IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BPS US Holdings, Inc., *et al.*,[1] Debtors.	Chapter 11 Case No. 16-12373 (KJC) (Jointly Administered) Re: D.I. 1283, 1284, 1285, 1327 **Disclosure Statement Hearing: October 3, 2017 at 1:00 p.m. (ET)** **Objections to Disclosure Statement Due: September 25, 2017 at 4:00 p.m. (ET)**

SECURITIES PLAINTIFFS' OBJECTION TO APPROVAL OF DISCLOSURE STATEMENT WITH RESPECT TO JOINT CHAPTER 11 PLAN OF LIQUIDATION OF OLD BPSUSH INC. AND ITS AFFILIATED DEBTORS

Plumbers & Pipefitters National Pension Fund, the court-appointed lead plaintiff ("Lead Plaintiff") in the securities class action styled as *Nieves v. Performance Sports Group Ltd., et al.*, Case No. 1:16-CV-3591-GHW (S.D.N.Y.) (the "Securities Litigation"), for itself and on behalf of the putative class of purchasers (the "Putative Class") of the common stock ("PSG Common Stock") of Performance Sports Group Ltd., now known as Old PSG Wind-down Ltd. (the "Parent Debtor") that it represents in the Securities Litigation, hereby submits this objection to approval of the proposed disclosure statement (the "Disclosure Statement") [D.I. 1284] for the proposed chapter 11 plan of liquidation (the "Plan") [D.I. 1283] filed by the debtors in

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number or Canadian equivalent, are as follows: BPS US Holdings Inc. (8341); Bauer Hockey, Inc. (3094); Easton Baseball / Softball Inc. (5670); Bauer Hockey Retail Inc. (6663); Bauer Performance Sports Uniforms Inc. (1095); Performance Lacrosse Group Inc. (4200); BPS Diamond Sports Inc. (5909); PSG Innovation Inc. (9408); Performance Sports Group Ltd. (1514); KBAU Holdings Canada, Inc. (5751); Bauer Hockey Retail Corp. (1899); Easton Baseball / Softball Corp. (4068); PSG Innovation Corp. (2165); Bauer Hockey Corp. (4465); BPS Canada Intermediate Corp. (4633); BPS Diamond Sports Corp. (8049); Bauer Performance Sports Uniforms Corp. (2203); and Performance Lacrosse Group Corp. (1249). The Debtors' headquarters are located at 100 Domain Dr., Exeter, New Hampshire 03833.

possession (the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases") and respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. The Plan, which will pay unsecured creditors in full, has one obvious, overarching goal: to completely disenfranchise defrauded purchasers of PSG Common Stock in order to line the pockets of current Class P7 Shareholders, vulture investors who paid option value at best for their shares well after the fraud was perpetrated. At bottom, the Plan embodies a thinly veiled scheme by the Equity Committee to eviscerate the claims of the Putative Class – the actual victims of the securities fraud that is the subject of the Securities Litigation – and hijack the potentially substantial value remaining in the Debtors' estates for the exclusive benefit of speculators who not only purchased their PSG Common Stock after the Class Period, but many (if not most) of whom purchased *after the Debtors were already in bankruptcy*.

2. Piling insult upon injury to the Putative Class, the Plan proposes (but fails) to pay Lead Plaintiff's individual claim against the Debtors "in full" in a misguided attempt to moot Lead Plaintiff's claims against the Individual Defendants and send the Securities Litigation back to the drawing board. Presumably, the primary purpose of the Equity Committee's gambit is to hoard the proceeds of the Debtors' directors' and officers' liability insurance policies for the exclusive benefit of the Equity Committee and its constituency of speculators through the Liquidation Trust. To that end, the Disclosure Statement cannot be approved because the Plan, on its face, was not proposed in good faith and cannot be confirmed.

[2] Capitalized terms used but not defined in this Preliminary Statement have the meanings given thereto below.

3. Looking behind the Plan's dubious façade reveals even more infirmities that render the Plan unconfirmable on its face and thus precludes approval of the Disclosure Statement. Among other things, the Plan:

- improperly attempts to prevent Lead Plaintiff from voting on the Plan by asserting that Class P6 is "unimpaired" – despite failing to pay Lead Plaintiff's Individual Securities Damages Claim in full, inclusive of interest, commissions, attorneys' fees, expert fees, or other costs incurred by Lead Plaintiff, all of which form the basis of such claim and would have to be determined by a judgment of a court of competent jurisdiction and paid in full for Class P6 to be truly unimpaired;

- does not classify or provide any treatment for the Class Claim, essentially presuming that the Class Claim has already been disallowed despite the fact that Lead Plaintiff's response to the U.S. Class Claim Objection is not even due until after the Disclosure Statement Hearing (and, in any event, neither the U.S. Class Claim Objection, which is meritless, nor the Canadian Class Claim Objection, which the Ontario Court has no jurisdiction to hear or grant, will be heard until approximately two weeks after the Disclosure Statement Hearing);

- contains a Third-Party Release that is unclear (and, if it is intended to release the Individual Defendants, is impermissible); and

- improperly discriminates between Classes P6 (Individual Securities Damages Claims) and P7 (Parent Equity Interests) as well as other members of the Putative Class, whose claims are not even classified under the Plan but are instead completely ignored.

4. Even if the Plan was not fatally flawed, the Disclosure Statement nevertheless fails to provide adequate information under section 1125 of the Bankruptcy Code because it

- Fails to provide any justification for the treatment of the Individual Securities Damages Claim or the Class Claim;

- provides no information whatsoever with respect to the Retained Causes of Action that will be brought by the Liquidation Trust; and

- does not adequately describe the post-confirmation obligations of the Debtors and the Liquidation Trust to preserve evidence that is potentially relevant to the Securities Litigation.

5. There is no legitimate reason to rush to confirm the Plan in its current form. The Debtors have sold substantially all of their assets, leaving a substantial pot of cash and the Retained Causes of Action as the only material assets of the Debtors' estates to administer. There are no businesses to reorganize, wasting assets to sell or preserve, or jobs to save. Distributions to current shareholders in Class P7, which are almost entirely (if not entirely) contingent on the outcome of litigation, will not occur for years after the effective date of the Plan in any event. The Court should not approve a Disclosure Statement that will set into motion a confirmation process for a Plan that is grossly inequitable and fraught with bad faith.

RELEVANT BACKGROUND

A. The Securities Litigation

6. The Securities Litigation is a putative securities class action commenced in the United States District Court for the Southern District of New York (the "SDNY District Court") on May 13, 2016 against, among others, Amir Rosenthal ("Rosenthal"), the Debtors' former Chief Executive Officer; Kevin Davis, the Debtors' former Chief Financial Officer (collectively with Rosenthal, the "Individual Defendants"); and Performance Sports Group Ltd. ("PSG" and collectively with the Individual Defendants, the "Defendants").

7. By order dated June 7, 2016 (the "Lead Plaintiff Order"), the SDNY District Court appointed Plumbers & Pipefitters National Pension Fund as Lead Plaintiff to represent the Putative Class in the Securities Litigation and appointed Cohen Milstein Sellers & Toll PLLC as lead counsel ("Lead Counsel"). The Lead Plaintiff Order tasked Lead Counsel with, among other responsibilities and duties, "the supervision of all other matters concerning the prosecution or resolution of" the Securities Litigation. Lead Plaintiff Order, ¶ 4(i).

8. On August 15, 2016, Lead Plaintiff filed an Amended Class Action Complaint (the "FAC") against PSG and the Individual Defendants, asserting claims under the Securities

Exchange Act of 1934 on behalf of itself and the Putative Class in connection with false and misleading statements and/or omissions by PSG and the Individual Defendants during the proposed class period. On that same day, PSG failed to file its annual financial report due to an ongoing internal Audit Committee investigation into the "Company's financial statements and the related certification process." On October 13, 2016, PSG and the Individual Defendants filed a joint motion to dismiss the FAC.

9. On October 31, 2016, days before Lead Plaintiff's deadline to respond to the Defendants' motion to dismiss (or, alternatively, to file an amended class action complaint if, instead of responding to the motion, Lead Plaintiff chose to amend the FAC pursuant to the applicable chambers rules), PSG filed these chapter 11 cases. As a result, the Securities Litigation was automatically stayed with respect to PSG under section 362(a) of the Bankruptcy Code.

10. On November 3, 2016, cognizant of PSG's status as a chapter 11 debtor and the impact of the automatic stay, Lead Plaintiff filed the Second Amended Class Action Complaint (the "SAC") against the Individual Defendants but not PSG. The SAC asserts claims against the Individual Defendants on behalf of the Putative Class, consisting of persons and entities who purchased or acquired PSG Common Stock on the New York Stock Exchange during the period from January 15, 2015 through March 14, 2016, inclusive (the "Class Period").

11. On November 18, 2016, Rosenthal moved in the Securities Litigation (not in this Court) for an order extending the automatic stay in these chapter 11 cases to himself. Davis filed a joinder to Rosenthal's motion. Lead Plaintiff opposed the motion. In response to Lead Plaintiff's argument that the Individual Defendants lacked standing to move to extend the automatic stay, PSG, without seeking relief from the automatic stay in this Court, filed a joinder

to Rosenthal's motion but did not raise any independent arguments or submit any evidence of its own.

12. On January 17, 2017, the SDNY District Court entered an order in the Securities Litigation extending the automatic stay in PSG's chapter 11 case to the Individual Defendants until the automatic stay terminates with respect to PSG or the SDNY District Court orders otherwise.[3]

13. On May 9, 2017, the SDNY District Court entered a stipulated scheduling order (the "Scheduling Order") lifting the stay as to the Individual Defendants, permitting the Securities Litigation to proceed against them only. The Scheduling Order granted the Individual Defendants until June 22, 2017 to respond to the SAC, or until June 8, 2017 to submit a pre-motion conference letter if they intended to move to dismiss.

14. On June 8, 2017, pursuant to the Scheduling Order, the Individual Defendants submitted a letter to the SDNY District Court requesting a pre-motion conference, which the Court held on June 15, 2017. On June 16, 2017, the SDNY District Court entered an order directing the Individual Defendants to file their motion to dismiss no later than June 22, 2017, directing Lead Plaintiff to file its opposition no later than July 24, 2017, and permitting the Individual Defendants to file a reply, if any, within three weeks after service of Lead Plaintiff's opposition. As of August 14, 2017, the Individual Defendants' motion to dismiss the SAC has been fully briefed.

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[3] For the avoidance of doubt, Lead Plaintiff maintains, *inter alia*, that (a) the SDNY District Court lacks jurisdiction to extend the automatic stay in these chapter 11 cases to the Individual Defendants or anyone else, as extension of the automatic stay is exclusively an exercise of this Court's equitable powers under section 105(a) of the Bankruptcy Code and (b) even if the SDNY District Court had jurisdiction to extend the automatic stay, neither the Individual Defendants nor PSG satisfied the heavy evidentiary burden necessary to obtain such extraordinary relief. Accordingly, Lead Plaintiff reserves all rights with respect to the SDNY District Court's order dated January 17, 2017 extending the automatic stay.

B. The Class Claim, the Individual Securities Damages Claim, and the U.S. and Canadian Objections to the Class Claim

15. On February 6, 2017, Lead Plaintiff timely filed two proofs of claim against the Parent Debtor, asserting claims arising out of the Securities Litigation (a) in Lead Plaintiff's individual capacity (the "Individual Securities Damages Claim") [Claim No. 494] and (b) for Lead Plaintiff itself and on behalf of the Putative Class (the "Class Claim") [Claim No. 444]. Both claims were denominated in United States Dollars and arise entirely under United States law. In addition, the addenda to each proof of claim filed by Lead Plaintiff included only the caption of the Chapter 11 Cases and expressly stated that the Claims were being submitted against the Parent Debtor as a debtor in the Chapter 11 Cases. Lead Plaintiff did not file copies of either proof of claim (or any other proof of claim) with the monitor in the CCAA Case (as defined below) or take any other action to file claims in the CCAA Case or submit itself to the jurisdiction of the Ontario Court (as defined below). The bar date order entered in the Chapter 11 Cases [D.I. 327] contains no provision deeming a proof of claim filed in the Chapter 11 Cases to also constitute a claim filed in the CCAA Case.[4]

The U.S. Class Claim Objection

16. On September 15, 2017, the Equity Committee (as defined below) filed an objection to the Class Claim (as amended on September 16, 2017, the "U.S. Class Claim Objection") [D.I. 1338, 1340]. The U.S. Class Claim Objection is currently scheduled to be heard on October 16, 2017, with a response deadline of October 5, 2017 at 4:00 PM (ET). The primary basis of the U.S. Class Claim Objection appears to be – although it took the Debtors and

[4] Because the Ontario Court has no personal jurisdiction over Lead Plaintiff or the Putative Class, and no subject-matter jurisdiction over the Class Claim, the Individual Securities Damages Claim, or any other claims asserted by Lead Plaintiff and/or the Putative Class, the claims procedure order entered in the CCAA Case on December 19, 2016 is inapplicable to Lead Plaintiff, the Putative Class, the Class Claim, and the Individual Securities Damages Claim.

the Equity Committee months of negotiating in secret to prepare and file a Plan designed to disenfranchise the Debtors' largest creditor constituency – that "the expeditious distribution of the estates is being 'held up' by" the Class Claim. U.S. Class Claim Objection at 3. Lead Plaintiff intends to vigorously oppose the U.S. Class Claim Objection.

The Canadian Class Claim Objection

17. The morning of September 25, 2017 (the deadline for filing objections to approval of the Disclosure Statement), bankruptcy counsel for Lead Plaintiff and the Putative Class received two large binders of motion materials filed in the Debtors' Canadian insolvency proceedings (the "CCAA Case") pending in the Ontario Superior Court of Justice (the "Ontario Superior Court"), seeking entry of an order of the Ontario Superior Court disallowing the Class Claim (the "Canadian Class Claim Objection").[5] However, the Class Claim was never filed in the CCAA Case, Lead Plaintiff has never submitted itself or the Putative Class to the jurisdiction of the Ontario Superior Court, and neither the Class Claim nor the Individual Securities Damages Claim is a "Canadian Claim" or a "Cross-Border Claim" as defined in the claims resolution order entered in the CCAA Case on September 1, 2017 (the "Claims Resolution Order").[6] The Class Claim was filed only in, and thus remains within the exclusive jurisdiction of, this Court. Indeed, the Canadian Class Claim Objection, by its terms, is subject to Rule 5.04 of the *Ontario Rules of Civil Procedure*, which provides in pertinent part that the Ontario Court "may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the

[5] Although the Canadian Class Claim Objection is dated September 21, 2017, it was not sent until the evening of Friday, September 22, 2017, for delivery on Monday, September 25, 2017. Moreover, as of 10:06 AM (ET) on Monday, September 25, 2017, the Canadian Class Claim Objection was not available on the website maintained by the Monitor in the CCAA Case. Bankruptcy counsel to Lead Plaintiff and the Putative Class are not included on the most recent e-mail service list in the CCAA Case, dated July 7, 2017.

[6] The Debtors obtained entry of the Claims Resolution Order in the CCAA Case pursuant to a motion dated Friday, August 25, 2017, returnable the following Friday, September 1, 2017. Bankruptcy counsel for Lead Plaintiffs and the Putative Class did not receive the motion materials until the afternoon of September 1, after the Claims Resolution Order had already been entered. In any event, Lead Plaintiffs and the Putative Class remain strangers to the CCAA Case and the Ontario Court.

proceeding and pronounce judgment *without prejudice to the rights of all persons who are not parties*" (emphasis added). Neither Lead Plaintiff nor the Putative Class are parties to the CCAA Case, and thus the Claims Resolution Order does not bind them.

18. The Debtors never sought this Court's approval of the Claims Resolution Order concurrently with seeking its entry in the Ontario Court. Instead, eleven days after the Claims Resolution Order was entered (effectively *ex parte*) by the Ontario Court, the Debtors filed a motion in this Court seeking an order "granting effect to and enforcing" the Claims Resolution Order (the "Claims Resolution Enforcement Motion") [D.I. 1326]. The Claims Resolution Enforcement Motion essentially treating as a fait accompli an order of the Ontario Court that purports to confer both subject-matter and personal jurisdiction on the Ontario Court to adjudicate the Class Claim, notwithstanding the fact that the Class Claim (a) arises out of litigation pending solely before a United States court, (b) asserts claims arising solely under United States law, (c) was filed solely in this Court by a party that is domiciled in the United States and has taken no steps whatsoever to submit itself or the Class Claim to the jurisdiction of the Ontario Court. Through the U.S. Class Claim Objection, the Canadian Class Claim Objection, the Claims Resolution Order, and the Claims Resolution Enforcement Motion, the Debtors and the Equity Committee are attempting to grant themselves the ability to forum-shop by pressing the same matter simultaneously in two separate forums, one of which is utterly without jurisdiction over the Class Claim, Lead Plaintiff, or the Putative Class.

19. As noted in the cross-border protocol approved by this Court on November 29, 2016 (the "Cross-Border Protocol") [D.I. 220 Ex. 1], the Chapter 11 Cases and the CCAA Case "are full and separate proceedings[,]" this Court and the Ontario Court have independent jurisdiction that the Cross-Border Protocol "shall not divest nor diminish[,]" and this Court has "sole and exclusive jurisdiction and power over the conduct of the Chapter 11 Cases and the hearing and determination of matters arising in

the Chapter 11 Cases." Cross-Border Protocol, ¶¶ 5, 6, 7. To the extent the Claims Resolution Order purports to confer on the Ontario Court the plenary authority to adjudicate or otherwise resolve the Class Claim, *which was filed solely in this Court*, the Claims Resolution Order violates paragraph 8(a) of the Cross-Border Protocol, which provides that nothing in the Cross-Border Protocol shall be construed to "increase . . . or otherwise modify the . . . jurisdiction of the U.S. Court, the Canadian Court . . . ."

20. In the interest of resolving the Class Claim in a timely manner, avoiding conflicting decisions, and – most importantly – upholding this Court's exclusive subject-matter jurisdiction over the allowance and disallowance of the U.S.-only Class Claim and the treatment thereof under any chapter 11 plan of the Debtors,[7] this Court should direct the Debtors and the Equity Committee to immediately cease the jurisdictional chicanery in which they are attempting to engage.

C. The Plan and Disclosure Statement

21. Aside from the various provisions and improper purpose discussed below that render it patently unconfirmable, the Plan is a relatively straightforward chapter 11 plan of liquidation. The Debtors initially filed the Plan, together with a motion for leave to file the Plan without concurrently filing a disclosure statement (the "Motion for Leave") [D.I. 1241], on August 9, 2017. On August 25, 2017, the Debtors re-filed the Plan and filed the Disclosure Statement, then withdrew the Motion for Leave on August 28, 2017. A hearing on approval of the Disclosure Statement (the "Disclosure Statement Hearing") is currently scheduled for October 3, 2017 at 1:00 PM (ET).

Classification and Treatment of Claims and Interests

22. Three classes of claims and interests under the Plan are relevant to this Objection:

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[7] Nothing herein is intended to, does, or shall (a) waive any rights of Lead Plaintiff or the Putative Class to seek withdrawal of the bankruptcy reference with respect to the Class Claim or any other issue or (b) constitute consent by Lead Plaintiff, on behalf of itself or the Putative Class or any member thereof, to entry by this Court of a final order or judgment on any non-core issue.

a. general unsecured claims against the Parent Debtor, which are classified in Class P4 ("Class P4"), are allegedly being paid in full without interest despite junior classes receiving distributions, and are impaired, entitling the holders thereof to vote;

b. Lead Plaintiff's Individual Securities Damages Claim against the Parent Debtor, which is classified in Class P6 ("Class P6") and is allegedly (but, as discussed below, is not actually) being paid in full, and the holder of which (Lead Plaintiff) is not entitled to vote; and

c. equity interests in the Parent Debtor, which are classified in Class P7 ("Class P7") and are impaired, and the holders of which ("Class P7 Shareholders") are entitled to vote.

Composition of Class P7

23. Class P7 consists primarily, if not entirely, of recent purchasers of PSG Common Stock at deeply discounted prices, and the degree of overlap between Class P7 Shareholders and the Putative Class is miniscule, to the extent there is any overlap at all. Thus, Class P7 Shareholders – the Equity Committee's constituents – are primarily speculators who bought PSG Common Stock for pennies on the dollar with the hope of a windfall, not the innocent victim investors who were defrauded by PSG and the Individual Defendants during the Class Period.

24. According to the Disclosure Statement, there are 45,861,205 shares of PSG Common Stock outstanding. See Disclosure Statement at 19. The day after the end of the Class Period marked the beginning of a massive sell-off of the Parent Debtor's common stock, with

21.7 million shares – nearly half the total number outstanding – changing hands in fifteen trading days, and the equivalent of the entire float changing hands in thirty-nine trading days.[8]

25. From the end of the Class Period through the last trading day before the date of this Objection, cumulative trading volume in PSG Common Stock was 251.8 million shares, or almost five times the total number of shares outstanding.[9] During the Chapter 11 Cases, 99.2 million shares have changed hands, more than twice the total number of shares outstanding.[10] This significant turnover strongly suggests that substantially all of the current holders of PSG Common Stock – the Class P7 Shareholders who are the Equity Committee's constituents – are recent purchasers, many during the Chapter 11 Cases, when PSG Common Stock has traded at a deep discount ($0.34-$1.90/share, as compared to $2.80-$21.72/share during the Class Period).

26. The shift in the universe of major holders of PSG Common Stock since the end of the Class Period confirms that fact. At the end of the first quarter of 2016 (i.e., approximately two weeks after the end of the Class Period), the 20 largest reporting holders of PSG Common Stock held 29.4 million shares, or approximately 64% of all PSG Common Stock. See Exhibit A. Only one of those reporting holders now appears on the list of the largest holders of PSG Common Stock, with 2,127 shares remaining from its prior position of nearly 1.2 million shares. See Exhibit B. There are now only fourteen reporting holders, with an aggregate position of just 934,076 shares, barely 2% of all shares outstanding. Id.

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[8] See Yahoo! Finance, Historical Data, *available at:* https://finance.yahoo.com/quote/PSGLQ/history?period1=1458014400&period2=1506225600&interval=1d&filter=history&frequency=1d

[9] Id.

[10] Id.

Treatment of Lead Plaintiff's Class P6 Individual Securities Damages Claim

27. The Plan creates a cash reserve (the "Individual Securities Damages Claim Reserve") in the amount of $928,077.31

> for the purposes of making distributions in respect of and satisfying the Allowed amount, if any, of the Individual Securities Damages Claim, subject to the rights of Holders of General Unsecured Claims to the prior Payment in Full of such Holders' Allowed Claims under the Plan (including the Global Settlement).

Plan, Art. I.A.93.

28. According to the Disclosure Statement, the Individual Securities Damages Claim Reserve serves as a de facto cap on the amount of the Individual Securities Damages Claim:

> For the avoidance of doubt, the Individual Securities Damages Claim shall not receive any distribution on account of any Allowed Individual Securities Damages Claim in excess of the Individual Securities Damages Claim Reserve, and such Claim shall not be treated as a Parent Equity Interest notwithstanding section 510(b) of the Bankruptcy Code and the applicable provisions of the CCAA.

Disclosure Statement at 31.

29. However, the amount of the Individual Securities Damages Claim Reserve is calculated only as the purported amount of Lead Plaintiff's direct losses on its purchases and sales of the Parent Debtor's common stock, and does not include any amounts for interest, commissions, attorneys' fees, expert fees, or other costs incurred by Lead Plaintiff, all of which form the basis of Lead Plaintiff's Individual Securities Damages Claim and all of which would have to be determined by a judgment of a court of competent jurisdiction and paid in full for Class P6 to be truly unimpaired. Thus, despite the statements in the Plan and Disclosure Statement to the contrary, Class P6 is impaired and Lead Plaintiff is entitled to vote on the Plan.

30. Incredibly, though not surprisingly, the Disclosure Statement purports to reserve the rights of the Debtors and the Equity Committee to change the treatment of the Individual Securities Damages Claim at any time as they see fit, as follows:

> For the avoidance of doubt, the Debtors, with the consent of the Equity Committee, reserve the right to modify the Plan at any time prior to the Confirmation Hearing with respect to the proposed treatment of the Individual Securities Damages Claim thereunder, including, without limitation, providing that the Individual Securities Damages Claim, to the extent Allowed, will be subordinated to the level of Parent Equity Interests under the Plan.

Disclosure Statement at 32. Given that "caveat" and reservation of rights, the Individual Securities Damages Claim is fundamentally impaired and must be entitled to vote on the Plan.[11]

The Liquidation Trust and Treatment of Class P7 Shareholders

31. Class P7 Shareholders are entitled to receive their pro rata share of the net proceeds of (a) the "Retained Causes of Action" described more fully below, (b) the remainder, if any, of a cash reserve, in an amount to be determined by the Equity Committee, to be established on or before the effective date of the Plan to fund the wind-down expenses of the Liquidation Trust, the liquidating Parent Debtor, and the other Debtors, (c) any sale proceeds remaining after all of the various Plan reserves are funded, all wind-down expenses are paid in full, and holders of all allowed claims are paid in full in cash, and (d) any other assets, such as investment income (collectively, the "Shareholder Distributable Assets"). See Plan, Art. V.B.3.b.

32. At their election, Class P7 Shareholders can choose "Option 1" and exchange their interests for beneficial interests in a liquidation trust (the "Liquidation Trust") or choose

[11] Because Class P6 is an impaired class that must be, but is not, entitled to vote, the Debtors' proposed procedures for soliciting votes on the Plan (the "Solicitation Procedures") are facially invalid as well and the Debtors' motion seeking, among other relief, entry of an order approving the Disclosure Statement and the Solicitation Procedures (the "Solicitation Procedures Motion") [D.I. 1327] must be denied.

"Option 2" and retain their interests and receive their distributions through the liquidating Parent Debtor. Plan, Art. IV.C.7.b. The Plan does not contemplate a difference in the treatment of Class P7 Shareholders based on which option they select; rather, the Shareholder Distributable Assets will vest in the Liquidation Trust and the liquidating Parent Debtor pursuant to the proportions of Class P7 Shareholders electing Option 1 and Option 2, respectively. Id.

The Retained Causes of Action

33. All of the Debtors' causes of action that have not been assigned, settled, or released are retained under the Plan (the "Retained Causes of Action"). Plan, Art. I.A.144. According to the Debtors, the Retained Causes of Action will constitute "substantially all of the assets of the Liquidation Trust[.]" Disclosure Statement at 104. Neither the Plan nor the Disclosure Statement provides any explanation of the nature or intended targets of, or any other information pertaining to, the Retained Causes of Action.

Conditions to Confirmation

34. The Plan contains two conditions to confirmation related to Lead Plaintiff's Individual Securities Damages Claim and the Class Claim.

35. First, the Plan requires, as a condition to confirmation, that

> the Purported Securities Class Action Claim shall have been disallowed and expunged in its entirety or estimated at $0.00, in each instance, pursuant to an order of the Bankruptcy Court, Canadian Court or other court of competent jurisdiction entered on or before the Confirmation Date, and for all purposes, including, without limitation, Plan distribution purposes"

Plan, Art. IX.A.3.

36. Second, the Plan requires, again as a condition to confirmation, that

> either the Holder of the Individual Securities Damages Claim shall have agreed to the treatment of the Individual Securities Damages Claim as provided under this Plan (including, but not limited to,

> the amount of the Individual Securities Damages Claim Reserve), or (ii) the Individual Securities Damages Claim shall have been estimated at $928,077.31 or some lesser amount pursuant to an order of the Bankruptcy Court or other court of competent jurisdiction entered on or before the Confirmation Date.

Plan, Art. IX.A.4.

Third-Party Release

37. The Plan also contains a release of certain non-Debtors' claims against various other non-Debtors (the "Third-Party Release").

38. The "Releasing Parties" deemed to grant the Third-Party Release include creditors that (a) vote to accept the Plan, (b) are unimpaired and deemed to accept the Plan, or (c) vote to reject the Plan but do not mark an "opt out" checkbox on their ballots, but exclude, among others, voting creditors that opt out and unimpaired creditors that are deemed to accept the Plan but check an "opt out" checkbox on a notice to be provided pursuant to the Debtors' proposed solicitation procedures (the "Opt-Out Notice"). Plan, Art. I.A.140.

OBJECTION

39. The Disclosure Statement cannot be approved because the Plan is unconfirmable. However, even if the Plan was not fatally flawed, the Disclosure Statement cannot be approved because it lacks adequate information with respect to key terms of the Plan.

I. THE DISCLOSURE STATEMENT CANNOT BE APPROVED BECAUSE THE PLAN IT DESCRIBES IS PATENTLY UNCONFIRMABLE.

40. A disclosure statement describing a plan that cannot be confirmed cannot be approved, regardless of the amount of disclosure it contains. See, e.g., In re Am. Capital Equip., LLC, 688 F.3d 145, 154 (3d Cir. 2012); John Hancock Mutual Life Insurance Co. v. Route 37 Business Park Associates, 987 F.2d 154, 157 (3d Cir. 1993); see also In re Beyond.com, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) (denying approval of disclosure statement where plan

could not be confirmed); In re Phoenix Petroleum Co., 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible,' the court should exercise its discretion to refuse to consider the adequacy of disclosures."). The purpose behind this rule is pure common sense: Courts will not permit a bankruptcy estate to incur the costs of soliciting votes for a plan that, even if unanimously accepted by creditors, could never be confirmed. See, e.g., In re Main Street AC, Inc., 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999); In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) ("If, on the face of the plan, the plan could not be confirmed, then the court will not subject the estate to the expense of soliciting votes and seeking confirmation.").

41. Such is the case here. For the reasons described below, the Plan could never be confirmed in its present form even if all impaired, voting classes vote to accept it. Permitting the Debtors to proceed with the solicitation of votes on a Plan that cannot be confirmed would be an egregious waste of estate resources. Accordingly, the Disclosure Statement cannot and should not be approved and the Debtors should not be authorized to solicit votes on this Plan.

A. The Plan was not proposed in good faith.

42. To be confirmed, a chapter 11 plan must, among other things, be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Bankruptcy Code does not define "good faith." However, courts have generally held that good faith is determined by the totality of the circumstances and requires a showing that a plan is "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." In re Combustion Engineering, Inc., 391 F.3d 190, 247 (3d Cir. 2004); In re Genesis Health Ventures, Inc., 266 B.R. 591, 609 (Bankr. D. Del. 2001); In re Coram Healthcare Corp., 271 B.R. 228, 234 (Bankr. D. Del. 2001). A plan that unjustifiably benefits certain stakeholders to the detriment of others is

not proposed in good faith. See In re Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. D. Del. 2010). Several factors demonstrate that the Plan was not proposed in good faith.

43. First, by proposing to pay Lead Plaintiff's Individual Securities Damages Claim "in full," the Debtors (who, at this point, are acting merely as a proxy for the Equity Committee and its constituency of speculators) seek to preclude Lead Plaintiff from voting on the Plan, presumably in an attempt to dodge the cramdown requirements of section 1129(b) of the Bankruptcy Code.

44. Second, the supposed payment in full of Lead Plaintiff's Individual Securities Damages Claim, along with whatever accompanying findings are included in the confirmation order, is simply a disingenuous attempt to stall the Securities Litigation so the Liquidation Trust can pursue its own litigation for the exclusive benefit of its contingency of speculators, unimpeded by the Securities Litigation.

45. Through the combined effect of the treatment of Lead Plaintiff's Individual Securities Damages Claim, the omission of the Class Claim from the Plan in its entirety, and the de facto cap imposed by the Individual Securities Damages Claim Reserve, the Plan is clearly designed to completely disenfranchise Lead Plaintiff and the Putative Class for the exclusive benefit of Class P7 Shareholders who, by and large, bought their PSG Common Stock for pennies on the dollar well after the wrongdoing of the Parent Debtor and the Individual Defendants was reflected in the price of PSG Common Stock.

46. In essence, the Debtors and the Equity Committee are attempting to present the Court with a contrived binary option: completely disenfranchise the innocent victims in the Putative Class, a major creditor constituency in the Chapter 11 Cases, or be faced with a meltdown in a chapter 7 liquidation. The Court should look beyond this smoke screen and direct

the parties to pursue the third option: modify the Plan to preserve and appropriately treat the claims of Lead Plaintiff and the Putative Class – who are the real victims of the wrongdoing of the Parent Debtor and the Individual Defendants – rather than permitting the Equity Committee to eviscerate their claims to engineer a windfall for the speculators that comprise Class P7.

B. The Plan improperly asserts that Class P6 is unimpaired.

47. The Plan and Disclosure Statement assert that the Individual Securities Damage Claim in Class P6 is being paid in full through its treatment under the Plan and is unimpaired, and that Lead Plaintiff thus is conclusively deemed to accept the Plan and is not entitled to vote. See Plan, Art. IV.A.1, IV.B.6(b), (c); Disclosure Statement at 37, 42-43. These assertions are incorrect and are merely an unabashed attempt to dodge the cramdown requirements of section 1129(b) of the Bankruptcy Code. The actual terms of the Plan make clear that Class P6 is impaired, and thus Lead Plaintiff is entitled to vote to accept or reject the Plan.

48. First, as set forth above, the Debtors and the Equity Committee have reserved for themselves the right to unilaterally "modify the Plan *at any time prior to the Confirmation Hearing* with respect to the proposed treatment of the Individual Securities Damages Claim thereunder . . . ." Disclosure Statement at 32 (emphasis added). This reservation alone renders Class P6 impaired, since the Debtors and the Equity Committee would hold the power to alter the treatment of the Individual Securities Damages Claim even after the Solicitation Procedures have been approved and votes have been solicited.

49. Second, general unsecured claims in Class P4 are purportedly being paid at 100% of face value, but without interest, and thus Class P4 is impaired and entitled to vote. Plan, Art. IV.B(4)(b), (c). It defies reason – and the absolute priority rule – to assert that a junior class is unimpaired when a senior class is not being paid in full, is impaired, and entitled to vote.

50. Third, payment of *any* distribution on account of the Individual Securities Damages Claim is "subject to the rights of Holders of General Unsecured Claims to the prior Payment in Full of such Holders' Allowed Claims under the Plan (including the Global Settlement)." Plan, Art. IV.B(6)(b). Other than the U.S. Class Claim Objection, no claims objections appear to have been filed, and the Plan contemplates the Liquidation Trust assuming responsibility for the claims reconciliation process in the Chapter 11 Cases. See Plan, Art. VI.A. Thus, Plan provides no guarantee of what, if any, distribution Lead Plaintiff might actually receive on account of the Individual Securities Damages Claim. On that basis, Class P6 is impaired and is entitled to vote.

51. Fourth, as discussed above, the Individual Securities Damages Claim Reserve imposes an arbitrary cap on the amount Lead Plaintiff can ever recover on account of the Individual Securities Damages Claim. See Plan, Art. I.A.93; Disclosure Statement at 31. However, neither the amount of the Individual Securities Damages Claims Reserve nor any other provision of the Plan provides for the payment of interest,[12] commissions, attorneys' fees, expert fees, or other costs incurred by Lead Plaintiff, all of which form the basis of such claim. For Class P6 to be truly impaired, the Plan would have to provide for payment in full of all such items to the extent they are ultimately awarded by a judgment of a court of competent jurisdiction.

52. By operation of various provisions of the Plan, the actual treatment of the Individual Securities Damages Claim Reserve renders the supposedly unimpaired status of Class P6 an illusion. In reality, Class P6 is impaired and must be entitled to vote. Because the Plan

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[12] See, e.g., Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989) ("[P]rejudgment interest should be presumptively available to victims of federal law violations."); see also Nicholas R. Weiskopf, *Remedies Under Rule 10b-5*, 45 ST. JOHN'S L. REV. 733, 744 (2012) ("In many cases, an appropriate item of relief is prejudgment interest on the damages incurred, which the court, in its discretion, may award.").]

prohibits Lead Plaintiff from voting, the Plan is facially unconfirmable and the Disclosure Statement must not be approved.

C. The Plan improperly excludes the Class Claim.

53. The Plan does not classify the Class Claim, designate the Class Claim as an unclassified claim that will be paid in full, or otherwise provide for any treatment whatsoever of the Class Claim. In essence, the Plan pretends the Class Claim does not exist at all, presuming instead that the Class Claim will be disallowed even though the hearings on the U.S. Class Claim Objection (which is meritless in any event) and the Canadian Class Claim Objection (which the Ontario Court lacks jurisdiction to hear or grant) are not even scheduled to occur until nearly two weeks after the Disclosure Statement Hearing. Indeed, as discussed above, the Plan requires, as a condition to confirmation, that the Court enter an order disallowing the Class Claim or estimating it at zero for all purposes under the Plan. Plan, Art. IX.A.3. Carving a major creditor constituency completely out of the Plan, then conditioning confirmation on the Court completely disenfranchising that constituency, is a grossly inequitable attempt to force the Court to condone the Equity Committee's scheme to eliminate the Securities Litigation in its entirety and usurp all of the remaining estate value – and insurance proceeds – for itself and its constituency of speculators who bought their PSG Common Stock for pennies.

D. The scope of the Third-Party Release is unclear.

54. The Plan deems creditors whose claims are unimpaired to have consented to the Third-Party Release unless they affirmatively opt out. Plan, Art. I.A.140. As an initial matter, this treatment is inappropriate. See In re Chassix Holdings, Inc., 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015) (holding that unimpaired creditors should not be deemed to have consented to third party releases set forth in a chapter 11 plan).

55. Moreover, the universe of parties released by the Third-Party Release is subject to potential misinterpretation and must be clarified. The "Third-Party Releasees" who would receive the benefits of the Third-Party Release include

> the Debtors, the Monitor, the Creditors' Committee, the Equity Committee and the Consumer Privacy Ombudsman or any of their respective current members, partners, officers, directors, employees, advisors, professionals, or agents and advisors of any of the foregoing (including any attorneys, financial advisors, investment bankers and other professionals retained by such Persons) but solely in their capacities as such.

Plan, Art. I.A.156.

56. The qualifier "current" in the definition of "Third-Party Releasees" appears to be intended as distributive, thereby applying to each of the categories of entities that follow (i.e., *current* members, *current* partners, *current* officers, etc.). If that is the case, the Individual Defendants are, as they should be, excluded from the operation of the Third-Party Release regardless of whether Lead Plaintiff or any member of the Putative Class opts out.

57. However, the position of "current" adjacent to "members" creates the possibility of misinterpretation (or creative interpretation) in the future. In order to completely eliminate the potential for misinterpretation and to clarify that the Individual Defendants are <u>not</u> Third-Party Releasees, Article I.A.156 should be revised such that the list following ". . . or any of their respective current" is ordinal in nature, as follows:

> The Debtors, the Monitor, the Creditors' Committee, the Equity Committee and the Consumer Privacy Ombudsman or any of their respective current (as of September 22, 2017) (a) members, (b) partners, (c) officers, (d) directors, (e) employees, (f) advisors, (g) professionals, or (h) agents and advisors of any of the foregoing (a)-(g) (including any attorneys, financial advisors, investment bankers and other professionals retained by such Persons) but solely in their capacities as such.

This revised definition will clarify that the Third-Party Releasees include only those entities that, as of the present time, *currently* fit into the categories referenced therein.

E. If the Third-Party Release *is* intended to release the Individual Defendants, it is impermissible and the Plan cannot be confirmed.

58. To the extent the Plan is intended to release any claims against the Individual Defendants, particularly any claims held by members of the Putative Class who are not being provided with actual notice or an opportunity to opt out of the Third-Party Release, the Third-Party Release is impermissible and renders the Plan unconfirmable.

59. While the Third Circuit has suggested, in dicta, that non-consensual third party releases might be permissible if there are specific factual findings that they are fair and necessary to the debtor's reorganization, see In re Continental Airlines, 203 F.3d 203, 214 (3d Cir. 2000), the Third Party Release fails to meet this standard. Unlike debtors in those chapter 11 cases where third-party releases have passed muster, the Debtors are liquidating, not reorganizing. The Individual Defendants are no longer employed by the Debtors, are contributing nothing to the Plan, and will play no role in the Liquidation Trust (other than as likely litigation targets). If the Third-Party Release were to release the claims of Lead Plaintiffs or the Putative Class against the Individual Release, the release would be purely gratuitous. Moreover, the Liquidation Trust is clearly retaining Retained Causes of Action against the Individual Defendants. Thus, the Third-Party Release is neither fair nor necessary to the Debtors' reorganization. Accordingly, unless the Third-Party Release is modified to clarify that the Individual Defendants (and any other defendants now or hereafter named in the Securities Litigation) are excluded from its scope, it is impermissible and precludes confirmation of the Plan.

F. The Plan violates section 1123(a)(4) of the Bankruptcy Code by improperly discriminating between Class P6 and Class P7, and between the Individual Securities Damages Claim and the Class Claim.

60. A plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular class or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Here, the Plan discriminates between Class P6 and Class P7 by purporting to pay Class P6 in full (which it does not, but it nevertheless provides a substantial, immediate cash distribution to Lead Plaintiff while leaving Class P7 Shareholders, whose interests are *pari passu* with the Individual Securities Damages Claims in Class P6, to wait for an eventual distribution that hinges almost entirely, if not entirely, on the outcome of litigation by the Liquidation Trust. While Lead Plaintiff recognizes that the Plan actually *favors* Lead Plaintiff in its individual capacity over Class P7 Shareholders, that ruse is intended to handicap Lead Plaintiff's efforts to abide by the mandate of the SDNY District Court in the Lead Plaintiff Order – supervise all matters concerning the prosecution or resolution of the Securities Litigation.

61. In addition, as set forth above, the Class Claim is completely omitted from the Plan, notwithstanding the fact that it shares the same fundamental basis with the Individual Securities Damages Claim. If the Class Claim were properly considered, classified, and treated in the Plan, it would belong in Class P6. See 11 U.S.C. § 1122(a). Instead, by omitting the Class Claim in its entirety, the Plan purports to pay the Individual Securities Damages Claim in full while simultaneously providing no distribution whatsoever on account of the Class Claim.

62. This discrimination, in both purpose and effect, renders the Plan unconfirmable and makes approval of the Disclosure Statement and solicitation of votes a wasteful exercise.

II. THE DISCLOSURE STATEMENT CANNOT BE APPROVED BECAUSE IT DOES NOT CONTAIN ADEQUATE INFORMATION.

63. A chapter 11 debtor may only solicit votes to accept or reject a chapter 11 plan of reorganization once the court has approved the debtor's written disclosure statement for that plan as containing "adequate information." 11 U.S.C. § 1125(b). The Bankruptcy Code defines "adequate information" as

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to . . . a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan[.]

11 U.S.C. § 1125(a).

64. The Third Circuit has emphasized the importance of adequate disclosure, stating that, given the reliance creditors and bankruptcy courts place on disclosure statements, "we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information." In re Oneida Motor Freight, Inc., 848 F.2d 414, 417 (3d Cir. 1988). Although courts assess adequacy on a case-by-case basis, a disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible . . . alternatives so that [creditors] can intelligently accept or reject the Plan." In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). In essence, a disclosure statement "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." In re Ferretti, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

65. Courts have identified numerous categories of information that should be included in a disclosure statement to satisfy section 1125(a). See, e.g., In re U.S. Brass Corp., 194 B.R. 420, 424 (Bankr. E.D. Tex. 1996); In re Ferretti, 128 B.R. 16, 18-19 (Bankr. D.N.H. 1991); In re Cardinal Congregate I, 121 B.R. 760, 765 (Bankr. S.D. Ohio 1990); In re Metrocraft Publ'g Servs., Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984). Courts' various formulations for assessing adequacy can be distilled into several broad groups:

(i) historical information about the debtor and its businesses,

(ii) an explanation of the debtor's pre- and post-petition restructuring efforts and the causes of its bankruptcy filing,

(iii) details of the nature and value of a debtor's assets,

(iv) a description of the proposed plan of reorganization, including financial information regarding claims and expenses, means of implementation, and a liquidation analysis demonstrating what creditors would receive in a chapter 7 case, and

(v) future business projections.

66. The information presented in a disclosure statement should not be interpretive, speculative, or opinion, but instead must be "uncontested, concrete facts" from which voting claimants can make their own informed decisions how to vote. See In re Zenith Electronics Corp., 241 B.R. 92, 99-100 (Bankr. D. Del. 1999); see also In re Unichem Corp., 72 B.R. 95 (Bankr. N.D. Ill. 1987); In re Ligon, 50 B.R. 127 (Bankr. M.D. Tenn. 1985); In re Egan, 33 B.R. 672 (Bankr. N.D. Ill. 1983); In re Civitella, 15 B.R. 206 (Bankr. E.D. Pa. 1981).

67. Because the Disclosure Statement does not provide adequate information for holders of claims and interests in impaired, voting classes (including, as discussed above, Lead

Plaintiff, notwithstanding the Plan's improper designation of Class P6 as unimpaired), the Disclosure Statement cannot be approved.

A. The Disclosure Statement fails to provide any justification for the treatment of the Individual Securities Damages Claim or the Class Claim.

68. As set forth above, the Plan purports, but fails, to pay the Individual Securities Damages Claim in full, while simultaneously failing to provide for any treatment of the Class Claim at all. The Disclosure Statement fails to provide any justification for this disparate treatment of two fundamentally similar claims. The Disclosure Statement also improperly asserts that the Individual Securities Damages Claim is being paid in full when, in fact, the various contingencies and reservations of rights, together with the actual treatment of Class P6 under the Plan, render the Individual Securities Damages Claim impaired. The Disclosure Statement cannot be approved as adequate with these glaring errors and omissions. Needless to say, the actual purpose of the treatment of the Individual Securities Damages Claim and the Class Claim is obvious, yet the Disclosure Statement also provides no detail whatsoever with respect to the Equity Committee's inequitable scheme.

B. The Disclosure Statement provides no information whatsoever with respect to the Retained Causes of Action that will be brought by the Liquidation Trust.

69. The Disclosure Statement contains seventy-two references to the Retained Causes of Action; the Plan contains fifty-nine. Although the Retained Causes of Action will be "substantially all of the assets of the Liquidation Trust[,]" see Disclosure Statement at 104, the Disclosure Statement contains no information whatsoever, much less adequate information, from which creditors can ascertain what the Retained Causes of Action even are. The Plan is of no help either, providing simply that the Retained Causes of Action are all of the Debtors' causes of action that have not previously been assigned, settled, or released. Plan, Art. I.A.144.

70. Based on the context of the Chapter 11 Cases and the Equity Committee's nascent crusade to torpedo the Securities Litigation, it is likely that the Retained Causes of Action will consist primarily of claims against the Debtors' former directors and officers for breaches of their fiduciary duties, some of which probably arise out of the same facts and circumstances underlying the Securities Litigation.

71. Assuming the Debtors and the Equity Committee manage to remedy the significant issues that render the Plan unconfirmable, Lead Plaintiff will be entitled to vote on the Plan. Moreover, Class P7 Shareholders, who are entitled to vote on the Plan in its current form, must be provided with information regarding the source of their potential distributions. At a minimum, the Disclosure Statement should describe the nature and intended targets of the Retained Causes of Action, indicate whether the Retained Causes of Action fall into the same policy periods under any relevant insurance policies as the claims asserted in the Securities Litigation, disclose the amount of coverage exhausted and remaining under the applicable insurance policies, and describe any coverage disputes, denials, or disclaimers the Debtors' insurers have made with respect to both the Securities Litigation, as this information could have a material impact on Lead Plaintiffs' assessment of their potential recovery on behalf of the Putative Class and (once the Debtors remedy the voting status of Class P6) their decision of how to vote on the Plan.

C. The Disclosure Statement does not adequately describe the post-confirmation obligations of the Debtors and the Liquidation Trust to preserve evidence that is potentially relevant to the Securities Litigation.

72. As the issuer of the PSG Common Stock that is the subject of the Securities Litigation, and as the former employer of the Individual Defendants, the Debtors undoubtedly have books, records, electronically stored information, and other evidence potentially relevant to

the Securities Litigation in their possession, custody, and/or control (the "Potentially Relevant Books and Records").

73. The Securities Litigation is subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, which mandates that

> any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(b)(3)(C)(i). This mandatory requirement is subject to "sanction for willful violation." 15 U.S.C. § 78u-4(b)(3)(C)(ii).

74. Prior to the commencement of the Chapter 11 Cases, the Parent Debtor was a defendant in the Securities Litigation and thus was subject to the document preservation requirements under the PSLRA. Preservation of the Potentially Relevant Books and Records is absolutely crucial to avoid prejudice to Lead Plaintiffs and the Putative Class, which prejudice would be magnified if the fact that the Debtors filed for bankruptcy protection were to obviate the Parent Debtor's document preservation obligations under the PSLRA.

75. The Plan provides for the Debtors' books and records to vest in the Liquidation Trust and the reorganized Debtors. Plan, Art. V.E.11. However (presumably due in part to the Equity Committee's parochial efforts to use the Plan to thwart the continued prosecution of Securities Litigation), the Plan does not require either the Liquidation Trust or the reorganized Debtors to preserve the Potentially Relevant Books and Records for the duration of the Securities Litigation, or to provide Lead Plaintiff or Lead Counsel with notice of any proposed destruction or other disposition of any Potentially Relevant Books and Records.

76. The Disclosure Statement merely reiterates the document preservation language in the Plan, without providing any meaningful explanation of what the Debtors intend to preserve or for how long. For the avoidance of any future doubt or uncertainty, any plan put forth for a vote in these Chapter 11 Cases should provide as follows, along with related disclosures in the accompanying disclosure statement:

> Until the entry of a final and non-appealable order of judgment or settlement with respect to all defendants now or hereafter named in the litigation captioned as *Nieves v. Performance Sports Group Ltd., et al.*, Case No. 1:16-CV-3591-GHW (S.D.N.Y.) (the "Securities Litigation"), the Reorganized Debtors, the Liquidation Trust and/or any trustee thereof, and any transferee or custodian of the Debtors' books, records, documents, files, electronic data (in whatever format, including native format), or any tangible object or other item of evidence potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records"), shall preserve and maintain the Potentially Relevant Books and Records as though they were the subject of a continuing request for production of documents and/or a subpoena, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records.

Absent the foregoing language or a provision of substantially similar import, the Plan creates the risk of irreparable harm to Lead Plaintiff and the Putative Class and cannot be confirmed.

RESERVATION OF RIGHTS

77. Lead Plaintiff reserves all rights with respect to confirmation of the Plan (as may be amended from time to time) or any other chapter 11 plan proposed in the Chapter 11 Cases, including but not limited to objecting to confirmation of the Plan or any other plan on any and all grounds, regardless of whether such grounds are raised in this Objection. Lead Plaintiffs further reserve all rights to object to any Disclosure Statement or any new disclosure statement for any other plan on any basis whatsoever, whether or not raised in this Objection.

[*signature page follows*]

WHEREFORE, for all of the foregoing reasons, the Court should not approve the Disclosure Statement or Solicitation Procedures or grant the Solicitation Procedures Motion.

Dated: September 25, 2017
Wilmington, Delaware

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