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)

Overview of Submissions of Lead Plaintiff re Jurisdiction of the Canadian Court to Deal with the Proposed Disallowance of the Class Claim Filed by the Lead Plaintiff in the Chapter 11 Cases

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Introduction

1. The Lead Plaintiff has not previously appeared in, or attorned to the jurisdiction of the Canadian Court for any purpose, , nor does the Lead Plaintiff now attorn to such jurisdiction. These submissions are being filed for the sole purpose of contesting the jurisdiction of the Canadian Court to disallow the Class Claim filed in the Chapter 11 Cases pursuant to paragraph 11(d)(iv) of the Cross-Border Restructuring Protocol herein. The Lead Plaintiff does not seek any affirmative relief from the Canadian Court.

2. Paragraph 11(d)(iv) of the Cross-Border Restructuring Protocol provides that a party that has not previously appeared in or attorned to the jurisdiction of a Court may file material to dispute jurisdiction in a Joint Hearing without being deemed to have attorned to

the jurisdiction of the Court as long as it does not request in its materials or submissions any affirmative relief from the Court.

3. It is the position of the Lead Plaintiff that:

(a) This Canadian Court does not have jurisdiction to adjudicate the requested disallowance of the Class Claim, which was filed only in the Chapter 11 Cases and not in the CCAA Proceedings;

(b) There is presently a claim objection with respect to the Class Claim pending before the U.S. Bankruptcy Court (the "U.S. Claim Objection"), which is scheduled to be heard on October 16, 2017, to determine whether US Bankruptcy Rule 7023 should apply to the Class Claim. The Applicants and the Equity Committee are participants in that U.S. proceeding;

(c) The U.S. Bankruptcy Court is the only appropriate court to decide whether the relief the Applicants and the Equity Committee have requested in the U.S. Claim Objection should be granted; and

(d) Aside from the absence of jurisdiction, a joint hearing does not make sense from a practical standpoint. If the U.S. Bankruptcy Court "disallows" the Class Claim pursuant to the U.S. Claim Objection, there will be no need for the Canadian Court to independently rule on the matter. On the other hand, if the U.S. Bankruptcy Court overrules the U.S. Claim Objection, it would be anomalous, and highly unlikely, that the Canadian Court would take a contradictory position, particularly where the Class Claim was filed only in the U.S. Cases and not in the CCAA Proceedings.

4. Consequently, the Applicants' and the Equity Committee's request to disallow the Class Claim should be adjudicated solely in the U.S. Bankruptcy Court.

Submissions with Respect to Jurisdiction

There are Two Plenary Proceedings

5. On October 31, 2016, the former PSG commenced two separate and plenary restructuring proceedings - one in Canada pursuant to the CCAA and one in the U.S. pursuant to Chapter 11 of the Bankruptcy Code.

6. The Cross-Border Restructuring Protocol[1] confirms, throughout, that the Chapter 11 Cases and the Canadian Proceedings are "full and separate proceedings" (para. 5). The U.S. Bankruptcy Court shall have sole and exclusive jurisdiction and power over the conduct of the Chapter 11 cases and the hearing and determination of matters arising in the Chapter 11 Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings (para. 7).

The claims processes in the CCAA Proceedings and the Chapter 11 Cases are separate.

7. The claims process in the Canadian Proceeding is governed by the provisions of the CCAA, the Claims Procedure Order, and the Claims Resolution Order.

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[1] Compendium, Tab 8.

8. The claims procedure in the Chapter 11 Cases is governed by the provisions of the Bankruptcy Code and the Bar Date Order entered by the U.S. Bankruptcy Court.

9. Both claims processes have been coordinated (e.g. matching of bar dates) and synchronized administratively (e.g. use of a common proof of claim form and retention of Prime Clerk as claims agent).

10. However, both claims processes are separate processes. There is no "Cross-Border Claims Protocol" approved by order of the Canadian Court and the U.S. Bankruptcy Court.

11. The Claims Procedure Order isued by this Court defines the "U.S. Claims Procedure" as "the claims process approved by the U.S. Bankruptcy Court to be conducted within the Chapter 11 Proceedings in respect of the Applicants". It is clearly distinct from ant Canadian claims process.

12. Furthermore, paragraph 15 of the Claims Procedure Order provides that any Claimant who has complied with the requirements of the U.S. Claims Procedure shall not have its Claim or Restructuring Claim, as applicable, barred and extinguished as a consequence of failing to comply with paragraphs 16 or 20 [of the Claims Procedure Order] as applicable. If there was one unified claims procedure this provision would not be required as the filing of a single proof of claim would, *ipso facto*, constitute a filing in both proceedings. This provision (among others) makes clear that there is no such unified claims process here.

13. Interestingly, the U.S. Claim Objection[2] does not ground its jurisdiction in the Claims Procedure Order or the Claims Resolution Order (which have not been recognized in the U.S.). Rather, as set out in paragraph 5 of the U.S. Claim Objection, the jurisdiction of the U.S. Bankruptcy Court to hear the U.S. Claim Objection is pursuant to 28 U.S.C. §§ 157 and 1334, the objection is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), venue in the U.S. Bankruptcy Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409, and the statutory predicates for the relief requested therein are section 502 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq*., and United States Federal Rules of Bankruptcy Procedure 3007, 7023 and 9014. That is, the US Claim Objection is grounded solely on US bankruptcy rules and procedures.

The Class Claim was filed solely in the Chapter 11 proceeding

14. Although the proof of claim form used in the Canadian Proceedings and the Chapter 11 Cases is the same physical form, the class proof of claim filed by the Lead Plaintiff included an addendum containing only the caption of the Chapter 11 Cases, referenced only the U.S. Bankruptcy Court and the case number therein, and clearly stated that the Class Claim was submitted against PSG as a debtor in the Chapter 11 Cases The addendum contained no reference whatsoever to the Canadian Proceedings.[3]

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[2] Compendium, Tab 1.

[3] Compendium, Tab 1, Exhibit B.

The Class Claim was filed by a U.S. resident, solely in the Chapter 11 Cases, and involves class action litigation pursuant to specialized class action legislation in the United States and class action procedures under the Bankruptcy Code

15. The Lead Plaintiff is a U.S. entity, Plumbers & Pipefitters National Pension Fund, appointed as Lead Plaintiff pursuant to an order of the United States District Court for the Southern District of New York.[4]

16. The Complaint alleges only violations of the United States federal securities laws with respect to stock purchased on the New York Stock Exchange and does not assert any claims under Canadian law or based on purchases on any Canadian stock exchange.

17. U.S. securities class actions are subject to specialized U.S. securities class action legislation. In addition, the United States Federal Rules of Bankruptcy Procedure contain certain rules dealing with the treatment of class actions within Chapter 11 proceedings - see, for example, the "Notice of Securities Plaintiffs' Cross-Motion for Application of Bankruptcy Rule 7023 to Class Claim" made pursuant to 28 U.S.C. §§ 157 and 1334 and U.S. Federal Rules of Bankruptcy Procedure 7023 and 9014(c).[5] The applicability of these special rules is the subject matter of the U.S. Claim Objection brought by the Equity Committee and joined in by the Applicants (as debtors in the Chapter 11 Cases), scheduled to be argued before the U.S. Bankruptcy Court on Monday.

The CCAA Court has no jurisdiction to disallow or otherwise adjudicate any aspect of the Class Claim, which was filed only in the Chapter 11 Cases

18. It is respectfully submitted that section 20(1)(a)(iii) of the CCAA cannot be reasonably read to provide a Canadian court with jurisdiction to adjudicate a claim filed

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[4] Compendium, Tab 1 Exhibit B, page 89, para. (f).

[5] Compendium, Tab 5.

solely in a separate, plenary, Chapter 11 proceeding simply because the CCAA Applicants and the Chapter 11 Debtors have entities in common which were incorporated under Canadian laws. There is no authority for this proposition.

19. Former PSG voluntarily availed itself of the jurisdiction of the U.S. Bankruptcy Court by commencing a plenary Chapter 11 proceeding in the United States and, among other things, seeking entry of the Bar Date Order establishing a separate process for creditors in the United States to file proofs of claim. Jurisdiction over the disallowance of claims filed solely in the Chapter 11 Cases, such as the Class Claim, thus lies exclusively with the U.S. Bankruptcy Court.

20. Similarly, section 11 of the CCAA and the concepts of inherent jurisdiction and equitable jurisdiction grant a broad jurisdiction to a CCAA court. However that jurisdiction is not limitless. The CCAA court cannot do whatever it wishes. The jurisdiction is subject to "appropriateness." There is no basis for the Canadian Court to assert jurisdiction over claims filed solely in the plenary Chapter 11 Cases pending before the U.S. Bankruptcy Court. It is respectfully submitted that it is not "appropriate" for the Canadian Court to become involved in the adjudication of the U.S. Claim Objection simply because PSG is a Canadian entity.

21. Moreover paragraph 13 of the Claims Resolution Order , referred to in the factum of the Applicants, does not confer jurisdiction on the Canadian Court to adjudicate Securities Law Claims filed in the Chapter 11 proceedings.

22. Firstly, it should be noted that the Claims Resolution Order has not been recognized by the U.S. Bankruptcy Court. A motion seeking to enforce that order in the

United States is before the U.S. Bankruptcy Court on Monday and is being opposed by the Lead Plaintiff because, among other things, that motion appears to request that the U.S. Bankruptcy Court share its exclusive jurisdiction over the Class Claim with the Canadian Court.

23. The Canadian Applicants/Debtors have conceded in their "REPLY OF THE DEBTORS IN FURTHER SUPPORT OF THE DEBTORS' MOTION FOR AN ORDER GRANTING EFFECT TO AND ENFORCING THE CLAIMS RESOLUTION ORDER"[6] at paragraph 9 that:

> "…Paragraph 13 of the Claims Resolution Order provides that the Debtors, Equity Committee, Monitor and liquidation trustee "may determine whether the Securities Law Claims [which term encompasses the Class Claim] will be adjudicated pursuant to this Claims Resolution Order in the CCAA Proceedings or in the Chapter 11 Proceedings, or jointly by this Court and the U.S. Bankruptcy Court.Nowhere in this paragraph or elsewhere in the Claims Resolution Order does it say that the Canadian Court shall have subject matter jurisdiction over the Class Claim or personal jurisdiction over the Putative Class. Rather, the language simply gives the Debtors and their stakeholders the ability to select the court or courts before which they will proceed with claim objections, **without determining the question of whether that court has jurisdiction to hear the objection**". [emphasis added]

24. The Applicants' position is fundamentally inconsistent because they are asking the U.S. Bankruptcy Court to permit them, the Monitor, and the liquidation trustee to elect to adjudicate matters in this Court over which this Court has no jurisdiction. The Applicants cannot unilaterally confer jurisdiction upon this Court over parties and issues that are not before this Court.

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[6] Compendium, Tab 6.

The authorities cited by the Monitor, the Applicants and the Equity Committee are not apposite to the present circumstances

25. All of the authorities cited by the Applicants, the Monitor and the Equity Committee in their facta turn on their own particular facts. None of them are similar to the present case. For example, in the *Nortel* case involving SNMPRI, SNMPRI had filed a proof of claim in <u>both</u> the Canadian and U.S. proceedings and thereby submitted itself and its claim to Canadian jurisdiction In the *Muscletech* case, there were plenary CCAA proceedings and Chapter 15 recognition proceedings – not plenary Chapter 11 proceedings – in the U.S.

26. There was no case or authority cited by the Applicants, the Monitor or the Equity Committee where, as here:

(a) there are plenary CCAA and Chapter 11 proceedings with separate processes permitting creditors to file claims in the U.S., Canada, or both;

(b) a U.S. resident commenced a class action in a United States District Court prior to the commencement of cross-border restructuring proceedings, based solely upon events that occurred in the U.S., involving only purchases of securities on a U.S. stock exchange, asserting claims based exclusively on specialized U.S. legislation, and subject to specialized U.S. rules and legislation governing class action proceedings;

(c) a class proof of claim was timely and properly filed only in the U.S. chapter 11 proceedings; and

(d) the class proof of claim filed solely in the Chapter 11 proceedings was subject to a pending Objection in the U.S., advanced by the same parties as in the proposed Canadian motion.

27. Here, just as in those circumstances, the Canadian Court has no jurisdiction to hear the Canadian Motion or grant any other relief with respect to the Class Claim. Even if the Canadian Court had jurisdiction, it should not exercise its discretion to become involved in this issue.

There is no need for a Canadian motion to disallow the Class Claim

28. The U.S. Claim Objection was filed in the Chapter 11 Cases by the Equity Committee prior to the commencement of the present motion in the CCAA Proceedings.[7]

29. Applicants, as Debtors in their plenary Chapter 11 Cases, have formally joined in the U.S. Claim Objection.[8] The Equity Committee has even filed its present factum in the material before the U.S. Court as part of its Objection to the “Putative Classes’ Cross-Motion for Application of Bankruptcy Rule 7023”.[9]

30. The relief sought in the U.S. Claim Objection is identical to the relief sought from this Court in the present disallowance motion. Indeed, the factum of the Applicants states that “The relief sought by the Applicants on this motion is a **necessary ancillary** to the relief sought by the Equity Committee’s objection.”[10]

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[7] Compendium, Tab 1.

[8] Compendium, Tab 3.

[9] Compendium, Tab 7.

[10] Applicant’s Factum, paragraph 2.

31. All parties agree that the U.S. Court has jurisdiction to adjudicate the U.S. Claim Objection, and the Applicants acknowledge that their motion in this Court is ancillary to the U.S. Claim Objection. It is respectfully submitted that there is absolutely no need for the Canadian Court to become involved in that process pursuant to an "ancillary" Canadian motion seeking the same relief.

32. If the U.S. Court grants the relief sought by the Equity Committee in the U.S. Claim Objection (disallowance of the Class Claim), it is not likely that the Canadian Court would rule to the contrary. A separate, stand-alone disallowance order of the Canadian Court is not necessary to make the US "disallowance" of the Class Claim effective in Canada. The U.S. order could simply be recognized in Canada and thus become effective with respect to Canadian stakeholders including the Applicants.

33. Similarly, if the U.S. Court, under U.S. law, overrules the U.S. Claim Objection, it would be anomalous and highly unlikely that the Canadian Court would rule otherwise in an admittedly ancillary proceeding.

Conclusion

34. Thus, for all of the above reasons, it is submitted that the Canadian Court has no jurisdiction to adjudicate the present motion or the U.S. Claim Objection or otherwise adjudicate any aspect of the Class Claim and, in any event, should not become involved in the determination of the allowance or disallowance of the Class Claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October 2017

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As agent for Lowenstein Sandler LLP, U.S. Bankruptcy Counsel for the Lead Plaintiff and the Class

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Proceeding commenced at Toronto

Submissions of Lead Plaintiff

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