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: CCAA Approval Order)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Peter Howard LSUC#: 22056F
Tel: (416) 869-5613
E-mail: phoward@stikeman.com

Lee Nicholson LSUC#66412I
Tel: (416) 869-5604
E-mail: leenicholson@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

TO: THE SERVICE LIST

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)

PART I - INTRODUCTION

1. During these Bankruptcy Proceedings, the Applicants have completed a sale of substantially all their assets. After repayment of their secured debt, the Applicants have a significant amount of remaining proceeds that needs to be distributed to stakeholders, along with their other assets. After several months of negotiations between the Applicants and various stakeholders, the Applicants were able to develop the *First Amended Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc*. and its affiliated debtors (as it may be further amended, modified or supplemented from time to time, the "**Joint Plan**") which proposes to pay unsecured creditors in full (without post-petition interest) and distribute any remaining proceeds to Holders of Parent Equity Interests and the Lead Plaintiff. The Joint Plan represents a consensus among the Applicants' major stakeholders, including the Equity Committee, Creditors' Committee, as well as the Lead Plaintiff in the Securities Litigation. The Applicants have also solicited votes on the Joint Plan from unsecured creditors and shareholders and all classes of stakeholders have overwhelmingly approved of the Joint Plan. Over [90%] in number and [99%] in amount of the Holders of Parent Equity Interests, who are the stakeholders to receive the residual value under the Joint Plan, have voted in favour of the Joint Plan.

2. The Applicants are seeking a companion distribution and approval order (the "**CCAA Approval Order**") from this Court (the "**Canadian Court**") to implement and effectuate the Joint Plan and its contemplated transactions in Canada. This motion is the last major step in the Applicants' Bankruptcy Proceedings. Granting the CCAA Approval Order will give effect to the agreed upon compromises amongst various stakeholders with respect to the contentious issues in these Bankruptcy Proceedings as reflected in the Joint Plan and provide a path for stakeholders to start receiving distributions from the Applicants and for the ultimate winding-up and liquidation of the Applicants.

PART II - THE FACTS

3. The facts with respect to this motion are more fully set out in the Affidavit of Brian J. Fox sworn December 7, 2017 (the "**Fox Affidavit**"). Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Joint Plan, which is attached as Exhibit "A" to the Fox Affidavit.

A. Background of the CCAA Proceedings

(i) Commencement of the Bankruptcy Proceedings and the Sale

4. On October 31, 2016, Old PSG Wind-down Ltd. (f/k/a Performance Sports Group Ltd.) ("**PSG**" or the "**Parent Debtor**") 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**").

Fox Affidavit at para. 8, Motion Record of the Applicants, Tab 2.

5. 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 Cases, the "**Bankruptcy Proceedings**").

Fox Affidavit at para. 9, Motion Record of the Applicants, Tab 2.

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

Fox Affidavit at paras. 10 - 12, Motion Record of the Applicants, Tab 2.

(ii) The Joint Plan

7. Following the Closing, the Applicants held the net proceeds from the Sale (the "**Sale Proceeds**") and explored various alternatives in respect of distributing the Sale Proceeds to the Applicants' stakeholders. The Applicants engaged in discussions with the Monitor and their stakeholders, including the Creditors' Committee and the Equity Committee, to determine an efficient method to wind up the Bankruptcy Proceedings. During the discussions, the Applicants were advised that a plan would be necessary or desirable in order to implement the Global Settlement and effect distributions to the Applicants' stakeholders in the Chapter 11 Cases.

Fox Affidavit at paras. 16 - 17, Motion Record of the Applicants, Tab 2.

8. On August 9, 2017, the Applicants filed an initial Joint Plan proposing to distribute the Applicants' remaining assets, including the Sale Proceeds and potential Retained Causes of Action. A modified version of the Joint Plan, along with the related disclosure statement (the

"**Disclosure Statement**"), was filed with the Bankruptcy Court on August 25, 2017. On October 11, 2017, the Applicants filed a further revised Joint Plan and Disclosure Statement.

Fox Affidavit at para. 18, Motion Record of the Applicants, Tab 2.

9. The Bankruptcy Court initially scheduled the hearing for approval of the Disclosure Statement for October 3, 2017. The hearing was later adjourned to October 16, 2017, in order for the hearing to proceed at the same time as the hearing in respect of objections by the Equity Committee and the Applicants (the "**Class Claim Objections**") to the claim filed by the Lead Plaintiff on behalf of the Putative Class (the "**Putative Class Claim**").

Fox Affidavit at para. 19, Motion Record of the Applicants, Tab 2.

10. On October 31, 2017, the Applicants filed the first amended Joint Plan, incorporating the Class Settlement, described below, along with a revised Disclosure Statement. The Disclosure Statement in respect of the Joint Plan was approved by the Bankruptcy Court on November 1, 2017, and the Applicants commenced solicitation on the Joint Plan shortly thereafter.

Fox Affidavit at para. 20, Motion Record of the Applicants, Tab 2.

(iii) Initial CCAA Approval Order

11. On September 27, 2017, the Applicants sought and obtained an Order from the Canadian Court (the "**Initial CCAA Approval Order**"), authorizing the Applicants to proceed with their proposed path forward for making the Joint Plan effective in Canada without filing a plan of compromise or arrangement under the CCAA. The Initial CCAA Approval Order also authorized the Applicants to solicit votes on the Joint Plan in accordance with the process approved by the Bankruptcy Court in the Chapter 11 Cases.

Fox Affidavit at para. 21, Motion Record of the Applicants, Tab 2.

12. The Initial CCAA Approval Order Hearing also set an objection deadline as seven (7) business days in advance of the CCAA Approval Order Hearing, which was December 11, 2017. No party has filed materials to date opposing the CCAA Approval Order.

Fox Affidavit at para. 57, Motion Record of the Applicants, Tab 2.

13. Prior to obtaining the Initial CCAA Approval Order, the Applicants filed a draft CCAA Approval Order with the Canadian Court and served a copy on the Service List.

Fox Affidavit at para. 23, Motion Record of the Applicants, Tab 2.

(iv) Class Settlement

14. On October 16, 2017, the Courts held a hearing in respect of the Class Claim Objections. Following the hearing, the Applicants, the Equity Committee, and the Lead Plaintiff engaged in extensive, good-faith, arms'-length negotiations and agreed to the *Stipulation Resolving Securities Claims, Objections Thereto, Lead Plaintiff's Potential Plan Confirmation Objections, and Cross Motion to Apply Bankruptcy Rule 7023 to Putative Class Claim* (the "**Class Plaintiff Stipulation**") to resolve the Class Claim Objections.

Fox Affidavit at paras. 19, 25, Motion Record of the Applicants, Tab 2.

15. Pursuant to the Class Plaintiff Stipulation, the Applicants agreed to further amend the Joint Plan to, among other things, provide the Lead Plaintiff (on behalf of itself and the Putative Class) with a payment of $1.15 million from the Sale Proceeds and 40% of the Cause of Action Net Proceeds (recoveries from the Retained Causes of Action net of costs and expenses) up to a maximum aggregate amount of $2.5 million. On November 1, 2017, the Bankruptcy Court entered an order approving the Class Plaintiff Stipulation.

Fox Affidavit at para. 25, Motion Record of the Applicants, Tab 2.

B. Overview of the Joint Plan

(i) Overview

16. The Joint Plan incorporates two settlements, the Global Settlement and the Class Settlement, that resolve certain obstacles to winding up the Bankruptcy Proceedings.

Fox Affidavit at para. 26, Motion Record of the Applicants, Tab 2.

17. The Global Settlement, which is incorporated into the Joint Plan, provides for, among other things: (a) payment in full of all Allowed General Unsecured Claims without Post-Petition Interest (to the extent it would have been allowable); (b) resolution of all disputes regarding the treatment of Intercompany Claims and Equity Interests; (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.

Fox Affidavit at para. 27, Motion Record of the Applicants, Tab 2.

18. The Class Settlement provides, among other things, that: (a) the Lead Plaintiff will receive (for itself and each member of the Putative Class) a distribution of $1.15 million of Cash from the Sale Proceeds contemporaneously with other Cash distributions of Sale Proceeds made to Holders of Parent Equity Interests; and (b) the Lead Plaintiff will receive (on behalf of itself and each member of the Putative Class) forty percent (40%) participation in net recoveries from the Retained Causes of Action, up to an aggregate maximum amount of $2.5 million. Subject to approval by the Courts, the Class Settlement will be binding on the Lead Plaintiff and each member of the Putative Class.

Fox Affidavit at para. 28, Motion Record of the Applicants, Tab 2.

(ii) Classes

19. The Joint Plan classifies creditors and stakeholders of PSG into seven different classes for purposes of voting and distributions under the Joint Plan. Holders of General Unsecured Claims and Parent Equity Interests were impaired by the Joint Plan and therefore entitled to vote to accept or reject the Joint Plan. Pursuant to the Class Plaintiff Stipulation, the Lead Plaintiff was also entitled to vote on the Joint Plan on behalf of all Holders of Securities Claims.

> Fox Affidavit at paras. 29, 31, Motion Record of the Applicants, Tab 2.

20. The Joint Plan classified creditors of Subsidiary Debtors into five different classes for purposes of voting and distribution. Only Holders of General Unsecured Claims were entitled to vote in respect of the plans for each Subsidiary Debtor.

> Twelfth Report of the Monitor dated December 14, 2017 (the "**Twelfth Report**") at paras. 31 - 33.

(iii) The Liquidation Trust

21. The Joint Plan contemplates the creation of a Liquidation Trust which will receive certain assets of the Applicants to be distributed to Liquidation Trust Beneficiaries. Holders of Parent Equity Interests are required to either elect to receive Liquidation Trust Beneficial Interests in exchange for the mandatory purchase and cancellation of their Parent Equity Interests, or to retain their Parent Equity Interests and receive their distributions from the Reorganized Parent Debtor. Holders of Parent Equity Interests were urged to select either of the foregoing options based on their tax reporting jurisdiction, subject to consulting their own tax advisors for advice having regard to their own situation.

> Fox Affidavit at paras. 33 - 34, Motion Record of the Applicants, Tab 2.

22. The Equity Committee has selected Theseus Strategy Group LLC to act as trustee of the Liquidation Trust.

> Affidavit of Keisha Lackpatiah-Sealy sworn December 7, 2017 (“**KLS Affidavit**”) at Exhibit 1(C), Liquidation Trustee and Members of the Liquidation Trust Advisory Board, Supplementary Motion Record of the Applicants, Tab (AA)(1)(C).

(iv) Corporate Governance

23. As part of the Joint Plan, the Applicants’ current directors and officers will resign or be deemed to resign on the Effective Date in accordance with the terms of the Joint Plan. The Equity Committee has selected Geoff Arens, Brenda Reed, Ken Grossman, Lee Matheson and Kevin McEchleran to serve on the boards of the Reorganized Parent Debtor following the Effective Date. The new directors will also serve on the Liquidation Trust Advisory Board and will review certain decisions to be made by the Liquidation Trustee.

> Fox Affidavit at paras. 35 - 37, Motion Record of the Applicants, Tab 2.
>
> KLS Affidavit at Exhibit 1(D), The Liquidation Trust Agreement, Supplementary Motion Record of the Applicants, Tab (AA)(1)(D).

24. Mark E. Palmer of Theseus Strategy Group LLC has been selected by the Equity Committee to act as the Chief Wind-Down Officer under the Joint Plan. Theseus Strategy Group LLC will also act as the Litigation Representative of Reorganized Parent Debtor.

> Fox Affidavit at para. 35, Motion Record of the Applicants, Tab 2.

(v) Distributions

25. Under the Joint Plan, the Monitor will act as Distribution Agent for all distributions to Holders of General Unsecured Claims. Distributions may be made to these creditors following either receipt of applicable clearance certificates or a comfort letter from the applicable taxing authorities, including the Canadian Revenue Agency, or such other arrangements as are

satisfactory to the Monitor. Following these distributions, the Monitor, Reorganized Parent Debtor, or the Liquidation Trustee will be responsible for choosing a new Distribution Agent who will make distributions to Holders of Parent Equity Interests on behalf of the Liquidation Trust and the Reorganized Parent Debtor following receipt of applicable clearance certificates.

> Fox Affidavit at para. 38, Motion Record of the Applicants, Tab 2.

(vi) Reserves

26. The Joint Plan contemplates the creation of a Liquidation Trust Expense Reserve, a Holdback Amount Reserve and other reserves which may be established for disputed claims. The Liquidation Trust Expense Reserve will be administered by the Liquidation Trustee and used to pay Wind-Down Expenses and other expenses incurred by the Applicants and Liquidation Trust following the Effective Date, including expenses incurred in connection with prosecuting the Retained Causes of Action. The estimated amount of the Liquidation Trust Expense Reserve to be determined by Liquidation Trustee is $7 million. The Holdback Amount Reserve will be used to pay fees and expenses incurred by the Applicants prior to the Effective Date.

> Fox Affidavit at paras. 39 - 40, Motion Record of the Applicants, Tab 2.
>
> KLS Affidavit at Exhibit 1(D), The Liquidation Trust Agreement, Supplementary Motion Record of the Applicants, Tab (AA)(1)(D).

(vii) Releases, Exculpations and Injunctions

27. The Joint Plan provides for certain releases, exculpations and injunctions for the Applicants, their directors, officers and other employees, the Monitor and other professionals engaged in the Bankruptcy Proceedings. Claims arising from the exceptions set forth in section 5.1(2) of the CCAA are excluded from the exculpations provided for under the Joint Plan.

Fox Affidavit at paras. 42 - 44, Motion Record of the Applicants, Tab 2.

(viii) The Plan Supplement

28. The Applicants filed a Plan Supplement containing certain documents ancillary to the Joint Plan on December 5, 2017 with the Bankruptcy Court and on December 8, 2017 with the Canadian Court. The Plan Supplement contained: (a) the names of the directors that will serve on the Board of Directors of each of the Applicants after the Effective Date; (b) the name of the Chief Wind-Down Officer; (c) the name of the Liquidation Trustee; (d) the names of the members of the Liquidation Trust Advisory Board; (e) the proposed form of the Liquidation Trust Agreement; (f) the proposed form of the Cost Sharing Agreement; (g) the restricted share units and deferred share units that will be treated as Parent Equity Interests under the Joint Plan; (h) additional information regarding the treatment of Intercompany Claims and Intercompany Equity Interests; and (i) the proposed amendments to PSG's articles to become effective on the Effective Date.

KLS Affidavit at Exhibit 1, The Plan Supplement, Supplementary Motion Record of the Applicants, Tab (AA)(1).

C. Solicitation Procedures

29. On November 1, 2017, the Bankruptcy Court entered an order: (a) approving the revised Disclosure Statement (the "**Solicitation Order**"); and (b) authorizing the Applicants to solicit votes on the Joint Plan. The deadline to submit a Ballot to accept or reject the Joint Plan (the "**Voting Deadline**") was December 12, 2017. The Initial CCAA Approval Order authorized the Applicants to solicit votes on the Joint Plan in accordance with the solicitation procedures approved by the Bankruptcy Court.

Fox Affidavit at paras. 47 - 48, Motion Record of the Applicants, Tab 2.

30. Holders of General Unsecured Claims, Parent Equity Interests and the Lead Plaintiff on behalf of itself and the Putative Class were eligible to vote to accept or reject the Joint Plan. The Applicants distributed solicitation packages to parties eligible to vote on the Joint Plan. The Applicants also arranged for public notice of the Joint Plan and the Class Settlement.

> Fox Affidavit at paras. 49 - 50, Motion Record of the Applicants, Tab 2.

31. The voting results on the Joint Plan are detailed in the below charts. As set out in the charts, in every class at least 88.24% in number and 99% in amount voted to accept of the Joint Plan.

Parent Debtor Plan			
Class P4 Claims Vote on Plan			
Accept		**Reject**	
Number	**Amount**	**Number**	**Amount**
30 (88.24%)	$12,391,254.53 (99.99997%)	4 (11.76%)	$4.00 (0.00003%)
Class P6 Vote on Plan			
Accept		**Reject**	
Number	**Amount**	**Number**	**Amount**
1 (100%)	$1,115,000 (%)	0 (0%)	$0 (0%)
Class P7 Vote on Plan			
Accept		**Reject**	
Number	**Amount**	**Number**	**Amount**
N/A	25,754,410 (99.87%)	N/A	32,501 (0.13%)

Subsidiary Debtor Plans				
Debtor	**Class 3 Votes to Accept**		**Class 3 Votes to Reject**	
	Number	**Amount**	**Number**	**Amount**
Bauer Hockey Corp.	20 (100%)	$2,530,649.62 (100%)	0 (0%)	$0 (0%)
Bauer Hockey Retail Inc.	2 (100%)	$6,332.00 (100%)	0 (0%)	$0 (0%)
Bauer Hockey, Inc.	22 (91.67%)	$15,214,808.24 (99.99999%)	2 (8.33%)	$2.00 (0.00001%)
Bauer Performance Sports Uniforms Corp.	6 (100%)	$13,894.90 (100%)	0 (0%)	$0 (0%)
Bauer Performance	1	$2,481.50	0	$0

Sports Uniforms Inc.	(100%)	(100%)	(0%)	(0%)
BPS Diamond Sports Corp.	3 (100%)	$302,124.97 (100%)	0 (0%)	$0 (0%)
BPS Diamond Sports Inc.	2 (100%)	$4,154.49 (100%)	0 (0%)	$0 (0%)
BPS US Holdings Inc.	4 (100%)	$188,155.49 (100%)	0 (0%)	$0 (0%)
Easton Baseball / Softball Corp.	1 (100%)	$380,610.00 (100%)	0 (0%)	$0 (0%)
Easton Baseball / Softball Inc.	13 (100%)	$2,676,830.59 (100%)	0 (0%)	$0 (0%)
Performance Lacrosse Group Corp.	1 (100%)	$4,806.00 (100%)	0 (0%)	$0 (0%)
Performance Lacrosse Group Inc.	8 (100%)	1,219,895.49 (100%)	0 (0%)	$0 (0%)
PSG Innovation Corp.	N/A	N/A	N/A	N/A
PSG Innovation Inc.	N/A	N/A	N/A	N/A

> Declaration of Christina Pullo dated December 15, 2017 (the "**Voting Affidavit**"), Second Supplementary Motion Record of the Applicants, Tab 1.

D. Stipulation

32. On November 9, 2017, the Bankruptcy Court approved a stipulation among the Applicants, the Equity Committee and the Applicants' former directors (the "**Stipulation**"), resolving claims for indemnification filed by the Applicants' former directors under the Claims Procedure Order. Pursuant to the Stipulation, the indemnification claims of the former directors shall be estimated at $0.00 for purposes of voting and distributions under the Joint Plan.

> KLS Affidavit at Exhibit 2, Order of the Bankruptcy Court Approving the Stipulation, Supplementary Motion Record of the Applicants, Tab (AA)(2).

PART III - ISSUES

33. The issues on this motion are:

(a) Whether this Canadian Court should grant the CCAA Approval Order, approving the Joint Plan and other ancillary relief allowing the Applicants to implement and effectuate the Joint Plan and the contemplated transactions;

(b) Whether this Canadian Court should approve the amendments the PSG's articles;

(c) Whether this Canadian Court should grant the requested exemptive relief for PSG and the Liquidation Trust from applicable corporate and securities law;

(d) Whether this Canadian Court should enforce the Order of the Bankruptcy Court approving the Stipulation; and

(e) Whether this Canadian Court should extend the Stay Period to December 31, 2018.

PART IV - LAW AND ARGUMENT

A. The Joint Plan should be approved

34. The Applicants have pursued the Joint Plan in the Chapter 11 Cases, which has been overwhelmingly approved by the Applicants' stakeholders. The Applicants are seeking the CCAA Approval Order to implement and effectuate the Joint Plan. The structure proposed by the Applicants is unique, but specifically designed to fit these unique circumstances and reflects significant input and compromise from all stakeholders. The overarching approach of not pursuing dual plans of compromise or arrangement was approved by this Canadian Court in the Initial CCAA Approval Order.

> Fox Affidavit at paras. 21 - 22, Motion Record of the Applicants, Tab 2.

35. By not filing a plan of compromise or arrangement under the CCAA, the Applicants have saved 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 avoided the 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; and (c) differing conditions for acceptance under the Bankruptcy Code and CCAA.

> Fox Affidavit at para. 22, Motion Record of the Applicants, Tab 2.
>
> Fox Affidavit at Exhibit C, Eleventh Report of the Monitor, Applicants' Motion Record, Tab (C).

36. Section 11 of the CCAA provides that the Court may "make <u>any order</u> 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 and 59, Applicants' Book of Authorities at Tab 1.

37. With the jurisdiction provided under section 11 of the CCAA, a court may approve a material transaction entered into by the debtor company if: (i) the transaction is fair and reasonable; (ii) the transactions will be beneficial to the debtor and its stakeholders generally; and (iii) the transaction is consistent with the purpose and spirit of the CCAA.

> CCAA, section 11.
>
> *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd*., 2010 ONSC 1759 at para. 11, Applicants' Book of Authorities, Tab 2.
>
> *Air Canada, (Re),* [2004] O.J. No. 303 at para. 9, Applicants' Book of Authorities at Tab 3.

38. In *Calpine*, the Court approved a global settlement agreement involving various transactions to be undertaken by the debtor companies. In approving the global settlement, the Court stated:

> That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.
>
> *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 ["*Calpine*"] at para. 75, Applicants' Book of Authorities, Tab 4.

39. As detailed below, the Joint Plan is fair and reasonable, benefits stakeholders generally and is consistent with the purpose of the CCAA, and should therefore be approved.

40. The Joint Plan is a fair, reasonable and successful resolution of these Bankruptcy Proceedings. In *Central Guaranty*, the court recognized that a plan is always the result of difficult negotiations between the debtor and its stakeholders, and the court should not second-guess the business aspects of the plan, descending into the "negotiating arena". The Joint Plan incorporates the Global Settlement and Class Settlement, which represent compromises among

various stakeholders regarding the contentious issues in these Bankruptcy Proceedings. The settlements incorporated in the Joint Plan were the result of significant negotiations among the Applicants and various stakeholders, and have allowed the Bankruptcy Proceedings to be wound up in an efficient and consensual manner.

> Fox Affidavit at paras. 5 - 6 and 26 - 28, Motion Record of the Applicants, Tab 2.
>
> *Central Guaranty Trustco Ltd., (Re)*, (1993), 21 C.B.R. (3d) 139 at para. 3; Applicants' Book of Authorities at Tab 5.

41. Courts have also noted that a successful vote on a plan by sophisticated parties "speaks volumes as to fairness and reasonableness." Every eligible voting class, voted overwhelmingly in favour of the Joint Plan. Over 99% of Parent Equity Interests voted in favour of the Joint Plan and in every class of creditors over 99% in amount voted in favour of the Joint Plan. The voting results demonstrate that the Joint Plan has the near unanimous support of the Applicants' stakeholders.

> *T. Eaton Co., (Re)*, (1999) O.J. No. 5322 (Sup. Ct. J. (Comm. List)) at para. 5, Applicants' Book of Authorities at Tab 6.
>
> Voting Affidavit, Second Supplementary Motion Record of the Applicants, Tab 1.

42. Approval of the Joint Plan also furthers the purpose of the CCAA as it provides the mechanism by which creditors and other stakeholders will receive their recoveries from the Bankruptcy Proceedings. The Joint Plan contemplates the distribution of the Applicants' remaining assets, including the approximately US$50 million in remaining Sale Proceeds. 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". The relief sought by the Applicants is permitted by the architecture of

the CCAA, as the CCAA permits such orders to be made, so long as it is just and appropriate in the circumstances. Justice Blair explained in *Red Cross* the approach:

> 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 7.
>
> Also see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Sup. Ct. J. (Comm. List)) at para. 43, Applicants' Book of Authorities at Tab 8.
>
> Fox Affidavit at para. 26, Motion Record of the Applicants, Tab 2.

43. Additionally, the Joint Plan allows Holders of Parent Equity Interests to attempt to maximize their recovery by allowing the Liquidation Trustee and Reorganized Parent Debtor to pursue the Retained Causes of Action. It was also tailor-made to allow Holders of Parent Equity Interests to choose how to receive their recoveries; i.e., either from the Liquidation Trust or the Reorganized Parent Debtor. The structure takes into account different tax considerations for Holders in different jurisdictions and allows Holders to make a choice based on their own situation. Courts have recognized on numerous occasions that a fundamental purpose of the CCAA is to achieve the maximum value available for stakeholders.

> Fox Affidavit at paras. 26 - 27 and 33 - 34, Motion Record of the Applicants, Tab 2.
>
> *Dondeb Inc., (Re),* 2012 ONSC 6087 at para. 15, Applicants' Book of Authorities, Tab 9.

B. The amended and restated articles should be approved

44. In connection with the Joint Plan, the Applicants are requesting the Canadian Court to approve amended and restated articles for the Reorganized Parent Debtor. In accordance with the Joint Plan, the amendments provide for, among other things, transfer restrictions on the shares of the Reorganized Parent Debtor along with restrictions on the activities that the Reorganized Parent Debtor may carry out. Stakeholders, including shareholders, were provided notice of the amended and restated articles prior to the Voting Deadline, which were filed with the Plan Supplement. Over 99% of the voting Parent Equity Interests voted to accept the Joint Plan, including the amended articles.

> KLS Affidavit at Exhibit 1(F), Proposed Amended Articles, Supplementary Motion Record of the Applicants, Tab (AA)(1)(F).

45. Section 6(2) of the CCAA provides that in connection with sanctioning a plan the court "may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement." The provision provides express jurisdiction approve the amendments as, even though there not a dual plan under the CCAA, this Canadian Court is in effect sanctioning the Joint Plan. Interpreting the provision in this manner is consistent with the broad, flexible nature of the CCAA. In any event, the Canadian Court has jurisdiction under section 11 to approve the amended and restated articles as granting the relief will allow the Applicants to implement the Joint Plan, furthering the purpose of the CCAA.

> CCAA, sections 6(2), 11.

C. The exemptive relief should be granted

46. In order to carry out the post-Effective Date limited activities described in the Fox Affidavit and Disclosure Statement in an efficient and cost effective manner, the Applicants have requested relief from certain obligations under applicable corporate and securities laws. The

Applicants have also requested in the CCAA Approval Order that the Applicants be entitled to proceed with implementation of the Joint Plan on basis that the Applicants are in compliance with applicable corporate law.

47. As set out above, section 11 of the CCAA allows the court to make any order that is appropriate in the circumstances. Further, under section 11.1(3) of the CCAA, the court may stay actions of a regulatory body if: (a) a viable compromise or arrangement could not be made in respect of the company if such regulatory actions were not stayed; and (b) it is not contrary to the public interest that the regulatory order may be affected. Under both of those provisions, the court has jurisdiction to grant the relief requested by the Applicants. Courts frequently use this jurisdiction under the CCAA to suspend any obligation to hold annual shareholder meetings under applicable corporate law. The relief requested by the Applicants is analogous.

> CCAA, sections 11, 11.1(3).
>
> *Canwest Global Communications Corp., (Re)*, (2009), 59 C.B.R. (5th) 72 at para. 54, Applicants' Book of Authorities, Tab 10.

48. Though the Joint Plan provides for the liquidation and distribution of the Applicants' remaining assets, the CCAA Proceedings and the Applicants as bodies corporate are expected to continue for a significant period of time following the Effective Date principally to allow the Liquidation Trust and Reorganized Parent Debtor to pursue the Retained Causes of Action. In addition, the claims process needs to be completed as well as other formalities to wind up the Subsidiary Debtors. During this wind-up phase in the Bankruptcy Proceedings, the Applicants are requesting relief from applicable reporting obligations and the deeming of compliance with applicable corporate laws. Exempting the Reorganized Debtors from applicable reporting requirements will reduce the costs incurred in carrying out post-Effective Date activities and maximize recovery for stakeholders. It will also provide the Liquidation Trustee and new board members of the Reorganized Parent Debtor with certainty as to their compliance and reporting

obligations as they carry out the transactions and limited activities set out the Joint Plan which has the overwhelming support of the Applicants' stakeholders.

> Fox Affidavit at para. 53, Motion Record of the Applicants, Tab 2.

49. The relief is appropriate in these circumstances, as (i) the Reorganized Parent Debtor and Liquidation Trust will only carry on limited activities described in the Joint Plan following the Effective Date with the principal purpose of liquidating and distributing the Applicants' remaining assets; and (ii) the amended and restated articles will provide for transfer restrictions on the shares of the Reorganized Parent Debtor following the Effective Date and limitations on the activities to be carried out by the Reorganized Parent Debtor. The Liquidating Trust Agreement contains similar restrictions for the Liquidation Trust Beneficial Interests. For these reasons, there is limit reason for the Reorganized Debtors to comply with ongoing reporting obligations as if it were still a publicly traded company in compliance with applicable corporate and securities laws. Stakeholders may still receive periodic reporting from the Monitor as the CCAA Proceedings are proposed to continue following the Effective Date. Similarly, in the United States, the Applicants will deregister as a public company relieving it from applicable disclosure obligations for purposes of applicable United States securities law. Granting the requested relief will ensure the implementation of the Joint Plan is coordinated in both jurisdictions.

> KLS Affidavit at Exhibit 1(F), Proposed Amended Articles, Supplementary Motion Record of the Applicants, Tab (AA)(1)(F).

50. Additionally, as set out in the Twelfth Report, the Applicants are and have been in default of applicable securities laws due to, among other things, its failure to timely file its Annual Report on Form 10-K for the fiscal years ended May 31, 2016 and May 31, 2017 and will not be in a position to remedy such defaults. With the existing defaults, providing the requested relief will allow the Liquidation Trustee and directors of the Reorganized Parent Debtor to carry

out their obligations under the Joint Plan with certainty regarding further reporting and compliance.

Twelfth Report at para. 48.

51. The Joint Plan, Disclosure Statement, and draft CCAA Approval Order that was served in connection with the motion for the Initial CCAA Approval Order, have each disclosed that the Applicants are seeking the relief described above from the Canadian Court. The disclosure has provided sufficient notice to stakeholders and regulators to provide an opportunity for such parties to raise any concerns regarding the requested relief. Representatives of the Applicants have also engaged in discussions with staff at the Ontario Securities Commission (the "**OSC**") regarding the relief sought in the CCAA Approval Order and the transactions contemplated by the Joint Plan. Additionally, the British Columbia Attorney General was served with the motions for the CCAA Approval Order and the Initial CCAA Approval Order. To date, neither staff at the OSC nor the British Columbia Attorney General have provided notice to the Applicants that they are opposed to the relief sought.

Fox Affidavit at para. 53, Motion Record of the Applicants, Tab 2.

Twelfth Report at para. 47.

52. The circumstances of this case are completely different from those in *Richtree,* where the court denied a request of a debtor company to exempt it from complying with continuous disclosure requirements. In that case, the shares of the debtor company continued to trade and the debtor company continued to carry on business in an effort restructure as a going concern. Additionally, in that case, the relief requested was previously the subject of an OSC hearing, where OSC staff had indicated it would recommend refusing the exemptive relief requested by the debtor. Contrastingly, in this case, the Applicants have engaged in a constructive dialogue with staff of the OSC regarding the requested relief and the staff of OSC has not provided notice

that it is opposed to the relief. The Applicants also note that *Richtree* was decided prior to the 2009 amendments to the CCAA which added section 11.1 providing express jurisdiction to stay regulatory orders and the Supreme Court of Canada's decision in *Century Services* providing a new framework on the interpretation of the jurisdiction provided by section 11 of the CCAA.

> *Richtree Inc., (Re)*, [2005] O.J. No. 251 (Sup. Ct. J. (Comm. List)) ["*Richtree*"], Applicants' Book of Authorities, Tab 11.
>
> *Century Services*, Applicants' Book of Authorities, Tab 1.

D. The Order of the Bankruptcy Court approving the Stipulation should be enforced

53. The Stipulation resolving certain claims of the Applicants' former directors was the result of arm's length negotiations between the Applicants, the Equity Committee and certain former directors of the Applicants. Pursuant to the Stipulation, the indemnification claims of the Applicants' former directors will be estimated at $0.00 for purposes of voting and distribution under the Joint Plan. The formerly indeterminate claims have been resolved in a consensual manner following an agreement between the relevant parties. The Stipulation has resolved the claims in an efficient manner and enforcing the Order of the Bankruptcy Court which approved the Stipulation in the CCAA Proceedings will prevent any collateral attack on the resolution. As set out above, with the jurisdiction provided under section 11 of the CCAA a court may approve a material agreement entered into by the debtor company.

> CCAA, section 11.

E. The Stay Period should be extended

54. 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.

55. 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 12.

56. On November 28, 2017, the Applicants obtained an extension of the Stay Period (as defined in the Initial Order), to January 15, 2018 from this Canadian Court. The Applicants are seeking a further extension of the Stay Period until December 31, 2018.

> Twelfth Report at paras. 3, 11 and 62 - 64.

57. 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 31, 2018. Creditors will be paid in full during the Stay Period and as result, none 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 in connection with the wind-up of the Applicants and pursuit of the Retained Causes of Action. Though longer than typical, a one year extension is appropriate in the circumstances given the limited activities to be carried on by the Applicants.

> Fox Affidavit at para. 54, Motion Record of the Applicants, Tab 2.
>
> Twelfth Report at para. 66.

PART V - ORDER REQUESTED

58. 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 18th day of December, 2017.

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

SCHEDULE "A"
LIST OF AUTHORITIES

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

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

3. *Air Canada, (Re),* [2004] O.J. No. 303

4. *Calpine Canada Energy Ltd.,* (Re), 2007 ABQB 504

5. *Central Guaranty Trustco Ltd.,* (Re), (1993), 21 C.B.R. (3d) 139

6. *T. Eaton Co., (Re),* (1999) O.J. No. 5322 (Sup. Ct. J. (Comm. List))

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

8. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.,* [2008] O.J. No. 1818 (Sup. Ct. J. (Comm. List))

9. *Dondeb Inc., (Re),* 2012 ONSC 6087

10. *Canwest Global Communications Corp., (Re),* (2009), 59 C.B.R. (5th) 72

11. *Richtree Inc., (Re),* [2005] O.J. No. 251 (Sup. Ct. J. (Comm. List))

12. *Canwest Global Communications Corp., (Re),* [2009] O.J. No. 4788 (Sup. Ct. J. (Comm. List))

SCHEDULE "B"
RELEVANT STATUTES

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

Court may order amendment

6. (2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

…

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.

…

Meaning of regulatory body

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF OLD PSG WIND-DOWN LTD. ET. AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Peter Howard LSUC#: 22056F
Tel: (416) 869-5613
phoward@stikeman.com

Lee Nicholson LSUC#66412I
Tel: (416) 869-5604
leenicholson@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants