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: Directions on Joint Plan and Stay Extension)

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TO: THE SERVICE LIST

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(Applicants)

PART I - INTRODUCTION

1. During these Bankruptcy Proceedings (defined below), the Applicants have completed a sale of substantially all of their assets which allowed for repayment of their secured creditors in full and generated significant additional proceeds that need to be distributed to their stakeholders, along with their other remaining assets. The Applicants are faced with the unusual situation of having sufficient cash to pay unsecured creditors in full and potentially being left with significant residual assets to distribute to their shareholders. The Applicants are also in the unique position of being subject to dual plenary proceedings in the United States and Canada. To fit these circumstances, the Applicants have explored various creative alternatives to wind-up their affairs in an efficient and timely manner.

2. After several months of exploration and canvassing alternatives in consultation with the Monitor and their stakeholders, the Applicants have proposed a path forward of implementing a Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and its affiliated debtors (the "**Joint Plan**") and if approved by stakeholders, seeking a companion order from this Canadian Court (the "**CCAA Approval Order**") to implement the substance of the Joint Plan in the CCAA

Proceedings (defined below). This motion is the initial step in the Applicants' proposed path forward and seeks authorization from this Canadian Court to proceed without a plan of compromise or arrangement under the CCAA, authorization and direction to conduct a US-style solicitation process on the Joint Plan, schedule a hearing to consider the proposed CCAA Approval Order and other ancillary relief related to the proposed process.

PART II - THE FACTS

A. Background to the Joint Plan

3. 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 Cases**") in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**" and together with the Canadian Court, the "**Courts**") under Chapter 11 of Title 11 of the U.S. Code (the "**Bankruptcy Code**").

4. 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 "**Bankruptcy Proceedings**").

5. 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 "**Purchase Agreement**") for the sale of substantially all of the Applicants' assets to Peak Achievement Athletics Inc. (f/k/a 9938982 Canada Inc.) or its designate (in either case, the

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

> Eleventh Report of the Monitor dated September 26, 2017 (the "**Eleventh Report**") at para. 6.

6. Following the Closing, the Applicants held significant proceeds from the sale and accordingly needed to develop a method for distributing their remaining assets to stakeholders. The Applicants engaged in discussions with the Monitor and their stakeholders, including the Official Committee of Equity Security Holders (the "**Equity Committee**") and the Official Committee of Unsecured Creditors (the "**Creditors' Committee**"), to determine an efficient method to distribute the proceeds and wind-up the Bankruptcy Proceedings. The Applicants explored various alternative structures, including potential alternatives to monetize tax assets at the request of the Equity Committee.

> Eleventh Report at para. 23.

7. In the end, the Applicants determined the most efficient method to wind-up the Bankruptcy Proceedings was to proceed with the Joint Plan in the Chapter 11 Cases which effects a liquidation of the Applicants' remaining assets, including the sale proceeds and potential causes of action (the "**Retained Causes of Action**"). If authorized by this Canadian Court on this motion, the Applicants, supported by the Monitor, intend to seek a CCAA Approval Order to give effect to the substance of the Joint Plan in Canada and empower the Applicants and the Monitor to perform the actions contemplated by or described in the Joint Plan or as may be necessary, appropriate or desirable to effectuate the Joint Plan.

> Eleventh Report at paras. 25 – 26.

B. The Joint Plan

8. The specifics of the Joint Plan involved significant and lengthy arm's-length negotiations between the Applicants and their various stakeholders, including on potentially contentious issues that could have involved expensive litigation. The Joint Plan incorporates a global settlement (the "**Global Settlement**") agreed to among the Applicants' stakeholders that compromises and settles these remaining issues and controversies in the Bankruptcy Proceedings. The Global Settlement provides for, among other things: (a) payment in full of all Allowed General Unsecured Claims[1] (including General Unsecured Claims of Canadian Holders) without Post-Petition Interest (to the extent it would have been allowable); (b) the resolution of all disputes regarding the treatment of intercompany claims; (c) the resolution of all disputes regarding allocation of value among the Applicants and the allocation of the sale proceeds; and (d) the resolution of all disputes regarding substantive consolidation of the Applicants.

Eleventh Report at paras. 30 – 31.

9. Holders of Parent Equity Interests (who are primarily of the shareholders of Old PSG Wind-down Ltd. (f/k/a Performance Sports Group Ltd.) ("**PSG**")) are proposed to receive Shareholder Distributable Assets which are comprised of (a) the Retained Causes of Action and proceeds thereof; (b) the Liquidation Trust Expense Reserve which is a reserve to fund the pursuit of the Retained Causes of Action; (c) the net sale proceeds after payment of Allowed Claims, payment of expenses and funding of the reserves; and (d) any other assets of the Applicants.

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[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Joint Plan (defined below).

Eleventh Report at para. 44.

10. Due to differing tax treatment of Holders of Parent Equity Interests in Canada and the United States, the Joint Plan offers such Holders two options: Holders of Parent Equity Interests may elect to either (a) exchange their Parent Equity Interests into Beneficial Trust Interests of U.S.-based Liquidation Trust (and a right to receive their *pro-rata* share of any other Shareholder Distributable Assets) ("**Option 1**"); or (b) retain their Parent Equity Interests ("**Option 2**"). Holders who select Option 1 will receive any distributions from the Retain Causes of Action and Liquidation Trust Expense Reserve on account of their Beneficial Trusts Interests.

Eleventh Report at paras. 39 – 40.

11. Beyond the distributions, the Joint Plan contemplates a number of other transactions, including, among other things: (a) deemed resignation of PSG's board of directors and replacement with directors selected by the Equity Committee; (b) appointment of Chief Wind-down Officer to wind-up the affairs and dissolve PSG's subsidiaries; (c) a transfer of a portion of the Retained Causes of Action to the Liquidation Trust in accordance with the portion of Holders of Parent Equity Interests that select Option 1; (d) certain releases and exculpations for PSG's board of directors, the Creditors' Committee, the Equity Committee, the Monitor, and other professionals involved Bankruptcy Proceedings; and (e) creation of certain reserves to fund the Bankruptcy Proceedings and pursuit of the Retained Causes of Action. It is also expected that the Joint Plan will be modified to contemplate that PSG's articles may be amended on the effective date of the Joint Plan to make its Parent Equity Interests non-transferrable.

Eleventh Report at paras. 47 – 50 and 54 – 57.

12. The CCAA Approval Order will seek relief to implement and effectuate the Joint Plan, including the contemplated transactions.

Eleventh Report at paras. 66 – 67.

13. The proposed path forward with require approval of both the Bankruptcy Court and the Canadian Court. This motion seeks to schedule the hearing to consider the CCAA Approval Order for November 21, 2017, which shall be a joint hearing with the Bankruptcy Court that shall consider confirmation of the Joint Plan, assuming the Joint Plan is accepted by stakeholders in accordance with the Bankruptcy Code.

Eleventh Report at para. 67.

C. Solicitation Procedures

14. The Applicants have filed a motion with the Bankruptcy Court to approve the disclosure statement associated with the Joint Plan (the "**Disclosure Statement**") and solicitation procedures for soliciting votes and elections on the Joint Plan. The Solicitation Motion is scheduled to be heard by the Bankruptcy Court on October 3, 2017. The Solicitation Motion contemplates that the packages of solicitation materials will be mailed on or before October 9, 2017 and the deadline to vote on the Joint Plan by submitting a ballot in accordance with the Solicitation Procedures will be November 13, 2017. Under the Bankruptcy Code, votes on the Joint Plan do not require a meeting of creditors or shareholders and votes are solicited electronically and through mailings.

Eleventh Report at paras. 59 – 65.

PART III - ISSUES

15. The issues on this motion are:

(a) Whether the Applicants may proceed with their proposed path forward without filing a plan of compromise or arrangement under the CCAA;

(b) Whether this Canadian Court should authorize and direct the Applicants to solicit votes and elections on the Joint Plan in accordance with the Solicitation Procedures as and if approved by the Bankruptcy Court; and

(c) Whether the Stay Period should be extended to December 15, 2017.

PART IV - LAW AND ARGUMENT

A. The Applicants should not be required to file a plan of compromise or arrangement under the CCAA

16. The dual plenary nature of these Bankruptcy Proceedings has provided many challenges to developing an acceptable structure to wind-up the affairs of the Applicants and distribute their remaining assets. In a typical CCAA proceeding, with sufficient funds to pay unsecured creditors and residual proceeds for equity, the Applicants may have been able to solely pursue a distribution through an order of this Canadian Court or explored other available alternatives using the flexibility of the CCAA. However, due to the dual plenary nature of the Bankruptcy Proceedings, such alternatives were not available and additionally did not have support of certain key stakeholders.

Eleventh Report at para. 68.

17. To find an alternative that fit within both the requirements of the CCAA and the Bankruptcy Code, the Applicants canvassed alternatives in consultation with their stakeholders over several months following the Closing. Following this extensive exploration, the Applicants' developed the current path forward of pursuing the Joint Plan in the Chapter 11

Cases and the CCAA Approval Order in CCAA Proceedings (assuming acceptance of the Joint Plan by stakeholders) which has the support of each of the Applicants' major stakeholders. Each of the Applicants, the Monitor, the Equity Committee and the Creditors' Committee are of the view that it is not necessary or desirable to file a plan of compromise or arrangement under the CCAA and the proposed path is best path forward in the circumstances.

> Eleventh Report at paras. 23 – 25.

18. The structure proposed by the Applicants is unique, but specifically designed to fit these unique circumstances. The CCAA provides a broad framework to encourage creative restructuring solutions, which is exactly what the Applicants have proposed. It is a well-established and bedrock principle that the "the key objective" of the CCAA is "to facilitate the restructuring of corporations through flexibility and creativity". Even if the relief sought by the Applicants is novel, the architecture of the CCAA permits such orders to be made, so long as it is just and appropriate in the circumstances to make the order. Justice Blair explained in *Red Cross* the approach that feeds the creativity that makes the CCAA work so well:

> As Farley J. said in *Dylex Ltd.* supra p. 111 [*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Comm. List])], "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if the make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has [been] made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.
>
> *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 at para. 45 (W.L.) (Ont. Gen. Div. [Comm. List]) ["*Red Cross*"], Applicants' Book of Authorities at Tab 1.
>
> Also see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, Applicants' Book of Authorities at Tab 2.

19. Section 11 of the CCAA provides that the Court may "make any order that it considers appropriate in the circumstances" (emphasis added). Debtor companies turn to the CCAA specifically for its flexibility and to facilitate creative but practical-minded restructuring solutions. With respect to section 11, the Supreme Court of Canada held in *Century Services* that:

> …appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

CCAA, section 11.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 ["*Century Services*"] paras. 15, 19, 59 and 70, Applicants' Book of Authorities at Tab 3.

20. By not filing a plan of compromise or arrangement under the CCAA, the Applicants will save significant professional costs of developing a second conforming plan, conducting a duplicative voting process and holding a meeting of the creditors and shareholders. Without an ongoing business generating revenue, the professional fees associated with pursuing a plan under the CCAA directly affect the recoveries of the Applicants' stakeholders on a dollar-for-dollar basis. A single Chapter 11 plan also avoids undue complexity of having dual plans under two separate statutes providing for different rules governing restructuring plans. The complexities involved in having dual plans, include, among other things, (a) potentially having stakeholders vote twice on separate plans; (b) the potential for inconsistent results on the plans; (c) differing conditions for acceptance under the Bankruptcy Code and CCAA.

Eleventh Report at paras. 26, 28.

21. The proposed path forward is consistent with the fundamental principles of the CCAA, making it appropriate in these specific circumstances. Individual stakeholders are being given an opportunity to vote on the Joint Plan which sets out that there will be no plan under the CCAA, the Joint Plan represents a consensus among major stakeholders and settles potentially otherwise contentious issues in these Bankruptcy Proceedings, and the Joint Plan without a corresponding CCAA plan will maximize recoveries for the Applicants' stakeholder by saving on an additional layer of costs. With these facts, this Canadian Court should use the flexibility of the CCAA to permit the Applicants to proceed with the proposed path forward in order for these Bankruptcy Proceedings to be wound-up in an efficient manner.

B. The Applicants should be authorized and directed to solicit votes on the Joint Plan in accordance with the Solicitation Procedures approved by the Bankruptcy Court

22. The Applicants are proposing to be authorized to follow the Solicitation Procedures, as and if, approved by the Bankruptcy Court. The Solicitation Procedures contemplated by the Solicitation Motion, propose that a solicitation package including the Disclosure Statement, ballots, election forms and other notice documents be mailed to the Applicants' stakeholders. Stakeholders will have approximately one month to submit ballots on the Joint Plan either electronically or by mail. The Solicitation Motion contemplates that the Bankruptcy Court will find that, among other things, (a) the period for soliciting votes is "reasonable and adequate"; (b) the Solicitation Procedures provide for a "fair and equitable voting process"; and (c) the Disclosure Statement contains "adequate information" as defined by the Bankruptcy Code, before approving the Solicitation Procedures.

> Keisha Lackpatiah-Sealy sworn September 21, 2017, Applicants' Motion Record, Tab 2(C).

Eleventh Report at paras. 62 – 65.

23. The Solicitation Procedures have not been considered by the Bankruptcy Court, but in the circumstances it is appropriate and in the interests of comity, to defer to the Bankruptcy Court on the specific voting procedures to be followed for voting on the Joint Plan. The Joint Plan is a plan under the Bankruptcy Code and therefore voting to should comply with the specific requirements under that statute which contains the same fundamental principles that underlie the CCAA. In these circumstances, this Canadian Court should grant the relief requested by the Applicants and authorize and direct the Applicants follow the Solicitation Procedures ultimately approved by the Bankruptcy Court.

C. The Stay Period should be extended

24. 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, section 11.02.

25. In *Canwest Global*, 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]) ["*Canwest Global*"] at para. 43, Applicants' Book of Authorities, Tab 4.

26. During the extension of the Stay Period (as defined in the Initial Order), the Applicants intend to resolve claims filed against the Applicants, solicit votes for the Joint Plan and seek confirmation of the Joint Plan and obtain the CCAA Approval Order.

> Eleventh Report at para. 69.

27. 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 December 15, 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 Bankruptcy Proceedings.

> Eleventh Report at paras. 70 – 71.

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

PART V - ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of September, 2017.

/s/ Stikeman Elliott LLP
Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299

2. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008

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

4. *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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