

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

CDS U.S. HOLDINGS, INC., *et al.*,

Debtors in a Foreign Proceeding,¹

Chapter 15

Case No. 20-11719 (CSS)

(Jointly Administered)

Re: Docket No. 2

**Hearing Date: Aug. 11, 2020 at 11:00
a.m. ET**

**Objection Deadline: Aug. 4, 2020, at
4:00 p.m. ET**

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF THE 2L
GROUP TO DEBTORS' VERIFIED PETITION FOR (I) RECOGNITION
OF FOREIGN MAIN PROCEEDINGS, (II) RECOGNITION OF
FOREIGN REPRESENTATIVE, AND (III) RELATED RELIEF UNDER
CHAPTER 15 OF THE BANKRUPTCY CODE**

The Ad Hoc Committee of Independent 2L Holders (the “**2L Group**”) holding claims under the July 8, 2015 credit agreement (as amended and/or restated from time to time, the “**Second Lien Credit Agreement**”) among CDS U.S. Intermediate Holdings, Inc. as U.S. Borrower and Borrower Representative, Cirque du Soleil Canada Inc. as Canadian Borrower; TPG VII CDS Holdings, L.P., Bank of America, N.A. as Administrative Agent and Collateral Agent,² and certain lenders thereto, hereby submits this limited objection and reservation of rights (the

¹ The last four digits of Debtor CDS U.S. Holdings, Inc.’s tax identification number are (0086). Due to the large number of debtor entities in these jointly administered chapter 15 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent at www.omniagentsolutions.com/cirquedusoleil. The location of the Debtors’ service address for purposes of these chapter 15 cases is: 8400, 2e Avenue Montréal, Quebec H1Z 4M6 Canada.

² Bank of America, N.A., the original Administrative Agent and Collateral Agent, resigned as Second Lien Loan Agent pursuant to a letter dated April 3, 2020, and was replaced by Wilmington Trust, National Association pursuant to an Agency Resignation, Appointment, Assignment and Assumption Agreement dated May 22, 2020. See V. Pet. ¶ 55 n. 5.

“**Objection**”) to the Foreign Representative’s *Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* [Docket No. 2] (the “**Verified Petition**”).³ This Objection makes reference to the *Declaration of Laura Femino in Support of Limited Objection of the 2L Group* (the “**Femino Declaration**”) filed contemporaneously herewith and in support hereof.⁴

PRELIMINARY STATEMENT

The Debtors are in the process of auctioning substantially all of their assets in their Canadian restructuring proceedings. The stalking horse bidder in that auction is an ad hoc group holding first-lien debt (“**1L AHG**”), whose members also have sufficient second-lien holdings to direct action under the Second Lien Credit Agreement. The 1L AHG’s stalking horse bid includes a credit bid of the full value of claims under both the 1L and 2L facilities—and then allocates essentially all company value to the 1L lenders following the sale. As a consequence, 2L Lenders will get nearly nothing (out-of-the-money warrants) for a credit bid of approximately \$154 million. This makes no economic sense. If the 1L AHG thinks the company has no value beyond the 1L claims, then credit bidding the 2L claims serves no purpose beyond boxing out competing bidders; and if the company is in fact worth more than the value of the 1L claims alone, the 2L Lenders should receive a non-trivial portion of the company’s value on account of their credit bid.

Through this credit bid, the 1L AHG has prevented any genuine market test that could inform a proper allocation of sale value. Indeed, because the 1L AHG ascribes no economic value to the 2L credit bid, the only logical conclusion is that the 1L AHG has inflated the value of its stalking horse bid in order to discourage competition from bidders who may value the company at

³ Capitalized terms used but not defined herein have the meaning ascribed to them in the Verified Petition.

⁴ All exhibit numbers referenced herein refer to exhibits to Femino Declaration unless otherwise specified.

more than the value of the 1L claims. Notably, when asked to simply permit bids at auction that exceed only the 1L debt in the first instance (with the ability to credit bid the 2L debt later if needed to top a competing bid), the 1L AHG declined.⁵

Now the Debtors seek from this Court—in one fell swoop with recognition—orders granting full force and effect to *all* prior Canadian court orders, including the order authorizing the sale proceedings and stalking horse agreement that would allocate the 2L Lenders next to nothing for their roughly \$154 million contribution to the (potential) winning credit bid. The Debtors seek this blanket relief despite not having even submitted the relevant Canadian Court orders to this Court for its review and consideration, let alone for parties-in-interest to evaluate them and be heard.

The 2L Group does not object to recognition of the Canadian Proceedings as foreign main proceedings of the Debtors. It does object, however, to the Foreign Representative's request that this Court grant *automatic* full force and effect to orders of the Canadian Court that have not been submitted to this Court and subjected to a fair hearing. Without having been presented with the orders it is being asked to enforce, this Court cannot evaluate whether the relief requested is “necessary” and “appropriate,” as required by section 1521(a); whether the “interests of creditors and other interested entities . . . are sufficiently protected,” as required by section 1522; or whether the requested relief meets the standards of 1507(b), as a court must consider for any relief issued under section 1507(a). The 2L Group therefore submits that the Foreign Representative's request for blanket approval of all prior Canadian Court orders should be denied, and that where the Debtors need Canadian Court orders enforced in the United States, the Foreign Representative be required to seek enforcement for each, with proper notice and an opportunity to object and be heard

⁵ As further detailed herein, the 1L AHG responded to this request with a placeholder letter reserving all rights.

for all parties-in-interest.

The 2L Group also objects specifically to the entry of an order granting full force and effect to the Canadian Court order approving sale and bid procedures and authorizing the Debtors' entry into the stalking horse agreement with the 1L AHG.⁶ (This particular Canadian court order, issued on July 17, 2020, is among the orders that the Foreign Representative has not submitted to this Court but for which it nevertheless seeks recognition under sections 1507 and 1521 of the Bankruptcy Code.) Because the 1L AHG proposes to allocate nearly all of the value paid in the sale to the 1L lenders,⁷ without any evidence or valuation data to justify such an allocation, recognition of this order cannot pass muster under the applicable standards of chapter 15 of the Bankruptcy Code required for full force and effect. The 2L Group objects to the bidding procedures to the extent they purport to lock in this improper allocation of value and to prevent any challenges to it.

Finally, while no Canadian sale order has yet been entered, the auction and sale procedures approved by the Canadian Court are engineered to protect from robust competition the 1L AHG stalking horse bid and the proposed allocation of sale value. While the 1L AHG's bid ascribes almost no value to the 2L credit bid, on account of such credit bid, a third-party bidder is required to include approximately \$154 million of real value to top the 1L AHG bid. As such, these procedures will taint any sale to the 1L AHG that may later be presented to this Court for approval. As it is contemplated today, that proposed sale would fail the standards of section 363(b), which

⁶ The Canadian order approves Spectacle serving as stalking horse bidder as well as various stalking horse protections set forth in the Spectacle APA, but provides that "nothing herein approves the transaction contemplated in the Stalking Horse APA," and that "the approval of such transaction . . . shall be considered by [the Canadian] Court in a subsequent application to be filed and presented to [the Canadian] Court." Canadian SISP and APA Order (as defined below), ¶ 12.

⁷ The 2L lenders are to receive warrants for common equity in Spectacle with a strike price that denies them any recovery unless and until Spectacle reaches a value that would give a 110% recovery to the 1L lenders on their pre-petition claims. July 16 Monitor's Report (as defined below), ¶ 17.16.

are (as this Court has held) applicable to foreign sales of U.S.-located assets for which full force and effect is sought under chapter 15. The 2L Group has no desire to appear belatedly, and once the horse is long out of the barn, with a last-minute objection on these grounds. As such, the 2L Group raises these issues now, to put the Court on notice of its objection, and reserves all rights to object to recognition of any sale order if and when such recognition is sought from this Court.

BACKGROUND

A. The Company and its Restructuring Proceedings

1. On June 30, 2020, Cirque du Soleil Canada Inc. and certain of its debtor affiliates listed in the above caption (collectively, the “**Debtors**” or the “**Company**”) filed for jointly-administered insolvency proceedings (the “**Canadian Proceedings**”) in the Superior Court of Quebec, Commercial Division (the “**Canadian Court**”) under the Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the “**CCAA**”). Developments in the Canadian Proceedings are set forth in various reports made publicly available online by Ernst & Young, Inc., in its capacity as the court-appointed monitor (the “**Monitor**”) of the Canadian Proceedings.⁸

2. On June 30, 2020, the Canadian Court entered the First Day Initial Order (the “**First Day Initial Order**”), attached as Exhibit 1 to the Debtors’ *Motion for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code* [ECF No. 7]. On July 10, 2020, the Canadian Court entered the *Amended and Restated Initial Order* (the “**Revised First Day Initial Order**”), attached as Exhibit 1 to the *Order Granting Provisional Recognition of the Initial CCAA Order pursuant to Section 1519 of the Bankruptcy Code* [ECF No. 53], as well as the *Order Appointing a Receiver* (the “**Receivership Order**”), attached as Exhibit C-1 to the Femino Declaration. While the

⁸ Reports of the Monitor are publicly available online at <https://documentcentre.eycan.com/Pages/Main.aspx?SID=2510&Redirect=1>.

Foreign Representative has filed with this Court the First Day Initial Order and the Revised First Day Initial Order, it has not at any time filed the Receivership Order.

3. On July 1, 2020, Cirque du Soleil Canada Inc., in its capacity as the foreign representative (the “**Foreign Representative**”) of each of the Debtors, filed petitions to commence these chapter 15 proceedings (the “**Chapter 15 Proceedings**”). According to the Foreign Representative, the Company commenced the Canadian Proceedings and these Chapter 15 Proceedings as part of the marketing and sale of substantially all of their assets under the supervision of the Canadian Court. V. Pet. ¶ 5.

4. Among the debt facilities subject to the Canadian Proceeding are those governed by the First Lien Credit Agreement (the holders of claims thereunder, the “**1L Lenders**”) and the Second Lien Credit Agreement (the holders of claims thereunder, the “**2L Lenders**”). *Id.* at ¶¶ 50, 55. According to the Foreign Representative, the amounts owing under the First Lien Credit Agreement as of March 31, 2020 totaled approximately \$784.725 million in principal, plus accrued interest of approximately \$11.296 million under the term loan, and \$100 million under the revolving credit facility. *Id.* at ¶ 53-54. The amounts owed under the Second Lien Credit Agreement totaled \$150 million, plus accrued interest of approximately \$3.9 million. *Id.* at ¶ 58.

B. The Proposed Sale

5. Prior to commencement of the Canadian Proceedings, the Debtors initiated a sale and investment solicitation process to solicit proposals related to a potential recapitalization. *June 29, 2020 Report of the Proposed Monitor* (the “**June 29 Monitor’s Report**”),⁹ attached as Exhibit A-1 to the Femino Declaration, ¶ 92. This preliminary process included discussions with both the

⁹ The June 29 Monitor’s Report was supplemented by a *Supplemental Report of the Monitor – July 9, 2020* (the “**July 9 Monitor’s Report**”), attached as **Exhibit A-2** to the Femino Declaration.

company's shareholders and the 1L AHG as potential buyers of substantially all of the Company's assets. Id. at ¶¶ 98-101.

6. On June 28, 2020, Cirque du Soleil Holdings L.P. executed an APA (the "**Trapeze APA**") with Trapeze Acquisition Limited Partnership ("**Trapeze**"), an investment company held primarily by the Company's shareholders,¹⁰ pursuant to which Trapeze would serve as stalking horse bidder in the solicitation process. Id. at ¶¶104-05. Ultimately, however, the Debtors terminated the Trapeze APA and executed a new APA (the "**Spectacle APA**") (attached as Exhibit E to the Femino Declaration) with Spectacle BidCo LP ("**Spectacle**"), a company formed by the 1L AHG for the purpose of the proposed acquisition. *Second Report of the Monitor – July 16, 2020* (the "**July 16 Monitor's Report**"), attached as Exhibit A-3 to the Femino Declaration, ¶ 4.

7. At a hearing before the Canadian Court on July 10, Gerry Apostolatos of Langlois Lawyers LLP ("**Langlois**"), Canadian Counsel to the 2L Group, informed the Canadian Court that Langlois acted for a group of substantial minority 2L holders and was aware of the Company's ongoing discussions with the 1L AHG.¹¹ Langlois requested that the 2L Group be meaningfully consulted and timely informed by the Company and the Monitor as to any developments in those ongoing negotiations and the finalization of any new stalking horse bid and the terms of sale and investment solicitation process.

8. This request was ignored. Canadian counsel to the 2L Group were served with the Spectacle APA and a revised set of bidding procedures (the "**SISP**") by email on July 16, 2020, the day before the hearing to approve them. At that hearing, the Canadian Court entered an order approving the SISP and the Debtors' entry into the Stalking Horse APA (the "**Canadian SISP and**

¹⁰ The equity sponsors of Trapeze are the shareholders of the CDS Group and *Investissement Quebec*, a partnership with the Debtors. V. Pet. ¶ 88; Ex. A-1 ¶ 104.

¹¹ Transcripts of these Canadian Court hearings were not yet available as of the timing of this filing.

APA Order,” attached as Exhibit C-2 to the Femino Declaration). At this hearing, Langlois expressed the 2L Group’s concern with the lack of adequate notice of the proposed order, the abbreviated bidding period, and the apparent strategy of the 1L AHG to protect its bid by using the 2L credit bid without allocating non-trivial value to the 2L Lenders in return.

9. The Foreign Representative has not submitted to this Court the Spectacle APA, the SISP, or the Canadian SISP and APA Order. Nor have the terms of the Spectacle APA been disclosed to this Court. See generally V. Pet. ¶¶ 104-111 (describing only the terms of now-terminated Trapeze APA).

C. The Spectacle APA, 1L AHG and 2L Group

10. The SISP provides terms and procedures for the bid and sale process. Ex. C-2, SISP at ¶ F. It sets forth in detail the requirements of a “qualified bid” and bidder and the process by which a potential bidder may bid. Id. at ¶¶ 17-21. It also protects the right of the 1L AHG to credit bid all claims against the Debtors. Id. at ¶ 22.

11. Under the terms of the Spectacle APA, Spectacle will acquire substantially all of the assets of the CDS Group in exchange for \$1.215 billion of consideration. Ex. A-3 ¶ 17.5. Nearly all of this consideration is a credit bid in the amount of \$1,078,197,253.03, which is the full value of all amounts owing under both the First Lien and Second Lien Credit Agreements. Spectacle will also provide cash sufficient to pay an outstanding \$50m term loan (lent *by the 1L AHG itself*) and certain reserve amounts, and assume \$87 million in liabilities. Id. at ¶ 17.5; exhibit F thereto at § 3.1(a). In addition to the purchase price, certain participating 1L Lenders will provide \$375 million (\$300 million in a senior secured term loan and \$75 million in a delayed draw term loan) in exit financing (the “**1L Exit Financing**”) to the Debtors, backstopped by three of the participating 1L Lenders (the “**Backstopping 1Ls**”). Ex. A-3 ¶ 17.7. 2L Lenders that are

not part of the 1L AHG were not offered the opportunity to participate in this financing. Id. at ¶ 17.7-12.

12. Under the terms of the proposed sale, the Backstopping 1Ls will receive, *as a backstop fee*, 15% of the equity in the reorganized company. Id. at ¶ 17.10. 1L Lenders who participate in funding the 1L Exit Financing will share amongst themselves an additional 70% of the Company. Id. at ¶ 17.14. And all 1L Lenders will share, pro rata to their holdings of prepetition 1L claims, the remaining 15% of the Company's equity, as well as secured take-back paper in the value of \$300 million. Id. at ¶¶ 17.7-15. This means that of the \$375 million in new value that the 1L AHG are providing, \$50 million will immediately be used to repay a loan from the 1L AHG itself; and another \$300 million will eventually be used to repay the newly issued take-back paper also to be held by the 1L AHG. Id. at ¶¶ 17.14. Thus, in return for *ultimately* routing \$350 million of value to themselves (after the Company gets temporary use of that capital), members of the 1L AHG will receive 85% of the Company's equity, as well as the remaining 15% of the Company that they receive on account of their prepetition 1L claims. Id. at ¶¶ 17.7-15.

13. Holders of 2L debt, despite contributing approximately \$154 million to the credit bid, will receive no current equity at all. Rather, 2L holders will be offered warrants for common equity in Spectacle with a strike price that denies them any recovery unless and until Spectacle reaches a value that would give a 110% recovery on the prepetition 1L debt. Id. at ¶ 17.16.

14. The proposed sale relies on no objective valuation of the Company, and none has been submitted in the Canadian Proceedings or in these Chapter 15 Proceedings. Instead, the 1L AHG simply *declares* that the Company's value must be precisely equal to the 1L debt outstanding after the 1L Lenders receive their \$300m of take-back paper. Id. at ¶ 17.15 ("The value of the common equity is calculated by the [f]inancial [a]dvisors at approximately \$620m; being the face

value of the First Lien Lenders [sic] accrued claim of \$920m less the \$300m take-back [paper].”). This circular calculation in no way speaks to the Company’s actual value.

15. It is clear why the Spectacle APA allocates all the asset value to the 1L Lenders and leaves only out-of-the-money warrants for the 2L Lenders. The Spectacle acquisition vehicle is held by the 1L AHG, whose undisclosed members hold a majority percentage of the 1L debt. The same institutions also hold a majority of 2L debt and therefore can direct the 2L administrative agent to take actions on behalf of the entire 2L group. Second Lien Credit Agreement, attached as Exhibit B to the Femino Declaration, § 10.24 (regarding credit bidding); p. 62 (definition of “Required Lenders”). The 1L AHG therefore has every incentive to maximize the recoveries of the 1L Lenders at the expense of the 2L Lenders. It can use, and is using, its majority position in the 2L debt to the detriment of 2L minority holders. And it has shown by its actions that the directions it has issued to the 2L agent are in fact not in the best interests of 2L Lenders.

16. In an attempt to address this procedural defect in the bidding procedures, White & Case LLP (“**W&C**”), as U.S. Counsel to the 2L Group, on July 24, 2020 sent a letter to the advisors to the 1L AHG (the “**July 24 Letter**”) proposing a consensual resolution to their procedural concerns. See July 24 Letter, attached as Exhibit D to the Femino Declaration. The 2L Group asked for the 1L AHG “to confirm to the Monitor a purchase price under the Sales Procedures (to be communicated to all qualified bidders 7 days prior to the bid deadline) that would allow third-party bidders to participate in the auction so long as they have a starting bid in excess of the current stalking horse bid less the amount of the second lien claim.” Ex. D at 2. W&C made clear that the 2L Group did not want to prevent the 1L AHG from ultimately credit bidding the full 2L claim; rather, its objective was “simply transparency as to whether such credit bid was necessary” so as

to shed light on the appropriate allocation of value of the company following any eventual sale. Id.

17. On August 3, 2020, Milbank in its capacity as counsel to the 1L AHG sent a response (the “**August 3 Letter**,” attached as Exhibit E to the Femino Declaration) “disagree[ing] with the contentions set forth” in the July 24 Letter and reserving rights.¹² Ex. E at 1. As a result, a third-party buyer willing to put a cash bid on the table that would satisfy the 1L claims in full in cash, assume or satisfy the other liabilities being satisfied by the Stalking Horse Bid, and provide \$125 million in cash to the 2L Lenders (i.e., payment in full to the 1L Lenders and more than 80 cents on the dollar in cash to the 2L Lenders), is not permitted to make that bid at the auction. The 1L AHG’s refusal to permit such a market test evidences their belief that they are getting more than par plus accrued interest on their 1L claims. If the fulcrum security of the Company were truly the 1L debt, then the 1L AHG would gladly accept a recovery that pays them in full in cash, with significant cash residual to the 2L claims (a majority of which they own). The 1L AHG’s insistence of an upfront credit bid of the full value of the 2L claims tells the real story.

D. The Requested Relief

18. In its request for recognition, the Foreign Representative requests entry of an order, among other things, recognizing the Canadian Proceedings as “foreign main proceedings” and granting full force and effect to the First Day CCAA Order. V. Pet. ¶ 6. The 2L Group has no objection to this request.

¹² While the August 3 Letter did assert that the advisors to the 1L AHG were “discussing” the July 24 Letter with the Company’s advisors, the letter offered no steps forward to resolve the 2L Group’s concerns, as the bidding window continues to tick by and the objection deadline for the relief requested in the Verified Petition approached. Ex. E at 1.

19. Additionally, the Foreign Representative has requested that this Court automatically give full force and effect to all other orders already entered by the Canadian Court.

Paragraph 19 of the Proposed Order states:

[u]pon entry of this order (this “**Proposed Order**”), the Canadian Proceedings and all prior orders of the Canadian Court shall be and hereby are granted comity and given full force and effect in the United States

Proposed Order, Exhibit A to the Verified Petition, ¶ 19. The Debtors have submitted that their requested relief is authorized under sections 1507 and 1521 of the Bankruptcy Code. V. Pet. ¶ 150.

20. As of the date of this Objection, these “prior orders” include: 1) the June 30 Initial Order, 2) the July 10 Restated Initial Order, 3) the July 10 Receivership Order, and 4) the July 17 SISP and Spectacle APA Order. As of the date of this Objection, neither the July 10 Receivership Order nor the July 17 SISP and Spectacle APA Order have been submitted to this Court.

APPLICABLE LAW

21. Section 1522(a) provides that “[t]he court may grant relief under section . . . 1521 . . . **only if** the interests of the creditors. . . are sufficiently protected.” 11 U.S.C. § 1522(a) (emphasis added). Section 1521(a) provides that “[u]pon recognition of a foreign proceeding . . . the court may, at the request of the foreign representative, grant any appropriate relief,” including an enumerated list of specific forms of relief. 11 U.S.C. § 1521(a).

22. Similarly, section 1507(a) provides that “the court, if recognition is granted, may provide additional assistance to a foreign representative under this title.” 11 U.S.C. § 1507(a). Section 1507(b) then sets forth the standards that the court “**shall consider**” when evaluating proposed additional assistance under 1507(a), including “(1) just treatment of all holders of claims against . . . the debtor’s property” and (4) “distribution of proceeds of the debtor’s property

substantially in accordance with the order prescribed by [the Bankruptcy Code].” 11 U.S.C. § 1507(b) (emphasis added).

23. These provisions enshrine creditor protections and the right to due process—key tenets of any bankruptcy proceeding. In re Weiland Auto. Indus., 612 B.R. 824, 847 (Bankr. D. Del. 2020) (“Procedural due process is a fundamental component of chapter 11 bankruptcy because of the broad authority that may be granted to those that seek its protection”). As the Third Circuit Court of Appeals has articulated, “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” Anthony v. Interform Corp., 96 F.3d 692, 697 (3rd. Cir. 1996) (internal citation omitted). When adequate notice and the opportunity to object and be heard have not been given, including in the chapter 15 context, courts should not allow a movant its requested relief. See In re Pro-Fit Holdings Ltd., 391 B.R. 850, 866 (Bankr. C.D. Cal. 2008) (rescheduling a hearing in a chapter 15 proceeding to “protect [objector]’s due process rights and its right to be informed of the relief that the foreign representatives seek”).

24. The notice periods set forth in the Federal Rules of Bankruptcy Procedure and this court’s local rules also exist to safeguard these rights, including in chapter 15 proceedings. Del. Bankr. L.R. 9006-1(c) provides that unless otherwise specified, motion papers shall be served at least 14 days prior to hearing date, and sale procedure motions must be filed 21 days prior to hearing date.

25. Additionally, section 1520(a)(2) provides that “[u]pon recognition of a foreign proceeding that is a foreign main proceeding . . . section[] 363 . . . appl[ies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States.” 11 U.S.C. § 1520(a)(2). In the Third Circuit, it is “well-settled” that [a] debtor may sell assets outside

the ordinary course of business only if four requirements are satisfied: “(1) a sound business purpose exists for the sale; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith.” See In re Elpida Memory, Inc., No. 12-10947(CSS), 2012 Bankr. LEXIS 5367, at *18 (Bankr. D. Del. Nov. 16, 2012). This Court has specifically held that “under the plain meaning of section 1520(a)(2), this test is applicable” in chapter 15 cases in which approval is sought for the non-ordinary course sale of U.S.-located assets. Id.; see also In re Fairfield Sentry Ltd., 539 B.R. 658, 672-673 (Bankr. S.D.N.Y. 2015) (“[Section] 1520(a)(2) unambiguously makes § 363 applicable to chapter 15 cases [T]he bankruptcy court is required to conduct a section 363 review when the debtor seeks a transfer of an interest in property within the territorial jurisdiction of the United States.”).

ARGUMENT

A. This Court Cannot Find that the Canadian Orders Satisfy Applicable Chapter 15 Standards for Full Force and Effect because the Foreign Representative Failed to Present the Orders for Which it Seeks Recognition

26. The Foreign Representative seeks full force and effect of certain Canadian Orders as a form of “additional relief” available to a foreign representative under sections 1521 and 1507 of the Bankruptcy Code.¹³ V. Pet. ¶ 6. Yet the Foreign Representative has not filed with this Court, nor have parties in interest been served with, copies of the Canadian Receivership Order or the Canadian SISP and APA Order and the underlying Spectacle APA it authorizes. Moreover, as worded, the Proposed Order would also grant relief to any additional orders entered by the Canadian Court in the interim. Proposed Order ¶ 19. In effect, the Foreign Representative asks

¹³ The Debtors also seek relief under section 105(a), see V. Pet. ¶ 10, but chapter 15 courts have consistently held that where relief can be granted under the more specific sections of 1521(a) or 1507, courts should do so, rather than rely on the court’s more general equitable powers under section 105. See, e.g., Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV), 701 F.3d 1031, 1054 (5th Cir. 2012) (noting that the general tenet that specific provisions prevail over general provisions applies in the context of chapter 15 relief sought under multiple sections).

this court for a “blank check” granting full force and effect under U.S. law to anything the Canadian Court happens to authorize between now and the entry by this Court of the Debtors’ Proposed Order.

27. Without the opportunity to review the orders for which full force and effect is sought and to hear from any parties-in-interest, this Court cannot adequately evaluate whether the requested relief satisfies the standard of section 1521(a), as required by section 1522 (that the “interests of the creditors and other interested entities . . . are sufficiently protected,”); scrutiny under 1507 (requiring the court to consider whether claim holders are treated justly and the distribution of proceeds of the debtor’s property is substantially in accordance with that in place under the U.S. Bankruptcy Code); or the requirements of section 1521(a) (that the relief is both “necessary” and “appropriate”). Additionally, this Court cannot grant of full force and effect relief before parties in interest to these proceedings have had notice and an opportunity to be heard, which would deny those parties due process. See In re Pro-Fit Holdings Ltd., 391 B.R. at 866; see also Local Rules for the United States Bankruptcy Court District of Delaware (effective February 1, 2020) § Rule 1002-1(c) (“[C]ounsel for the debtor or foreign representative. . . shall also comply with the noticing provisions set forth in Local Rule 9013-1(m)(iii)); § 2002-1(b) (“In chapter 11 and chapter 15 cases, all motions . . . shall be served only upon . . . all parties whose rights are affected by the motion, as applicable.”).

28. For this reason, recognition of a foreign proceeding is a threshold matter; once the proceeding has been recognized, *then* a foreign representative can ask the chapter 15 court for “additional assistance” on a particularized, *matter-by-matter* basis. See 11 U.S.C. § 1521 (listing forms of additional assistance that a chapter 15 court may grant *after recognition*); § 1507 (contemplating additional assistance *after recognition has been granted*); Ad Hoc Grp. of Vitro

Noteholders v. Vitro SAB De CV, 701 F.3d at 1044 (“[A] foreign representative must first petition a United States bankruptcy court for recognition of a foreign proceeding. . . . Only after a United States court recognizes a proceeding can the foreign representative . . . apply . . . for appropriate relief”) (internal citations and quotation marks omitted). Recognition is not intended to bestow *carte blanche* powers upon a foreign court to issue orders that will be automatically effective under U.S. law without chapter 15 court scrutiny. See In re Hamilton, 240 F.3d 148, 157 (2d Cir. 2001) (explaining, with respect to former section 304 (the statutory predecessor to chapter 15), that “comity has never meant categorical deference to foreign proceedings.”) (citations omitted).

29. While this court may defer to the Canadian Court as to matters of Canadian law, due process failures in these Chapter 15 Proceedings are a matter of U.S. law. The Debtors chose to avail themselves of U.S. court protection and as such are bound by the procedural obligations attendant to the relief they seek. See generally W. Auto Supply Co. v. Savage Arms, Inc (In re Savage Indus., Inc.), 43 F.3d 714, 720 (1st Cir. 1994) (holding that the requirement of notice “is the cornerstone underpinning Bankruptcy Code procedure.”); Litto Loan Servicing, L.L.P. v. Eads (In re Eads), 417 B.R. 728, 743 (Bankr. E.D. Tex. 2009) (“As the Supreme Court has explained, due process entitles creditors to the heightened notice provided for by the Bankruptcy Code and [r]ules.”).

30. Accordingly, the Foreign Representative’s requests for full force and effect for particular orders not yet filed with or even described to this Court cannot be heard at the August 11 hearing on recognition of the Canadian Proceedings. The Foreign Representative should be required to file new motions for any full force and effect relief sought, with adequate

documentation and sufficient notice under Del. Bankr. L.R. 9006-1(c) and Fed. R. Bankr. P. 9006(a)-(f) to all parties in interest to these proceedings.

B. The Foreign Representative's Request for Full Force and Effect for the Canadian SISP and APA Order Should be Denied on the Merits

31. Even if the Canadian SISP and APA Order were properly before the Court, the 2L Group submits that full force and effect for that particular order would fall well short of applicable chapter 15 standards, insofar as the bid and sale procedures approved by that order purport to lock in an allocation of value that affords the 1L Lenders greater than full recovery on their claims.

i. The interests of creditors are not sufficiently protected under the Canadian SISP and APA Order, as required by section 1522 for additional relief under section 1521

32. Section 1522 requires this Court to find that “the interests of creditors . . . are sufficiently protected” before granting full force and effect relief under section 1521. Chapter 15 courts have understood this language to require courts “to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interest of those affected by such relief, without unduly favoring one group of creditors over another.” Hosking v. Hellas Telcoms. (Lux.) II SCA (In re Hellas Telcoms. (Lux.) II SCA), 524 B.R. 488, 522 (Bankr. S.D.N.Y. 2015) (quoting In re Atlas Shipping A/S, 404 B.R. 726, 738-39 (Bankr. S.D.N.Y. 2009)). Here, the interests of the 2L Lenders are not at all protected; rather, they have been trampled for the benefit of the 1L AHG.

33. A public auction process should provide an objective market check on the enterprise value of the estate. The bid procedures established by the SISP, however, appear to have been formulated to block any bids that would provide more value to 2L Lenders than the negligible value reflected in the warrants. Because the 1L AHG unnecessarily credit bid the full amount of the 2L debt upfront as part of the Stalking Horse Bid, no third-party bidder is entitled

to participate in the auction unless it is willing to satisfy the almost \$154 million of 2L debt *in full*. SISP at 4. That means that a third-party buyer willing to put a cash bid on the table that would satisfy the 1L debt in full in cash, assume or satisfy the other liabilities being satisfied by the Stalking Horse Bid, *and* provide some amount in cash to 2L Lenders, would not be permitted to make that bid at the auction.

34. For these reasons, the bidding procedures and stalking horse agreement for which the Debtors seek full force and effect today cannot pass muster under section 1522.

ii. *The Section 1507(b)(1) and (4) factors weigh against recognition of the Canadian SISP and APA Order*

35. Section 1507(b) lists various factors which a Court “shall consider” when evaluating a request for additional assistance to a foreign representative. The Foreign Representative’s request for full force and effect relief regarding the Canadian SISP and APA Order fails under these factors. 11 U.S.C. § 1507(b).

36. Section 1507(b)(1) asks whether the additional assistance requested “will reasonably assure . . . just treatment of *all holders of claims* against . . . the debtor’s property.” (emphasis added). 11 U.S.C. § 1507(b)(1). Courts uniformly have held that this requirement is satisfied where the foreign insolvency law provides a comprehensive procedure for the orderly resolution of claims and the equitable distribution of assets among all of the estate’s creditors in a single proceeding. *See, e.g., In re Hamilton*, 240 F.3d 148, 158 (2d Cir. 2001); *In re Culmer*, 25 B.R. 625, 629 (Bankr. S.D.N.Y. 1992).

37. Recognition of the Canadian SISP and APA Order would not assure just treatment of all claimholders. The procedures and stalking horse provisions authorized by the Canadian SISP and APA Order permit the 1L AHG to use their majority position in the 2L debt to direct the collateral agent under the Second Lien Credit Agreement to take action to the detriment of the 2L

Lenders and for the benefit of the 1L Lenders. Efforts of the 1L AHG to credit bid or otherwise “vote” their 2L position to the detriment of that position but to provide a recovery of more than 100% on their 1L position is a vote or bid in bad faith—and one that would be subject to designation or otherwise disallowed in a chapter 11 proceeding in order to ensure the just treatment to all stakeholders. See 11 U.S.C. § 1126(e) (allowing the court to “designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith”); Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.), 634 F.3d 79, 102 (2nd Cir. 2010) (“Section 1126(e) comes into play when voters venture beyond mere self-interested promotion of their claims” and applies “to those who were not attempting to protect their own proper interests instead [were] attempting to obtain some benefit to which they were not entitled.”).

38. The additional assistance requested also will not “reasonably assure [a] distribution of the debtor’s property substantially in accordance with the order prescribed by this title,” as must be considered under section 1507(b)(4). Because the 1L AHG are using the credit bid of the 2L claims to artificially inflate their bid at the expense of 2L minority holders, the sale proposed in the Spectacle APA (and authorized by the Canadian SISP and APA Order) amounts to a greater-than-100% recovery for the 1L Lenders. Such an overpayment is a particularly egregious violation of a bedrock principle of U.S. restructuring law: the absolute priority rule. See 11 U.S.C. § 1129(b)(2) (requiring that a plan be “fair and equitable,” which courts have interpreted to mandate absolute priority); In re Exide Techs., 303 B.R. 48, 60-61 (Bankr. D. Del. 2003) (“Courts have decided that a corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims.”) (internal citation omitted); In re Simmons, 288 B.R. 737,

751 (Bankr. N.D. Tex. 2003) (holding that “overpayment of debt” violated the “absolute priority rule”).

39. By authorizing bid procedures and stalking horse protections designed to win overpayment for the 1L Lenders, the Canadian SISP and APA Order also does not at all assure “a distribution of proceeds of the debtor’s property substantially in accordance with the order prescribed by . . . title [11]” and should not be given full force and effect. See Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.), 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012) (refusing to recognize and enforce under U.S. law a reorganization plan approved in Mexico because the order “does not provide for the distribution of proceeds of the debtor’s property substantially in accordance with the order prescribed by . . . [section] 1507(b)(4)”).

iii. Full force and effect relief for the Canadian SISP and APA Order is neither necessary nor reasonable and thus fails the standards of 1521(a) for discretionary relief

40. Section 1521(a) requires that recognition of the Canadian SISP and APA Order be both necessary and reasonable. Granting full force and effect to an order that is not even on the record and that enshrines both an unfair process and unreasonable sale price is not reasonable, for all the reasons discussed above.

41. Nor is it necessary. If and when the Debtors complete their auction and identify a winning bidder, and obtain a Canadian Court order approving the sale to that winning bidder, the Foreign Representative can return to this Court to seek full force and effect for that Canadian sale order in the United States. There is no need at this time for the Debtors to obtain recognition of sale procedures set to lock in a win for the 1L AHG. Indeed, recognition of the Canadian SISP and APA Order at this time could inhibit a subsequent proper inquiry by this Court as to a final

sale order, insofar as the Canadian procedures protect the stalking horse bid and foreclose competing bids.

42. Accordingly, recognition of the Canadian SISP and APA Order at this time and on this incomplete record is neither reasonable nor necessary and cannot be granted under section 1521.

* * *

43. The Canadian SISP and APA Order authorize under Canadian law a bidding and sale process set to lock in a recovery for the 1L Lenders in excess of 100%. With a stalking horse bid that undervalues the Debtors, coupled with bidding procedures designed to ensure that no better offer can be heard, and jammed through a court process without reasonable notice to parties in interest, the Canadian SISP and APA Order cannot satisfy the standards of 1521(a), 1522, or 1507(b). The Court should decline to grant full force and effect to the Canadian SISP and the Spectacle APA.

C. The 2L Group Reserves its Rights to Object to Recognition of a Sale if the Foreign Representative Later Asks this Court to Grant Full Force and Effect to a Canadian Sale Order Authorizing the Contemplated Sale to Spectacle

44. As noted, should the proposed sale to Spectacle come to pass, the Debtors can be expected to return to this Court to seek recognition and full force and effect of that sale under U.S. law. The 2L Group reserves all rights to object to any motion seeking such full force and effect, including on the grounds for objection discussed herein.

45. Because the current bid procedures purport to lock in the allocation of value determined by the 1L AHG, and in anticipation of a request for approval of an eventual sale to the 1L AHG according to the standards of section 363, the 2L Group, concurrent with the filing of this Objection, has served the 1L AHG with limited discovery requests inquiring into the valuation of

the Company and the allocation of sale value contemplated in Spectacle's stalking horse bid. The 2L Group has commenced this limited discovery process immediately so as not to unnecessarily delay approval and consummation of any eventual sale of the Company.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the 2L Group hereby respectfully requests that the Court deny the Foreign Representative's request for "additional assistance" under sections 1507 and 1521 in the form of an order granting full force and effect to all prior Canadian Orders.

Dated: August 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Farnan, hereby certify that on August 4, 2020, a copy of the Limited Objection and Reservation of Rights of the 2L Group to Debtors' Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code was on the following via e-mail:

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