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 OLD PSG WIND-DOWN LTD., OLD BHR WIND-DOWN CORP., OLD BPSU WIND-DOWN CORP., OLD BPSDS WIND-DOWN CORP., OLD EBS WIND-DOWN CORP., OLD PLG WIND-DOWN CORP., OLD PSGI WIND-DOWN CORP., OLD BHR INC., OLD BH INC., OLD BPSU INC., OLD BPSCI INC., OLD BPSUSH INC., OLD EBS INC., OLD PLG INC., AND OLD PSGI INC.

(Applicants)

FACTUM OF THE APPLICANTS
(Re: Stay Extension and Other Relief)

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TO: THE SERVICE LIST

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(Applicants)

PART I - INTRODUCTION

1. On October 31, 2016, the Applicants 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**"). 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**").

2. 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**").

3. This motion is brought by the Applicants seeking an Order:

(a) Approving the Lease Stipulation between the Applicants (by and through Old EBS Inc. (f/k/a Easton Baseball / Softball Inc.), on behalf of itself and its affiliated Applicants) and the Purchaser which settles the outstanding Capitalized Lease Issue between the parties (as those terms are defined below); and

(b) Extending the Stay Period (as defined by the Initial Order) to October 1, 2017.

PART II - THE FACTS

A. Background

4. The Applicants formerly designed, developed, manufactured, marketed and sold performance sports equipment and accessories for ice hockey, roller hockey, lacrosse, baseball and softball, as well as related apparel.

> Affidavit of Brian Fox sworn July 11, 2017 (the "**Fox Affidavit**") at para. 4, Applicants' Motion Record, Tab 2.

5. 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 on October 31, 2016.

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

6. An essential component of the Applicants' restructuring was the going concern sale of substantially all of their assets following a comprehensive marketing and sales process.

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

7. On February 6, 2017, the Courts issued and entered orders, among other things, approving the stalking horse asset purchase agreement dated October 31, 2016, as amended (the "**Asset Purchase Agreement**") for the sale of substantially all of the Applicants' assets to 9938982 Canada Inc. or its designate (in either case, the "**Purchaser**"). Closing of the transaction

contemplated under the Asset Purchase Agreement was announced on February 28, 2017 (the "**Closing**").

Fox Affidavit at paras. 8 - 9, Applicants' Motion Record, Tab 2.

B. Capitalized Lease Issue

8. Prior to Closing, the Applicants and the Purchaser could not reach agreement on the calculation of the purchase price due to a disagreement about whether a lease of Old EBS Inc. (f/k/a Easton Baseball/Softball Inc.), a US-incorporated Applicant, in respect of a property in Thousand Oaks, California constituted a "Capitalized Lease" under the Asset Purchase Agreement (the "**Capitalized Lease Issue**"). Under the Asset Purchase Agreement, liabilities related to capitalized leases were included in Specified Assumed Liability Deduction Amount (as that term is defined in the Asset Purchase Agreement) and deducted from the purchase price payable by the Purchaser to the Applicants at the Closing, whereas operating leases were assumed by the Purchaser without a corresponding deduction to the final purchase price.

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

9. To facilitate the Closing, the Applicants and Purchaser entered into the Third Amendment to the Asset Purchase Agreement Pursuant (the "**Third Amendment**"). Pursuant to the Third Amendment, the Applicants and the Purchaser agreed that an escrow agent shall retain US$12,008,073 (the "**Capital Lease Escrow Amount**") pending resolution of the Capitalized Lease Issue.

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

10. The Applicants and the Purchaser have agreed to a stipulation (the "**Lease Stipulation**") pursuant to which the Applicants shall receive US$8,000,000 of the Capitalized Lease Escrow

Amount and the Purchaser shall receive the remaining US$4,008,073 from the Capital Lease Escrow Amount.

> Fox Affidavit at para. 14, Applicants' Motion Record, Tab 2.
>
> Affidavit of Keisha Lackpatiah-Sealy sworn July 13, 2017, Applicants' Supplementary Motion Record, Tab 1.

11. If approved by the Courts, the Lease Stipulation will result in full and final settlement the Capitalized Lease Issue on the terms set out therein.

> Fox Affidavit at para. 14, Applicants' Motion Record, Tab 2.

PART III - ISSUES

12. The issues on this motion are:

(a) Whether the Lease Stipulation should be approved; and

(b) Whether the Stay Period should be extended to August 1, 2017?

PART IV - LAW AND ARGUMENT

A. The Lease Stipulation should be approved

13. Section 11 of the CCAA provides the Canadian Court with jurisdiction 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 settlement agreement entered into by the debtor company before the filing of any plan of compromise or arrangement, if the agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

CCAA, s. 11.

Return on Innovation Capital Ltd v Gandi Innovations Ltd, 2010 ONSC 1759 at para. 11; Applicants' Book of Authorities, Tab 1.

14. The Lease Stipulation is a fair and reasonable settlement of the Capitalized Lease Issue. The Lease Stipulation will allow the Applicants to recover a substantial portion of the Capital Lease Escrow Amount, avoid the costs of litigating the Capitalized Lease Issue and allow the Restructuring Proceedings to progress in an efficient manner. The Lease Stipulation will result in US$8,000,000 of the Capitalized Lease Escrow Amount becoming available for distribution to the Applicants' stakeholders.

Fox Affidavit at para. 15, Applicants' Motion Record, Tab 2.

Ninth Report of the Monitor dated July 13, 2017 (the "**Ninth Report**") at paras. 30.

15. The Applicants' believe in their business judgement that the Lease Stipulation provides for a fair reasonable settlement of the Capitalized Lease Issue and is in the best interests of their stakeholders. It is also supported by the Monitor and the Applicants' major stakeholders, the equity committee and unsecured creditors' committee ("**UCC**").

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

Ninth Report at para. 29.

B. The Stay Period should be extended

16. Pursuant to section 11.02 of the CCAA, the Canadian 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.

17. 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 2.

18. During the extension of the Stay Period, the Applicants intend to:

(a) Complete all post-closing transactional matters with the Purchaser;

(b) Continue to reconcile claims filed in the Restructuring Proceedings and conduct a claims process pursuant to a further order of the Canadian Court to have any disputed claims determined on a final basis for distribution purposes;

(c) Continue working with their advisors, the Monitor, and stakeholders, including the equity committee and UCC, to determine an efficient manner to the wind up the Restructuring Proceedings and distribute the proceeds from the sale of their assets to their stakeholders; and

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

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

19. 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 October 1, 2017. No creditor will suffer

any material prejudice if the Stay Period is extended as requested. The proceeds available from the sale are sufficient to continue paying the administrative expenses necessary to wind up the Restructuring Proceedings.

> Ninth Report at paras. 32 - 33.
>
> Fox Affidavit at paras. 17 - 18, Applicants' Motion Record, Tab 2.

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

PART V - ORDER REQUESTED

21. For all of the foregoing reasons, it is appropriate for the Canadian Court to grant the requested Order in the form sought by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of July, 2017.

*_/s/ Stikeman Elliott LLP_*
Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

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

2. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

…

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.

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

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Proceeding commenced at Toronto

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