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 OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO PUTATIVE CLASS PROOF OF CLAIM FILED BY PLUMBERS & PIPEFITTERS NATIONAL PENSION FUND (PROOF OF CLAIM NO. 444)

MCMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON, M5J 2T3

Andrew Kent LSUC#18484O
Tel: 416.865.7160
Email: Andrew.Kent@mcmillan.ca
Fax: (416) 865-7048

Caitlin Fell LSUC# 60091H
Tel: 416.865.7841
Email: Caitlin.Fell@mcmillan.ca

Lawyers for the Applicants

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PART I - OVERVIEW

1. The Official Committee of Equity Security Holders (the "**Official Equity Committee**") of Old BPSUSH Inc. (f/k/a BPS US Holdings Inc.), *et al.*, support the Applicants' motion for an Order disallowing the proof of claim bearing no. 444 (the "**Putative Class Proof of Claim**").

2. The Plumbers & Pipefitters National Pension Fund (the "**Individual Claimant**"), on behalf of certain shareholders (the "**Class Action**") that purchased or acquired common stock of PSG on the New York Stock Exchange during the period from January 15, 2015 through March 14, 2016, filed the Putative Class Proof of Claim against Old PSG Wind-down Ltd. (f/k/a Performance Sports Group Ltd.) ("**PSG**").

3. In the Putative Class Proof of Claim, the Individual Claimant alleges that PSG and the Individual Defendants (defined below) made materially false and misleading statements regarding the PSG's financial performance.

4. The Official Equity Committee submits that this Court should disallow the Putative Class Proof of Claim on the basis that:

(a) the Individual Claimant had no authority from class members to file the Putative Class Proof of Claim. The relevant laws in Canada require judicial determination before a class is certified and deemed worthy of legal recognition;

(b) the Claims Procedure Order does not permit the filing of proof of claims by individuals who are not the proper legal representative of the claimant;

(c) even if the Individual Claimant had authority to file a class proof of claim, there is no inherent right to file a representative class proof of claim in a CCAA proceeding and class counsel has not sought this Court's authority to file the Putative Class Proof of Claim to date;

(d) the CCAA process, including the claims procedure, adequately protected the interests of the other potential individual claimants such that a "class" claim is not necessary;

(e) notwithstanding that the Applicants have been in CCAA and Chapter 11 protection for nearly a year, to date, the Class Action lawsuit has not been certified as a class action in Canada or in the United States. Accordingly, the Putative Class Claim is entirely contingent and unliquidated and is subject to a court process in the Southern District of New York that is currently in its infancy, and may take many years to complete;

(f) at this late stage in the restructuring, allowance of the Putative Class Claim will disable resolution of the Restructuring Proceedings. The disallowance of the U.S. Court or this Court of the Putative Class Claim is a condition precedent to confirmation of the *Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and Its Affiliated Applicants* filed on August 25, 2017 (the "**Plan**"), which Plan is to be recognized in Canada. Permitting the claim to proceed would be costly and materially delay distributions to equity holders.

PART II - FACTS

A. Background with Respect to Putative Class Proceeding in the Context of This CCAA Proceeding

5. On May 13, 2016, plaintiff Juan Francisco Gonzales Nieves, as trustee of the Gonzalez Coronado Trust, filed a complaint, individually and purportedly on behalf of a class of similarly situated persons, against PSG, Kevin Davis (PSG's former CEO), and Amir Rosenthal (PSG's former Interim CEO/CFO) (Messrs. Davis and Rosenthal, together, the "**Individual Defendants**", and, with PSG, the "**Defendants**") in the United States District Court for the Southern District of New York (the "**District Court**") (Case No. 16-03591) (GHW) (the "**Putative Class Proceeding**").[1]

6. The Putative Class has not been certified in the Putative Class Proceeding, and to date, no motion or other pleading requesting class certification has yet been filed with the District Court or any other court.[2]

7. On June 7, 2016, the District Court entered an order appointing the Individual Claimant as the lead plaintiff in the Putative Class Proceeding.[3]

8. On August 15, 2016, the Individual Claimant filed its first amended putative class claim with the District Court. Pursuant to this amended complaint, the Individual Claimant alleges two counts against the Defendants: (i) one count for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "**Exchange Act**") and Rule 10b-5

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[1] Affidavit of Keisha Lackpatiah-Sealy, sworn September 20, 2017, Motion Record of the Applicants, Tab 2 ("Lackpatiah-Sealy Affidavit ") at para 7 and Exhibit F.
[2] Lackpatiah-Sealy Affidavit at para 8 and Exhibit F.
[3] Lackpatiah-Sealy Affidavit at para 10 and Exhibit F.

of the Securities and Exchange Commission; and (ii) one count for alleged violation of Section 20(a) of the Exchange Act.[4]

9. On October 13, 2016, the Defendants filed a joint motion to dismiss the putative class complaint.[5]

10. On October 31, 2016 (the "**Filing Date**"), the Applicants made an application for protection from their creditors under the CCAA in the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**", and the proceedings therein, the "**CCAA Proceedings**").[6] In addition, the Applicants commenced bankruptcy proceedings under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court (the "**US Court**") for the District of Delaware (the "**Chapter 11 Proceedings**") As a result, the Putative Class Proceeding was stayed as against PSG.

11. On November 3, 2016, the Individual Claimant filed its second amended putative class complaint, which did not name PSG as a defendant.[7]

12. On January 17, 2017, the District Court entered an order extending the automatic stay to the Individual Defendants.[8]

13. On May 9, 2017, the District Court entered a stipulated scheduling order pursuant to which the automatic stay was lifted as to the Individual Defendants and a deadline of June 22,

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[4] Lackpatiah-Sealy Affidavit at para 11 and Exhibit F.
[5] Lackpatiah-Sealy Affidavit at para 12 and Exhibit F.
[6] Lackpatiah-Sealy Affidavit at para 164 and Exhibit A.
[7] Lackpatiah-Sealy Affidavit at para 13 and Exhibit F
[8] Lackpatiah-Sealy Affidavit at para 13 and Exhibit F.

2017 was established for the Individual Defendants to answer or otherwise respond to the second amended putative class complaint.[9]

14. On June 22, 2017, the Individual Defendants filed their joint motion to dismiss the second amended putative class complaint. On July 24, 2017, the Individual Claimant filed its opposition to the joint motion to dismiss. Pursuant to an order of the District Court, the Individual Defendants have until three weeks after service of such opposition to file any consolidated reply.[10]

B. Relevant Background with Respect to the CCAA and Chapter 11 Cases

i. Scope and Progress of the Claims Procedure

15. On December 19, 2016, the Applicants obtained approval by the CCAA Court of the entry of an order soliciting claims against the Applicants and approving certain claims bar dates for the submission of claims against the Applicants and approving the form and manner of notice of such bar dates to creditors (the "**Canadian Claims Order**"). At the same time, the US Court also entered the *Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof* (Docket No. 327) (the "**US Claims Order**" together with the Canadian Claims Order, the "**Claims Procedure Orders**").

16. The Claims Procedure Orders provide for, among other things, the solicitation of claims that relate to the acquisition of shares of PSG, which includes claims for any misrepresentation of financial statements. In particular, the Claims Procedure Orders provide the following:

> Interest Holders [defined as any person holding any stock in PSG or any warrants, rights to purchase, sell or subscribe to any such stock] who want to assert claims against the Applicants that arise out of or relate to the

[9] Lackpatiah-Sealy Affidavit at para 14 and Exhibit F.
[10] Lackpatiah-Sealy Affidavit at para 15 and Exhibit F.

> ownership or purchase of an Interest, including claims arising out of or relating to the sale, issuance or distribution of the Interest, must file a claim by the applicable Bar Dates, unless another exception identified in this motion applies.[11]

17. The Canadian Claims Order and the US Claims Order are substantially the same in substance and provide a mechanism for the solicitation of all claims against the Applicants, without regard to the jurisdiction of the claim. Accordingly, there is only one single claims process.

18. Under the Canadian Claims Order and the US Claims Order all claimants were required to file proofs of claims with Prime Clerk LLC regardless of whether the claim was a Canadian claim against the Applicants or a US claim. The form of proof of claim is the same for both the US and Canada and the filing of a proof of claim results in the submission of such claim in both jurisdictions.

19. The Claims Procedure Orders provide for a claims bar date of February 6, 2017 for the submission of general claims against the Applicants (the "**Claims Bar Date**"). Pursuant to the Claims Procedure Orders, the CCAA Court and the Bankruptcy Court approved the form and manner of notice of the Claims Bar Date and the General Bar Date, as applicable, to creditors, including the Publication Notice (each as defined in the Claims Procedure Orders).[12]

20. On December 23, 2016, the Applicants served the bar date notice on, among other parties in interest: (i) all registered holders of PSG stock; and (ii) the Individual Claimant (and the named plaintiff) in the Putative Class Proceeding.[13]

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[11] Lackpatiah-Sealy Affidavit at para 19 and Exhibit F.
[12] Lackpatiah-Sealy Affidavit at para 20 and Exhibit F.
[13] Lackpatiah-Sealy Affidavit at para 21 and Exhibit F.

21. Among the entities served with actual notice of the Claims Bar Date were CDS & Co. (the nominee company for the Canadian Depository for Securities Ltd., which, as of the Filing Date, was the registered owner of approximately 38,553,857 PSG shares (or approximately 84.06% of PSG's issued and outstanding stock), and CEDE & Co. (the nominee company for the Depository Trust Company, which, as of the Filing Date, was the registered owner of approximately 6,184,432 PSG shares (or approximately 13.49% of PSG's issued and outstanding stock).[14]

22. Pursuant to and in accordance with the Claims Procedure Orders, the Applicants also provided constructive notice of the Claims Bar Date/General Bar Date, via Publication Notice, to all "unknown" creditors of the Applicants.[15]

23. In accordance with the Claims Procedure Orders, the Publication Notice was approved by the CCAA Court and the Bankruptcy Court and published in the following periodicals: (i) the National Edition of the Globe and Mail, on December 28, 2016; (ii) the National Edition of USA Today, on December 28, 2016; (iii) the International Edition of The Wall Street Journal, on December 28, 2016; and (iv) La Presse (French language), on December 31, 2016.[16]

24. On February 6, 2017, the Individual Plaintiff submitted its individual claim and the Putative Class Proof of Claim with Prime Clerk LLC. No other individual claimant submitted a claim.

25. On September 1, 2017, this Court granted an Order for the resolution of claims (the "**Claims Resolution Order**"). Under the Claims Resolution Order, the Applicants, in

[14] Lackpatiah-Sealy Affidavit at para 22 and Exhibit F.
[15] Lackpatiah-Sealy Affidavit at para 23 and Exhibit F.
[16] Lackpatiah-Sealy Affidavit at para 23 and Exhibit F.

consultation with the Monitor and with the consent of the Equity Committee, may determine whether the Putative Class Claim is adjudicated in the CCAA Proceedings or the Chapter 11 Proceedings.

26. On August 9, 2017, the Applicants filed their *Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and Its Affiliated Applicants* and, on August 25, 2017, the Applicants filed a revised version of the Plan and a disclosure statement.

27. A condition precedent to Plan confirmation, as set out in section IX(A)(3) of the Plan, is that the Putative Class Claim is disallowed or estimated at $0.00 by the Bankruptcy Court, the CCAA Court or other court of competent jurisdiction.

28. The recognition of Plan, and other relief, including authority to make distributions will be sought by the Applicants in the CCAA proceedings.

PART III - ISSUES

29. The issues on this motion are as follows:

(a) Whether this Court has jurisdiction to disallow the Putative Class Proof of Claim; and

(b) In the event that the Court answers (a) above in the affirmative, whether the Putative Class Proof of Claim should be disallowed.

PART IV - ARGUMENTS

A. The CCAA Court has the jurisdiction to disallow the Putative Class Claim

30. The Individual Claimant submitted the Putative Class Proof of Claim to Prime Clerk LLC in accordance with the Claims Procedure Orders. There is only one single claims process and the filing of the Putative Class Proof of Claim results in the submission of such claim in both jurisdictions. Pursuant to the Canadian Claims Order, the Putative Class Claim may be adjudicated in the CCAA Proceedings. Accordingly, pursuant to the Canadian Claims Order, the CCAA Court has the jurisdiction to disallow the Putative Class Claim.

31. In addition, while the Putative Class Claim is a class action commenced in the District Court, it is also claim against the Canadian parent company, PSG, subject to these CCAA proceedings. This Court's inherent jurisdiction under the CCAA as well as the requirement under the CCAA to summarily determine claims against a debtor, gives this Court the discretion to grant the relief sought by the Applicants.

32. Specifically, section 11 of the CCAA gives this Court the power "to make any order that it considers appropriate in the circumstances".[17] Courts have held that the discretion provided for in section 11 should be "interpreted widely" and that it is "the engine that drives the broad and flexible statutory scheme" of the CCAA.[18]

33. Section 21(1) of the CCAA mandates that any dispute about a claim will be determined in a summary manner by the Court.[19] Specifically, the CCAA provides for a summary

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[17] *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, s 11, Schedule "B", page 23.
[18] *Stelco, Re* (2005), 253 DLR (4th) 109 at para 36, 2005 CarswellOnt 1188 (Ont Sup Ct (Comm List)), Applicant's Book of Authorities, Tab 8; see also *Dylex Ltd., Re* (1995), 31 CBR (3d) 106, 1995 CarswellOnt 54 (Ont Sup Ct (Comm List)), Applicant's Book of Authorities, Tab 1.
[19] *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, s 21(1), Schedule "B", page 23.

determination of the validity of a disputed claim, such as the claim asserted here by the Putative Class.

34. Canadian courts, including the Supreme Court of Canada and this Court, have consistently held that disputes relating to debtor companies involved in CCAA proceedings should be resolved by the CCAA court and that principles of private international law relating to jurisdiction and forum selection must be applied with modifications in the insolvency context.

35. In *Eagle River International Ltd, Re* ["*Sam Levy*"], a trustee in bankruptcy of a bankrupt Quebec company moved in Quebec to recover certain assets of the bankrupt from a British Columbia company.[20] The British Columbia defendant company sought to transfer the proceeding to British Columbia, arguing the Quebec Court lacked jurisdiction to hear the exclusively contractual claim against it. At the time of the trustee's motion, the British Columbia defendant company had filed no proof of claim in the bankruptcy. The British Columbia defendant gave notice of its counterclaim only after the trustee brought its motion.

36. The Supreme Court of Canada upheld the decisions of the motions judge and the Quebec Court of Appeal, holding that the Quebec Court had jurisdiction and was the proper forum to determine the trustee's claim. The Supreme Court of Canada applied the "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction and stated, in part:

> In the present case, we are confronted with a federal statute that prima facie establishes one command centre or "single control" for all proceedings related to the bankruptcy (s. 183(1)), Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and

[20] *Eagle River International Ltd, Re*, 2001 SCC 92, [2001] 3 SCR 978 [*Sam Levy*], Applicant's Book of Authorities, Tab 2.

> who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.[21] [Citations omitted.]

37. The Supreme Court of Canada also reasoned that, in light of the very important public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation, the general principles of private international law should not necessarily govern in the context of an insolvency proceeding.[22]

38. The Quebec Superior Court followed *Sam Levy* in *Montreal, Maine*[23] where the CCAA court was asked to consider a dispute regarding the CCAA debtor's claim against its American insurer that arose under an insurance contract governed by Maine law.[24] As between the Quebec Court or the Maine Court, the Quebec Court had jurisdiction over the insurer and the dispute under the "single proceeding model."[25]

39. Further, this Court recently held in *Essar Steel Algoma Inc., Re*[26] that, applying the single control model, the CCAA Court had jurisdiction to determine whether the debtor had breached

[21] *Eagle River International Ltd, Re*, 2001 SCC 92 at para 77, [2001] 3 SCR 978 [*Sam Levy*], Applicant's Book of Authorities, Tab 2.
[22] *Eagle River International Ltd, Re*, 2001 SCC 92 at para 77, [2001] 3 SCR 978; Applicant's Book of Authorities, Tab 2.
[23] *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada cie*, *Re*, 2013 QCCS 5194, 2013 CarswellQue 10709 [*Montreal, Maine*], Applicant's Book of Authorities, Tab 4.
[24] *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada cie*, *Re*, 2013 QCCS 5194 at para 20, 2013 CarswellQue 10709, Applicant's Book of Authorities, Tab 4.
[25] *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada cie*, *Re*, 2013 QCCS 5194 at para 24, 2013 CarswellQue 10709, Applicant's Book of Authorities, Tab 4.
[26] *Essar Steel Algoma Inc.*, *Re*, 2016 ONSC 595 at para 29, 33 CBR (6th) 313, Applicant's Book of Authorities, Tab 3.

its contractual obligations to a supplier, notwithstanding that there was already pending litigation in Ohio.

40. For the single control model to apply, the third-party must not be a stranger to the insolvency proceedings.[27] Here, the Putative Class has filed a proof of claim and raised damages against the Applicants through the class action. The Putative Class is therefore not a stranger to these proceedings.

41. While the Equity Committee contends that this CCAA Court has jurisdiction to disallow the Putative Class Proof of Claim, this does not preclude the US Court in the Chapter 11 proceedings from also determining whether the Putative Class Claim should be disallowed under US law.

B. The Putative Class Proof of Claim should be Disallowed

i. No Legal Authority by Class Members to file Proof of Claim

42. The persons who filed the Putative Class proof of claim against PSG had no legal authority to file the Putative Class Proof of Claim on behalf of any putative class member.

43. A "class" is a legal fiction. Thus, a class has no inherent entitlement to access the courts as a "class" in Canada or in the U.S. The relevant laws in Canada require judicial determination before a class is certified and deemed worthy of legal recognition.[28]

44. Even if there had been a certification of a claim in a foreign court, however, no steps have been taken to certify or recognize a class proceeding or claim in Canada. The relevant laws

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[27] *Essar Steel Algoma Inc., Re*, 2016 ONSC 595 at para 33, 33 CBR (6th) 313, Applicant's Book of Authorities, Tab 3.
[28] Lackpatiah-Sealy Affidavit at para 3 and Exhibit F.

in Canada require judicial determination before a class is certified and deemed worthy of legal recognition.

45. Under Ontario's *Class Proceedings Act, 1992*, a class proceeding will not be authorized unless:

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who, (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.[29]

46. The persons who filed the Putative Class Proof of Claim also did not, prior to the Claims Bar Date, seek to lift the stay of proceedings in order to obtain class certification in the Southern District of New York or in Canada. No motion has been filed since that time to lift the stay of proceedings to obtain class certification.

[29] *Class Proceedings Act, 1992*, SO 1992, c 6, ss 2(2), 2(3), 5(1), Schedule "B", page 22.

47. Even if there had been the requisite certification of claims in another proceeding, however, the persons who filed the Putative Class Proof of Claim did not have the requisite legal authority to file such claim in these CCAA Proceedings. Leave was neither sought nor granted to pursue or in any way recognize a class proceeding before this Court or any Ontario court. The Individual Claimant did not take any steps before the Canadian Court to seek the appointment of representative counsel or any form of representative status under Canadian law vis-à-vis the Putative Class.

48. The Court has authority to give a party representative status or appoint representative counsel in CCAA proceedings under section 11 of the CCAA and Rule 10.01 of the *Rules of Civil Procedure*.[30] Here, it was open to the Individual Claimant to seek an order under and Rule 10.01 of the Rules of Civil Procedure and Section 11 of the CCAA but the Individual Claimant chose not to. Accordingly, there can be no reasonable expectation that any "class" claim was either advanced or preserved.

49. As the class has not been certified in either the U.S or in Canada, and representative status was not obtained in these CCAA proceedings, the persons who filed the Putative Class Proof of Claim did not have the requisite legal authority to file such proof of claim in these proceedings.

ii. The Claims Procedure Order Does Not Provide for Submission of the Putative Class Proof of Claim

50. The Putative Class Proof of Claim is not properly filed pursuant to and in accordance with the Claims Procedure Orders and therefore the claim should be disallowed.

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[30] *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3028 at paras 10-13 (Ont Sup Ct (Comm List)) [*Nortel*], Applicant's Book of Authorities, Tab 7.

51. The Claims Procedure Orders do not permit the filing of representative claims, rather in order for a claim to be filed the person filing such claim must either be the claimant's lawyer or their authorized agent.[31]

52. The Court has authority to give a party representative status or appoint representative counsel in CCAA proceedings under section 11 of the CCAA and, where persons "cannot be readily ascertained, found or served", under Rule 10.01 of the *Rules of Civil Procedure.*

53. Before exercising its discretion to permit a representative claim, the Canadian court has considered whether there was a qualified legal representative and certification of the class action prior to the claims bar date.[32]

54. In *Muscletech Research & Development Inc., Re*, the Court found that, as a result of the absence of documentary evidence from members of the putative class supporting the potential claimant's authority to file a proof of claim on their behalf or a court order granting such authority, the potential claimant was not a "legal personal representative" for purposes of a proof of claim.[33]

55. Here, the Individual Claimant did not take, prior to the claims bar date or even to date, any steps before the Canadian court to seek recognition of any representative status, class certification or authorization, the appointment of representative counsel appropriately qualified

[31] Notice of Motion returnable October 16, 2017, Application Record, Tab 1 at para 7.
[32] *Muscletech Research & Development Inc.,Re* (2006), 2006 CarswellOnt 7877 at para 35 (Ont Sup Ct), Applicant's Book of Authorities, Tab 6.
[33] *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 7877 at para 32 (Ont Sup Ct), Applicant's Book of Authorities, Tab 6.

before the Canadian court, or seeking a representation order or any form of representative status under Canadian law.[34]

56. As the Individual Claimant did not take any steps before the Canadian Court to seek recognition, certification, authorization, appointment of qualified representative counsel or any form of representative status under applicable Canadian law prior to the Claims Bar Date, the Putative Class Claim should be disallowed.

iii. The Court Should Exercise Its Discretion And Disallow the Putative Class Claim in Any Event

57. Canadian law does not recognize a right to file a class proof of claim in a CCAA proceeding. In Canada, the CCAA is silent as to "class" proofs of claims and whether they can be filed in a CCAA proceeding.[35]

58. Although the court has inherent jurisdiction to permit a representative proof of claim, the determination of whether it should be permitted in any particular case will depend upon the factual circumstances of the case and the equities between the parties.[36]

59. Before exercising its discretion to permit a representative claim, the Canadian court has considered whether the orders within the CCAA proceeding gave adequate protection to the potential group of creditors.[37]

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[34] Lackpatiah-Sealy Affidavit at para 47 and Exhibit F.

[35] *Muscletech Research & Development Inc.,Re* (2006), 2006 CarswellOnt 7877 at para 19 (Ont Sup Ct), Applicant's Book of Authorities, Tab 6.

[36] *Muscletech Research & Development Inc.,Re* (2006), 2006 CarswellOnt 7877 at para 24 (Ont Sup Ct), Applicant's Book of Authorities, Tab 6.

[37] *Muscletech Research & Development Inc.,Re* (2006), 2006 CarswellOnt 7877 at para 35 (Ont Sup Ct), Applicant's Book of Authorities, Tab 6.

60. A class proof of claim should not be accepted where the CCAA process, including a claims procedure thereunder, adequately protects the interests of the potential claimants such that a "class" claim is not necessary.[38]

61. In *Muscletech Research & Development Inc., Re*, the Court, in refusing to exercise its jurisdiction to allow the filing of a representative claim, considered that the CCAA process gave adequate opportunity for anyone with a claim to file a proof of claim.[39]

62. In this case, appropriate notice of the Claims Procedure Order and the Claims Bar Date was provided to all potential individual class claimants and not a single one (besides the Individual Claimant) filed a proof of claim or otherwise asserted any entitlement in these proceedings.[40] In addition, given that the class was not certified in Canada and no representative status was sought in the CCAA proceedings, individual claimants could not reasonably assume that they need not comply with the Claims Procedure Order, including the Claims Bar Date.

iv. Any Request for Recognition of the Putative Class Claim Is Untimely and Prejudicial To the Applicants' Other Stakeholders

63. The Individual Claimant has not, to date, sought certification of the Class Action in the District Court.

64. In the U.S., a claimant bears a particularly heavy burden to earn such class recognition before its case can proceed.[41] The U.S court would need to determine whether the certification requirements of Rule 23 of the Federal Rules of Civil Procedure have been met including

[38] *Muscletech Research & Development Inc.,Re* (2006), 2006 CarswellOnt 4929 at paras 37-40 (Ont Sup Ct (Comm List)), Applicant's Book of Authorities, Tab 5.
[39] *Muscletech Research & Development Inc.,Re* (2006), 2006 CarswellOnt 4929 at para 44 (Ont Sup Ct (Comm List)), Applicant's Book of Authorities, Tab 5.
[40] Lackpatiah-Sealy Affidavit at para 3 and Exhibit F.
[41] Lackpatiah-Sealy Affidavit at para 29 and Exhibit F.

whether (1) the class is needed because there are "numerous" actual claimants; (2) those claimants are similarly situated because they have "common" questions of facts and law, and there is "typicality" to their claims; and (3) a class action is "superior" to all other methods of claim adjudication.[42] The fact that the Individual Plaintiff has not sought certification of the Class Action in the District Court will necessarily result in a significant delay in the administration of this estate, including distributions to stakeholders.

65. The Individual Claimant also has still not: (i) made an application to seek representative or certification status in Canada, notwithstanding that the claims bar date passed nearly seven (7) months ago and that these Chapter 11 and CCAA cases are rapidly nearing their conclusion; or (ii) made an application in the Chapter 11 court as to whether the bankruptcy court should permit the filing of a class proof of claim (via application of Bankruptcy Rule 7023 to the claim) and whether the filing would be beneficial to the case[43].

66. The failure of the Individual Claimant to take proper steps in connection with the Putative Class Claim frustrates the statutory purpose underlying the authority of the Court under section 21(1) of the CCAA to summarily deal with the Putative Class Claim.[44] The authority to summarily determine claims is intended to resolve claims without undue costs and to facilitate timely distributions to stakeholders. The Individual Claimant should not be able to frustrate the policy objectives of the statute through wilful delay. .

67. Because the Putative Class has not been certified (and discovery has not yet begun), allowing the Putative Class Claim at this time will precipitate costly and time-consuming

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[42] Lackpatiah-Sealy Affidavit, footnote 4, at para 4 and Exhibit F.
[43] Lackpatiah-Sealy Affidavit at paras 2, 26, 28, 30,43 and Exhibit F.
[44] *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, s 21(1), Schedule "B", page 23.

litigation regarding class certification, which would further prejudice the Applicants' equity holders by imposing unnecessary delay and burden on the Applicants' remaining resources.[45]

68. The absence of any certification in the U.S. or in Canada and the fact that nothing has been done to advance the Class Action in the CCAA proceedings implies that the Putative Class Claim is of little merit. If the claim had any merit, one would reasonably expect that steps to advance the claim would have been taken in these proceedings.

69. The Individual Claimant has simply waited too long and any such application at this point in the cases would prejudice the Applicants' other stakeholders by jeopardizing Plan confirmation and likely substantially delaying distributions to equity holders.[46]

v. Recognizing the Unauthorized Class is Unnecessary and Would Adversely Affect The Administration Of The Estates

70. Under Canadian law, a class proof of claim may be disallowed where the court determines that permitting the claim to proceed would disrupt or extend the case (and consideration of a plan), increase costs, and delay distributions to creditors.[47]

71. The Applicants' CCAA proceedings and Chapter 11 cases are nearing their end. The sale closed several months ago, the claims bar date passed nearly seven (7) months ago, and, as a result of the Court's approval of the Claims Resolution Order, the process to determine and resolve submitted claims is well underway. A Chapter 11 plan and a concurrent Canadian Order in the CCAA proceedings have been fully negotiated and a hearing is scheduled for November 21, 2017.

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[45] Lackpatiah-Sealy Affidavit at para 44 and Exhibit F.
[46] Lackpatiah-Sealy Affidavit at para 44 and Exhibit F.
[47] See e.g. *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 7877 at para 34 (Ont Sup Ct), Applicant's Book of Authorities, Tab 6.

72. Denying the disallowance of the Putative Class Claim at this time would jeopardize the Plan process, introduce additional and wholly unnecessary layers of procedural and factual complexity to the Chapter 11 and CCAA cases, and require the estates to expend additional resources to adjudicate issues such as class certification and the merits of the Putative Class Claim.[48]

73. Further, the Putative Class Claim is a securities fraud claim based on an ownership interest in shares of PSG. Accordingly, even if the Putative Class Claim was a proper claim with merit it would nevertheless constitute an equity claim under the CCAA. The recognition of the Putative Class Claim may result in costly litigation over the distribution of residual sale proceeds among the Putative Class members and the Applicants' other equity holders. At the very least, it would likely result in a substantial delay of any distributions to the Applicants' equity holders under any Chapter 11 plan and Canadian Order pending the disposition of the class litigation (or estimation of the Putative Class Claim).[49]

74. Any benefit of class adjudication is far outweighed by the negative consequences in these cases. The members of the Putative Class had an opportunity to file individual claims pursuant to the Claims Procedure Order, yet no individual class member did so. In any event, members of the Putative Class continue to have an alternative and adequate forum for pursuing claims. The claims in the second amended putative class complaint continue in the District Court as against the Individual Defendants. That proceeding is the appropriate venue, and contains the appropriate defendants for the putative class claim.[50]

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[48] Lackpatiah-Sealy Affidavit at para 43 and Exhibit F.
[49] Lackpatiah-Sealy Affidavit at para 44 and Exhibit F.
[50] Lackpatiah-Sealy Affidavit at para 45 and Exhibit F.

PART V - RELIEF REQUESTED

75. The Official Equity Committee respectfully requests that the Court disallow the Putative Class Claim or in the alternative, recognize an Order of the US Court disallowing the Putative Class Claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2017.

Andy Kent
Per: Caitlin Fell
McMillan LLP

Lawyers for the Applicants

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Dylex Ltd., Re* (1995), 31 CBR (3d) 106, 1995 CarswellOnt 54 (Ont Sup Ct (Comm List)).
2. *Eagle River International Ltd, Re*, 2001 SCC 92, [2001] 3 SCR 978.
3. *Essar Steel Algoma Inc., Re*, 2016 ONSC 595, 33 CBR (6th) 313.
4. *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada cie, Re*, 2013 QCCS 5194, 2013 CarswellQue 10709.
5. *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 4929 (Ont Sup Ct (Comm List)).
6. *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 7877 (Ont Sup Ct).
7. *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3028 (Ont Sup Ct (Comm List)).
8. *Stelco, Re* (2005), 253 DLR (4th) 109, 2005 CarswellOnt 1188 (Ont Sup Ct (Comm List)).
9. *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426, 2016 CarswellOnt 13839.

SCHEDULE "B"
RELEVANT STATUTES

Class Proceedings Act, 1992, SO 1992, c 6.

Motion for certification

2 (2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. SO 1992, c 6, s 2 (2).

Idem

(3) A motion under subsection (2) shall be made,

- **(a)** within ninety days after the later of,
  - **(i)** the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
  - **(ii)** the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or
- **(b)** subsequently, with leave of the court. SO 1992, c 6, s 2(3).

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

- **(i)** would fairly and adequately represent the interests of the class,
- **(ii)** has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- **(iii)** does not have, on the common issues for the class, an interest in conflict with the interests of other class members. SO 1992, c 6, s 5 (1).

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. RSC 1985 c C-36, s 11.

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., ET AL.

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO PUTATIVE CLASS PROOF OF CLAIM FILED BY PLUMBERS & PIPEFITTERS NATIONAL PENSION FUND (PROOF OF CLAIM NO. 444)

McMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON M5J 2T3

Andrew Kent LS#: 18484O
Tel: 416.865.7160
E-mail: andrew.kent@mcmillan.ca
Jeffrey Levine LS#: 55582H
Tel: 416.865.7791
E-mail: jeffrey.levine@mcmillan.ca
Caitlin Fell LS#: 60091H
Tel: 416.865.7841
E-mail: caitlin.fell@mcmillan.ca

Lawyers for the Respondent,
Official Committee of Equity Holders