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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

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 SPSUSH INC., OLD EBS INC., OLD PLG INC., AND OLD PSGI INC.

Applicants

FACTUM OF THE MOVING APPLICANTS

Motion for CCAA Termination Order
(January 20, 2023)

January 18, 2023

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

Tushara Weerasooriya LS# 51186K
tushara.weerasooriya@mcmillan.ca
Tel: (416) 865-7890 / Fax: (416) 865-7048

Jeffrey Levine LS#: 55582H
jeffrey.levine@mcmillan.ca
Tel: (416) 865-7791 / Fax: (416) 865-7048

Nicole Rozario LS#: 72376V
nicole.rozario@mcmillan.ca
Tel: (416) 945-8007 / Fax: (416) 865-7048

Lawyers for the Applicants

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PART I - INTRODUCTION

1. This is intended to be a final attendance in a CCAA proceeding started in 2016. During these insolvency proceedings, the Applicants (defined below) completed a sale of substantially all of their assets. After repayment of their secured and unsecured debt, the Applicants were in the unusual position of having residual cash to distribute to holders of equity interests in the parent debtor, Old PSG Wind-down Ltd. ("**PSG**").

2. Through negotiations with various stakeholders, the Applicants developed the First Amended Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and its affiliated debtors (the "**Joint Plan**"). The Joint Plan provided for the successful completion of the Applicants' liquidation and distribution of approximately $50 million of remaining sale proceeds.[1] The Court approved the Joint Plan by order dated December 20, 2017 ("**Plan Approval Order**").

3. In accordance with the Joint Plan, the Applicants and Monitor worked diligently to make interim distributions to holders of equity claims in PSG ("**Holders of Parent Equity Interests"**). They are now in a position to distribute the final approximately $4.78 million in residual cash on hand to the Holders of Parent Equity Interests and subsequently take steps to terminate these CCAA proceedings.

4. Accordingly, the Applicants, with the support of the Monitor, seek an order (the "**CCAA Termination Order**"), substantially in the form of the draft order attached as Tab 3 of the Motion Record that, among other things:

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[1] All references to currency are references to U.S. dollars.

(a) approves and authorizes the holding of a meeting of Old PSG Shareholders (defined below) to vote on a resolution for the dissolution of PSG;

(b) permits, following approval of a resolution for the dissolution of PSG, a final distribution to the Holders of Parent Equity Interests accounting for a reserve to cover the costs associated with winding-up PSG, the American-incorporated Applicants (the "**U.S. Debtors**") and the Liquidation Trust (the "**Wind-Down Cost Reserve**");

(c) confirms that the releases set out in the Plan Approval Order became effective as of the effective date of the Joint Plan in favour of the new board of PSG (the "**PSG Board**"), the board of the Liquidation Trust created under the Joint Plan ("**Trust Advisory Board**"), the Chief Wind-Down Officer, the Litigation Representative, the Liquidation Trustee, and the Monitor;

(d) directs the Chief Wind-Down Officer to dispose of any residual amounts from the Wind-Down Cost Reserve by depositing the funds with charities;

(e) terminates these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("**CCAA**") (the "**CCAA Proceedings**"); and

(f) approves activities of Ernst & Young Inc. ("**EY**") in its capacity as Monitor (the "**Monitor**"), and discharges the Monitor upon the service of the CCAA Termination Certificate (as defined below).

PART II - THE FACTS

A. Background and Commencement of the CCAA Proceedings

1. The Applicants formerly designed, developed, manufactured, marketed and sold performance sports equipment, accessories, and related apparel for a variety of sporting activities under the brand names of BAUER, EASTON, MISSION, MAVERIK, CASCADE, INARIA and COMBAT.[2]

2. Background on the Applicants, including their business operations and causes of insolvency are described in more detail in the affidavit of Mark Vendetti, attached as Exhibit "**C**" to the Applicants' Motion Record, sworn on October 31, 2016 in support of the Applicants' motion for the Initial Order (defined below).

5. On October 31, 2016 (the "**Filing Date**"), the Applicants were granted protection from their creditors under the CCAA pursuant to an Order (as amended and restated, the "**Initial Order**") of this Court (the "**Canadian Court**"). Also on the Filing Date, the Applicants filed for creditor protection (the "**Chapter 11 Cases**") in the U.S. Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**" and together with the Canadian Court, the "**Courts**") under the U.S. Bankruptcy Code.[3]

6. Pursuant to the Initial Order, EY was appointed as the Monitor in these CCAA proceedings (the "**CCAA Proceedings**" and together with the Chapter 11 Cases, the "**Insolvency Proceedings**"). The Applicants' restructuring included the going concern

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[2] Affidavit of Mark Palmer sworn January 13, 2023 ("**Palmer Affidavit**") at para. 8, Motion Record of the Applicants ("**Applicants' MR**"), Tab 2, p. 12.

[3] Palmer Affidavit at para. 10, Applicants' MR, Tab 2, p. 12.

sale of substantially all of their assets. On November 30, 2016, the Courts issued and entered orders approving a sales process (the "**Sales Process**"), including a stalking horse asset purchase agreement dated October 31, 2016, (the "**Purchase Agreement**") for the sale of substantially all of the Applicants' assets.[4]

7. On February 6, 2017, the Courts issued and entered orders approving, among other things, the Purchase Agreement and vesting the purchased assets in the purchaser on closing free and clear of all claims and encumbrances (the "**Sale Orders**"). The sale transaction (the "**Sale**") closed on February 28, 2017. Following the Sale, the Applicants' court-approved DIP Facilities were fully repaid.[5]

8. It was anticipated that residual funds in the estate (the "**Sale Proceeds**") would (i) repay the Holders of General Unsecured Claims (in Canada and the U.S.) in full, upon resolution of those claims in accordance with the claims procedures described below; (ii) fund the prosecution of certain Retained Causes of Action held by Old PSG and the Liquidation Trust (as defined below); and (iii) along with any further recoveries, be used to make a distribution to the Holders of Parent Equity Interests.[6]

B. Joint Plan and Approval

9. After the Sale closed, the Applicants, the Monitor, and various stakeholders negotiated an agreement to wind-up the Insolvency Proceedings. These stakeholders

[4] Palmer Affidavit at para. 11, Applicants' MR, Tab 2, p. 12.

[5] Palmer Affidavit at para. 12. Applicants' MR, Tab 2, p. 13.

[6] Palmer Affidavit at para. 13, Applicants' MR, Tab 2, p. 13.

included the statutory committee of equity holders (the "**Equity Committee**") and the statutory committee of unsecured creditors (the "**Creditors' Committee**") each appointed in the Chapter 11 Cases. The Joint Plan was the result of these negotiations.[7]

10. The Joint Plan represented a global settlement reached amongst the parties that resolved the Insolvency Proceedings. The Joint Plan provided for the successful completion of the Applicants' liquidation and distribution of approximately $50 million in remaining Sale Proceeds.[8]

11. At the meetings of creditors eligible to vote on the Joint Plan, each class of creditor voted at least 88.24% in number and 99% in claim value to accept the Joint Plan. At a joint hearing on December 20, 2017, the Courts approved the Joint Plan and the Canadian Court granted the Plan Approval Order.[9]

i. Overview of the Substantive Details of the Joint Plan

12. The Joint Plan incorporated two settlements that resolved certain obstacles to winding up the Insolvency Proceedings:

(a) A global settlement (the "**Global Settlement**") reached between the parties in order to resolve the Insolvency Proceedings. The Global Settlement involved: (a) payment in full of all Allowed General Unsecured Claims; (b) resolution of all disputes regarding the treatment of Intercompany

[7] Palmer Affidavit at para. 14, Applicants' MR, Tab 2, p. 13.

[8] Palmer Affidavit at paras. 14-15, Applicants' MR, Tab 2, p. 13-14.

[9] Palmer Affidavit at para. 16, Applicants' MR, Tab 2, p.14.

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;[10] and

(b) A class settlement (the "**Class Settlement**") between the Applicants and a representative plaintiff (the "**Lead Plaintiff**"), acting for itself and on behalf of the putative class of purchasers of common shares of PSG (the "**Putative Class**"). Under the Class Settlement:

(A) the Lead Plaintiff received (on behalf of itself and each member of the Putative Class) a distribution of $1.15 million of Cash from the Sale Proceeds (net of reimbursable administrative costs associated with certain document productions made by PSG to the Putative Class) prior to Cash distributions of Sale Proceeds made to Holders of Parent Equity Interests;

(B) the Lead Plaintiff was granted (on behalf of itself and each member of the Putative Class) a forty percent (40%) participation in any net proceeds from Retained Causes of Action (after the payment of fees, costs, and expenses incurred by PSG in connection with the prosecution of such

[10] Palmer Affidavit at para. 17(a), Applicants' MR, Tab 2, p. 14.

Retained Causes of Action), up to an aggregate maximum amount of $2.5 million; and

(C) the Liquidation Trust agreed to provide a one-time delivery of documentary discovery to the Lead Plaintiff subject to certain limitations described in previous affidavits I have sworn in these CCAA Proceedings.[11]

ii. Corporate Governance

13. The Equity Committee recommended the appointment of Mark Palmer to act as Chief Wind-Down Officer to wind-up and dissolve each of the Applicants other than PSG. The Plan Approval provided for his appointment and his duties included assisting the Applicants in completing the necessary intercompany transactions to implement the Global Settlement.[12]

14. As part of the Joint Plan and Plan Approval Order, the Applicants' current directors and officers resigned or were deemed to have resigned. Thereafter, the Joint Plan recommended a new board of the Parent Debtor from the effective date of the Joint Plant (the "**Effective Date**") (the "**Reorganized Parent Debtor**"), and this board (the "**PSG Board**") was appointed under the Plan Approval Order.[13]

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[11] Palmer Affidavit at para. 17(b), Applicants' MR, Tab 2, p. 14-15.

[12] Palmer Affidavit at para. 18, Applicants' MR, Tab 2, p. 15-16.

[13] Palmer Affidavit at para. 19, Applicants' MR, Tab 2, p. 16.

15. To address certain differing tax treatment for shareholders in Canada and the U.S., a Liquidation Trust was created as part of the Joint Plan to provide Holders of Parent Equity Interests with an option to exchange their equity interests for beneficial interests in the Liquidation Trust (the "**Beneficial Trust Interests**"). The Joint Plan provided that the Applicants would automatically transfer to the Liquidation Trust assets allocable to those exchanged equity interests, along with certain Liquidation Trust expense reserves. The Equity Committee selected members for a Liquidation Trust Advisory Board (the "**Trust Advisory Board**") to review decisions made regarding the Liquidation Trust, among other things. These positions became effective through the Plan Approval Order.[14]

16. The Plan Approval Order also appointed Theseus to the role of trustee of the Liquidation Trust ("**Liquidation Trustee**"). Theseus also acted as Litigation Representative of the Applicants and Liquidation Trust in prosecuting Retained Causes of Action for the benefit of Holders of Parent Equity Interests (and the Lead Plaintiff and Putative Class in accordance with the Class Settlement).[15]

C. Claims Procedure

17. On December 19, 2016, the Canadian Court issued a claims procedure order (the "**Claims Procedure Order**") to solicit claims against the Applicants. On April 10, 2017, the Canadian Court also issued a claims procedure order for the solicitation of claims from

[14] Palmer Affidavit at para. 20, Applicants' MR, Tab 2, p. 16.

[15] Palmer Affidavit at para. 21, Applicants' MR, Tab 2, p. 16.

the Applicants' former employees (the "**Employee Claims Procedure Order**"). The Bankruptcy Court granted a similar orders.[16]

18. On September 1, 2017, the Canadian Court granted an order (the "**Claims Resolution Order**") regarding the resolution of claims against the Canadian-incorporated Applicants (the "**Canadian Debtors**"). The Claims Resolution Order also set out a protocol to resolve cross-border claims filed against both the Canadian Debtors and the American-incorporated Applicants (the "**U.S. Debtors**"). On October 19, 2017, the Bankruptcy Court granted a reciprocal order.[17]

19. Following the issuance of the Claims Resolution Order, the Applicants and the Monitor worked diligently to reconcile and resolve claims filed against the Applicants. As set out more particularly below, the efforts led to the resolution of all claims, and as a result, the Monitor, the PSG Board and the Trust Advisory Board approved certain distributions.[18]

D. Performance of the Joint Plan Following the Plan Approval Order and Distributions

20. Following the issuance of the Plan Approval Order, the Parent Debtor took steps to implement the transactions contemplated therein with the advice and direction of the PSG Board and Trust Advisory Board (collectively, the "**Boards**") to ensure that the

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[16] Palmer Affidavit at para. 22, Applicants' MR, Tab 2, p. 17.

[17] Palmer Affidavit at para. 23, Applicants' MR, Tab 2, p. 17.

[18] Palmer Affidavit at para. 24, Applicants' MR, Tab 2, p. 17.

Applicants were liquidated, and distributions were made to creditors of the estates, in accordance with the Joint Plan.[19]

i. Trust Beneficiary Elections

21. As described above, under the Joint Plan, certain of the Holders of Parent Equity Interests elected to exchange their equity interests in the Parent Debtor for Beneficial Trust Interests (the "**Beneficial Trust Holders**"), while others elected to retain their shareholding in the Parent Debtor (the "**Old PSG Shareholders**").[20]

22. The election that the Beneficial Trust Holders exercised resulted in a countervailing transfer of the assets of the Parent Debtor to the Liquidation Trust in an amount equal to such electing equity holder's pro rata interest in the Parent Debtor. In order to assess the total value of transferred assets, the Liquidation Trustee was required to undertake a good faith valuation of the Applicants' and Liquidation Trust's assets (including the potential value of the Retained Causes of Action). With the Boards' authorization, FTI Consulting Inc. ("**FTI**") was engaged to conduct the valuation and prepare a report.[21]

23. In connection with this contemplated valuation by FTI, the Boards approved the valuation of the Liquidation Trust's assets as of two valuation dates:

[19] Palmer Affidavit at para. 25, Applicants' MR, Tab 2, p. 17-18.

[20] Palmer Affidavit at para. 26, Applicants' MR, Tab 2, p. 18.

[21] Palmer Affidavit at para. 27, Applicants' MR, Tab 2, p. 18.

(a) the effective date of the Joint Plan (being the day following the Plan Approval Order: December 21, 2017); and

(b) the effective date on which equity holders in the Parent Debtor who elected to exchange their shares for beneficial interests in the Liquidation Trust would be deemed to have so exchanged such shares for beneficial interests in the Liquidation Trust (the "**Split Date**").[22]

24. On May 24, 2018, the PSG Board and Trust Advisory Board resolved to establish May 31, 2018 as the Split Date, and provided authorization to implement any adjustments necessary to effect this exchange in an administratively efficient manner.[23]

ii. Distributions to Creditors

25. Further to the Joint Plan, the Parent Debtor and the Monitor acted as Distribution Agent for all distributions to Holders of General Unsecured Claims. In December 2019, the Monitor and the Applicants finally resolved all creditor claims against the Applicants, including all General Unsecured Claims. Distributions on account of resolved claims in the aggregate amount of $11,817,000 were made.[24]

iii. Distributions to Equity

29. Pursuant to the Joint Plan and the Plan Approval Order, interim distributions to Holders of Parent Equity Interests (being Old PSG Shareholders and Beneficial Interest

[22] Palmer Affidavit at para. 28, Applicants' MR, Tab 2, p. 18-19.

[23] Palmer Affidavit at para. 29, Applicants' MR, Tab 2, p. 19.

[24] Palmer Affidavit at paras. 26-27, Applicants' MR, Tab 2, p. 19.

Holders) could be made after all creditor claims were paid in full and following the receipt of applicable clearance certificates from the relevant taxing authorities.[25]

30. As described above, all creditor claims were been paid in full. The Applicants applied for and received all applicable clearance certificates from the Canada Revenue Agency for the period ending on May 31, 2019.[26]

31. Accordingly, the Applicants (with oversight and assistance by the Monitor) authorized and effected interim distributions (the "**Interim Distributions**") to the Holders of Parent Equity Interests as follows, in accordance with the Joint Plan:

1. PSG distributed $11,975,485.44, in the aggregate to the Old PSG Shareholders, as a return of capital under section 74 of the Business Corporations Act (British Columbia) ("BCBCA") and return of "paid-up capital" for purposes of the Income Tax Act (Canada); and

2. The Liquidation Trust distributed $8,024,514.56, in the aggregate, to Beneficial Interest Holders.[27]

iv. Retained Causes of Action

26. The Joint Plan contemplated the prosecution of certain Retained Causes of Action. The Chief Wind-Down Officer and the Liquidation Trustee, in its capacity as Litigation Representative, with the input of the Boards and their advisors, engaged in material

[25] Palmer Affidavit at para. 29, Applicants' MR, Tab 2, p. 19.

[26] Palmer Affidavit at para. 30, Applicants' MR, Tab 2, p. 19.

[27] Palmer Affidavit at para. 31, Applicants' MR, Tab 2, p. 20.

diligence and analysis of the Retained Causes of Action. Ultimately, the Chief Wind-Down Officer and the Liquidation Trustee were instructed by the Board to pursue such litigation against, among others, certain former officers and directors of the U.S. and Canadian Debtors.[28]

27. Before any proceeding was commenced, the former officers and directors, against whom the Chief Wind-Down Officer and the Liquidation Trustee had decided to pursue litigation, commenced an adversary proceeding in the Chapter 11 Proceedings on October 23, 2019.[29] On November 22, 2019, Theseus, in its capacity as Litigation Representative, filed an Answer and Counterclaim in the same adversary proceeding.[30]

28. On June 30, 2020, on a motion brought by the former officers and directors, the Bankruptcy Court dismissed Theseus' Counterclaim.[31] Theseus filed a motion for reconsideration, which the former directors and officers opposed. On October 13, 2020, the Bankruptcy Court denied the motion for reconsideration, dismissing Theseus' Counterclaim, and dismissing the Adversary Complaint.[32] Theseus filed a notice of appeal of the Reconsideration Order. On September 29, 2021, the United States District Court for

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[28] Palmer Affidavit at para. 33, Applicants' MR, Tab 2, p. 19.

[29] Palmer Affidavit at para. 34, Applicants' MR, Tab 2, p. 20-21; Adversary Complaint, Exhibit "E" to the Palmer Affidavit, Applicants' MR, Tab 2E, p. 413.

[30] Palmer Affidavit at para. 35, Applicants' MR, Tab 2, p. 21; Answer and Counterclaim, Exhibit "F" to the Palmer Affidavit, Applicants' MR, Tab 2F, p. 454.

[31] Palmer Affidavit at para. 36, Applicants' MR, Tab 2, p. 21; Bankruptcy Court's Order dated June 30, 2020, Exhibit "G" to the Palmer Affidavit, Applicants' MR, Tab 2G, p. 568.

[32] Palmer Affidavit at para. 37, Applicants' MR, Tab 2, p. 21; Bankruptcy Court's Order dated October 30, 2020, Exhibit "H" to the Palmer Affidavit, Applicants' MR, Tab 2H, p. 571.

the District of Delaware (the "Federal District Court") affirmed the Reconsideration Order.[33]

29. Theseus and the former officers and directors thereafter engaged in good faith settlement discussions that culminated in a global settlement of all claims between them. The Bankruptcy Court approved the settlement by order dated June 6, 2022.[34]

v. Class Settlement

32. The Joint Plan and Plan Approval Order required the amount of $1.15 million (net of reimbursable administrative costs associated with certain document productions made by PSG to the Putative Class) to be paid to the Lead Plaintiff Counsel, on behalf of the Lead Plaintiff and the Putative Class, once all creditor claims had been paid and all applicable clearance certificates had been received. In full and final satisfaction of the foregoing, PSG paid to the Putative Class an aggregate amount of $938,891.50, representing the settlement amount less $166,108.50 in reimbursable administrative costs associated with certain document productions made by PSG to the Putative Class.[35]

33. The Joint Plan additionally provided that the Lead Plaintiff would receive (on behalf of itself and the Putative Class) 40% participation in net recoveries from Retained Causes of Action (after the payment of fees, costs, and expenses incurred by PSG in connection with the prosecution of such Retained Causes of Action). As described above,

[33] Palmer Affidavit at para. 38, Applicants' MR, Tab 2, p. 21; Bankruptcy Court's Order dated October 30, 2020, Exhibit "I" to the Palmer Affidavit, Applicants' MR, Tab 2I, p. 574.

[34] Palmer Affidavit at para. 39, Applicants' MR, Tab 2, p. 21.

[35] Palmer Affidavit at para. 41, Applicants' MR, Tab 2, p. 22.

the Applicant and the Liquidation Trustee have resolved the Retained Causes of Action, and prosecution has not yielded any net recoveries after the payment of fees, costs, and expenses incurred in connection therewith. Accordingly, the Lead Plaintiff will not receive any recovery in connection with the Retained Causes of Action.[36]

vi. Tax Refunds

34. The Applicants received Canadian tax refunds approximating $5.3 million.[37]

E. Conditions to Termination of the CCAA Proceedings

29. It is now contemplated that the Applicants and the Monitor will take the following necessary steps to distribute the residual cash on hand and wind-up PSG, the US Debtors and the Liquidation Trust.[38]

i. Resolution Approving Dissolution of PSG

30. The Applicants are in the process of scheduling and preparing to hold a special meeting of Old PSG Shareholders (the "**Special Meeting**") to consider and vote on a resolution approving the voluntary dissolution of PSG (the "**Dissolution Resolution**") in the first quarter of 2023. If the Dissolution Resolution is passed, it is anticipated that the dissolution of PSG will occur during the 2023 fiscal year following the receipt of a final clearance certificate from the CRA and completion of the Final Distribution (as defined

[36] Palmer Affidavit at para. 42, Applicants' MR, Tab 2, p. 22.

[37] Palmer Affidavit at para. 43, Applicants' MR, Tab 2, p. 23.

[38] Palmer Affidavit at para. 44, Applicants' MR, Tab 2, p. 23.

below).[39] Plans for the Special Meeting will be described in further detail in a Notice of Special Meeting of Shareholders and Management Information Circular (the "**Circular**") to be mailed next month. The Circular will also be available on SEDAR.[40]

ii. Final Distribution to Holders of Parent Equity Interests

31. In September, 2022, PSG received from the Canada Revenue Agency a clearance certificate for the period ending August 31, 2021. Accordingly, the Applicants expect to distribute the remaining cash on hand, less the Wind-Down Cost Reserve, to the Holders of Parent Equity Interests (the "**Final Distribution**") following receipt of approval by Old PSG Shareholders of the Dissolution Resolution, the receipt of a final clearance certificate for the period following August 31, 2021 and the winding up of the US Debtors.[41] The Final Distribution is presently estimated to be in the approximate amount of $4,776,537.[42]

iii. Application for Voluntary Dissolution of PSG

32. Following the payment of the Final Distribution, PSG will file an application for dissolution pursuant to section 316 of the BCBCA. Once the application has been filed, the BC Registrar will provide confirmation of the dissolution in the form of a certificate of dissolution ("**Certificate of Dissolution**").[43]

[39] Palmer Affidavit at para. 45, Applicants' MR, Tab 2, p. 23.

[40] Palmer Affidavit at para. 46, Applicants' MR, Tab 2, p. 23.

[41] Palmer Affidavit at para. 47, Applicants' MR, Tab 2, p. 24.

[42] Seventeenth Report of the Monitor dated January 17, 2023, para. 38.

[43] Palmer Affidavit at para. 49, Applicants' MR, Tab 2, p. 24.

iv. Filing to Cease Being a Reporting Issuer

33. An agent of PSG will file the Certificate of Dissolution with the securities regulator in each Canadian jurisdiction where PSG is a reporting issuer.[44]

v. Disposition of the Wind-Down Cost Reserve

34. The Applicant will dispose of any residual funds in the Wind-Down Cost Reserve, after payment of the Final Distribution and payment in full of all applicable costs and expenses payable from the Wind-Down Cost Reserve, by contributing such residual funds to a Canadian charitable organization identified by the Wind-Down Officer, in his sole discretion.[45]

35. Once the Final Distribution is complete to the satisfaction of the Monitor, it is expected that the Monitor will terminate the CCAA Proceedings by filing a certificate with this Court ("**CCAA Termination Certificate**").[46]

vi. Termination of Chapter 11 Cases and Dissolution of Liquidation Trust

36. Following the Final Distribution, and in connection with the wind-up described above, PSG and the Liquidation Trustee will file an application in the Bankruptcy Court seeking entry of a final decree closing PSG's Chapter 11 Cases.[47]

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[44] Palmer Affidavit at para. 50, Applicants' MR, Tab 2, p. 24.

[45] Palmer Affidavit at para. 51, Applicants' MR, Tab 2, p. 25.

[46] Palmer Affidavit at para. 52, Applicants' MR, Tab 2, p. 25.

[47] Palmer Affidavit at para. 53, Applicants' MR, Tab 2, p. 25.

PART III - ISSUES AND THE LAW

30. The issues to be considered on this motion are whether this Court should:

(a) approve and authorize the holding of a meeting of Old PSG Shareholders to vote on a resolution for the dissolution of PSG;

(b) permit, following approval of a resolution for the dissolution of PSG, a final distribution to the Holders of Parent Equity Interests accounting for the Wind-Down Cost Reserve;

(c) confirm releases in favour of the PSG Board, the Trust Advisory Board, the Chief Wind-Down Officer, the Litigation Representative, the Liquidation Trustee, and the Monitor set out in the Plan Approval Order became effective as of the effective date of the Joint Plan;

(d) direct the Chief Wind-Down Officer to dispose of any residual amounts from the Wind-Down Cost Reserve by depositing the funds with charities;

(e) permit termination of these CCAA Proceedings; and

(f) approve activities of, and discharges the Monitor upon the service of the CCAA Termination Certificate.

A. PSG Should Hold a Meeting of Old PSG Shareholders to Vote on Dissolution

31. The proposed CCAA Termination Order authorizes PSG to call and conduct a special meeting of the Old PSG Shareholders to consider and vote on the Dissolution Resolution.[48]

32. After considering the relevant options, the PSG Board unanimously determined it appropriate to communicate to the Old PSG Shareholders that dissolving PSG (after making the Final Distribution and disposing of the Wind-Down Cost Reserve, among other things) is in the best interests of PSG and the Old PSG Shareholders.[49]

33. The anticipated benefits to the Old PSG Shareholders include the following:

(a) Approval of the Dissolution Resolution is anticipated to result in the Final Distribution to the Old PSG Shareholders as a tax free return of capital for Canadian federal income tax purposes; and

(b) Once the Final Distribution and dissolution are complete, the investment made by Old PSG Shareholders in PSG will no longer be subject to the risks that PSG currently faces or may face in the future with respect to its affairs and future prospects; and

34. The Dissolution Resolution must be approved by an affirmative vote of a simple majority of the votes cast by Old PSG Shareholders, present virtually or represented by

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[48] CCAA Termination Order at para. 4, Applicants' MR, Tab 3, p. 578.

[49] Palmer Affidavit at para. 46, Applicants' MR, Tab 2, p. 23.

proxy, at the Special Meeting pursuant to s. 314(1) of the BCBCA.[50] In light of these benefits and safeguards, it is appropriate for the PSG to call a special meeting to vote on the Dissolution Resolution.

B. The Final Distribution Will Benefit Holders of Parent Equity Interests

35. As described above, the proposed CCAA Termination Order permits that, following approval of the Dissolution Resolution, and receipt of a final clearance certificate from Canada Revenue Agency, the Holders of Parent Equity Interests will receive the Final Distribution, less the Wind-Down Cost Reserve.[51]

C. The Releases Set Out in the Plan Approval Order Are Effective

36. The Plan Approval Order affirmed releases and exculpations for third parties instrumental in achieving the Joint Plan and having it confirmed. The affirmation of these releases and exculpations was effective (with the usual carve outs for wilful misconduct and gross negligence) on the Effective Date of the Joint Plan, but covered claims that might be made in connection conduct arising after the effective date relating to the Joint Plan and its administration. The PSG Board, the Trust Advisory Board, the Chief Wind-Down Officer, the Litigation Representative and the Liquidation Trustee have all been instrumental in administering and implementing the Joint Plan.[52]

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[50] Palmer Affidavit at para. 46, Applicants' MR, Tab 2, p. 23; BCBCA, s. 314(1).

[51] CCAA Termination Order at para. 5, Applicants' MR, Tab 3, p. 578.

[52] Plan Approval Order at paras. 45-46, Exhibit "A" to the Palmer Affidavit, Applicants' MR, Tab 2A, p. 39.

37. Accordingly, it is appropriate for this Court to confirm that those parties have the benefit of the releases and exculpations set out in the Joint Plan since the Effective Date.

D. Residual Funds in the Wind-Down Cost Reserve Should Be Donated

38. The Applicants have determined that any residual amounts from the Wind-Down Cost Reserve should be donated to charity.

39. This Court has previously authorized the donation of residual administrative costs reserves to charity.[53]

E. The CCAA Proceedings Should Be Terminated

40. This Court has the jurisdiction to terminate these CCAA Proceedings pursuant to section 11 of the CCAA, which provides that, "the court [. . .] 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.[54] Courts have relied upon the authority conferred by section 11 to grant orders terminating CCAA proceedings in several other instances.[55]

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[53] See for example, *TerreStar Networks Inc., Re*, 2012 CarswellOnt 18530 (27 February 2012), Toronto CV-10-8944-00CL (Ont Sup. Ct. J. [Comm List]) wherein Justice Morawetz gave full effect to a U.S. Chapter 11 Plan of Liquidation Order providing at Schedule A, Exhibit A, Art. IV(E), s. 11(c), for the donation of residual administrative costs.

[54] CCAA, s. 11.

[55] For example, Golf Town Canada Holdings Inc. et al., CCAA Termination Order granted March 29, 2018, Court File No. CV-16-11527-00CL (Ont. Sup. Ct. J. [Commercial List]); McEwan Enterprises Inc., CCAA Termination Order granted December 21, 2021, Court File No. CV-21-00669445-00CL (Ont. Sup. Ct. J. [Commercial List]); Harte Gold Corp. et al., CCAA Distribution and Termination Order granted February 15, 2022, Court File No. CV-21-00673304-00CL (Ont. Sup. Ct. J. [Commercial List]).

41. This section confers broad discretionary power to grant a variety of orders, although the breadth of this authority is not boundless.[56] This authority must be exercised in furtherance of the remedial objectives of the CCAA, which have "evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself."[57]

42. With the remedial objectives of the CCAA in mind, the Court must determine whether the applicant has demonstrated the three baseline considerations: namely, (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence.[58]

43. There are similarities between the Applicants' situation and that of the debtors in *JTI-MacDonald Corp.*[59] In *JTI-MacDonald*, the Applicant debtor was profitable and had positive cash flow and substantial cash resources. The Applicant sought CCAA protection solely to deal with a notice of assessment and oppression application brought by the Province of Quebec. The Applicant eventually settled its disputes with the Province and subsequently sought to terminate the CCAA proceedings. The Court granted the termination order on the grounds that, among other things, the Applicant was no longer in need of creditor protection and termination would not unduly prejudice any stakeholders.

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[56] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*] at paras. 48-49.

[57] *Callidus* at para. 42.

[58] *Callidus* at para. 49.

[59] *JTI-MacDonald Corp., Re,* 2010 ONSC 4212, (Ont. Sup. Ct. J. [Commercial List]) (*JTI-MacDonald*).

44. In the present case, the Applicants' sought CCAA protection in similarly unusual circumstances. Although the Applicants were facing a liquidity crisis, they were able to maintain business operations in the ordinary course once shielded from their creditors. The CCAA Proceedings were intended to provide the Applicants with the time necessary to liquidate substantially all of their assets and distribute significant residual sale proceeds to stakeholders.

45. In accordance with the Joint Plan, the Applicants have acted in good faith to successfully completed their liquidation with a view to distributing substantially all of the sale proceedings. The CCAA Proceedings have thus served their purpose and the proposed CCAA Termination Order serves the priority objective of the CCAA to "avoid the social and economic losses resulting from liquidation of an insolvent company".[60]

46. Once the Applicant, PSG, is authorized to hold a special meeting of the Old PSG Shareholders to vote on the Dissolution Resolution, the Applicants and Monitor will undertake the following residual activities as part of the CCAA Proceedings:

(a) distribute the Final Distribution to Holders of Parent Equity Interests;[61]

(b) apply for dissolution of PSG under the BCBCA and file a Certificate of Dissolution;[62]

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[60] *Callidus* at para. 41.

[61] Palmer Affidavit at para. 47, Applicants' MR, Tab 2, p. 24.

[62] Palmer Affidavit at para. 49, Applicants' MR, Tab 2, p. 24.

(c) file the Certificate of Dissolution to cease becoming a reporting issuer;[63]

(d) dispose of the Wind-Down Cost Reserve;[64] and

(e) terminate the Chapter 11 cases and dissolve the litigation trust.[65]

47. In light of these impending events, it is appropriate for the Court to now authorize termination of these CCAA Proceedings at CCAA Termination Time. The proposed CCAA Termination Order provides for an efficient process for termination once the steps above have been concluded.

F. The Monitor Should Be Discharged and Released From Potential Claims

48. The proposed CCAA Termination Order provides that, effective as of the CCAA Termination Time, EY will be discharged from its duties and will have no further duties, obligations, or responsibilities as Monitor from and after the CCAA Termination Time. Notwithstanding its discharge as Monitor, EY shall have the authority to carry out, complete or address any matters in its role as Monitor that are ancillary or incidental to these CCAA Proceedings following the CCAA Termination Time, as may be required or appropriate (the "**Monitor Incidental Matters**").[66]

49. The Monitor and its counsel will continue to have the benefit of any rights, approvals, releases and protections in favour of the Monitor at law or pursuant to the Plan

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[63] Palmer Affidavit at para. 50, Applicants' MR, Tab 2, p. 24.

[64] Palmer Affidavit at para. 51, Applicants' MR, Tab 2, p. 25.

[65] Palmer Affidavit at para. 53, Applicants' MR, Tab 2, p. 25.

[66] CCAA Termination Order at para. 12, Applicants' MR, Tab 3, p. 580.

Approval Order, all other orders after the Monitor's discharge, and the CCAA.[67] The proposed CCAA Termination Order further provides for the release of the Monitor and its counsel from any and all claims asserted against them, provided that such claims do not arise out of any gross negligence or wilful misconduct on the part of the released parties.[68]

50. Courts have relied on section 11 of the CCAA to grant orders discharging the Monitor on terms similar to those sought in the proposed CCAA Termination Order in several other cases.[69]

51. In light of these considerations, it is appropriate for the Monitor to be discharged at the CCAA Termination Time.

PART IV - ORDER REQUESTED

52. For the foregoing reasons, the Applicants respectfully request that this Court grant the CCAA Termination Order substantially in the form of the draft order attached as Tab 3 to the Applicants' motion record.

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[67] CCAA Termination Order at para. 13, Applicants' MR, Tab 3, p. 580.

[68] CCAA Termination Order at para. 14, Applicants' MR, Tab 3, p. 580.

[69] For example, Re Peraso Technologies Inc. (28 October 2020), Toronto CV-20-006422010-00CL (Ont Sup. Ct. J. [Comm List]), CCAA Termination Order at paras. 14-16; Golf Town Canada Holdings Inc. et al., (29 March 2018) CCAA Termination Order at paras. 12-13, Toronto CV-16-11527-00CL (Ont. Sup. Ct. J. [Commercial List]).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2023.

Jeffrey Levine
Tushara Weerasooriya
Nicole Rozario
McMillan LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10

2. Harte Gold Corp. et al., CCAA Distribution and Termination Order granted February 15, 2022, Court File No. CV-21-00673304-00CL (Ont. Sup. Ct. J. [Commercial List])

3. Golf Town Canada Holdings Inc. et al., CCAA Termination Order granted March 29, 2018, Court File No. CV-16-11527-00CL (Ont. Sup. Ct. J. [Commercial List])

4. *JTI-MacDonald Corp., Re,* 2010 ONSC 4212, (Ont. Sup. Ct. J. [Commercial List])

5. McEwan Enterprises Inc., CCAA Termination Order granted December 21, 2021, Court File No. CV-21-00669445-00CL (Ont. Sup. Ct. J. [Commercial List])

6. Re Peraso Technologies Inc. (28 October 2020), Toronto CV-20-006422010-00CL, CCAA Termination Order at paras. 14-16, (Ont Sup. Ct. J. [Commercial List])

SCHEDULE "B"
RELEVANT STATUTES

***Business Corporations Act*, SBC 2002, c 57**

Authorization for voluntary dissolution

314 (1) A company may apply to be dissolved under this Division if

(a) it is authorized to do so by an ordinary resolution,

(b) it has no assets, and

(c) it

(i) has no liabilities, as a result of section 315 (6) or otherwise, or

(ii) has made adequate provision for the payment of each of its liabilities.

(2) Despite subsection (1) (a) of this section, a company referred to in subsection (1) (b) and (c) that has not issued any shares may apply to be dissolved under this Division if it is authorized to do so by a directors' resolution.

***Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36**

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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., et al.
Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE MOVING APPLICANTS
(Motion returnable January 20, 2023)

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

Tushara Weerasooriya LS# 51186K
tushara.weerasooriya@mcmillan.ca
Tel: (416) 865-7890 / Fax: (416) 865-7048

Jeffrey Levine LS#: 55582H
jeffrey.levine@mcmillan.ca
Tel: (416) 865-7791 / Fax: (416)865-7048

Nicole Rozario LS#: 72376V
Nicole.rozario@mcmillan.ca
Tel: (416) 945-8007 / Fax: (416) 865-7048

Lawyers for the Applicants