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 MONITOR
(Re: Disallowance of Putative Class Claim)

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TO: THE SERVICE LIST

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PART I - INTRODUCTION

1. On October 31, 2016, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (as amended and restated, the "**Initial Order**"), which, *inter alia*: (i) declared that Old PSG Wind-down Ltd. ("**PSG**") (formerly known as Performance Sports Group Ltd.) and certain of its subsidiaries and affiliates (collectively, the "**Applicants**")[1] were companies to which the *Companies' Creditors Arrangement Act* (the "**CCAA**")[2] applied; (ii) granted a stay of proceedings in favour of the Applicants until November 30, 2016; and (iii) appointed Ernst & Young Inc. as monitor of the Applicants (in such capacity, the "**Monitor**").

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[1] The Applicants in the present proceedings are comprised 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. (collectively, the "**Canadian Applicants**"), 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. (collectively, the "**U.S. Applicants**").

[2] RSC 1985, c. C-36, as amended.

Third Report of the Monitor dated December 16, 2016 (the "**Third Report**") at para 1, Applicants' Compendium of U.S. Filings and Other Documents ("**Compendium**"), Tab 9.

2. On the same date, the Applicants commenced proceedings (the "**Chapter 11 Proceedings**") in the United States ("**U.S.**") under Chapter 11 of Title 11 of the *U.S. Code* (the "**U.S. Bankruptcy Code**")[3] in the Bankruptcy Court for the District of Delaware (the "**U.S. Court**").

Third Report at para 2, Compendium, Tab 9.

3. This factum is filed by the Monitor in response to a motion brought by the Applicants and supported by the Official Committee of Equity Security Holders (the "**Equity Committee**") seeking an Order (the "**Disallowance Order**") disallowing the proof of claim no. 444 (the "**Putative Class Claim**") filed by The Plumbers & Pipefitters National Pension Fund (the "**Individual Claimant**") on behalf of an alleged class of unidentified claimants (the "**Putative Class**").

PART II - THE FACTS

4. On May 13, 2016, plaintiff Juan Francisco Gonzales Nieves, as trustee of the Gonzalez Coronado Trust, filed a complaint, individually and on behalf of the Putative Class, against PSG, Kevin Davis (PSG's former CEO), and Amir Rosenthal (PSG's former President and Interim CEO/CFO) in the U.S. District Court for the Southern District of New York (the "**Class Action**"). The Putative Class has not been certified in the U.S. There is no pending request for class certification filed in the U.S.

[3] 11 U.S.C §§ 101 *et seq*.

Affidavit of Keisha Lackpatiah-Sealy, sworn September 20, 2017 (the "**KLS Affidavit**") at Exhibits A and C, Motion Record of the Applicants, Tab 2 (the "**Applicants' Motion Record**").

5. On December 19, 2016, the Canadian Court entered the Claims Procedure Order (the "**CCAA Claims Procedure Order**"), which established a process for soliciting claims against the Applicants and set certain claims bar dates. On the same date, the Applicants were granted an order in the Chapter 11 Proceedings approving the same procedures and bar dates (the "**U.S. Claims Procedure Order**" and together with the CCAA Claims Procedure Order, the "**Claims Procedure Orders**"). Through the Claims Procedure Orders, the Applicants established one consolidated procedure to solicit claims in both the CCAA Proceedings and Chapter 11 Proceedings against each Applicant. This was intended to streamline the solicitation procedures and allow for one coordinated approach.

The KLS Affidavit at Exhibit G, Applicants' Motion Record, Tab 2.

Third Report at paras 25-28, Compendium, Tab 9.

6. The Claims Procedure Orders provided that claimants were to file a proof of claim in the form provided (a "**Proof of Claim**") with Prime Clerk LLC, the Applicants' claims agent. The Proof of Claim form was designed by the Applicants, in consultation with the Monitor, to conform to the requirements under both the CCAA Proceedings and Chapter 11 Proceedings. In fact, the Proof of Claim form refers to both this Court and U.S. Court. As stated in the Third Report:

> *"The documentation is intended to be used in both the Chapter 11 Proceedings and the CCAA Proceedings so that claimants only have to file a single Proof of Claim."*

Third Report at para 27, Compendium, Tab 9.

7. Prior to the bar date set out in the Claims Procedure Orders, the Individual Claimant filed the Putative Class Claim in respect of the Class Action in accordance with the Claims Procedure Orders. No individual in the Putative Class submitted an individual proof of claim, other than the Individual Claimant, alleging the same accusations as set out in the Putative Class Claim.

The KLS Affidavit at Exhibit A, Applicants' Motion Record, Tab 2.

8. On September 1, 2017, this Court granted an Order outlining the procedures to review and resolve all claims filed against the Applicants (the "**Claims Resolution Order**"). Pursuant to the Claims Resolution Order, all claims filed against the Canadian Applicants, other than the Putative Class Claim, are defined as a "Canadian Claim" and are to be resolved in accordance with the Claims Resolution Order. All claims filed against the U.S. Applicants are defined as a "U.S. Claim" and are to be resolved in accordance with the procedures set out in the Chapter 11 Proceedings. The Claims Resolution Order provides that the Putative Class Claim is to be resolved either pursuant to the Claims Resolution Order, or in the Chapter 11 Proceedings, or jointly by the Court and the U.S. Court. Such determination is to be made by the Applicants with the consent of the Equity Committee and in consultation with the Monitor. The Applicants and the Equity Committee have determined that their objections to the Putative Class Claim shall be heard jointly by the Court and the U.S. Court.

The KLS Affidavit at Exhibit G, Applicants' Motion Record, Tab 2.

9. On September 15, 2017, the Equity Committee filed a motion with the U.S. Court objecting to the Putative Class Claim, which the Applicants filed a joinder to on October 5, 2017 (the "**U.S. Objection Motion**"). On September 21, 2017 the Applicants filed an objection to the Putative Class Claim with the Court and the Equity Committee filed a

factum in connection with the Applicants' objection to the Putative Class Claim on October 11, 2017 (the "**CCAA Objection Motion**" and together with the U.S. Objection Motion, the "**Objection Motions**"). Among other things, the Objection Motions state that the Putative Class Claim should be disallowed as the Individual Claimant is not a proper representative of the Putative Class and did not have authority to file the Putative Class Claim on behalf of the members of the Putative Class.

> Objection of Official Committee of Equity Security Holders to Putative Class Claim, Compendium, Tab 1
>
> Joinder of the Debtors to the Objection of the Official Committee of Equity Security Holders, Compendium, Tab 3.

10. The Individual Claimant has filed an objection to the U.S. Objection Motion in the U.S. Court. Among other things, the Individual Claimant alleges that this Court does not have the jurisdiction to determine the Putative Class Claim since the Individual Claimant filed the Putative Class Claim in the Chapter 11 Proceedings and not the CCAA Proceedings.

> Lead Plaintiff's Brief in Opposition to Objection of Equity Committee to Class Claim, Compendium, Tab 4.

11. The Applicants filed a Joint Plan of Liquidation for the Applicants and accompanying disclosure statement in the Chapter 11 Proceedings with the U.S. Court on August 25, 2017, which were amended on October 12, 2017 (together, the "**Joint Plan**"). Litigating the Putative Class Claim would significantly deteriorate the recoveries available to stakeholders pursuant to the Joint Plan since it would be extremely expensive and time consuming to litigate the merits of the Putative Class Claim.

PART III - ISSUES

12. The issue on this motion is whether the Putative Class Claim should be disallowed. The issue specifically discussed in this Factum of the Monitor is whether this Court has jurisdiction to hear the CCAA Objection Motion to the Putative Class Claim.

PART IV - LAW AND ARGUMENT

13. For the reasons outlined below, this Court has the jurisdiction to hear the CCAA Objection Motion to the Putative Class Claim.

14. Section 11 of the CCAA affords this Court the jurisdiction to make any order it considers appropriate in the circumstances, which includes the ability to create a procedure for the solicitation and review of claims of a debtor. The procedure in connection with the adjudication of the Putative Class Claim has previously been authorized by this Court in the Claims Resolution Order.

> CCAA, s. 11.
>
> *ScoZinc Ltd., Re*, 2009 NCCS 136, at paras 23 and 26 ("***ScoZinc***"). Monitor's Book of Authorities, Tab 1.
>
> *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967, at para 5. Monitor's Book of Authorities, Tab 2.

15. PSG, the Applicant against which the Putative Class Claim has been filed, is a Canadian Applicant incorporated pursuant to the British Columbia *Business Corporations Act*. Pursuant to section 20(1)(a) of the CCAA, the CCAA Court has explicit authority to determine a claim of any creditor of a CCAA debtor on summary application by the debtor.

> *Business Corporations Act*, SBC 2002 c. 57.
>
> CCAA, s. 20(1)(a).

ScoZinc, supra at para 22. Monitor's Book of Authorities, Tab 1.

16. In this case, the Claims Procedure Orders established one coordinated claims solicitation process and bar dates. Creditors were not given the ability to 'choose' the jurisdiction in which they wished to file a claim against the Applicants. Creditors were required to submit one Proof of Claim form per Applicant to Prime Clerk – there was no distinction in the procedures regarding filing claims in only one jurisdiction. All claims were accepted as filed against the Applicants in both jurisdictions. The jurisdictional distinction in the resolution of the claims (versus the filing of claims) was established in the Claims Resolution Order.

Third Report at paras 25-28, Compendium, Tab 9.

17. At this juncture, the Applicants and the Equity Committee are asking this Court to disallow the Putative Class Claim as it did not comply with the Claims Procedure Orders (i.e., the Individual Claimant filed a representative class claim on behalf of an uncertified class). The Applicants and the Equity Committee are not asking this Court to determine whether the Putative Class Claim should be disallowed based on the merits of the allegations set out in the Putative Class Claim. This Court has jurisdiction to determine whether a proof of claim is invalidly filed in the CCAA Proceedings and whether such proof of claim is ineffective even if the underlying merits of the claim is based on an alleged violation of U.S. law.

See *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 7877, at para 14. Monitor's Book of Authorities at Tab 3.

PART V - ORDER REQUESTED

18. For all of the foregoing reasons, the monitor submits that it is appropriate for this Court to hear the CCAA Objection Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October, 2017.

Thornton Grout Finnigan LLP

Thornton Grout Finnigan LLP
Lawyers for Ernst & Young Inc., in its capacity as Monitor

SCHEDULE "A"
LIST OF AUTHORITIES

1. *ScoZinc Ltd., Re*, 2009 NCCS 136.
2. *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967.
3. *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 7877.

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.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

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Proceeding commenced at Toronto

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