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COURT FILE NUMBER 2501 01350
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

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

AND IN THE MATTER OF A PLAN OF PEAVEY INDUSTRIES GENERAL PARTNER LIMITED, TSC STORES GP INC., GUYS FREIGHTWAYS LTD., and PEAVEY INDUSTRIES LIMITED

DOCUMENT **BRIEF OF LAW OF THE APPLICANT,
1903P LOAN AGENT LLC**

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**Hearing via Webex before the Honourable Justice Jones
on the Calgary Commercial List, on March 19, 2025 commencing at 3:00p.m.**

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I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicant, 1903P Loan Agent LLC (the “**Agent**”), in its capacity as administrative agent to 1903 Partners, LLC (the “**Lenders**”). The Agent, on behalf of the Lenders, is the largest and first-priority secured creditor of Peavey Industries LP (“**Peavey**”), Peavey Industries General Partner Limited (“**Peavey GP**”), TSC Stores GP Inc. (“**TSC GP**”), Guys Freightways Ltd. (“**Guys**”), Peavey Industries Limited (“**Peavey Industries**”) and Peavey Industries Mutual Fund Trust (“**MFT**”) (collectively, the **Peavey Group**).
2. The Agent’s priority secured interest arises from a credit agreement dated December 20, 2024 (the “**1903 Credit Agreement**”), among the Lenders, the Agent, Peavey (as borrower), and Peavey GP, TSC GP and Guys (as guarantors). The 1903 Credit Agreement is supported by various guarantees and security agreements in favour of the Agent, on behalf of the Lenders, granted by the Peavey Group.
3. Peavey defaulted on its obligations owing under the 1903 Credit Agreement on or about January 15, 2025.
4. On January 16, 2025, the Agent, on behalf of the Lenders, served demand letters and notices of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act* (Canada)¹ (the “**Demands**”). Following the issuance of the Demands, the Peavey Group decided to move forward with filing for protection under the *Companies’ Creditors Arrangement Act* (Canada) (the “**CCAA**”).² The Agent and Lenders supported its decision.
5. On January 27, 2025, the Peavey Group sought and received protection under the CCAA pursuant to an initial order of this Court (the “**Initial Order**”), as amended and restated on February 6, 2025 (the “**ARIO**”). FTI Consulting Canada Inc. (the “**Monitor**”) was appointed Monitor of the Peavey Group.
6. As of the commencement of these CCAA proceedings, the Peavey Group was indebted to the Agent, on behalf of the Lenders, in the approximate amount \$85,569,782.41 (the “**Pre-Filing Obligations**”), plus professional fees, costs, charges, disbursements and expenses as expressly provided for in the 1903 Credit Agreement.

¹ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3.

² *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36.

7. In accordance with the terms of the Initial Order and ARIO, the Court authorized the Peavey Group to obtain interim financing (the “**Interim Financing**”) from the Agent through continued advances under the existing 1903 Credit Agreement to fund restructuring efforts and ongoing operations. In connection with the Interim Financing, the Court authorized the Agent to sweep receipts and deposits made to the Peavey Group’s bank accounts and apply those funds against the Pre-Filing Obligations owing under the 1903 Credit Agreement.
8. Paragraph 35 of the ARIO provides that the Agent may apply funds swept from the Peavey Group’s bank accounts against the principal amount of the Pre-Filing Obligations up to the maximum aggregate amount of \$66,414,413.41, subject to further Order of the Court.
9. The Agent brings the within application to amend paragraph 35 of the ARIO to increase the amount it is permitted to apply against the Pre-Filing Obligations up to the maximum aggregate amount of \$85,569,782.41, plus professional fees, costs, charges, disbursements and expenses as provided for in the 1903 Credit Agreement.
10. Unless otherwise defined, capitalized terms not defined herein have the meanings ascribed to them in the 1903 Credit Agreement.

II. STATEMENT OF FACTS

11. The relevant facts with respect to this Application are briefly outlined herein. They are more fully set out in the Affidavit of Kyle Shonak sworn March 7, 2025 (the “**Shonak Affidavit**”).

A. *The Peavey Group’s Pre-Filing Strategic Process*

12. Peavey operates as a retailer, selling agriculture, farm and ranch, pet, work wear, lawn and garden, hardware and homesteading supplies throughout Canada. Prior to the commencement of these CCAA proceedings, Peavey operated 88 Peavey Mart branded retail stores (42 in western Canada and 46 in eastern Canada), and six MainStreet Hardware branded retail stores.³
13. Peavey has faced liquidity issues since at least 2023 caused by softening customer demand for discretionary goods, pressures from the COVID-19 pandemic, inflation, high

³ Affidavit of Kyle Shonak, sworn March 6, 2025 [**Shonak Affidavit**] at para 13.

interest rates, and strong competition from big box and e-retailers. These factors put pressure on Peavey's ability to service its debt and suppliers.⁴

14. As a result of its liquidity issues, Peavey defaulted on its obligations owing under an amended and restated credit agreement dated December 18, 2020 (the "**RBC Credit Agreement**") with the Royal Bank of Canada ("**RBC**"). The RBC Credit Agreement was in default throughout 2023 and 2024 and was amended eleven times.⁵
15. On July 31, 2023, the Peavey Group engaged FTI Capital Advisors ("**FTI CA**") to assist with identifying potential partners to payout the amounts owing RBC Credit Agreement. This strategic alternative process was carried out between March and December 2024.⁶
16. Gordon Brothers LLC ("**GB**") was approached by FTI CA in March 2024, and again in September 2024, to participate in a potential refinancing transaction with Peavey.⁷
17. On September 30, 2024, GB submitted an initial indicative term sheet setting out a proposed refinancing deal for the Peavey Group. On November 8, 2024, the Agent (as an affiliate of GB) and Peavey executed an indicative term sheet setting out the terms of a potential refinancing transaction between the parties.⁸
18. On December 4, 2024, the Agent and Peavey executed a commitment letter (the "**Commitment Letter**"), which set out the final terms and conditions upon which the Agent would extend credit to Peavey, subject to satisfactory completion of due diligence, and execution and delivery of loan documentation. The terms of the Commitment Letter relevant to this application include, *inter alia*, the following:
 - (a) a closing fee, agency fee and monitoring fee all of which were fully earned on the closing date and non-refundable;
 - (b) a prepayment fee associated with the revolving credit facility and term loan facility;
and

⁴ *Ibid* at para 14.

⁵ *Ibid* at para 16.

⁶ *Ibid* at para 17.

⁷ *Ibid* at para 19.

⁸ *Ibid* at para 24.

(c) a preferred return fee payable upon a liquidity event.⁹

B. The 1903 Credit Agreement

19. On December 20, 2024, the 1903 Credit Agreement was executed by the Lenders, the Agent (as the Lenders' administrative agent), Peavey (as borrower), and Peavey GP, TSC GP and Guy's (as guarantors). The 1903 Credit Agreement repaid the debt outstanding under the RBC Credit Agreement in full.¹⁰
20. Due to the risk associated with advancing funds to a distressed borrower, such as in the case of Peavey, it was a material term of the transaction that the Agent would be entitled to certain fees on closing, as well as fees if the loan was accelerated due to default or early termination (whether voluntary or involuntary) prior to the final maturity date.¹¹ Such fees are set forth in a fee letter (the "**Fee Letter**") executed concurrently with the 1903 Credit Agreement.
21. The 1903 Credit Agreement incorporates the Fee Letter by reference, which provides for the following:
- (a) a closing fee (the "**Closing Fee**") payable to the Agent and fully earned on the effective date (i) \$2,100,000 for the 1903 Revolving Credit Facility, and (ii) \$450,000 for the Term Loan Facility;
 - (b) an annual agency fee (the "**Agency Fee**") payable to the Agent of 0.75% of the sum of Total Revolving Credit Commitment plus the principal amount of Loans funded under the Total Term Loan Commitments fully earned and payable in advance on the Effective Date and on each anniversary of the Effective Date occurring before the Termination Date;
 - (c) a collateral monitoring fee (the "**Collateral Monitoring Fee**") of \$240,000 fully earned on the Effective Date and each anniversary date thereafter;

⁹ *Ibid* at para 27.

¹⁰ *Ibid* at para 33.

¹¹ *Ibid* at para 31.

- (d) prepayment fees (the “**Prepayment Fees**”) after the occurrence of a Prepayment Fee Event, which is earned and due and payable in full on the first date upon which the applicable Prepayment Fee Event occurs; and
 - (e) a preferred return fee (the “**Preferred Return Fee**”) payable to the Agent in the amount of \$5,000,000 upon a Liquidity Event.¹²
22. It was agreed between the Agent, the Lenders and Peavey that the Agent would defer the collection of the Closing Fee, Agency Fee and Collateral Monitoring Fee to provide Peavey with additional much needed liquidity post-closing.¹³

C. Default of the 1903 Credit Agreement

23. On January 15, 2025, Peavey defaulted on the Financial Covenants in the 1903 Credit Agreement.¹⁴
24. On January 16, 2025, the Agent served the Demands. The amount demanded was \$66,414,413.41, plus fees, costs, charges, disbursements and expenses as expressly provided for in the 1903 Credit Agreement and Fee Letter.¹⁵
25. On January 25, 2025, the Lenders issued a capital fees letter (the “**Capital Fees Letter**”) to the Peavey Group setting out the fees that were triggered in respect of the Prepayment Fee Events and Liquidation Events (as those terms are defined in the Fee Letter). The fees claimed in the Capital Fees Letter are calculated in accordance with the Fee Letter and total \$19,155,369.¹⁶

D. CCAA Proceedings

26. Following the issuance of the Demands, the Peavey Group decided to move forward with filing for CCAA protection. The Agent and Lenders supported its decision.¹⁷

¹² *Ibid* at para 35.

¹³ *Ibid* at para 37.

¹⁴ *Ibid* at para 42.

¹⁵ *Ibid* at para 44.

¹⁶ *Ibid* at para 45.

¹⁷ *Ibid* at para 47.

27. On January 27, 2025, the Peavey Group was granted protection under the CCAA pursuant to an Initial Order. On February 6, 2025, the Court granted the ARIO.¹⁸
28. The ARIO limits the amount which the Agent is permitted to sweep and apply against the Pre-Filing Obligations to the principal owing under the 1903 Credit Agreement totalling \$66,414,413.41 and the amounts advanced pursuant to Interim Financing. The Monitor, the Peavey Group and the Agent agreed that the Agent would return to Court at a later date to obtain approval to apply any cash sweeps against the fees set out in the Capital Fee Letter.¹⁹
29. Since the filing date, cash from business operations and liquidation efforts deposited into the Cash Management Accounts have reduced the Pre-Filing Obligations outstanding under the 1903 Credit Agreement by \$61,301,167. As of March 1, 2024, approximately \$23,514,188 remains outstanding under the 1903 Credit Agreement, inclusive of fees, and \$22,158,444 remains owing under the Interim Financing facility.²⁰

III. ISSUE

30. The issue to be determined is whether this Court should amend paragraph 35 of the ARIO to increase the amount the Agent is permitted to apply from its cash sweeps against the remainder of the Pre-Filing Obligations.

IV. LAW AND ARGUMENT

A. The Fees are Due and Payable Pursuant to the 1903 Credit Agreement

31. Section 6.12 of the 1903 Credit Agreement sets forth Financial Covenants which, among other things, mandates that Peavey must maintain minimum sales, collections, receipts and inventory levels. On January 15, 2025, Peavey defaulted on the Financial Covenants.²¹
32. As a result of Peavey's default, the Agent, on behalf of the Lenders, issued the Demands. The amount demanded was the principal amount then owing, plus fees, costs, charges, disbursements and expenses.²² Subsequently, the Agent issued the Capital Fee Letter

¹⁸ *Ibid* at para 50.

¹⁹ *Ibid* at para 52.

²⁰ *Ibid* at para 55.

²¹ *Ibid* at para 42 and Exhibit "L", section 6.12.

²² *Ibid* at para 44.

setting out the fees that were triggered in the Fee Letter as a result of the Events of Default.²³

33. The 1903 Credit Agreement provides that upon the occurrence of an Event of Default “all Loans then outstanding, together with all accrued and unpaid interest thereon, all fees, Obligations, and all other amounts due under this Agreement and the other Loan Documents, shall be accelerated and become due and payable automatically and immediately”.²⁴

34. Section 1.01 of the 1903 Credit Agreement defines “Obligation” as:

“Obligations” means all present and future indebtedness, obligations, and liabilities of each Loan Party to the Administrative Agent and the Lenders arising under or in connection with this Agreement and each other Loan Document, whether or not the right of payment in respect of such claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, and whether or not such claim is discharged, stayed or otherwise affected by any proceeding referred to in Section 7.01. Without limiting the generality of the foregoing, the Obligations of each Loan Party under the Loan Documents include (a) the obligation (irrespective of whether a claim therefor is allowed in an Insolvency Proceeding) to pay principal, interest, charges, expenses, fees, premiums, attorneys’ fees and disbursements, indemnities and other amounts payable by such Person under the Loan Documents, including Erroneous Payment Subrogation Rights, (b) the obligation of such Person to reimburse any amount in respect of any of the foregoing that the Administrative Agent or any Lender (in its respective sole discretion) may elect to pay or advance on behalf of such Person, and (c) all obligations (i) under the Consignment Agreements, or any credit line for inventory purchases, (ii) under the Consulting Agreement, (iii) under the GBRS Agreements, or (iv) in respect of other services provided by or on behalf of any Affiliate of Administrative Agent to or for the benefit of any Loan Party. Notwithstanding any of the foregoing, Obligations shall not include any Excluded Swap Obligations.²⁵

35. The definition of “Obligation” includes any “Loan Document”, which is defined at section 1.01 as follows:

“Loan Document” means this Agreement, each Control Agreement (or blocked account agreement, as applicable), the Fee Letter, each Guarantee, each Intercompany Subordination Agreement, each Subordination Agreement, each Joinder Agreement, each Security Document, each UCC Filing Authorization Letter, each Collateral Access Agreement, each Perfection Certificate, the Consignment Documents, the Consulting Agreement, the GBRS Agreements and each other agreement, instrument, certificate, report, and other document executed and delivered pursuant hereto or thereto or otherwise evidencing or securing any Loan or any other Obligation.²⁶

²³ *Ibid* at para 45.

²⁴ *Ibid* at Exhibit “L”, section 7.01.

²⁵ *Ibid* at section 1.01.

²⁶ *Ibid*.

36. Since the definition of “Loan Document” includes the “Fee Letter”, the fees set out in the Fee Letter forms part of the Obligations owing by Peavey to the Agent pursuant to the 1903 Credit Agreement.

B. The Fully Earned Fees are due and payable

37. Pursuant to the Fee Letter, the Collateral Monitoring Fee, Revolver Closing Fee, Term Loan Closing Fee and Agency Fees (collectively, the “**Fully Earned Fees**”) were fully earned on the Effective Date, being December 20, 2024.²⁷

38. The Agent and the Lenders agreed to defer the collection of the Fully Earned Fees to provide Peavey with additional much needed liquidity post-closing.²⁸

39. As a result of Peavey defaulting under the 1903 Credit Agreement, the Fully Earned Fees became due and payable automatically and immediately.

40. In accordance with the terms of the Fee Letter, “if any Prepayment Fee, Closing Fee, Agency Fee, Collateral Monitoring Fee, Preferred Return, or any other fee due hereunder [are] not paid in full in cash when due, then such unpaid amount thereof shall constitute a Loan and be added to the principal balance of the Revolving Loans or Term Loan, as applicable”.²⁹

41. As a result, the Fully Earned Fees are added to the principal balance owing under the 1903 Credit Agreement and forms part of the Pre-Filing Obligations.

C. Peavey’s default triggered the Preferred Return Fee

42. The Fee Letter also provides for a Preferred Return Fee in the amount of \$5,000,000 that is triggered upon the occurrence of a Liquidity Event. A Liquidity Event is defined as an event “occurring through one transaction or a series of related transactions, any sale, liquidation, dissolution or winding up voluntary or involuntary, of any Loan Party”.³⁰

43. On January 25, 2025, the Peavey Group commenced CCAA proceedings to pursue a going-concern liquidation. Such actions constituted a Liquidity Event under the terms of

²⁷ *Ibid* at Exhibit “M”.

²⁸ *Ibid* at para 36.

²⁹ *Ibid* at Exhibit “M”.

³⁰ *Ibid*.

the Fee Letter and the Preferred Return Fee became due and payable automatically and immediately.³¹

44. Similar to the Fully Earned Fees, the Preferred Return Fee is added to the principal balance owing under the 1903 Credit Agreement and forms part of the outstanding Pre-Filing Obligations owing to the Agent.

D. Peavey's default triggered the Prepayment Fee

45. Under the Fee Letter, Peavey is responsible for payment of the Prepayment Fees if a "Prepayment Fee Event" occurs. A "Prepayment Fee Event" is defined in the Fee Letter as any time before the Final Maturity Date when one of the following events occur:

- (a) The Revolving Credit Commitments are cancelled and terminated, whether pursuant to a voluntary cancellation and termination of the Revolving Credit Commitments by the Borrower, or as a result of an acceleration (including an automatic acceleration) of the Obligations after the occurrence of an Event of Default (including an Event of Default under Section 7.01(f) or (g) of the Credit Agreement) (any of the foregoing, a "**Revolver Prepayment Fee Event**"); or
- (b) The Term Loans are paid, prepaid, or accelerated, or where an automatic acceleration is triggered by an Event of Default (for example, under Section 7.01(f) or (g) of the Credit Agreement) (any of the foregoing, a "**Term Loan Prepayment Fee Event**").³²

46. The Fee Letter provides that the Prepayment Fees are payable if the loans are accelerated, including as a result of automatic acceleration upon an Event of Default.³³
47. Peavey's breach of the Financial Covenants constituted an Event of Default. The Prepayment Fees therefore became immediately due and payable on January 15, 2025, and form part of the Pre-Filing Obligations payable to the Agent.
48. Early repayment clauses like the Prepayment Fees are common in commercial loan documents. When a borrower repays its indebtedness early, the lender does not collect interest payments that it would have received had the loan continued to maturity.³⁴

³¹ *Ibid* at paras 47-51.

³² *Ibid* at Exhibit "M".

³³ *Ibid*.

³⁴ *Ibid* at paras 31-32; Wael Rostom and Kourtney Rylands, *Annual Review of Insolvency Law*, "The Enforceability of Make-Whole Clauses in Insolvency Proceedings", 2017 at page 2 [**Rostom and Rylands**] [**Book of Authorities ("BOA") TAB 1**].

49. An “early repayment clause” is designed to protect a lender’s expected rate of return on an investment in the event that the borrower repays the indebtedness before the maturity date. A lender may include an early repayment clause in a loan contract so that they are compensated in the event the borrower repays the loan early and less interest is collected than anticipated.³⁵
50. With regard to the Prepayment Fees, the Fee Letter states that the Prepayment Fee is for liquidated damages, and that the quantum is reasonable.³⁶
51. The most influential factor a court will consider when deciding whether an early repayment clause is enforceable is the wording of the contract itself.³⁷ Where the words of the contract are clear and unambiguous that the parties intended an early repayment clause to be enforceable even when the maturity date is accelerated, or where the early repayment is involuntary, Canadian courts typically find that such early repayment clauses are enforceable.³⁸
52. Similarly, courts in the United States have found that early repayment clauses that constitute liquidated damages are enforceable. The United States Bankruptcy Court in the District of Delaware *In re Trico Marine Services Inc* (“**Trico**”) stated as follows:
- Research reveals that the substantial majority of courts considering this issue have concluded that make-whole or prepayment obligations are in the nature of liquidated damages rather than unmatured interest, whereas courts taking a contrary approach are distinctly in the minority... [T]his court is in agreement with a majority of courts that view a prepayment charge as liquidated damages, not as unmatured interest or an alternative means of paying under the contract... Prepayment amounts, although often computed as being interest that would have been received through the life of a loan, do not constitute unmatured interest because they fully mature pursuant to the provisions of the contract... [citations omitted].³⁹
53. The Fee Letter provides that the Prepayment Fee was intended to compensate the Agent, on behalf of the Lenders, for liquidated damages if Peavey repaid the 1903 Credit Agreement prior to maturity, either voluntarily or involuntarily, or as the result of

³⁵ Rostom and Rylands at page 2.

³⁶ Shonak Affidavit *supra* note 3 at Exhibit “M”.

³⁷ Rostom and Rylands *supra* note 36 at page 5.

³⁸ See for example *Maxam Opportunities Fund Limited Partnership v Greenscape Capital Group Inc.*, 2013 BCCA 460 [**Maxam**] at para 49 [**BOA TAB 2**].

³⁹ *In re Trico Marine Services, Inc, et al*, 450 BR 474 (Bankr D Del, 2011) at para 5 [**BOA TAB 3**].

acceleration (including automatic acceleration) after the occurrence of an Event of Default.⁴⁰

54. The Agent is unaware of any parties challenging its entitlement to the Prepayment Fee, however, in the event a party is looking to set aside this liquidated damages clause, such party has the onus of proving that it should be set aside.⁴¹
55. The Prepayment Fee is valid and enforceable and reflects the deal that was agreed between the Agent and Peavey.

V. CONCLUSION

56. The Peavey Group and the Agent are sophisticated commercial parties who negotiated the 1903 Credit Agreement and the fees contemplated by Fee Letter with the benefit of experienced financial advisors and legal counsel. Absent unconscionability, unilateral mistake, misrepresentation, or duress, courts refrain from interfering in contractual relationships.⁴²
57. Upon the occurrence of the Event of Default described above, all fees set forth in the Fee Letter became due and payable. Such fees form part of the Pre-Filing Obligations payable to the Agent on behalf of the Lenders. Accordingly, the amendment sought to the ARIO should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF MARCH, 2025.

MILLER THOMSON LLP

Per:



James W. Reid / Natasha Doelman
Counsel to the Applicant, 1903P Loan
Agent

⁴⁰ Shonak Affidavit *supra* note 3 at Exhibit "M".

⁴¹ *Infinite Maintenance Systems Ltd. v. ORC Management Ltd.*, 2001 CanLII 24082 (ON CA) at para 13 [BOA TAB 4].

⁴² *Zayo Inc. v. Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 paras 60-61 [BOA TAB 5]; See also *Maxam supra* note 38 at para 29.

TABLE OF AUTHORITIES

TAB NO.	AUTHORITY
1	Wael Rostom and Kourtney Rylands, <i>Annual Review of Insolvency Law</i> , "The Enforceability of Make-Whole Clauses in Insolvency Proceedings", 2017
2	<u>Maxam Opportunities Fund Limited Partnership v Greenscape Capital Group Inc., 2013 BCCA 460</u>
3	<u>In re Trico Marine Services, Inc, et al, 450 BR 474 (Bankr D Del, 2011)</u>
4	<u>Infinite Maintenance Systems Ltd. v ORC Management Ltd., 2001 CanLII 24082 (ON CA)</u>
5	<u>Zayo Inc. v. Primus Telecommunications Canada Inc., 2016 ONSC 5251</u>