This is Exhibit “E” referred to in the

Affidavit of Mark Palmer

sworn before me virtually by Zoom at Toronto, Ontario, this

13th day of January, 2023

A Commissioner for taking Affidavits in the Province of Ontario

Jeffrey Levine, LSO# 55582H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re Old BPSUSH, Inc., et al., Debtors.	Chapter 11 Bankr. Case No. 16-12373 (BLS)
KARYN BARSA, JOAN DEA, C. MICHAEL JACOBI, MATTHEW MANNELLY, BERNARD MCDONELL, BOB NICHOLSON, MARK VENDETTI and JULIE ZALESKI, Plaintiffs, v. THESEUS STRATEGY GROUP LLC, Defendant.	Adv. Proc. No. 19-_____ (BLS)

ADVERSARY COMPLAINT

1. This is a complaint against Theseus Strategy Group LLC ("Theseus" or "Defendant") for monetary, injunctive, and declaratory relief in connection with its meritless and hindsight-based effort to second guess the business judgment exercised by highly qualified and diligent former directors and officers of Performance Sports Group, Inc. ("PSG" or the "Company"), once a leading developer and manufacturer of sports equipment and apparel under such iconic brands as Bauer Hockey and Easton.

2. As detailed below, Theseus, in its capacity as Liquidation Trustee for PSG (which was renamed for restructuring purposes as Old PSG Wind-Down Ltd.), has threatened to sue two former PSG officers, Plaintiffs Mark Vendetti and Julie Zaleski—even though both individuals skillfully managed the financial accounting of PSG and exercised sound business judgment. Vendetti and Zaleski worked diligently in the face of unrelenting demands to prepare financial

statements for PSG's 2016 fiscal year that were fully in compliance with applicable accounting standards and free from material misstatement.

3. Theseus also has targeted Plaintiffs Karyn Barsa, Joan Dea, C. Michael Jacobi, Matthew Mannelly, Bernard McDonell, and Bob Nicholson—all of them independent directors (the "Director Plaintiffs") and, in the case of Jacobi, Mannelly, McDonell, and Dea, members of PSG's Audit Committee (the "Audit Committee").[1] Along with Plaintiffs Vendetti and Zaleski, these directors, with decades of business experience between them, guided PSG through a time of unprecedented challenges that included multiple bankruptcies by major PSG customers, a sudden devaluation of the Canadian dollar, public attacks by an activist shareholder, and slower-than-expected sales that led to significant revisions to Company guidance.

4. The facts show that each Plaintiff exercised prudent business judgment throughout the relevant time period. By way of just a few examples, between 2008 and 2014, as PSG grew through multiple acquisitions, the Board strengthened the Company's operational efficiency and internal controls by expanding the internal audit function, appointing an officer to oversee PSG's then-growing stable of brands, and taking other concrete steps. Then, in 2015, when PSG's former CEO accused the Company of engaging in improper sales practices, the Director Plaintiffs immediately ordered an investigation (which ultimately found no wrongdoing) with the assistance of respected outside advisors, including the former Chair of the Ontario Securities Commission. And in 2016, when KPMG voiced concerns about several of the Company's vendor relationships (detailed below), Plaintiffs acted promptly—and with the timely assistance of two prominent law firms—to create the conditions necessary for KPMG to finish its

[1] As detailed below, prior to February 2017, the Audit Committee was composed of Plaintiffs Dea, McDonell, and Jacobi. The Complaint refers to Plaintiffs Dea, McDonell, and Jacobi as the "Audit Committee Plaintiffs." From February 2017 to August 2017, the Audit Committee was composed of Plaintiffs Dea, McDonell, and Mannelly.

audit. Finally, when it became apparent that PSG would have to seek bankruptcy protection, Plaintiffs, with the advice of outside professionals, acted diligently to preserve the Company's assets.

5. Plaintiffs' efforts at asset preservation proved successful—so successful that PSG was awarded the Large Company Transaction of the Year by the Turnaround Management Association ("TMA") in 2018. As TMA explained, Plaintiffs and their advisors, under trying circumstances, obtained the best possible result for creditors, equity holders, and employees alike:

> Staring down a debt default within 60 days due to [PSG's] inability to file timely audited financial statements, the [C]ompany and its advisors were forced to work with critical urgency to make quick decisions and identify a path forward. The result: selling the company through a multi-jurisdictional bankruptcy process with a two-part [debtor-in-possession] financing.
>
> . . . The transaction resulted in new ownership, produced full recovery to unsecured creditors, yielded consequential recovery to equity holders, provided lawsuit settlement funds, preserved nearly all jobs, and reset the game clock for some of the most beloved brands in sports.

In other words, Plaintiffs acted in good faith by exercising prudent business judgment—the exact opposite of what Theseus is claiming here.

6. Undeterred by these objective and irrefutable facts, Theseus has falsely asserted that Plaintiffs are responsible for PSG's bankruptcy. In a move that will prolong its tenure as Liquidation Trustee, and the guaranteed salary of up to $150,000 per year for its principal that comes with it, Theseus has told Plaintiffs that if they do not accede to its demands, it will file a complaint against them based on the same facts that multiple, independent third parties have already found nonactionable.

7. The cornerstone of Defendant's theory is a single revenue entry for a single sale of bats between PSG's subsidiary, Easton, and a sporting goods retailer, Dunham's (the

"Immaterial Revenue Entry"). That entry represented less than one-half of one percent of PSG's quarterly revenues. Due to an ambiguous term in a one-off contract on Dunham's (not PSG) letterhead, the Immaterial Revenue Entry was adjusted at Vendetti and Zaleski's direction in June 2016 (to be recorded in the FY 2016 financial statements), only one month after they had learned about and investigated it. Vendetti and Zaleski then disclosed the adjusting entry and the details of the transaction to the Audit Committee and PSG's auditors when asked about it during an Audit Committee meeting on or about August 5, 2016, weeks before the deadline under PSG's credit facility to file audited financial statements. The Immaterial Revenue Entry did not cause PSG's financials in the relevant reporting periods to be materially misstated or to require restatement, nor did it help PSG to meet guidance or turn a net loss into a net profit. All of these facts are well-documented and indisputable.

8. By pursuing litigation based on this triviality, it is Theseus that is breaching its fiduciary duty to act in the interest of the Liquidation Trust and its beneficiaries, which include at least Plaintiff Mark Vendetti (who holds 20,000 shares of stock). Defendant is using money that rightfully belongs to equity holders to reap a handsome salary for itself and its principal, Mark Palmer, who (on information and belief) pockets the trustee fees for scant effort and almost no overhead so long as the trust remains in existence.

9. Theseus has a powerful incentive to pursue factually unsupported and protracted litigation instead of paying equity holders their money: the ability to generate more fees. While returning funds to equity holders now would cut off Theseus's guaranteed revenue stream as Trustee, engaging in litigation—despite its lack of legal merit—keeps the spigot running. This is a straightforward breach of Theseus's non-waivable duties of loyalty and good faith, which has damaged all beneficiaries of the Liquidation Trust in amounts that continue to accrue.

10. To remedy Theseus's misconduct, Plaintiffs seek the following relief:

(a) Monetary damages and disgorgement for Theseus's breaches of its duties of loyalty and good faith, in amounts to be determined at trial.

(b) A declaration that:

(i) Plaintiffs have not breached their fiduciary duties to PSG or any of its affiliates, successors, or assigns;

(ii) Plaintiffs' conduct did not cause PSG's bankruptcy;

(iii) Plaintiffs are not liable for any alleged damages caused by PSG's bankruptcy; and

(c) A permanent injunction removing Theseus as Liquidation Trustee.

Jurisdiction and Venue

11. This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157, 2201(a), and 1334.

12. This adversary proceeding is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Alternatively, this proceeding is related to a bankruptcy filing. 28 U.S.C. § 157(c).

13. Furthermore, this Court explicitly retained jurisdiction over the "Chapter 11 Cases and all matters arising under, arising out of, or related to, the Chapter 11 Cases and the Plan (i) as provided for in the Plan, (ii) as provided for in this Order, and (iii) for the purposes set forth in Bankruptcy Code Sections 1127 and 1142." *See In re: Old BPSUSH Inc., et al.*, No. 16-12373 (BLS), ECF 1566, at ¶ 38 (Bankr. D. Del. Dec. 20, 2017).[2] Pursuant to the Plan, this Court "shall retain the broadest jurisdiction over the Chapter 11 Cases after the Effective Date as legally

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[2] The "Plan" refers to the First Amended Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and Its Affiliated Debtors. *See id.*, ECF 1473.

permissible, including jurisdiction to: . . . determine any other matters that may arise in connection with or relate to this Plan, the Confirmation Order, or any contract, instrument, release, or other agreement or document created in connection with this Plan; . . . hear and determine any matters involving the Liquidation Trust; . . . and hear any other matter not inconsistent with the Bankruptcy Code or CCAA." *See id.*, ECF 1473, at Article XII (Bankr. D. Del. Nov. 2, 2017).

14. Venue of this adversary proceeding is proper in this district pursuant to 28 U.S.C. § 1409.

15. The facts alleged in this Complaint present an "actual controversy" pursuant to 28 U.S.C. § 2201(a).

The Parties

I. Plaintiffs

16. Plaintiff Karyn Barsa is a former member of PSG's board of directors (the "Board") and a resident of the State of Oregon. Barsa resigned from the Board in February 2017. Barsa, since receiving a Bachelor's Degree from Connecticut College and a Master of Business Administration from the University of Southern California, has established herself as a successful business leader with years of various executive experience. For example, she has served as the Chief Executive Officer ("CEO") of Smith & Hawken Ltd., Embark Stores Inc., The Investors Circle, and Coyuchi LLC, among other companies. In addition to her experience as a director of PSG, Barsa has served on a number of other corporate boards, including for Directors' Organization Ltd., NESsT, and Deckers Outdoor Corp. Recently, Barsa served in several executive capacities for Golden Leaf Holdings, including as Chief Financial Officer ("CFO").

17. Plaintiff Joan Dea is a former member of the Board (Spring 2015 to August 2017) and former Chair of the Audit Committee (December 2016 to August 2017). A California resident, Dea has decades of business experience including as a former Partner and Director of Boston Consulting Group in the Consumer Goods and Retail and Financial Services Practices and as an Executive Vice President and member of the Executive Committee of BMO Financial Group. She has extensive experience as a corporate director on several public company boards and has also voluntarily dedicated years of time to non-profit and educational institutions in an executive capacity. Dea received a Bachelor of Arts from Yale University and a Master of Science from The London School of Economics and Political Science.

18. Plaintiff C. Michael Jacobi is a former member of the Board, a former member of the Audit Committee, and a resident of the State of Connecticut. Jacobi served as a member of the Board and Audit Committee at all relevant times until his resignation in February 2017. Jacobi has also distinguished himself as a successful executive throughout his decades-long career. He has helmed at least seven different companies, including Beepware Paging Products LLC, Katy Industries, Inc., Timex Group USA, and Callanen International, Inc., and has served on the board of directors of three other public companies. Additionally, Jacobi is currently a member of the board of directors of Sturm, Ruger & Co., Inc. He received an undergraduate degree from the University of Connecticut and is a Certified Public Accountant.

19. Plaintiff Matthew Mannelly is a former member of the Board, a former member of the Audit Committee, and a resident of the State of Connecticut. Mannelly served on the Board at all relevant times and on the Audit Committee from February 2017 until his resignation in August 2017. As with the other Plaintiffs, Mannelly has distinguished himself in the business world. After obtaining a Bachelor’s Degree from Boston College and a Master of Business

Administration from the University of North Carolina, Mannelly served as the Director of Marketing for Gatorade Ltd. and the Chief Marketing Officer for the United States Olympic Committee. Mannelly also served as the President and CEO of Cannondale and Prestige Brands Holdings Inc. In addition to his time on the PSG Board, Mannelly has served on several other corporate boards, including for Collier Creek Holdings and Spartannash Co.

20. Plaintiff Bernard McDonell is the former Chairman of the Board, a former Chair (until December 2015) and member of the Audit Committee, and a resident of the Province of Ontario, Canada. McDonell first became Chairman of the Board in 2012, replacing W. Graeme Roustan. McDonell served as a member of the Audit Committee until his resignation in August 2017. Since receiving a Bachelor of Arts in Commerce from Concordia University in 1977, McDonell has embarked on a successful career in business and real estate. For example, McDonell was previously the Head of Quebec Operations for Loblaw Companies Ltd. and the President and Vice Chairman of Provigo Inc. He additionally served as the CEO of Capital Wapiti Inc. and the Interim CEO of Investus Real Estate, Inc. McDonell has also distinguished himself on the boards of directors for other companies, including First Capital Reality Inc., where he currently serves as the Chairman.

21. Plaintiff Bob Nicholson is a former member of the Board and a resident of the Province of Alberta, Canada. Nicholson served as a member of the Board at all relevant times until his resignation in February 2017. Prior to joining PSG's Board, Nicholson had established himself as one of the foremost names in the world of hockey. After a playing career at Providence College and several minor league teams, Nicholson transitioned to management. Nicholson was a Technical Director with the British Columbia Amateur Hockey Association from 1979 to 1989. Nicholson then joined Hockey Canada as President and CEO from 1988 to

2014, where he oversaw all operations for Canada's international competitions. Additionally, Nicholson served as Senior Vice President for the Canadian Hockey Association from 1992 to 1998, and is currently the Vice President of the International Ice Hockey Federation, a position he has held since May 2016. He is also currently the Chairman of the Edmonton Oilers, a professional sports team that plays in the National Hockey League, for which he also serves as an Alternate Governor. Nicholson's accomplishments have been recognized multiple times, including in 2016 when he was awarded the Order of Hockey in Canada.

22. Plaintiff Mark Vendetti is the former CFO of PSG and is a resident of the State of California. Vendetti has had a distinguished career with more than thirty years of diverse business experience, including in retail, e-commerce, and financial services. He received a Bachelor of Arts in Mathematics from Amherst College in 1983, and a Master of Business Administration from Harvard Business School in 1989. PSG announced his appointment as its CFO on December 1, 2015, and he assumed his duties in that role in mid-December 2015. Prior to joining PSG, Vendetti served as the CFO of Francesca's Holdings Corporation, a women's specialty retailer with over 600 locations and fiscal year 2014 revenue of $374 million. He previously also served as the Vice President of Finance for Abercrombie & Fitch from 2009 to 2013, and as Senior Vice President for XM Satellite Radio Inc. from 2005 to 2008.

23. When Vendetti became PSG's CFO, the finance organization of the Company was decentralized, which he quickly worked to change. In his first few months as CFO, Vendetti strived to improve communication across the Company and implemented a number of changes, including the adoption of new processes for sales forecasting and operational planning. He also improved controls across the organization, promoted key personnel (including Julie Zaleski),

revamped the processes for accruing bad debt reserves, and moved the Company towards a more centralized accounting function based out of its headquarters.

24. Plaintiff Julie Zaleski is the former Controller of PSG and is a resident of the State of Massachusetts. Zaleski received a Bachelor of Science in Business Administration in Accounting from John Carroll University in 1992. Zaleski initially joined Bauer Hockey (a predecessor company) in 2003 as an accounting manager. She has been promoted over the years to a variety of finance and accounting positions at Bauer and thereafter at PSG, where she worked through the Company's 2017 acquisition by Peak Achievement Athletics ("Peak"),[3] her current employer. During the relevant period at PSG, Zaleski held the positions of Senior Director, Corporate Controller and Treasurer. Her primary responsibilities included overseeing the corporate accounting function and the integrity of the Company's financial statements and reports. Zaleski also had oversight responsibility for the Credit and Treasury departments.

25. Zaleski is a skilled professional who has exhibited the highest level of integrity throughout her career. As a testament to her integrity and lasting value to the organization, Peak elected to retain Zaleski, promoting her to Vice President, Corporate Controller and Treasurer. She has more than twenty years of experience in accounting, finance, and auditing work, and has been a Certified Public Accountant since 1994.[4] Zaleski started her career as an accountant at Arthur Andersen, where she worked for approximately two years before joining the finance and accounting department of a small, privately held manufacturing firm.

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[3] The actual purchasing entities were private equity interests, but the new company was referred to as Peak. For ease of reference, this Complaint refers to the acquiring entity as Peak.

[4] Zaleski's CPA license is currently inactive.

II. Defendant

26. Theseus is an LLC organized under the laws of New York with its principal office at an apartment in Glen Cove, New York, that is, on information and belief based on searches of public records, leased by its principal and sole member, Mark Palmer, as a personal residence. On information and belief based on a docket search, prior to this case Theseus had no experience serving as a Liquidation Trustee and no other previous engagements serving as a court-appointed trustee in any capacity.

27. Under the terms of the Liquidation Trust Agreement, Theseus receives annual compensation of up to $150,000 for the lifetime of the Liquidation Trust. Theseus also receives a percentage of any recovery on litigation claims it asserts. Theseus appears to have been selected by counsel to the Equity Committee, Brown Rudnick.

Non-Parties

I. Performance Sports Group Ltd.

28. PSG was a developer and manufacturer of ice hockey, roller hockey, lacrosse, baseball and softball sports equipment, as well as sports apparel. The Company owned and sold internationally recognized sporting brands such as Bauer, Easton, Mission, Cascade, Maverik, and Combat, among others, to specialty retail stores, sporting goods and national retail chains, as well as directly to sports teams, primarily within the United States.

29. The historical foundation and core of the Company was Bauer, which was founded in 1927 in Kitchener, Ontario. In the mid-1990s, Bauer was acquired by Nike, which co-branded its products in the decade that followed. In 2008, Kohlberg & Co, a U.S. private equity firm, acquired Bauer. A series of strategic acquisitions followed, involving eight hockey, lacrosse and baseball brands, including most prominently Easton in April 2014. The Company

had its Canadian IPO in 2011 and its U.S. IPO in June of 2014 (following which the Company changed its name from Bauer Performance Sports Ltd. to PSG).

30. The Company was publicly-traded on the New York Stock Exchange. PSG's fiscal year ran from June 1 through May 31. In February of 2017, the Company's operational assets were acquired out of bankruptcy by Peak, a privately held company which continues to operate and sell many of the brands formerly owned by PSG.

II. KPMG

31. PSG's outside auditor was KPMG starting in 2010, and David Wilson was the audit engagement partner from the beginning.[5] As the engagement partner, Wilson had signed unqualified audit opinions on behalf of KPMG on PSG financial statements covering eight fiscal years (2008-15), and the fiscal year ending May 31, 2016 was to be Wilson's last year as engagement partner as part of mandatory auditor rotation requirements.

32. Even without these requirements, Wilson's tenure as audit partner was on shaky ground. Indeed, Wilson had lost the confidence of the Audit Committee, which had grown unhappy with the quality of Wilson's performance, judgment, and transparency. Put simply, the Audit Committee Plaintiffs had concluded that Wilson was a weak audit partner, and they were already deliberating internally on whether to replace him.

33. Ultimately, KPMG never completed its audit for PSG's 2016 fiscal year. The circumstances will be discussed in greater detail below, but on August 15, 2016, PSG announced that the filing of its annual audited financial statements would be delayed and that its Audit

[5] When Bauer was spun off from Nike in 2008, PSG continued to use Deloitte as its auditors through the fiscal year ended May 31, 2009. However, when KPMG took over the 2010 fiscal-year audit, KPMG performed a re-audit of the financial statements for the 2008 and 2009 fiscal years. Wilson has served as PSG's audit partner since 2008.

Committee had engaged independent legal counsel to conduct an internal investigation of the Company's accounting practices.

34. PSG's inability to file audited financial statements by August 28, 2016 created a potential covenant default under its secured debt facilities. With no other source of liquidity, PSG immediately negotiated an amendment to its secured credit facilities, which extended the deadline to file audited financials until October 28, 2016. Despite the Company's best efforts, the audit was not completed within the extension period, and on October 31, 2016, PSG commenced bankruptcy proceedings to pursue a sale of its businesses at the highest and best value. An auction was held on January 30, 2017, and the bankruptcy court approved the sale of substantially all of the Company's assets for $575 million to Peak, which closed on February 27, 2017.

<u>Factual Allegations</u>

I. PSG's Market Landscape and Other Background Information

35. Between 2008 and 2014, PSG (then known as Bauer Performance Sports Ltd.) engaged in several acquisitions that significantly expanded its brand both within and beyond the world of hockey. Among the companies acquired were Mission-Itech (hockey), Maverik (lacrosse), Cascade (lacrosse), Inaria (soccer apparel), and Easton (baseball and softball).[6]

36. To help ensure that PSG could manage its increasingly diverse portfolio of brands, the Board took several steps to enhance the Company's operational efficiency and corporate governance. For instance, the Board created a new position—President of PSG Brands—for an individual whose main function would be to oversee PSG's seven-brand portfolio. The Board appointed Amir Rosenthal, PSG's then-CFO, to this position on or about

[6] In January 2016, PSG made another acquisition, adding Easton Hockey to its portfolio.

May 28, 2015. To ensure a seamless transition, Rosenthal maintained his responsibilities as CFO while the Board conducted a search for his replacement.

37. The Board's Audit Committee was equally proactive in shoring up PSG's corporate governance and oversight functions. These steps included, but were not limited to, adding a role for an internal audit employee, requiring greater transparency on accounts receivable and timing of accounts receivable, and setting in motion a process to bring down accounts receivable.

38. This multi-faceted plan was aimed at helping PSG navigate through market conditions that had grown increasingly turbulent. In late 2015 and into early 2016, traditional brick-and-mortar players in the retail sports equipment and apparel market, including several of PSG's largest clients, were facing severe pressure, largely from online retailers. For example, on or about December 16, 2015, Team Express, one such retailer, filed for bankruptcy. Shortly before the bankruptcy, PSG's accounts receivable for Team Express were $4.5 million, with approximately $4 million listed as past due.

39. As these tectonic shifts were taking place in the industry, PSG also found itself responding to attacks from its former chief executive. On or about June 12, 2015, W. Graeme Roustan, PSG's former CEO and Chairman, sent the Company a letter alleging that Bauer had engaged in what he described as improper sales practices. In addition to sharing the results of "an informal survey" that he had conducted, Roustan claimed that the alleged practices included improperly "pulling forward" sales by offering retailers discounts to purchase more goods in earlier quarters so as to meet certain financial targets. On or about December 24, 2015, Roustan sent the Company another letter again discussing the results of his "survey" and discussing his

"desire to the return to the Board." In the second letter, he also called for Rosenthal to be elevated to Interim CEO.[7]

40. The Company, under the Board's leadership, took immediate steps to investigate Roustan's claims. In response to the first letter, for instance, several Board members—Plaintiffs Barsa, McDonell, and Nicholson—met with Roustan to better understand the nature of his allegations.

41. The Board also directed Rosenthal, with the assistance of outside counsel, to examine the Company's internal accounting and control processes with regard to the recognition of revenue. When Plaintiff Dea became Chair of the Audit Committee, she reviewed the results of Rosenthal's assessment. Even though it found no issues of concern, Dea, out of an abundance of caution, called for a further review of Roustan's allegations.

42. To this end, the Audit Committee designed a review process with the assistance of outside advisers, including the former Chair of the Ontario Securities Commission ("OSC") and AlixPartners, a well-respected global consulting firm that specializes in helping companies address their most complex and critical challenges. The Audit Committee received updates throughout the life of the review.

43. The results of this investigation were shared with the Board in the Spring of 2016. Although AlixPartners identified several minor control issues (which the Audit Committee immediately mandated for correction), the overall conclusion was positive: no issues of revenue recognition were identified. KPMG was intimately involved in designing and executing the review, and KPMG was present at all update meetings with the Audit Committee. KPMG representatives were also on hand when the results were shared with the Board.

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[7] The Board elevated Rosenthal to Interim CEO on March 22, 2016, as detailed below.

II. Plaintiffs Fulfilled Their Duties of Care, Loyalty, and Good Faith Under Challenging Circumstances

44. PSG's challenges continued to mount throughout 2016. On January 13, PSG announced disappointing financial results for the second quarter of fiscal year 2016 and lowered its previously issued guidance for adjusted net income for the year to a range of $0.66 to $0.69 per share.[8]

45. That same month, the Canadian Dollar fell in value suddenly, putting pressure on PSG's financial covenants under its loan agreements. Up to this point, PSG had displayed a history of sound collections and had not recorded meaningful accounts receivable write-offs.

46. Scott Frerichs, who had served as PSG's Vice President of Finance since 2011 and was planning to report to Vendetti, resigned from the Company just two days after Vendetti's start date of January 15, 2016. In spite of the timing, Frerichs' resignation was not related to the lower financial results.

47. The next several months were equally challenging, as three of PSG's largest retailers—the Sports Authority, Sports Chalet, and Total Hockey—filed for Chapter 11 bankruptcy in quick succession. This, coupled with other adverse market conditions and overall weakness in the baseball/softball market, caused the Company, at management's recommendation (including Vendetti's), to significantly reduce its earnings guidance again and take several large write-offs.

48. On March 8, 2016, the Company issued a press release of its third quarter earnings and announced that it was reducing fiscal year 2016 EPS guidance by approximately $0.55 per diluted share to a new range of $0.12 to $0.14 per diluted share. Following the

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[8] *See* January 14, 2016 Ex. 99.1 to Form 8-K filed by Old PSG Wind-Down Ltd.

announcement, class action lawsuits were filed against PSG alleging that the Company had failed to disclose the risk to its business caused by the wave of retailer bankruptcies.

49. On or about March 22, 2016, the Board asked for the resignation of Kevin Davis, who had been the Company's CEO since 2008. Davis had previously expressed a desire to leave PSG, and the Board had already been searching for his replacement. While this search was underway, the Board lost confidence in Davis—in part because of his desire to leave the position—and determined that his immediate removal was warranted. Rosenthal was named as Interim CEO until a permanent replacement was chosen.

50. Around the same time, both the U.S. Securities and Exchange Commission ("SEC") and the OSC initiated investigations into the business practices of PSG, and outside counsel was retained to investigate the circumstances surrounding the revised guidance, which was the subject of the SEC and OSC investigations.[9]

51. Soon thereafter, on or about June 8, 2016, PSG announced the hiring of Harlan Kent as the new CEO, effective June 20, 2016. *See* March 22, 2016 Ex. 99.1 to Form 8-K filed by Old PSG Wind-Down Ltd. Kent's hiring was part of a comprehensive plan for the Company that Plaintiffs had put in place to ensure the Company's viability going forward.

52. As these events unfolded, PSG's accounting and finance departments continued to work diligently with KPMG to evaluate and address a host of complex accounting and related issues, including the annual impairment testing process for goodwill and intangible assets, valuation of deferred tax assets and certain investments, evaluation of allowance for bad debt and the write down of accounts receivable, integration issues related to the Easton Hockey acquisition, analysis of the accounting impact of a large corporate structuring, upgrades to the

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9 The SEC investigation has since been closed with no charges brought.

Company's SAP system, and the ongoing testing and assessment of internal controls. This, of course, was in addition to facilitating the ongoing investigations into PSG's business and reporting to the Audit Committee.

A. Plaintiffs Identified and Investigated Red Flags at Combat

53. In connection with his overall review of forecasting and collectability issues, Vendetti became increasingly concerned during the third quarter with Combat, a small business unit focused on manufacturing softball bats. Combat was acquired in 2013 and represented a small percentage of PSG's overall business. In fact, Combat was so small that it was out of scope for both PSG's internal audit and KPMG's audit, which might explain how the issues at Combat arose.

54. In reviewing Combat's receivables aging, Vendetti became increasingly concerned with the growing receivable balance. Unlike Easton, which dealt mostly with large retail customers like Dick's Sporting Goods and the Sports Authority, Combat serviced mostly small "mom and pop" retailers and had historically offered extended payment terms of 150 to 240 days. For fiscal year 2016, Vendetti was especially concerned that Combat was projecting total revenues for the year at $10 million (substantially below the budget targets of $23 million set at the beginning of the fiscal year) while at the same time Combat's gross accounts receivable balance was approaching $12 million. In fact, given its poor performance and losses, PSG had made the decision to close the Combat business by June of 2016.

55. As a result, Vendetti asked Shelley Filocamo, a Director of Financial Planning and Analysis, to analyze Combat's aging receivable balance to better understand the delinquency profile. Based on this analysis, PSG increased Combat's bad debt reserve to $2.5 million in the third quarter (up from $850,000 in the second quarter) and then $3.9 million in the fourth

quarter. Even with the increase in the bad debt reserve, Vendetti was still concerned with the collectability of the net $8 million receivable balance.

56. Against this backdrop, in early June 2016 Vendetti learned of a $214,000 return of product to Combat. Vendetti was concerned about this return, especially given the prior work that was done on Combat and the receivable risk.[10] Thus, the totality of the circumstances presented at Combat caused Vendetti to question whether there might be a larger issue.

57. In response, and to help analyze accounting that would need to be done in anticipation of the closure of the Combat division in the summer of 2016, Vendetti instructed Alex Byrne, the head of PSG's Internal Audit group, to travel to Combat's sales office in Kent, Washington on June 20 and 21, 2016, to conduct interviews and review documentation. Following the Kent visit, Byrne continued to perform detailed invoice and credit memo testing through July 24, 2016. His audit work ultimately identified five transactions from the sample selection that had rights of return or other potential revenue recognition issues. Based on the audit, PSG recorded a current period adjustment to correct for improperly recognized revenue in prior periods during fiscal year 2016. In total, the financial impact of the Combat adjustment was $426,000 (with a P&L impact of $335,000), which was well below the materiality thresholds utilized by the Company.

58. The results of the Combat audit were presented to PSG's Audit Committee at an Audit Committee meeting on or about July 26, 2016. The Audit Committee Plaintiffs shared the results of the Combat audit with KPMG in advance of the meeting. At no time during the discussions with KPMG about the Combat audit (both before and immediately after the July 26

[10] The Combat bad debt reserve (approximately $4 million) represented 30% of the total Combat receivable balance. By way of comparison, the Easton bad debt reserve (approximately $8.6 million) represented 23% of its receivable balance. However, $7.6 million of the Easton reserve related to customers that were bankrupt (Team Express, Sports Authority and Sport Chalet).

Audit Committee meeting) did KPMG object to PSG's materiality conclusions or assert that the identification of multiple right of return agreements suggested fraud or warranted an independent investigation.

B. Plaintiffs Discovered a Guaranteed Sale Agreement at Easton and Corrected the Accounting Entry

59. In May of 2016, a credit supervisor at Easton (Stephanie Maghakian) became aware of a guaranteed sale agreement with Dunham's for the purchase of $513,400 worth of high-end bats, which was signed on a Dunham's form in connection with a Dunham's program. The agreement provided that, in the event that 60% of the bats were not sold by August 1, 2016, Dunham's had the right to return the unsold product. The agreement was uncovered through Easton's normal credit management process, which included analysis of customer receivable balances and follow-up on unpaid balances.

60. This was a non-standard agreement that was entered into by an Easton sales representative and Dunham's without the knowledge of the accounting and finance group at Easton, PSG's corporate offices, or PSG's Board. As a result, the full amount of the sale ($513,400) was recognized as revenue on November 25, 2015 upon the shipment of the bats, per the terms of the invoice and the Company's standard revenue recognition policy.

61. The discovery of the guaranteed sale resulted in further inquiry by Ricky Helland, the financial director of Easton, and Easton's VP of sales, David Lockridge, followed by a consultation with Byrne before the matter was elevated to Vendetti and Zaleski.

62. On May 16, 2016, Helland e-mailed Lockridge and Ryan Weller, the Strategic Account Manager at Easton, to set up a discussion about the transaction. In the e-mail, Helland asked why a guaranteed sale agreement had been entered into and whether there were any more customers with guaranteed sales agreements. Helland noted in his e-mail that this "is another

example of a bad deal . . . we can't do this going forward." He followed up by asking, "why would we guarantee sales? Who else are we doing this with?" Thereafter, Helland raised the matter with Byrne, who directed him to discuss the correct accounting for the transaction with Zaleski.

63. Helland reached out to Zaleski on June 14, 2016 and forwarded the guaranteed sale agreement to her on June 15, 2016. Zaleski then provided Vendetti with a broad overview of the Dunham's transaction on June 18, 2016.

64. Two days later, on June 20, 2016, Helland wrote to Lockridge informing him that he had received instructions to reverse the sale and to have Dunham's return the unsold product. Helland also once again asked Lockridge whether this was the only guaranteed sale, to which Lockridge responded that he would investigate. The following day, Helland directed Caryl Dolabson, the Accounting Manager of Easton, to make a journal entry reversing the revenue for the Dunham's guaranteed sale. This adjustment was to be recorded in the Company's FY 2016 financial statements.

65. Thus, shortly after learning of the agreement, Vendetti and Zaleski took steps to correct PSG's internal books and records, while Helland worked with Lockridge to confirm that no other guaranteed sales existed. Lockridge later confirmed that he had spoken with each individual sales representative and had confirmed that there were no additional guaranteed sales or agreements contemplating the same.

66. In considering the impact of the error and implications on the Company's financial statements and accounting controls, both Vendetti and Zaleski determined that the error was clearly immaterial. The impact of the error (an overstatement of approximately $412,000 in revenue) was a trivial amount for a company with $153 million and $126 million in reported

revenue for the second and third quarters, respectively, and $586 million in projected revenue for the fiscal year 2016. Both knew that the Company typically used 1% as a materiality threshold, which the Dunham's transaction was nowhere near. Both were intimately familiar with PSG's reported financial results for the year, and did not need a calculator to see that the impact on revenue was well below 1%. They further knew that the Company had reported a net loss for the second and third quarters, having revised the annual guidance downward significantly. Thus, it was apparent to both of them that the Dunham's transaction would not have changed the results during these reporting periods from a net loss to a net income position, nor would it have caused PSG to meet its earnings guidance.

67. Additionally, neither Vendetti nor Zaleski saw anything to indicate that the Dunham's transaction was a result of fraud or indicated a widespread problem at Easton. Both concluded it was unlikely that other rights of return or guaranteed sales agreements existed at Easton. For one, because the market and Easton were in decline, Vendetti reasonably expected that customers with such rights would have already attempted to return product given the difficult sales environment. Yet, after reviewing Easton's return statistics, there was nothing to suggest that returns were occurring outside of normal trends.

68. More importantly, Easton had an experienced finance and accounting team and strong internal controls, having been SOX compliant since before the 2014 acquisition by PSG. Unlike Combat, Easton was subject to regular audits by the Internal Audit group, which included sample testing of revenue transactions and credit memos and other substantive procedures. In fact, the internal controls that were in place to detect potential revenue recognition issues were responsible for uncovering the guaranteed sale in the first instance.

69. Moreover, unlike Combat, which had extended payment schedules that enabled non-standard agreements to delay detection, the majority of customers at Easton, who were typically large, brand-name retail customers, were on shorter, sixty-day payment terms. Easton and Combat were separate companies that operated independently of one another, and both Vendetti and Zaleski viewed the guaranteed sale agreement as a customer issue unique to Dunham's—not endemic of larger problems at Easton.

70. All of these factors led Vendetti and Zaleski to conclude that the Dunham's matter had been appropriately addressed—it was a single transaction amounting to an immaterial error that was corrected in the ordinary course. After the error was corrected, it simply did not occur to them to disclose the Dunham's transaction to KPMG affirmatively, as there were a myriad of other, material items to address regarding the audit and everything else going on at the Company.

71. In spite of reaching this conclusion, Vendetti informed the Audit Committee of the Dunham's transaction on or about August 5, 2016. The Audit Committee Plaintiffs questioned Vendetti about the transaction. He explained how his department had become aware of the sales contract and its right of return characteristic and described the financial details of the transaction, including the actions taken to correct the accounting for the transaction. Vendetti also explained the diligence described above that his department had taken to ensure that Easton had not entered into other similar contracts.

72. Nonetheless, out of an abundance of caution, the Audit Committee Plaintiffs asked the Company's outside counsel, Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), to conduct a preliminary review of the Easton and Combat transactions over the upcoming weekend. The Audit Committee Plaintiffs also discussed with Paul Weiss the

possibility of hiring additional outside counsel to perform a more thorough investigation. At the time, KPMG felt that such an investigation was not acceptable, and KPMG instead expressed the opinion that an investigation of unlimited scope would be necessary.

C. KPMG's Audit of PSG's Financial Statements for Fiscal Year 2016

1. The Initial Planning and Expansion of the Scope of KPMG's Audit

73. For the 2016 fiscal year audit, KPMG significantly expanded the approach and scope of its audit work plan throughout the course of the audit. In designing its audit procedures, KPMG followed a substantive approach that did not consider or rely on any of the Company's internal controls. This resulted in a substantially larger selection of sample testing, as KPMG's scoping coverage was extraordinarily high. While it is difficult to estimate (in part because KPMG did not provide the Company with a single master document tracking all of the various prepared by client ("PBC") lists and incremental follow-up requests sent during the audit to the corporate and business units), it is likely that KPMG selected over 500 samples for its revenue testing, with the volume of requests increasing as the audit progressed. By way of comparison, KPMG's June 9, 2016 PBC List shows 81 items on the worksheet listing the consolidated PBC list, whereas the July 30, 2016 version of the same worksheet shows 196 items.[11] The increase in audit work is likewise illustrated by the increase in audit fees from what KPMG originally projected—the $1.75 million budget approved by the Audit Committee on June 8, 2016, to the $3.3 million in total fees paid by the end for the 2016 fiscal year audit (an audit that never was completed).

74. Revenue testing, moreover, was only a small part of KPMG's focus. Among the most material and time-consuming issues impacting the audit were impairments and deferred

[11] It is worth noting that each PBC document, an Excel spreadsheet often consisting of multiple tabs, contained a multitude of requests.

taxes. For example, the Company recorded a $145 million impairment of intangibles/goodwill for the third quarter and projected a total impairment of $205.3 million impairment for the fiscal year ended May 31, 2016.

75. For these reasons, among others, the audit was extremely difficult from a process standpoint, and while the Company's finance team remained professional, the relationship with KPMG was admittedly strained. Throughout the audit, PSG and Plaintiffs continued to add resources to meet the incremental demands from KPMG. This included hiring additional accounting, tax and valuation experts from PwC, Deloitte, RSM McGladrey ("RSM") and Valuation Research Corporation ("VRC").[12] These outside resources were in addition to the RSM and PwC accountants who had already been brought on to assist with the Company's testing and analysis of internal controls. To respond to the volume of audit requests, the Company also added accounting resources from Accountemps and Robert Half Finance and Accounting.

76. Both KPMG and PSG acknowledged the hard work being done on both sides to get through the year-end process in an extremely challenging environment, which included, as noted previously, bankruptcy filings by major customers and general softness in the marketplace. Wilson recognized, for example, that the business issues "have contributed significantly to the time commitment required from all of us to make sure the accounting is finalized and appropriately documented." Key members of the PSG accounting team were working late nights and weekends until the audit was complete. While difficult to predict the workload and completions, as requests from KPMG continued to mount, PSG management was diligently working as hard as they could to meet the deadline to file the audited financials.

[12] In particular, PSG retained one manager and one senior from PwC to work on impairments and provide technical accounting research; one manger from Deloitte to assist on tax matters; two staff accountants from RSM to assist in base audit work; and VRC, a valuation firm, to assist with the impairment analysis.

77. All of this context is important when considering how the right of return transactions surfaced and how they were addressed by PSG. The Dunham's transaction was not the only issue that arose during the audit and paled in comparison to numerous more significant challenges the Company was working through.

2. Discussion of the Combat Audit and Dunham's Transaction at Easton

78. Although Combat was outside the scope of KPMG's audit, the Company, at the insistence of the Audit Committee Plaintiffs, shared the results of the Combat audit with KPMG in July, prior to the July 26, 2016 Audit Committee meeting. The identification of multiple Combat customers with right of return agreements did not appear to set off any alarm bells with the auditors, and KPMG appeared to agree that the items were immaterial and had been appropriately addressed. There was no suggestion by Wilson, for example, that the Combat transactions were the result of fraud or warranted an independent investigation.

79. Following the July 26 Audit Committee presentation (at which the Audit Committee Plaintiffs were present), Wilson and KPMG's forensics director, Peter Blessing, met with Vendetti and Byrne to discuss the Combat audit process and obtain a more detailed understanding of the scope, procedures and results of the Company's review and analysis. Blessing's notes from the meeting confirm the discussion focused almost entirely on the Combat audit and other concerns regarding the Combat issues. Vendetti did not recall discussing the materiality of these rights of return or the likelihood of fraud during this meeting; however, they did discuss overlapping customers between Combat and Easton. Vendetti did not understand them to be interested in whether there were rights of return spanning across both companies, but rather on the collectability of outstanding balances at Combat (*i.e.*, whether Easton could leverage its ties to common customers to exact payments).

80. Nonetheless, after meeting with Wilson and Blessing of KPMG, Vendetti and Zaleski disclosed the right of return involving Dunham's at Easton on August 4—only six days later. In connection with KPMG's testing to reconcile the debits for returns with the sales return reserves, Holland became aware of the manual journal entry that included the reversal of revenue for Dunham's transaction. On August 3, 2016, Holland received an internal e-mail from Stephanie Cahill, another member on the KPMG audit team, attaching the manual journal entries that were posted as of May 31, 2016. On information and belief, the spreadsheet was created by KPMG based on journal entry data included in the Easton GL data dump.[13] Holland flagged the Dunham's entry and followed up with Helland for more information, who initially indicated that the entry related to a consignment sale. Shortly thereafter, in reviewing the journal entry, Zaleski realized that the journal entry did not relate to a consignment sale, but to a guaranteed sale. Zaleski and Vendetti met with KPMG on August 4, 2016 to clarify what the journal entry represented.

81. In the days that followed, Wilson became increasingly concerned over the Dunham's disclosure and the fact that the issue had not been brought to his attention sooner. At the Audit Committee meeting on August 8, 2016, Wilson delivered an ultimatum: either retain outside counsel to determine if management had intentionally concealed non-standard agreements with rights of return, or KPMG would resign as PSG's auditor immediately. Wilson emphasized that in order to be acceptable to KPMG, this investigation would have to be unlimited in scope. Plaintiff McDonell informed KPMG during the meeting that such an investigation would push PSG into bankruptcy proceedings.

[13] Significantly, the Easton GL data dump would have been provided to KPMG mid-July. KPMG worked directly with the Easton IT Department to extract data directly from the GL so that KPMG could then export the data it needed into an excel spreadsheet. As the review of manual entries is always a necessary and critical part of the audit, AS 2401.58, it is unclear why this work was not done until August 3.

3. Plaintiffs Worked Diligently to Complete the Audit as Soon as Practicable

82. In response to Wilson's demand, and consistent with their duties to the Company, the Audit Committee Plaintiffs retained outside counsel at the law firm of Richards Kibbe & Orbe LLP ("RKO") to conduct an independent investigation of the issues raised by KPMG. RKO was chosen by the Audit Committee Plaintiffs after being recommended by other outside counsel. The Audit Committee Plaintiffs, at the request of RKO, retained the forensic accounting firm AlixPartners to assist in the investigation and conduct transaction testing. Plaintiff Dea confirmed that KPMG was satisfied with the choice of both RKO and AlixPartners.

83. However, it became clear to Plaintiffs that the Company would not be able to meet the needs of the RKO investigation and KPMG's increased demands regarding the audit by the Company's required filing date of August 15, 2016. As a result, on or about August 15, 2016, the Company announced that its Form 10-K would not be filed by the required filing date, which the Company explained was "a result of the decision of [PSG's] Audit Committee to conduct an internal investigation in connection with the finalization of the Company's financial statements and the related certification process."

84. In addition to explaining that the Audit Committee Plaintiffs had retained RKO and AlixPartners, the Company stated, "The Audit Committee and its advisors are working diligently to complete the investigation with a view to having the Company finalize the Form 10-K as soon as practicable, although at this time it is uncertain when this will occur."[14] This uncertainty stemmed in part from KPMG's expanded audit procedures.

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[14] *See* August 15, 2016 Ex. 99.1 to Form 8-K filed by Old PSG Wind-Down Ltd.

4. KPMG's Audit Work Continued Through the Date of the Bankruptcy Filing

85. Following the disclosure of the Dunham's transaction, Vendetti and Zaleski—alongside and with the guidance of the Audit Committee Plaintiffs—continued to cooperate with KPMG and provide requested information to address any right of return issues. KPMG developed expanded audit procedures, which is expected and required under PCAOB standards if the auditor discovers information during the course of the audit that causes the auditor to revise its overall risk assessment. *See* AS 2810.14, .36. KPMG also maintained or increased its staffing levels on the audit.

86. In an August 17, 2016 e-mail, Wilson outlined the expanded procedures KPMG set out to perform based on its updated risk assessment and guidance from KPMG's National Office. The expanded procedures included:

- extending the review of post period end credit memos to the current date;
- expanded sampling of credit memos / debits to revenue during FY 16;
- additional "revenue" confirmations to a selection of customers across the businesses, including Combat;
- analysis of the nature and the timing of the change to the bad debt policy during the fourth quarter; and
- additional procedures over some of the information that was provided to the SEC.

KPMG vowed to work with the RKO team handling the independent investigation to make sure they were coordinated and efficient to the extent there were overlapping data requests to the Company.[15] Indeed, KPMG and RKO met regularly to discuss the investigation. During these meetings, RKO not only provided KPMG with regular updates but also reviewed and solicited feedback from KPMG on the original scoping and workplan for the investigation.

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[15] Wilson also explained that it was KPMG's policy to shadow the internal investigation by assisting in the up-front review of the workplan, providing feedback and monitoring the progress as the investigation moved forward.

87. In many ways, the audit work continued on its normal course. KPMG continued to request documents and information and selected more samples for testing, sent third-party confirm letters, and consulted with PSG, RKO, and AlixPartners.[16] Indeed, KPMG billed a significant amount of time for audit work during this period. Based on information and belief, KPMG billed to the audit at a higher run rate after the disclosure of the Dunham's transaction than they did prior—of the total $3.3 million in fees for the fiscal 2016 audit, roughly $1.4 million were incurred after August 26, 2016. From what the Audit Committee Plaintiffs, Vendetti, and Zaleski observed, there was nothing to suggest that KPMG was not working on the audit throughout this period.

88. By September 2016, Vendetti and Zaleski had prepared financial statements for PSG's 2016 fiscal year that were correct in all material respects. These financial statements were used by Peak post-acquisition as a basis for accounting in subsequent fiscal years, and they were never amended or restated.

89. By early October it appeared that KPMG was working to complete its incremental revenue testing on Easton. On October 4, 2016, Holland provided KPMG's revised incremental PBC list of "what we will need to sample down to date and to perform procedures to close out the issue of return rights found at Easton." In the e-mail, Holland noted: "We are trying to navigate this process with AlixPartners and RK&O to keep it as efficient as possible but will need obtain information directly from the Company for us to use as audit evidence."

90. KPMG's audit work appears to have stopped as a result of PSG's filings for bankruptcy on October 31, 2016. However, during the nearly three-month period following the August 4, 2016 disclosure of the Dunham's transaction, no additional guaranteed sale or right of return agreements were uncovered. In fact, throughout the entire audit KPMG never identified a

[16] There were over a dozen incremental PBC requests between August 24, 2016 and October 20, 2016.

single uncorrected accounting error, as evidenced by the lack of any summary of accounting differences presented to PSG by KPMG. While AS 2810.15 requires an auditor to promptly report any accounting errors uncovered during the course of the audit and propose (or accumulate) a correcting adjustment, after all of the audit work that was done, and the thousands of hours in fees billed, KPMG proposed no adjustments.

D. PSG's Bankruptcy and Plaintiffs' Additional Attempts to Limit Damage to the Company

91. As the audit process progressed, Plaintiffs made several decisions that were reasonably designed to prevent, or at least mitigate, any potential harm to the Company. For example, on or about August 11, 2016, the Company, under Plaintiffs' guidance and direction, initiated discussions with Alvarez & Marsal ("A&M"), a global professional services firm, about representing PSG in possible United States and Canadian bankruptcy filings. With Plaintiffs' guidance, PSG also hired Centerview Partners, a restructuring expert, to provide advice in the event that bankruptcy proceedings became necessary.

92. On or about August 29, 2016, the Company sought and was able to obtain amendments to its current lending agreements that provided PSG with a 60-day extension to file its Form 10-K. Pursuant to these amendments, PSG was required to provide its Form 10-K (and other documentation) to its lenders by October 28, 2016.[17]

93. By October 24, 2016, however, it had become apparent that PSG would not be able to meet the October 28 deadline (despite Plaintiffs' best efforts to conclude the internal investigation and complete the audit). Accordingly, that same day, the Company engaged A&M to represent it in bankruptcy filings in both the U.S. and Canada.

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[17] *See* August 30, 2016 Ex. 99.1 to Form 8-K filed by Old PSG Wind-Down Ltd.

94. Due to the complexity of the dual bankruptcy filings, the Director Plaintiffs solicited advice and guidance from several legal and financial authorities before exercising their business judgment. This included having the bankruptcy monitor in the Canadian filings attend all Board meetings. The Canadian monitor approved all the Board's approaches and expenses under the Canadian bankruptcy process.

95. On or about October 28, 2016, the Company terminated Rosenthal and the Executive Vice President of Baseball/Softball, Todd Harman. At this point in time, Kent was now in place as the CEO.

96. Three days later, on October 31, 2016, PSG filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. As a result of the bankruptcy filings, the Board's duties changed. In particular, the Board was now required to try to maintain the Company's assets. In an effort to preserve the Company's assets, the RKO investigation was temporarily suspended, which was approved by the Canadian bankruptcy monitor.

97. On December 19, 2016, the Audit Committee Plaintiffs, along with the Canadian bankruptcy monitor, authorized RKO to resume its internal investigation.

98. Eventually, Plaintiffs oversaw the Company's sale of substantially all of its assets to Peak on or about February 27, 2017. At the time, Centerview Partners had advised that the Company's assets were only worth $330 million. Yet in the end, Plaintiffs successfully negotiated a sale price of $575 million plus all operational liabilities—an objective testament to their skillful stewardship. What is more, Plaintiffs accomplished this result while fending off attempts by several parties to block the sale so that they could pick up the Company's debt. During the unusually seamless and efficient bankruptcy process achieved under Plaintiffs'

stewardship (and under this Court's supervision), Vendetti and Zaleski worked extremely long hours and put in exceptional effort to make the restructuring a success.

99. The sale was completed on or about February 27, 2017. On or about the same day, Plaintiffs Barsa, Jacobi, and Nicholson resigned from the Company. At the same time, Plaintiffs Dea, McDonell, and Mannelly agreed to remain on the Board and as members of the Audit Committee.

100. Plaintiffs Dea, McDonell, and Mannelly, as the remaining members of the Audit Committee, then oversaw the completion of RKO's investigation on or around March 6, 2017. Plaintiffs Dea, McDonell, and Mannelly also oversaw the maximization of the Company's assets before resigning from their roles in August 2017 when the Company had approximately $56 million in cash.[18]

E. Findings of the RKO Internal Investigation

101. Although the scope of the RKO investigation was necessarily impacted by PSG's filing for bankruptcy and subsequent acquisition by Peak, it nonetheless was a comprehensive investigation.

102. RKO is an experienced law firm specializing in internal investigations and was retained as independent counsel by the Audit Committee Plaintiffs to report directly to the Audit Committee. In consultation with KPMG at the start of the investigation, RKO developed a workplan that included the collection and review of a substantial volume of e-mails and

[18] Company filings show "Total Bank Account Cash" of $56,244,689 through June 30, 2017. *See In re Old BPSUSH Inc., et al.*, No. 16-12373 (BLS), ECF 1221, at 4.

documents (from 42 e-mail custodians and nine imaged hard drives from individuals in finance) and interviews of ten PSG employees starting in August 2016.[19]

103. The Audit Committee Plaintiffs, at the request of RKO, retained AlixPartners as its forensic accounting experts to perform transaction testing and other substantive procedures. AlixPartners collected and assembled general ledger documentation (2.7 terabytes of data), and the Company granted AlixPartners access to the shared folders on PSG's network. Their sample testing included the review of 108 Easton transactions with the supporting documents. AlixPartners also performed a trend analysis for sales, EBITDA and bad debt, reviewed sales and credit return activity by customer and performed customer analysis based on analytics. Among other things, AlixPartners looked for large credit memos at quarter end and credit memos for key customers, and further investigated issues identified by KPMG and the Company. AlixPartners's transaction testing looked at PSG's 2015 and 2016 fiscal years, as well as the first quarter of 2017.

104. All of this detailed forensic accounting work is exactly what one would expect from an internal investigation involving revenue recognition issues. At the end of the day, AlixPartners uncovered nothing suggesting a widespread pattern of improper revenue recognition practices or use of undisclosed side letters, guaranteed sale or right of return agreements. Indeed, the RKO investigation confirmed what Vendetti and Zaleski concluded in June of 2016: The Dunham's transaction was an isolated customer issue, and not indicative of a larger problem at Easton or the Company as a whole.

105. Time has borne out that conclusion as well. The PSG books remained open until the closing of Peak's acquisition of PSG. During that period, PSG's credit monitoring and other

[19] While they did not formally interview Wilson, RKO consulted with him throughout the process and were aware of, and considered, his views in reaching their final conclusions.

revenue controls continued and there was no dramatic uptick in returns or side letters uncovered or customers coming forward claiming to exercise a right of return. Ernst & Young ("EY"), the accounting experts retained by Peak as part of its pre-acquisition diligence, prepared an Integrity of Earnings Report and identified no revenue recognition issues or undisclosed problems. And widespread rights of return, if they existed, would have been of critical importance to Peak, as it was buying PSG's open receivable balance and the deal was closing, with full disclosure of the issues raised by KPMG, before the completion of the audit and RKO investigation. While Peak is now privately held, the Company still prepares audited financial statements—yet its new auditor, PwC, has not identified any pre-acquisition revenue recognition issues or concluded that there is any reason why they cannot rely on Zaleski's integrity or her representations.

106. RKO's conclusions were no different. On March 6, 2017, RKO presented its findings to Plaintiffs Dea, McDonell, and Mannelly, as members of the Audit Committee. RKO explained that they had done a complete and thorough investigation of the integrity of PSG's finance function, including KPMG's specific allegations regarding Vendetti and Zaleski surrounding the disclosure of the Dunham's agreement.[20] RKO reported that its independent investigation revealed no basis for concluding that management—in particular Vendetti and Zaleski—had intentionally or fraudulently recognized revenue in association with rights of return, or concealed information from KPMG about those transactions. RKO's investigation further found nothing to suggest that Vendetti or Zaleski—or any of the Plaintiffs for that matter—were not acting in good faith or were unfit for reliance in a financial review. In

[20] RKO further explained that the scope of testing of historic revenue recognition practices was truncated as a result of Bankruptcy filing, and management integrity became the focus of the investigation. Nevertheless, RKO used AlixPartners to analyze the full scope of the accounting system to try and identify right of return or other similar agreements. Based on AlixPartners' transaction testing and review, they did not identify a pattern or practice that would call into question integrity of senior management.

particular, RKO did not believe that the failure to raise the Dunham's right of return agreement until August 4, 2016 amounted to anything more than an inadvertent oversight by people who were overburdened with the audit and other work being done at the same time.

107. Nonetheless, Wilson and KPMG refused to accept the findings of the independent investigation. Though all of the Company's assets had been sold and PSG (which had been renamed Old PSG Wind-Down Ltd. and existed solely to wind down the remaining bankruptcy items) was no longer an SEC issuer reporting its financial results, KPMG resigned as auditor. As for its stated reason for resigning, KPMG asserted that it "does not consider the Investigation to have had an adequate scope or depth"[21]; "because the Investigation will not be completed, KPMG is unable to complete its audit"; and "it has not concluded on the various items set forth in Section 10A(b)(2)" given the timing of the resignation.[22]

108. In essence, Theseus claims that officers and directors must create a control environment in which each and every immaterial transaction must be accounted for and booked in the general ledger correctly from the moment it is recorded, and that any subsequent correction shows that senior staff breached duties to maintain a flawless system. But directors and officers are not held to such a stringent standard of care. The fact that a single contract for an immaterial sum was initially booked incorrectly and then caught a few months later in connection with other accounting controls at PSG simply does not show a breach of any duty. Nor was it a breach of duty for PSG's independent directors to determine, in the exercise of their business judgment, that it was in the Company's best interest to retain—rather than terminate—officers who had caught and promptly corrected the mistake. And indeed, extensive post-hoc

[21] KPMG was apprised of the scope and depth of the investigation throughout its life, and at no point did KPMG raise this concern with the Audit Committee Plaintiffs.

[22] *See* March 31, 2017 Form 8-K filed by Old PSG Wind-Down Ltd., at 2.

auditing procedures and investigations—performed at KPMG's demand, under heightened scrutiny—revealed nothing further and found no one at fault.

F. Defendant's Frivolous Allegations.

109. Numerous independent entities, including PSG's Audit Committee, RKO, AlixPartners, and EY, have reviewed these facts in detail and concluded that none of the Plaintiffs, particularly Vendetti and Zaleski, engaged in any wrongdoing whatsoever. These disinterested, independent reviews were done at great cost to PSG and each reached the same conclusion. There is no reason to burn through more valuable dollars that could be returned to equity-holdings on a meritless lawsuit that will enrich only the professionals paid for pursuing it.

110. Nonetheless, the Trustee seeks to revive long-dead allegations that, because KPMG decided it would not sign off on the audit, this was somehow Plaintiffs' fault. There is not a grain of truth to this. The facts, all of which are known to the Trustee, show that KPMG never intended to sign off on the 2016 audit. Specifically:

> (a) David Wilson was at the end of his run as lead audit partner, and would need to be replaced in the following year in any event. In February of 2016, KPMG introduced Wilson's replacement, Chris Valhallah, who had been jointly agreed among KPMG and the Audit Committee as a welcome replacement to Wilson. In July, Vendetti reached out to Valhallah to involve him in the audit so he could start to come up to speed on PSG's business. Valhallah did not return the outreach; instead, Wilson contacted Vendetti and informed him that Valhallah would be unable to assume the role as the new lead audit partner on the account due to health issues. This had never previously been disclosed to PSG, nor did KPMG propose another replacement. That is highly irregular and suggests KPMG had no intent of continuing as PSG's auditor.
>
> (b) Previously undisclosed internal KPMG correspondence now known to Plaintiffs shows that KPMG was going to refuse to sign-off on the audit "for a long time" before Wilson learned of the Dunham's guaranteed sale.
>
> (c) The guaranteed sale itself is entirely immaterial, was not part of a pattern of broader accounting failures, was corrected quickly by Vendetti and Zaleski when they learned of it, and Vendetti and Zaleski, with the guidance of the Audit Committee Plaintiffs, affirmatively disclosed it to KPMG while the audit was ongoing.

111. The Trustee is nonetheless threatening litigation against Plaintiffs.

112. There is no value to equity holders in this litigation. PSG's equity-holders have already footed the bill for multiple investigations of this same issue.

113. Threatening Plaintiffs with litigation based on the same facts that multiple independent entities, including the Audit Committee, RKO, AlixPartners, Peak, EY, and the SEC, have already reviewed therefore amounts to an unethical shakedown. It is also a breach of Theseus' fiduciary duties to the Liquidation Trust's beneficiaries, and is damaging them financially. This conduct must stop.

COUNT I

(Declaratory Judgment)

114. Plaintiffs repeat and reallege the foregoing paragraphs, which are incorporated by reference herein.

115. In an apparent effort to continue getting paid, Theseus is threatening to pursue what it knows to be frivolous litigation against Plaintiffs. The indisputable factual record demonstrates that Defendant's threatened claims are baseless. Indeed, the very facts that allegedly support those claims have already been reviewed many times, including by PSG's Audit Committee, RKO, AlixPartners, Peak, EY, and the SEC. None has found wrongdoing.

116. Nevertheless, on June 28, 2019, Theseus sent Plaintiffs a demand letter, attaching a draft complaint, and then informed Plaintiffs on or about September 27, 2019 that it intends to file the complaint.

117. To protect themselves and the Liquidation Trust's beneficiaries against this imminent risk of injury, Plaintiffs thus seek a declaratory judgment that they:

(a) did not breach their fiduciary duties to PSG or any of its affiliates;

(b) did not cause PSG's bankruptcy; and

(c) are not liable for damages caused by PSG's bankruptcy.

COUNT II

(Breach of Fiduciary Duty of Loyalty)

118. Plaintiffs repeat and reallege the foregoing paragraphs, which are incorporated by reference herein.

119. Theseus owes a fiduciary duty of loyalty to the Liquidation Trust and its beneficiaries, which include Vendetti (who holds 20,000 shares of stock).

120. Theseus has breached, and continues to breach, its duty of loyalty by using money that rightfully belongs to equity holders in order to threaten what it knows to be frivolous litigation against Plaintiffs.

121. Every day that Theseus spends trying to extract funds from Plaintiffs is money in Theseus' pocket that should be returned to equity holders. Theseus' ongoing breaches have therefore caused, and will continue to cause, damages to the Liquidation Trust's beneficiaries, including Vendetti.

COUNT III

(Breach of Fiduciary Duty of Good Faith)

122. Plaintiffs repeat and reallege the foregoing paragraphs, which are incorporated by reference herein.

123. Theseus owes a fiduciary duty of good faith to the Liquidation Trust and its beneficiaries, including Vendetti (who holds 20,000 shares of stock).

124. Theseus has breached, and continues to breach, its duty of good faith by using money that rightfully belongs to equity holders in order to threaten what it knows to be frivolous litigation against Plaintiffs.

125. Every day that Theseus spends trying to extract funds from Plaintiffs is money in Theseus' pocket—money that should be returned to equity holders now. Theseus' ongoing breaches have therefore caused, and will continue to cause, damages to the Liquidation Trust's beneficiaries, including Vendetti, in an amount to be determined.

COUNT IV

(Permanent Injunction)

126. Plaintiffs repeat and reallege the foregoing paragraphs, which are incorporated by reference herein.

127. From the beginning, Theseus was an unusual, if not risky, choice to serve as Liquidation Trustee. On information and belief, Theseus has no prior experience serving as a Liquidation Trustee, and no other active engagements serving as a court-appointed trustee in any capacity.

128. While that should have prevented Theseus' initial appointment to serve as Trustee, its conduct warrants immediate removal. Theseus' actions do not reflect a good faith review of the factual record, but instead can only be explained by a desire to keep getting paid—to the detriment of the Liquidation Trust, its beneficiaries, and Plaintiffs.

129. As a result, Plaintiffs seek an order removing Theseus as Liquidation Trustee pursuant to Section 2.7 of the Liquidation Trust Agreement and/or as otherwise permitted by law.

Jury Trial

130. Plaintiffs demand a jury trial on all issues so triable.

Prayer for Relief

131. For the foregoing reasons, Plaintiffs respectfully request that the Court grant the following relief:

(a) Declaring that Plaintiffs have not breached their fiduciary duties to PSG or any of its affiliates, successors, or assigns, did not cause PSG's bankruptcy, and are not liable for damages caused by PSG's bankruptcy (Count I);

(b) Entering judgement against Defendant and finding it breached its fiduciary duty of loyalty to the Liquidation Trust and its beneficiaries, and awarding damages as a result of such breach in an amount to be determined at trial (Count II);

(c) Entering judgement against Defendant and finding it breached its fiduciary duty of good faith to the Liquidation Trust and its beneficiaries, and awarding damages as a result of such breach in an amount to be determined at trial (Count III);

(d) Permanently enjoining Defendant from pursuing its course of conduct and removing it as Liquidation Trustee (Count IV); and

(e) Awarding Plaintiffs attorneys' fees and costs, to the extent allowable by law.

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Dated: October 23, 2019
Wilmington, Delaware

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