Inc. (2009), 62 C.B.R. (5th) 248 at paras. 55-58, ["***Nexient***"] Applicants' Book of Authorities, Tab 17.

Veris at paras. 53-55; Applicants' Book of Authorities, Tab 6.

(c) the Applicants' creditors also support the assignment of the Q30 Contracts. The UCC has noted that if the Q30 Contracts are not assigned there is a risk of termination of the Stalking Horse Agreement which could cause creditors to be "significantly and adversely impacted" and "all creditor recoveries in these cases would be immediately imperiled.";

Notice of Filing In the Chapter 11 Cases of The Joinder of Official Committee of Unsecured Creditors of BPS US Holdings, Inc. et al. to Debtors' Reply To Objection By Q30 Sports, LLC And Q30 Sports Science, LLC And Memorandum of Law in Support of the Debtors' Motion for an Order Pursuant to Section 365 Of The Bankruptcy Code Authorizing Assignment Of Exclusive License Agreements, Schedule "A" at p. 2.

(d) the evidentiary material filed by the Applicants in the U.S. Court establishes that the Stalking Horse Horse Purchaser will perform all of the obligations it seeks to assume "in the same manner" as the PSG Entities have performed to date. There is no substantive basis on which to find that Q30 would be prejudiced by the assignment to the Stalking Purchaser so long as all of the monetary defaults arising under the agreement are cured;

Augustine Declaration at paras. 7-12, Compendium of the Applicants' U.S. Materials at Tab 5, detailing the Stalking Horse Purchaser's financial situation and its ability and willingness to perform the Q30 Contracts.

Kent Declaration at paras. 2-15, Compendium of the Applicants' U.S. Materials at Tab 3, detailing the Applicants efforts to commercialize the IP that is the subject of the Q30 Contracts.

Eno Declaration at paras. 11-50, Compendium of the Applicants' U.S. Materials at Tab 4, detailing the Applicants efforts to secure regulatory approval in Canada and the United States.

(e) there is no principle in Canadian insolvency law holding that intellectual property ("**IP**") rights are not assignable in an insolvency. To the contrary, in

Nexient, Justice Wilton-Siegel took it to be a self-evident that an exclusive license is assignable in a liquidating CCAA on the appropriate facts. Courts ordinarily approve assignment orders effecting the transfer of rights;

Nexient at para. 55 to 59.

(f) the objection that the Equity Agreement is unassignable on grounds that it is not an executory contract and/or that it contains an anti-assignment clause with no carve-out has no bearing on the application section 11.3 of the CCAA;

Q30 Objection at paras. 77-79.

(g) the IC Agreements are not unassignable simply in virtue of being personal service contracts, and whether they are "executory contracts" or not is irrelevant under the CCAA. Even at common law, personal service contracts are assignable "if it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it". In any event, section 11.3 of the CCAA ousts the common law rule in favour of the statutory factors, with a central issue being "whether those rights and obligations cannot be performed by the proposed assignee";

Welcome Ford ABCA at paras. 55-56, Applicants' Book of Authorities, Tab 15.

For a review of the common law principles, see *Remington Development Corporation v. Enmax Power Corporation*, 2012 ABCA 196 at paras. 15-21, Applicants' Book of Authorities, Tab 19.

See also *Re Song Corp.* (2002), 31 CBR (4th) 97 (Ont. S.C.J.) at paras. 65-73 Applicants' Book of Authorities, Tab 20 (where the Court ordered the assignment of certain agreements argued to be personal service contracts, on the basis that section 83(2) of the BIA ousted the common law, permitting the trustee assign personal service contracts).

(h) generally, Q30's contractual rights and obligations under the Q30 Contracts will be preserved if assigned to the Stalking Horse Purchaser. As in *Welcome Ford*, this weighs strongly in favour of assignability; and

> *Welcome Ford* ABCA at paras. 55-56, Applicants' Book of Authorities, Tab 15 and 71, aff'g *Welcome Ford* ABQB at para. 96, Applicants' Book of Authorities, Tab 10.
>
> Sixth Report at para. 53.

(i) as the Applicants argue more fully in their materials filed in reply in the U.S. Court, Q30 is unreasonably withholding its consent to assignment. As in *Welcome Ford*, this factor weighs in favour of assigning the contracts.

> Applicants' Reply to the Sale Objection at paras. 46-50, Compendium of the Applicants' U.S. Materials at Tab 5.
>
> *Nexient* at paras. 98 and 100, Applicants' Book of Authorities, Tab 17.

C. The Pre-Closing Reorganization should be approved

i. The Court has jurisdiction to approve the Pre-Closing Reorganization

71. Section 11 of the CCAA provides the Court the power to make any order that it considers appropriate in the circumstances, provided the order is consistent with the CCAA. With this jurisdiction, a court may approve a material transaction entered into by the debtor company if (i) the transaction is fair and reasonable; (ii) the transactions will be beneficial to the debtor and its stakeholders generally; and (iii) the transaction is consistent with the purpose and spirit of the CCAA.

> CCAA, s. 11.
>
> *Return on Innovation Capital Ltd v Gandi Innovations Ltd*, 2010 ONSC 1759 at para. 11, Applicants' Book of Authorities, Tab 21.

Air Canada (Re), [2004] O.J. No. 303 at para. 9, Applicants' Book of Authorities at Tab 22.

72. In *Calpine*, the Court approved a global settlement agreement involving various transactions to be undertaken by the debtor companies. The Court stated:

> That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

Calpine Canada Energy Ltd., Re, 2007 ABQB 504 ["*Calpine*"] at para. 75, Applicants' Book of Authorities, Tab 23.

73. In *AbitibiBowater*, the Court approved a series of intercompany transactions outside of a plan of arrangement in order to prevent adverse tax consequences arising from the repayment of an intercompany note. The Court noted that there were economic reasons for the tax restructuring, the restructuring appeared reasonable and legitimate, and the legality of the corporate steps was properly supported.

AbitibiBowater (Re), 2009 QCCS 5833 ["*AbitibiBowater*"] at paras. 29 - 32, Applicants' Book of Authorities, Tab 24.

74. Courts have also authorized pre-closing restructuring steps for tax purposes in the context of an asset sale.

Lightstream Resources Ltd (Re), (8 December 2016), Calgary, Alberta, Court File No. 1601-12571 (Court of Queen's Bench Alberta) Approval and Vesting Order at para. 38, Applicants' Book of Authorities, Tab 25.

ii. The Court should approve the Pre-Closing Reorganization

75. For the reasons detailed below, the Pre-Closing Reorganization is fair and reasonable, benefits stakeholders generally, and is consistent with the purpose of the CCAA, and should therefore be approved.

76. Section 5.18 of the Stalking Horse Agreement has always contemplated the Pre-Closing Reorganization, though the specific steps have been amended since the Stalking Horse Agreement was executed. The Pre-Closing Reorganization has two primary objectives:

(a) the Pre-Closing Reorganization amalgamates certain Canadian Debtors to consolidate the tax attributes of the entities in order to minimize corporate taxes payable on account of completing the Sale Transaction.

(b) Second, the Pre-Closing Reorganization will satisfy intercompany receivables and also unwind an intercompany financing structure to eliminate any debts owing amongst the Applicants and non-applicant subsidiaries to be acquired by the Stalking Horse Purchaser. The transactions will allow for distributions to be made more directly to stakeholders, repatriate cash held in the PSG Entities' non-applicant subsidiaries for distribution to the Applicants' stakeholders, and minimize potential tax liability of the Applicants.

Fox Affidavit at para. 32, Applicants' Motion Record, Tab 2.

77. The Pre-Closing Reorganization will not materially adversely impact stakeholders, either individually or in the aggregate. And in any event, as described further below, the Draft Approval and Vesting Order preserves allocation rights of stakeholders based on the

Applicants' corporate structure existing prior to the Pre-Closing Reorganization should prejudice result from the Pre-Closing Reorganization.

> Fox Affidavit at paras. 40 – 41, Applicants' Motion Record, Tab 2.

78. In *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada held that the appropriateness requirement in s. 11 of the CCAA must be assessed in light of the policy objectives underlying the CCAA:

> . . . Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. . . when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court. [Citations omitted]
>
> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 70-71, Applicants' Book of Authorities, Tab 26.

79. Courts have recognized on numerous occasions that a fundamental purpose of the CCAA is to achieve the maximum value available for stakeholders. The Pre-Closing Reorganization is expected to result in tax savings of up to CAD $10 million maximizing the proceeds distributable to stakeholders following the Sale Transaction. Therefore, the Pre-Closing Reorganization is furthering the purposes of the CCAA and it is appropriate for it to be approved.

> *Dondeb Inc., Re*, 2012 ONSC 608 at para. 15, Applicants' Book of Authorities, Tab 27.
>
> *Nortel* at paras. 25 – 40, Applicants' Book of Authorities, Tab 1.

Fox Affidavit at paras. 40 - 41, Applicants' Motion Record, Tab 2.

80. Finally, the Applicants are not seeking to use section 11 of the CCAA to override Canadian corporate or other laws. The continuations and amalgamation of certain Canadian Debtors contemplated by the Pre-Closing Reorganization are being undertaken pursuant to the *Canada Business Corporations Act* and the British Columbia *Business Corporations Act* (the "**BCBCA**"), as applicable. The remaining steps are completed through the implementation of various intercompany transactions, including set-offs, distributions, repayments and transfers.

Fox Affidavit at paras. 36, Applicants' Motion Record, Tab 2.

Draft Approval and Vesting Order, Applicants' Motion Record, Tab 3.

iii. Relief necessary for the Pre-Closing Reorganization should be granted

(1) Staying defaults that may arise as result of the Pre-Closing Reorganization is appropriate

81. In *Doman Industries Ltd. (Re)*, the British Columbia Supreme Court held that the law is clear - under the CCAA a court may grant a permanent stay to prevent a creditor or non-creditor from accelerating indebtedness or terminating a contract:

> The law is clear that the court has the jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that <u>the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring</u>.
>
> *Doman Industries Ltd. (Re)* 2003 BCSC 376 at para. 15; Applicants' Book of Authorities, Tab 28.

82. The Draft Approval and Vesting Order provides that counterparties to contracts, agreements, licences or permits with the Applicants are prohibited from exercising any right or remedy that may arise as result of the Pre-Closing Reorganization. The relief is appropriate as it will assist with the Applicants continuing operation as a going-concern and ensure stability of the business is preserved following implementation of the Pre-Closing Reorganization and the Sale Transaction.

> Draft Approval and Vesting Order at para. 31, Applicants' Motion Record, Tab 3.

83. The Pre-Closing Reorganization will not result in prejudice to counterparties as it is expected to occur immediately or shortly prior to closing of the Sale Transaction. It does not have a fundamental effect on operation of the business or relationship with counterparties; rather it merely realigns the Applicants' corporate structure and rationalizes certain intercompany debt. Any attempt to claim a default arising from the Pre-Closing Reorganization would be a technical attempt by a counterparty to obtain leverage over the Applicants or the Purchaser. Therefore, it is appropriate to stay rights and remedies that may arise as result of the Pre-Closing Reorganization.

> Fox Affidavit at paras. 36, 41, Applicants' Motion Record, Tab 2.

(2) Preservation of allocation rights

84. The Applicants are requesting specific relief to preserve allocation and distribution rights of stakeholders if impacted by the Pre-Closing Reorganization. The Applicants are proposing to preserve the ability to distribute proceeds under the Applicants' corporate structure as it existed prior to the completion of the Pre-Closing Reorganization, including its intercompany notes.

Draft Approval and Vesting Order, Applicants' Motion Record, Tab 3.

Fox Affidavit at paras. 37 – 40, Applicants' Motion Record, Tab 2.

85. The Draft Approval and Vesting Order contemplates that the Applicants will preserve accounting entities, related systems, records and documents, and other information in order to produce a distribution model of creditor recoveries as if the Pre-Closing Reorganization had not occurred. If requested by the Monitor, UCC or Equity Committee, the Applicants will create such a model.

Draft Approval and Vesting Order at para. 28, Applicants' Motion Record, Tab 3.

Fox Affidavit at paras. 37, Applicants' Motion Record, Tab 2.

86. The process for determining distribution and allocation will remain subject to agreement by the Applicants, Monitor, UCC and Equity Committee, and failing such an agreement, in accordance with a determination by the Courts to be determined in a further process.

87. The general approach of proceeding with the Pre-Closing Reorganization to obtain the tax savings while preserving rights with respect to allocation is supported by the Monitor, the UCC and the Equity Committee, and was subject to intensive negotiations between the parties. Preservation of allocation rights is also necessary to complete the Pre-Reorganization as pursuant to the BCBCA, in order to complete a vertical short-form amalgamation, without court approval, a director or officer of the amalgamating Canadian Debtors must swear an affidavit stating that he or she believes and has reasonable grounds for believing that no creditor of the

company will be materially prejudiced by the amalgamation.[5] Section 277(3)(a) of the BCBCA states:

> (3) The affidavit referred to in subsection (1) must
>
> (a) state that the director or officer believes and has reasonable grounds for believing that no creditor of the company will be materially prejudiced by the amalgamation, …

Though the Applicants do not believe any creditor will be materially prejudiced by the Pre-Closing Reorganization, it is difficult to predict with certainty at this juncture whether the change in corporate structure could have an effect. Reserving the ability to distribute in accordance with a model reflecting the Pre-Closing Reorganization structure if prejudice does arise ensures the Applicants are able to complete to the Pre-Closing Reorganization for the benefit of stakeholders generally.

> British Columbia *Business Corporations Act*, SBC 2002, c 57 at s. 277.
>
> Fox Affidavit at paras. 40 - 41, Applicants' Motion Record, Tab 2.
>
> Sixth Report at paras. 67 – 73.

D. The additional relief requested in the Approval and Vesting Order should be granted

i. Exempting the Sale Transaction from the requirements under MI 61-101 is appropriate

88. Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") provides that certain types of transactions between issuers and control persons are subject to certain requirements, including obtaining a formal valuation and approval of the transaction by a majority of the minority shareholders. Due to Sagard's

[5] The BCBCA also provides that a short form vertical amalgamation may be completing without court approval by complying with a noticing regime, however, in the circumstances, it is impractical to proceed in that manner due to timing issues.

ownership of PSG's common shares, the Sale Transaction is subject to MI 61-101 and must comply with its requirements. However, s. 5.5(f) and s. 5.7(d) of MI 61-101 provide that if (i) the transaction is subject to court approval or a court orders that the transaction is effected under bankruptcy or insolvency law, (ii) the court is advised of the requirements of MI 61-101 regarding formal valuations and the possibility for exemption, and (iii) the court does not require compliance with s. 5.4 and/or s. 5.6, the issuer is exempt from the requirement to obtain a formal valuation (s. 5.4) and/or obtain minority approval (s. 5.6).

> MI 61-101 at s. 5.5(f) and s. 5.7(d), Applicants' Book of Authorities, Tab 29.

89. It is appropriate to exempt the Applicants and the Sale Transaction from the MI 61-101 as the Sale Transaction (i) was the result of a comprehensive, Court and Monitor-overseen marking process, (ii) represents the highest available value for stakeholders in the circumstances, including minority equity holders, (iii) benefits stakeholders generally; and (iv) is subject to approval by the Canadian Court and U.S. Court where any minority equity holder has to the opportunity to object to the Sale Transaction.

> Fox Affidavit at paras. 11 - 19, Applicants' Motion Record, Tab 2.
>
> Puntus Declaration at paras. 7 - 24, Compendium of Applicants' U.S. Materials, Tab 1(B).

90. The Initial Order contained similar relief in respect of approval of the Term Loan DIP Facility provided by the Stalking Horse Purchaser. Exemptions to MI 61-101 have also been granted in other CCAA proceedings.

> Initial Order at para. 51, Applicants' Motion Record, Tab 2(A).
>
> *RS Technologies Inc. (Re),* (9 September 2013), Calgary, Alberta, Court File No. 1301-02432 (Court of Queen's Bench Alberta) Order (Plan Sanction

and Amendments to ASPA) at para. 15, Applicants' Book of Authorities, Tab 30.

ii. Vesting of puts and forced sale provisions is appropriate

91. The Draft Approval and Vesting Order vests puts and forced sale provisions exercisable as consequence of the Sale Transaction from the Purchased Assets. The provision is included in the form of Approval and Vesting Order attached to the Stalking Horse Agreement, which the Applicants are required to obtain in order to close the Sale Transaction. Vesting such clauses has been permitted in prior CCAA Proceedings and is necessary to prevent unknown obligations from arising against the Stalking Horse Purchaser that a party may allege resulted from the Sale Transaction.

Arctic Glacier Inc. (Re), (21 June 2012), Winnipeg, Manitoba, Court File No. CI 12-01-76323, (Manitoba Queen's Bench) Amended and Restated Canada Vesting and Approval Order at para. 4, Applicants' Book of Authorities at Tab 31.

Firstonsite G.P. Inc. (Re), (9 May 2016), Toronto, Ontario, Court File No. CV-16-11358-00CL, (Ontario Superior Court of Justice) [Commercial List] Approval and Vesting Order at para. 4, Applicants' Book of Authorities at Tab 32.

E. The Stay Period should be extended

92. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to debtor companies where: (a) circumstances exist that make the order appropriate; and (b) the debtor companies have acted and are acting in good faith and with due diligence.

CCAA, s. 11.02.

93. In *Canwest Global Communications Corp. (Re)*, the Court granted an extension of the stay of proceedings based on the following factors (a) the cashflow forecast indicated that the

debtors had sufficient cash resources to operate throughout the extension of the stay period, (b) the monitor supported the extension, (c) there was a lack of opposition to the motion, and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

> *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List]) at para. 43, Applicants' Book of Authorities, Tab 33.

94. While the Applicants will not be operating any business after the closing of the Sale Transaction, an extension of the Stay Period is required to:

(a) address any post-closing matters ancillary to the Sale Transaction;

(b) review the proofs of claims submitted pursuant to an order of the Canadian Court dated December 19, 2016 and develop a claims process to quantify the claims against the Applicants;

(c) advance the distribution of proceeds arising from the Sale Transaction to stakeholders; and

(d) address any other issues as they arise in the Restructuring Proceedings.

> Fox Affidavit at paras. 44, Applicants' Motion Record, Tab 2.

95. The Applicants have acted and continue to act in good faith and with due diligence and the Monitor supports the extension of the Stay Period to May 1, 2017. No creditor will suffer any material prejudice if the Stay Period is extended as requested.

> Sixth Report at paras. 74 – 79.
>
> Fox Affidavit at paras. 47, Applicants' Motion Record, Tab 2.

96. The Applicants are currently unaware of any opposition to the requested stay extension.

PART V - ORDER REQUESTED

97. For all of the foregoing reasons, it is appropriate for the Court to grant the Draft Approval and Vesting Order and Stay Extension Order, both in the form sought by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2017.

Stikeman Elliott LLP
Lawyers for the Applicants

Appendix A

SUMMARY OF SALE MOTION OBJECTIONS AND RESPONSES

	Objection	Specific Objection(s)	Response(s) to Objections
1.	**Objection of G-Form, LLC to the Debtors' Proposed Assumption of Certain Executory Contracts and Unexpired Leases [Docket No. 641]**	**Cure:** G-Form, LLC, as supplier under an exclusive supply agreement with Bauer Hockey, Inc., objects to the proposed assumption and assignment unless the Cure Amount cures all alleged defaults under the supply agreement, including (1) $133,939.05 that the Debtors agree is owed on account of unpaid prepetition invoices and (2) G-Form's alleged lost profit and incidental and consequential damages arising from Bauer Hockey Inc.'s alleged breaches of the Supply Agreement in an amount to be determined after discovery concerning Bauer Hockey, Inc.'s alleged breaches.	The Debtors agree that the Cure Amount must be increased to $133,939.05, but otherwise dispute those factual and legal assertions of G-Form that seek to impose any additional Cure Amount or claim against the Debtors. Although the Debtors deny having any other liability to G-Form as alleged in the objection, the Debtors submit that even taking all of G-Form's allegations as true, G-Form has only alleged claims or causes of action independent of the agreement, not defaults under the supply agreement. As such, G-Form's allegations should be resolved in the claims resolution process, not as a cure objection. Alternatively, to the extent G-Form's allegations, if true, would give rise to a default under the supply agreement, the cure amount is unliquidated and disputed, and should be addressed by a reserve of the disputed portion of the cure in an amount approved by

	Objection	Specific Objection(s)	Response(s) to Objections
			the Court, with such dispute to be resolved after further negotiation by the parties or litigated at a subsequent hearing.
2.	**The Hockey Equipment Certification Council, Inc.'s ("HECC") Limited Objection Regarding Debtors' Notice of Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and Proposed Cure Amounts [Docket No. 647]**	**Assumption and Assignment:** HECC and Bauer Hockey, Inc. are party to a number of agreements that govern all aspects of Bauer Hockey's participation in HECC's equipment certification program (collectively, the "Certification Agreement"). The Certification Agreement includes a non-exclusive license of HECC's certification labels which include the HECC trade name and logo. HECC maintains that HECC's nonexclusive license is not assignable without HECC's consent, which HECC has not provided. In addition, HECC demands that, if the Certification Agreement is assigned, the Stalking Horse Purchaser must assume all of the agreements that comprise the Certification Agreement. **Adequate Assurance:** HECC objects and reserves all rights to the assumption and the assignment of the Certification Agreement until it receives adequate assurance of future performance from the Stalking Horse Purchaser.	The Debtors are conferring with HECC regarding their consent. The Debtors are awaiting agreement on a final form of consent to assignment, but otherwise resolved, and HECC's rights are reserved pending agreement on a final form of consent. If the dispute proceeds, the Debtors' response to the adequate assurance objection is set forth above and in Debtors' Omnibus U.S. Reply.

	Objection	Specific Objection(s)	Response(s) to Objections
3.	**Limited Objection Of USA Hockey, Inc. To The Sale Motion And The Debtors' Notice Of Potential Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases And Proposed Cure Amounts [Docket No. 719]**	**Cure:** USA Hockey Inc. and Bauer Hockey, Inc. are party to a certain sponsorship agreement pursuant to which USA Hockey assets that $14,000 is currently due and owing. USA Hockey alleges that the Debtors cannot assume and assign the sponsorship agreement until the $14,000 is paid pursuant to section 365(b)(1)(A) of the Bankruptcy Code. **Adequate Assurance**: USA Hockey objects to assumption and assignment on the basis that it has received no adequate assurance information from the Debtors of future performance from the Stalking Horse Purchaser. USA Hockey asserts that the Sponsorship Agreement cannot be assigned without its consent because it is a non-assignable, non-transferable intellectual property license.	The Debtors are conferring with USA Hockey regarding their consent. The Debtors' response to the adequate assurance objection is set forth above and in the Debtors' Omnibus U.S. Reply
4.	**Limited Objection of Oakley, Inc To Debtors' Proposed Sale of Assets Free And Clear of Claims, Liens, and Encumbrances [Docket No. 681]**	Assignment and Assumption: Objected to assumption and assignment of patent license agreement and sale of any products containing Oakley Trademarks	The Debtors will reply at the sale hearing.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. Sup. Ct. J. [Commercial List])

2. *Re Brainhunter Inc.*, 2009 CarswellOnt 7627 (Sup. Ct. J. [Commercial List])

3. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])

4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

5. *Re Grant Forest Products Inc.* 2010 ONSC 1846 [Comm. List]

6. *Re Veris Gold Corp.*, 2015 BCSC 1204

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

8. *White Birch Paper Holding Company (Re)* (2010), 72 C.B.R. (5th) 63 (Que. S.C.)

9. *Allarco Entertainment Inc., Re,* 2009 ABQB 503

10. *Ford Credit Canada Limited v. Welcome Ford Sales Ltd.,* 2010 ABQB 798

11. *Re West Bay SonShip Yachts Ltd., Re*, 2009 BCCA 31

12. Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause-by-Clause Analysis: https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01978.html

13. The Report of the Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors sharing the Burden: a review of the Bankruptcy and Insolvency Act and the *Companies Creditors Arrangement Act* (November 2003)

14. *Golf Town Canada Holdings Inc.*, *(Re)*, (27 October 2016), Toronto, Ontario, Court File No. CV-16-11527-00CL (Ontario Superior Court of Justice) [Commercial List]

15. *Ford Credit Canada Limited v. Welcome Ford Sales Limited* (sub nom. *Ford Motor Company of Canada Limited. v. Welcome Ford Sales Ltd.*), 2011 ABCA 158

16. Office of the Superintendent of Bankruptcy Canada, Bill C-55: Clause-by-Clause Analysis: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00908.html

17. *Re Nexient Learning Inc.* (2009), 62 C.B.R. (5th) 248

18. *Re Nortel Networks Corporation* (11 July 2011), Toronto, Ontario, Court File No. 09-CL-7950 (Ontario Superior Court of Justice) [Commercial List]

19. *Remington Development Corporation v. Enmax Power Corporation*, 2012 ABCA 196

20. *Re Song Corp.* (2002), 31 C.B.R. (4th) 97 (Ont. S.C.J.)

21. *Return on Innovation Capital Ltd v Gandi Innovations Ltd*, 2010 ONSC 1759

22. *Air Canada (Re),* [2004] O.J. No. 303

23. *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504

24. *AbitibiBowater, Re*, 2009 QCCS 5833

25. *Lightstream Resources Ltd (Re),* (December 8, 2016), Calgary, Alberta, Court File No. 1601-12571 (Court of Queen's Bench Alberta)

26. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

27. *Dondeb Inc., Re*, 2012 ONSC 608

28. *Doman Industries Ltd. (Re)* 2003 BCSC 376

29. Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions*

30. *RS Technologies Inc. (Re),* (September 9, 2013), Calgary, Alberta, Court File No. 1301-02432 (Court of Queen's Bench Alberta)

31. *Arctic Glacier Inc. (Re),* (June 21, 2012), Winnipeg, Manitoba, Court File No. CI 12-01-76323, (Manitoba Queen's Bench)

32. *Firstonsite G.P. Inc. (Re)*, (May 9, 2016), Toronto, Ontario, Court File No. CV-16-11358-00CL, (Ontario Superior Court of Justice) [Commercial List]

33. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List])

SCHEDULE "B"
RELEVANT STATUTES

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

…

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.

British Columbia *Business Corporations Act*, SBC 2002, c 57

Amalgamations without court approval

277 (1) An amalgamation may be effected under section 275 without court approval, and, for that purpose, there must be obtained from each amalgamating company, and deposited in that company's records office, an affidavit of a director or officer of that company that complies with subsection (2) of this section.

(2) The affidavit referred to in subsection (1) must

(a) state whichever of the following is applicable to the amalgamating company of which the individual making the affidavit is a director or officer:

(i) that the company has entered into an amalgamation agreement with the other amalgamating corporations and that amalgamation agreement

(A) complies with section 270, and

(B) has been adopted in accordance with section 271;

(ii) that the company proposes to amalgamate with one or more other corporations under section 273 or 274, as the case may be, and the amalgamation has been approved in accordance with section 273 or 274, as the case may be, and

(b) include whichever of the statements under subsection (3) is applicable.

(3) The affidavit referred to in subsection (1) must

(a) state that the director or officer believes and has reasonable grounds for believing that no creditor of the company will be materially prejudiced by the amalgamation, or

(b) state

(i) that the company has complied with section 278, giving particulars of the time and manner in which the required notices were sent, published or provided, as the case may be,

(ii) that the only objections in writing to the amalgamation received by the company fall into one or more of the following categories:

(A) objections on grounds that are frivolous or vexatious;

(B) objections by creditors who received a written notice under section 278 (3) (a) and who did not, within 15 days after the date of that notice, make application to the court for an order that the amalgamation not proceed;

(C) objections that have been dismissed by the court or withdrawn by the creditor, and

(iii) that the director or officer is not aware of there being any court order, or any application for a court order, that the amalgamation not proceed.

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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