

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **TED BAKER CANADA INC., TED
BAKER LIMITED, OSL FASHION SERVICES CANADA
INC. and OSL FASHION SERVICES, INC.**

APPLICANTS

FACTUM OF THE APPLICANTS

May 2, 2024

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PART I - NATURE OF THE APPLICATION

1. On April 24, 2024, Ted Baker Canada Inc. (“**Ted Baker Canada**”), Ted Baker Limited (together with Ted Baker Canada, “**Ted Baker NA**”), OSL Fashion Services Canada Inc. (“**Fashion Canada**”), and OSL Fashion Services, Inc. (“**Fashion Services**”, together with Fashion Canada, “**Fashion**,” and collectively, the “**Applicants**”) were granted protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”)¹ pursuant to an initial order of this court (the “**Initial Order**”).

2. As outlined in the Applicants’ Initial Order Factum, these CCAA proceedings were undertaken in order to allow the Applicants the breathing space necessary to engage with their principal stakeholders and to consider the best manner in which to monetize their assets. Given the Applicants’ limited liquidity and ongoing carrying costs, and without having received any proposals for other value maximizing alternatives, the Applicants are seeking approval at this time to commence a realization process to sell the remaining Merchandise and FF&E (as defined below) in their retail stores and through bulk sales to their wholesale customers. At present, the Applicants intend to conduct the Sale at all the Stores (as defined below). However, under the proposed realization process, the Applicants have the flexibility to modify the Sale by removing Stores should they identify a going concern third party transaction for some or all of the Applicants’ business or assets on or before May 17, 2024. The Applicants therefore seek the following relief:

- (a) A Realization Process Approval Order (the “**Realization Process Approval Order**”), which will, among other things:

¹ R.S.C. 1985, c. C-36, as amended.

- (i) approve a consulting agreement between Ted Baker Canada Inc. and Ted Baker Limited (together, “**Ted Baker NA**” or the “**Merchant**”) and Gordon Brothers Canada ULC and Gordon Brothers Retail Partners, LLC (together, the “**Consultant**”) dated as of April 30, 2024 (the “**Consulting Agreement**”);
 - (ii) approve the proposed Canadian sale guidelines (the “**Canadian Sale Guidelines**”) and US sale guidelines (the “**US Sale Guidelines**,” and together with the Canadian Sale Guidelines, the “**Sale Guidelines**”) for the orderly realization of the Merchandise and FF&E (both as defined below) at Canadian and US concession locations or at the Merchant’s stores (the “**Stores**”) and as located at the Warehouses (the “**Warehouses**”) through sales in accordance with the terms of the Sale Guidelines (the “**Sale**”); and
 - (iii) authorize the Merchant, with the assistance of the Consultant, to undertake a realization process in accordance with the terms of the Realization Process Approval Order, the Consulting Agreement and the Sale Guidelines; and
- (b) an amended and Restated Initial Order (the “**ARIO**”), which will, among other things:
 - (i) extend the Stay Period (defined below) to August 2, 2024;
 - (ii) approve a key employee retention plan (the “**KERP**”), grant a court-ordered charge (the “**KERP Charge**”) as security for payments under the KERP, and grant a sealing order in respect of the KERP;

- (iii) authorize the Applicants to enter into the DIP Term Sheet (defined below) and borrow under the DIP Facility (defined below) in the maximum principal amount of USD \$28 million secured by the DIP Lender's Charge (defined below); and
- (iv) increase the Administration Charge to USD \$1.5 million and the Directors' Charge to USD \$5 million.

3. An orderly, transparent process for realizing on the value of the Merchandise and FF&E is both necessary and appropriate in the circumstances. Inventory realization processes have been approved in a number of retail insolvencies, and the terms of the Consulting Agreement and the Sale Guidelines are generally consistent with similar agreements and guidelines approved in other retail realization/liquidation processes carried out under the CCAA. The Consultant was selected through a fair and reasonable selection process and the Consulting Agreement and Sale Guidelines were developed with the oversight and support of the Monitor.

4. The realization process embodied in the Consulting Agreement and the Sale Guidelines represents the best opportunity to maximize recoveries for stakeholders in a transparent, orderly, and efficient manner, including by leaving open the possibility for the Applicants to identify a going concern third party transaction for some or all of the Applicants' business or assets. The Applicants therefore seek this Court's immediate approval of the Consulting Agreement and the Sale Guidelines to allow the realization process to commence as soon as possible. Doing so will both maximize recoveries and limit operating costs, including by avoiding further rent, employee costs, critical supplier payments and other ongoing amounts.

PART II - SUMMARY OF FACTS

5. The facts are more fully set out in the Affidavit of Antoine Adams sworn May 1, 2024.²

A. Overview of the Applicants' Activities since the Initial Application

6. On April 24, 2024, this Court granted the Initial Order, which, among other things: (i) appointed Alvarez & Marsal Canada Inc. as monitor in these proceedings (the “**Monitor**”); (ii) granted a stay of proceedings for the initial ten day period (the “**Stay Period**”); (iii) authorized Ted Baker Canada and Ted Baker Limited to continue to borrow from the Interim Lender, being Canadian Imperial Bank of Commerce (“**CIBC**”), under the Applicants’ Existing Credit Facility (defined below), in an amount not to exceed USD \$7 million; (iv) authorized the Applicants to pay certain pre-filing amounts to key participants in the Applicants’ distribution network, and to other critical suppliers as needed; (v) granted the Administration Charge, the Interim Lender’s Charge (defined below), security granted with respect to the Existing Credit Facility and the Director’s Charge; and (vi) authorized Ted Baker Canada to act as foreign representative (the “**Foreign Representative**”) of the Applicants and to apply for foreign recognition and approval of these CCAA proceedings.³

7. Immediately following the granting of the Initial Order, the Foreign Representative commenced proceedings in the United States Bankruptcy Court for the Southern District of New York (the “**US Court**”) seeking an order to recognize and enforce these CCAA proceedings (the “**Chapter 15 Case**”). On April 26, 2024, the Applicants were granted provisional relief in the Chapter 15 Case, including a temporary restraining order to obtain the benefits of a stay of

² Affidavit of Antoine Adams, sworn May 1, 2024 [Second Adams Affidavit]. The Applicants further rely on the facts as set out in the Affidavit of Antoine Adams, sworn April 24, 2024. Capitalized terms not otherwise defined have the same meaning as in the Second Adams Affidavit. Dollar amounts are given in Canadian dollars unless otherwise specified.

³ Second Adams Affidavit at para. 9.

proceedings. The final recognition hearing in the US is scheduled for May 8, 2024,⁴ and the Foreign Representative intends to seek recognition of the ARIO and the Realization Process Approval Order by the US Court at that time.⁵

8. Since the granting of the Initial Order, the Applicants, in close consultation and with the assistance of the Monitor, have been working in good faith and with due diligence to, among other things:⁶

- (a) stabilize their business and operations as part of these CCAA proceedings;
- (b) advise their stakeholders, including all landlords, employees, logistics suppliers, license partners, and others, of the granting of the Initial Order;
- (c) commence and pursue the Chapter 15 Case;
- (d) develop the KERP;
- (e) negotiate the DIP Term Sheet;
- (f) develop the Sale Guidelines and finalize arrangements with the Consultant for the orderly realization of the Merchandise and the FF&E; and
- (g) respond to numerous creditor and stakeholder inquiries regarding these CCAA proceedings.

⁴ Second Adams Affidavit at para. 10.

⁵ Second Adams Affidavit at para. 4.

⁶ Second Adams Affidavit at para. 11.

9. The Applicants and the Monitor have also been in communication with several of the Applicants' key stakeholders, including as follows:⁷

- (a) The Monitor has sent letters to all landlords of the Applicant's retail locations (the "**Landlords**"), advising that the Applicants had been granted protection under the CCAA. The Applicants further circulated draft Canadian Sale Guidelines in respect of the proposed realization process to certain Canadian counsel who represent a significant number of the Landlords of the Canadian Stores and engaged in discussion with such counsel, along with counsel to the Monitor.⁸
- (b) The Applicants promptly initiated employee outreach following the granting of the Initial Order, including by hosting live employee town halls, and by conducting team meetings with Ted Baker NA, Lucky Brand, and Brooks Brothers store employees.⁹
- (c) The Applicants and the Monitor have been in communication with other stakeholders, including ABG, YM, and Jaytex, regarding the Initial Order and Chapter 15 Case.¹⁰

10. In addition, since the date of the Initial Order, the Applicants have reached out to various stakeholders in order to communicate their receptiveness to potential going concern transactions, and have entertained a number of inquiries and executed non-disclosure agreements in this regard.

⁷ See Second Adams Affidavit at paras. 14-17 for a full description of these communications.

⁸ Second Adams Affidavit at paras. 14-15.

⁹ Second Adams Affidavit at para. 16.

¹⁰ Second Adams Affidavit at para. 17-18.

To date, no proposals for a going-concern transaction or other value maximizing alternative have been received.¹¹

B. The Realization Process

11. Pursuant to the authority set out in the Initial Order, the Monitor, on behalf of the Applicants, reached out to three well-known third-party liquidators in order to seek bids in connection with the realization of the Applicants' Merchandise and FF&E. Each of the three potential liquidators expressed interest, and, following their execution of a nondisclosure agreement, were given access to a populated data room containing financial and operational details about the Applicants' business and their inventory.¹²

12. The third-party liquidators submitted their bids on April 28, 2024. On April 29, 2024, following the review and discussion of the three bids among the Applicants, the Monitor, and the Interim Lender, Gordon Brothers Canada ULC and Gordon Brothers Retail Partners, LLC were selected as the third-party liquidator to assist in the realization of the Applicants' retail stores (as defined above, the "**Consultant**").¹³ Following this selection, the terms of the Consulting Agreement and Sale Guidelines were negotiated and finalized.

13. Under the terms of the Consulting Agreement, the Consultant has exclusively been appointed to conduct the Sale, which is to commence on a date agreed to by the Merchant and the Consultant, following the granting of the Realization Process Approval Order and, with respect to Stores located in the US, following the recognition of the Realization Process Approval Order (the "**Sale Commencement Date**"). The Sale is to conclude no more than twelve weeks later (the "**Sale**

¹¹ Second Adams Affidavit at para. 21.

¹² Second Adams Affidavit at para. 23.

¹³ Second Adams Affidavit at para. 23.

Termination Date” and the period between the Sale Commencement Date and the Sale Termination Date, the “**Sale Term**”). Initially, the Sale will be conducted at the Stores specified in the Consulting Agreement, which at present includes all Stores, but which list may be amended by adding or removing Stores during the Sale Term (the “**Store List**”).¹⁴

14. The Consultant is responsible for the orderly realization of: (i) all merchandise that is located at the Stores or sold in bulk to wholesale customers during the Sale Term, which includes goods saleable in the ordinary course, located at or in transit to the Stores on the Sale Commencement Date and/or located in or in transit to the Warehouses on the Sale Commencement Date and thereafter delivered to the Stores (the “**Merchandise**”), and (ii) owned furnishings, trade fixtures, equipment and/or improvements to real property that are located in the Stores (“**FF&E**”).¹⁵

15. As consideration for its services, the Consultant will be entitled to a fee calculated as follows in respect of the Merchandise:¹⁶

- (a) With respect to Merchandise sold at the Stores during the Sale Term, a fee equal to: (i) 2.0% of the Gross Proceeds (as defined in the Consulting Agreement) of such Merchandise; and (ii) an additional fee based on certain thresholds of Gross Recovery Percentage (as defined in the Consulting Agreement); and
- (b) With respect to Merchandise sold in bulk to wholesale customers from the Warehouse during the Sale Term, a fee equal to: (i) 5.0% of the Gross Proceeds of

¹⁴ Second Adams Affidavit at paras. 26 (a)-(c) and 28. See Second Adams Affidavit at para. 26 for a full description of the proposed Sales Process.

¹⁵ Second Adams Affidavit at para. 11(f).

¹⁶ Second Adams Affidavit at para. 26(f).

such Merchandise, and (ii) an additional fee equal to 10% of all savings obtained as a result of avoiding certain US import duties.

16. In addition, the Consultant is entitled to a commission from the sale of FF&E equal to 15% of the gross proceeds of the sale, net of applicable sales taxes.¹⁷

17. The Consultant has the right to supplement the Merchandise in the Sale at the Stores with additional goods (the “**Additional Consultant Goods**”) purchased by the Consultant and delivered to the stores.¹⁸ The Consultant is in turn obliged to pay the Merchant an amount equal to 5% of the gross proceeds from the sale of Additional Consultant Goods.¹⁹

18. The Consulting Agreement is also subject to the Sale Guidelines, as developed by the Applicants in consultation with the Monitor. The Sale Guidelines, which have been designed in order to ensure an orderly and fair realization process and which are consistent with sale guidelines approved in other retail insolvencies, are discussed in more detail below.²⁰

PART III - THE ISSUES AND THE LAW

19. This Factum addresses the following issues:

- (a) This Court should approve the Consulting Agreement and the Sale Guidelines;
- (b) This Court should approve the KERP and grant the KERP Charge;
- (c) This Court should grant a sealing order in respect of the KERP;
- (d) This Court should authorize the DIP Term Sheet and the DIP Lender’s Charge;

¹⁷ Second Adams Affidavit at para. 26(i)

¹⁸ Second Adams Affidavit at para. 27.

¹⁹ Second Adams Affidavit at para. 27.

²⁰ Second Adams Affidavit at para. 30.

- (e) This Court should approve the requested increases to the Administration Charge and the Directors' Charge; and
- (f) This Court should extend the Stay Period until August 2, 2024

A. This Court should approve the Consulting Agreement and the Sale Guidelines

20. It is well-recognized that a CCAA court has jurisdiction to approve a sale process authorizing the realization/liquidation of a debtor's assets,²¹ and courts have frequently done so in the context of retail insolvencies.²² In prior cases involving the approval of inventory and FF&E realization processes, courts have made use of the *Nortel* factors which generally apply in respect of sale process approvals.²³ In applying the *Nortel* test, the Court considers the following questions:²⁴

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole economic community?

²¹ See, i.e., *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, [2013 ONSC 5933](#) at para. 44; *Indalex Ltd. (Re)*, [2011 ONCA 265](#) at para. 180.

²² See, i.e., *Mastermind GP Inc. (Re)*, (November 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00710259-00CL ([Endorsement of Justice Steele](#)), at paras. 10-18 [*Mastermind Toys Endorsement*], endorsing *Mastermind GP Inc. (Re)*, (November 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00710259-00CL ([Liquidation Sale Approval Order](#)) [*Mastermind Order*]; *Nordstrom Canada Retail Inc. (Re)*, [2023 ONSC 1814](#) at paras. 6-13 [*Nordstrom Endorsement*], endorsing *Nordstrom Canada Retail Inc. (Re)*, (March 20, 2023), Ont. S.C.J. [Commercial List], Court File No. CV- 23-00695619-00CL ([Liquidation Sale Approval Order](#)) [*Nordstrom Order*]; *Bed Bath & Beyond Canada Ltd. (Re)*, [2023 ONSC 1230](#) at paras. 7-9 [*BBB Endorsement*], endorsing *Bed Bath & Beyond Canada Ltd. (Re)*, (February 21, 2023), Ont. S.C.J. [Commercial List], Court File No. CV- 23-00694493-00CL ([Sale Approval Order](#)) [*BBB Order*]; *Sears Canada Inc. (Re)*, (July 18, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([Liquidation Sale Approval Order](#)); *Forever XXI ULC (Re)*, (October 7, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Sale Approval Order](#)); *Target Canada Co. (Re)*, [2015 ONSC 846](#) at paras. 2-5 [*Target Endorsement*], endorsing *Target Canada Co. (Re)* (February 4, 2015), Ont. S.C.J. [Commercial List], Court File No. CV-15-10832-00CL ([Approval Order – Agency Agreement](#)).

²³ See, i.e., *Nordstrom Endorsement*, at para. 7; *BBB Endorsement*, at para. 9.

²⁴ *Nortel Networks Corp (Re)*, [2009 CanLII 39492](#) (ONSC) at para. 49. While the *Nortel* factors were formulated before the 2009 amendments to the CCAA, CCAA courts have since confirmed that these criteria still apply: *Brainhunter Inc (Re)*, [2009 CanLII 72333](#) (ONSC) at paras. 15-17 [*Brainhunter*].

- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale?
- (d) Is there a better viable alternative?

21. Courts have also evaluated proposed retail realization processes in light of the criteria set out in s. 36(3) of the CCAA,²⁵ namely:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale or disposition;
- (c) whether the Monitor filed a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or disposition on creditors and stakeholders; and
- (f) whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.

22. The Applicants submit that both the *Nortel* criteria and the s. 36(3) factors are satisfied in respect of the realization process, for the reasons set out below.

²⁵ See, i.e., *Mastermind Toys Endorsement*, at para. 14; *Target Endorsement*, at para. 5; *Sears Canada Inc. (Re)*, [2017 ONSC 6235](#) at para. 8 [*Sears Canada*].

(a) The Sale is Warranted at this Time and there is no Better Viable Alternative

23. The sale of the Merchandise and FF&E is warranted at this time, as it is an integral and urgent part of the realization process. Given the Applicants' limited liquidity and ongoing carrying costs, along with the seasonal nature of a significant portion of the inventory, the realization process must be commenced as soon possible in order to maximize recoveries and limit operating costs by ensuring that the Merchant can exit from the Stores as soon as practicable and avoid further rents and other ongoing costs which would be incurred if the Stores continued to be occupied. Any delay in commencing this realization process would negatively impact net recoveries from the Sale to the detriment of stakeholders and the economic community.²⁶ Notably, however, the Consulting Agreement affords the Applicants the flexibility necessary to continue to pursue discussions in furtherance of a potential going-concern transaction and, if necessary, add or remove the number of the Ted Baker Group's stores subject to the Sale at any time until and including May 17, 2024.

24. Further, retaining the services of the Consultant is a vital element of maximizing recoveries obtained pursuant to the realization process. Retaining the Consultant will produce better results than attempting to realize on the Merchandise and FF&E without the assistance of the Consultant,²⁷ as the Consultant's services are necessary in order to facilitate a seamless and efficient large-scale store closing process and maximize the value of the saleable Merchandise.²⁸

²⁶ Second Adams Affidavit at para. 25.

²⁷ Second Adams Affidavit at para. 29.

²⁸ Second Adams Affidavit at para. 24.

(b) The Process to Select the Consultant was Reasonable

25. The reasonableness of the process used to solicit potential consultants is an important aspect of the court's evaluation of a proposed realization process.²⁹ For the reasons set out below, the process to select the Consultant was fair and reasonable.

26. The Consultant was selected following a competitive bidding process. As discussed above, the Monitor solicited three potential liquidators, each of whom executed a non-disclosure agreement and submitted bids in accordance with the bidding instructions received from the Monitor. The Consultant was selected following careful review and discussion of the bids between the Applicants, the Monitor, and the Interim Lender.³⁰ This process accords with similar processes which have been approved by this Court in other retail insolvencies.³¹

27. Further, the selection of the Consultant to assist in the realization process was based on both the Consultant's in-depth expertise and knowledge of the Applicants' business, merchandise, and store operations, and its extensive experience conducting retail liquidations and other value-maximizing store realization processes. The Consultant's experience includes a number of high-profile retail insolvencies, including *Target Canada*, *Sears Canada*, *American Apparel Canada*, *BCBG Canada*, *Express Fashion Apparel*, *Forever 21*, *Bed Bath & Beyond*, *Mastermind Toys* and *Nordstrom Canada* in Canada, and *David's Bridal*, *Soft Surrounding/Triad*, *Esco* and *Party City* in the US.³²

²⁹ See, i.e., *Mastermind Toys Endorsement*, at para. 16; *Nordstrom Endorsement*, at para. 9; *Target Endorsement*, at para. 2; *Sears Canada*, at para. 6.

³⁰ Second Adams Affidavit at para. 23.

³¹ See, i.e., *Mastermind Toys Endorsement*, at para. 16; *Target Endorsement*, at para. 2.

³² Second Adams Affidavit at para. 24. The experience of the proposed liquidator is an important consideration: see, i.e., *Mastermind Toys Endorsement*, at para. 16.

28. Finally, the Monitor has been consulted and/or directly involved throughout the process and is supportive of the engagement of the Consultant.³³ Owing to the Consultant's attractive bid and extensive qualifications, the Applicants, in consultation with the Monitor, have reasonably concluded that the Consultant is qualified and capable of performing the required tasks in a value maximizing manner.³⁴

(c) The Consulting Agreement and Sales Guidelines are Fair and Reasonable

29. The manner in which the Sale will be conducted pursuant to the Consulting Agreement and the Sale Guidelines is fair and reasonable in the circumstances, and has been designed by the Applicants and the Consultant, in consultation with the Monitor, in order to maximize recovery on the Merchandise and the FF&E for the benefit of stakeholders generally.³⁵

30. The terms of the Consulting Agreement, Sale Guidelines and Sale Approval Order are generally similar to and typical of agreements and orders for inventory realization sales that have been negotiated and/or approved in a number of other retail insolvencies, including *Nordstrom Canada*, *Mastermind Toys*, and *Bed Bath & Beyond Canada*.³⁶ Consistent with the differing circumstances of each case, each agreement and order inevitably varies to some degree to reflect the particular circumstances. This is consistent with the flexibility provided by the CCAA to make orders that are appropriate to the needs of the specific restructuring.

³³ First Report of the Monitor dated May 2, 2024, at para. 4.5 [First Report].

³⁴ Second Adams Affidavit at para. 24.

³⁵ Second Adams Affidavit at para. 29.

³⁶ See *Nordstrom Order* and *BBB Order*, respectively. See *Mastermind Toys Endorsement*, at para. 17, for an example of the court taking comfort in a proposed sale process' similarity to those approved in *Nordstrom* and *Bed Bath & Beyond Canada*.

31. Among other things:

- (a) The realization process envisions a flexible structure, whereby the Sale will initially occur only at Stores listed in the Consulting Agreement, with the Applicants having the power to add or remove individual Stores from the Store List during the Sale Term. While the Applicants currently intend to conduct the Sales Process in all Stores, this flexible approach will allow the Applicants to adjust to changing circumstances, such as a going concern third-party transaction for some or all of the Applicants' business or assets, and the parties have agreed to work cooperatively to modify the transaction in such circumstances.³⁷ Realization processes containing similar provisions have been approved in the past, on the grounds that they provided the debtors with additional flexibility.³⁸
- (b) The fee structure outlined in the Consulting Agreement is designed to align the Consultant's compensation with stakeholder outcomes and is supported by the Monitor as reasonable in the circumstances.³⁹ In particular, no fees will be earned by the Consultant on any sales to ABG or on merchandise that is located at any concession store location, unless and until such concession store location becomes an Added Concession Store.⁴⁰
- (c) As discussed above, the Consultant has the right under the Consulting Agreement to supplement the Merchandise with the Additional Consultant Goods, subject to an obligation to pay the Merchant 5% of gross proceeds. The augmentation of the

³⁷ Second Adams Affidavit at paras. 26I and 28.

³⁸ *Mastermind Toys Endorsement* at para. 16.

³⁹ First Report at para. 4.9(v).

⁴⁰ Second Adams Affidavit at para. 26(f).

Merchandise in this manner will contribute to the success of the Realization Process by encouraging increased foot traffic and ensuring that consumers find the mix and quality of goods they expect. In addition, payments received from the Consultant in respect of the Additional Consultant Goods will directly enhance the Applicants' recoveries.⁴¹

32. Further, the Sale Guidelines contain a number of other provisions designed to ensure that the Sale takes place in an orderly, respectful fashion. These guidelines have been adapted to the circumstances of this case based on similar sale guidelines approved in other retail insolvencies; in particular, the Canadian Sale Guidelines are substantially similar to those which were approved in *Nordstrom Canada* and *Mastermind Toys*, while the US Sale Guidelines are substantially similar to those which were approved in *David's Bridal* and *Bed Bath & Beyond*.⁴²

33. In particular, the Canadian Sale Guidelines require that the Sale be conducted in accordance with the terms of the leases for the Stores (except as set out in the Canadian Sales Guidelines), and the Canadian Sale Guidelines may be amended on a store-by-store basis with the consent of the parties and the applicable Landlord, in consultation with the Monitor. Among other things, the Canadian Sale Guidelines preclude the Merchant from engaging in any auctions of Merchandise or FF&E at the Stores, and require the Sale to be conducted during normal hours of operation.⁴³ All display and hanging signs used by the Consultant in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. The Consultant shall have the right, notwithstanding anything to the contrary contained in the Leases,

⁴¹ Second Adams Affidavit at para. 27.

⁴² Second Adams Affidavit at paras. 31-32.

⁴³ For a full description of the Sale Guidelines, see Second Adams Affidavit at para. 30.

to advertise the Sale as an “everything on sale”, “everything must go”, “store closing” and/or similar theme sale.

(d) The Monitor was Consulted and Supports the Realization Process

34. The involvement and support of the Monitor is an important consideration in determining whether to approve a proposed sale process.⁴⁴ The Monitor was closely involved in the process by which the Consultant was chosen, and the realization process, as set out in the Consulting Agreement and the Sale Guidelines, was designed in close consultation with the Monitor.⁴⁵ The Monitor supports the proposed Realization Process Approval Order, and believes that it will maximize net realizations during these CCAA proceedings.⁴⁶

35. For the foregoing reasons, this Court should approve the Consulting Agreement and the Sale Guidelines.

B. The KERP Should be Approved

36. The Applicants, in consultation with the Monitor, have developed a KERP in order to incentivize the retention of eight key Canadian and US employees who have been identified as critical to a successful realization process and orderly wind-down. It is proposed that a KERP Charge of be granted to secure amounts payable under the KERP up to a maximum of USD \$250,000, which will rank behind the Administration Charge, the Interim Lender’s Charge and the DIP Lender’s Charge, the security granted by the Applicants with respect to the Existing Credit

⁴⁴ See, i.e., *Mastermind Toys Endorsement*, at para. 16; *Nordstrom Endorsement*, at para. 9; *Target Endorsement*, at para. 2.

⁴⁵ Second Adams Affidavit at paras. 23-24, 29.

⁴⁶ First Report at para. 4.9.

Facility (as defined below) and the Directors' Charge, but in priority to all other security interests.⁴⁷

37. The discretion of a CCAA court to approve a KERP and a KERP Charge is well established,⁴⁸ and derives from the court's power under s. 11 of the CCAA to make any order it considers appropriate in a CCAA proceeding.⁴⁹ KERPs have frequently been approved in the context of retail insolvencies.⁵⁰

38. The factors considered in granting a KERP vary from case to case; however, some factors are generally present.⁵¹ The following factors support granting the proposed KERP:

- (a) The KERP is necessary and the KERP Participants are crucial to a successful realization process.⁵² The KERP Participants are key to the execution of an orderly wind-down and their participation will assist in maximizing realizations for the benefit of all stakeholders,⁵³ and the Monitor supports both the KERP and the KERP Charge.⁵⁴
- (b) The process of designing the KERP was fair and objectively reasonable.⁵⁵ The KERP was developed in consultation with the Monitor, who approves of the

⁴⁷ Second Adams Affidavit at paras. 35-36, 39.

⁴⁸ *Grant Forest Products (Re)*, [2009 CanLII 42046](#) (ONSC) at para. 14 [*Grant Forest Products*]; *Cinram International (Re)*, [2012 ONSC 3767](#) at para. 91 [*Cinram*].

⁴⁹ *Mountain Equipment Co-operative (Re)*, [2020 BCSC 1586](#) at para. 66 [*MEC*].

⁵⁰ See, i.e., *BBB Endorsement* at para. 12; *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#) at para. 9; *Target Canada Co. (Re)*, [2015 ONSC 303](#), at para. 59

⁵¹ *Walter Energy Canada Holdings Inc. (Re)*, [2016 BCSC 107](#) at para. 58 [*Walter Energy*], citing *Grant Forest Products*.

⁵² *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#) at para. 30 [*Aralez*].

⁵³ Second Adams Affidavit at para. 36.

⁵⁴ First Report at paras. 7.6, 7.9.

⁵⁵ *Aralez* at para. 30; Second Adams Affidavit at para. 36.

proposed KERP. CCAA Courts generally place “a great deal of confidence” in the Monitor’s support for a KERP.⁵⁶

- (c) The design of the KERP is fair and contains proper safeguards. An employee is only eligible for the KERP if the Applicants, in consultation with the Monitor, conclude that the employee is critical to a successful CCAA proceeding. The KERP is a one-time retention bonus calculated based on an employee’s base pay to ensure that KERP payments are commensurate with an employee’s responsibility and duties. Further, the KERP is only payable if the employee remains employed until their services are no longer needed.⁵⁷

39. Courts will defer to the business judgment of a debtor regarding the scope and quantum of a KERP where the process for designing the KERP has been fair and objectively reasonable and where the end result is also reasonable.⁵⁸ On this basis, and on the basis of the factors identified above, this Court should approve the KERP and grant the associated KERP Charge.

C. A Sealing Order Should be Granted in Respect of the KERP

40. Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, the Applicants request that the KERP schedule be treated as confidential and sealed, and not form part of the public record. The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test considers the following factors:⁵⁹

- (a) whether court openness poses a serious risk to an important public interest;

⁵⁶ *Grant Forest Products* at paras. 18-19.

⁵⁷ Second Adams Affidavit at paras. 36-38.

⁵⁸ *Grant Forest Products* at paras. 17-18.

⁵⁹ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para. 38.

- (b) whether the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measure will not prevent this risk; and
- (c) whether, as a matter of proportionality, the benefits of the order outweigh its negative effects.

41. Each of these considerations supports the proposed sealing order:

- (a) **Public Interest:** The court has found that there is a public interest both in maximizing recovery in an insolvency, and in protecting employees from the disclosure of private and personal information.⁶⁰ CCAA courts have accordingly approved sealing orders in respect of a KERP where the order is required to protect commercially sensitive and confidential information relating to the employees of a debtor.⁶¹ The KERP schedule contains precisely this type of commercially sensitive and personal information regarding the Applicants key employees, including identifiable personal information and commercially sensitive compensation information,⁶² which, if disclosed, could harm both the privacy interests of the KERP participants and the Applicants' commercial interests.
- (b) **Lack of a Reasonable Alternative:** There is no reasonable alternative to the sealing order which would protect the commercial and privacy interests of the Applicants and the individual KERP participants.

⁶⁰ *Body Shop Canada Ltd. (Re)*, (April 5, 2024), Ont. S.C.J. [Commercial List], Court File No. BK-24-03050417-0031 ([Endorsement of Justice Osborne](#)), at para. 28 [*Body Shop*]; *Danier Leather Inc., Re*, [2016 ONSC 1044](#) at para. 83 [*Danier Leather*].

⁶¹ See, i.e., *Mastermind Toys Endorsement* at paras. 35-36; *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#) at paras. 23-27; *Danier Leather*, at paras. 83-84; *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114](#) (ON SC) at paras. 51-52. See also *Body Shop*, at paras. 27-30, in which a sealing order in respect of a KERP was granted in a proceeding under the *Bankruptcy and Insolvency Act*.

⁶² Second Adams Affidavit at para. 40.

- (c) **Proportionality:** CCAA courts have approved sealing orders where the information over which confidentiality is sought to be maintained is “discrete, proportional, and limited.”⁶³ The proposed sealing order fulfils these criteria, as it applies only to the KERP. The public disclosure of the information contained in the KERP would not assist the Applicants’ stakeholders in any way, and the benefits of the proposed sealing order – i.e., the protection of the privacy interests of the KERP participants – therefore far outweigh any negative effects.

42. Finally, the proposed sealing order is supported and recommended by the Monitor, who has attached the proposed KERP schedule as a confidential supplement to its first report.⁶⁴ CCAA courts have referred to the support of the monitor as a relevant factor in determining whether the *Sherman Estate* test is met.⁶⁵

D. The DIP Should be Approved

43. Pursuant to the Initial Order, Ted Baker Canada and Ted Baker Limited were granted interim funding from CIBC (in which capacity, the “**Interim Lender**”) under an existing credit facility between Ted Baker Canada and Ted Baker Limited, as borrowers, and CIBC as lender (the “**Existing Credit Facility**”), during the initial Stay Period (the “**Interim Borrowings**”). The Interim Borrowings are secured by a Court-ordered charge (the “**Interim Lender’s Charge**”) on all of the present and present assets, property, and undertaking of the Applicants (the “**Property**”).⁶⁶

⁶³ *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, [2023 ONSC 753](#), at para. 63 [*Original Traders*].

⁶⁴ First Report at para. 7.7.

⁶⁵ *Original Traders*, at paras. 60, 64.

⁶⁶ Second Adams Affidavit at para. 41.

44. Since the granting of the Initial Order, CIBC (in which capacity, the “**DIP Lender**”) has agreed to provide additional funding to Ted Baker Canada and Ted Baker Limited, as Borrowers during these CCAA proceedings, and Fashion Canada and Fashion US, as guarantors, under a senior secured, super priority, debtor-in-possession, revolving credit facility (the “**DIP Facility**”) on the terms set out in the term sheet agreed to between the Borrowers, Fashion Canada and Fashion Services as Guarantors, and the DIP Lender (the “**DIP Term Sheet**”), to a maximum principal amount of USD \$28 million.⁶⁷

45. Pursuant to s 11.2 of the CCAA, the Applicants seek an interim financing charge to secure the DIP Facility (the “**DIP Lender’s Charge**”). The DIP Lender’s Charge is proposed to be secured by the Property, and to rank behind the Administration Charge and Permitted Priority Liens as defined by the ARIO, and ahead of all other security interests, charges and liens. Under the terms of the DIP Term Sheet, the Applicants’ post-filings receipts will be applied to repay in the following order: (i) first, the Applicants’ Obligations under the Existing Credit Facility until the remaining principal balance is \$5 million; (ii) second, the DIP Financing Obligations, until repaid in full, and (iii) lastly, the remaining balance of the Obligations under the Existing Credit Facility until paid in full.⁶⁸

46. Section 11.2(1) of the CCAA provides the court with the authority to grant an interim financing charge “in an amount the court considers appropriate,” subject to the limitation that the security or charge may not secure an obligation that exists before the order is made. The emphasis under s. 11.2(1) is on ensuring that the proposed financing is consistent with the pre-filing status quo, such that it upholds the relative priority of each secured creditor.⁶⁹ The proposed DIP

⁶⁷ Second Adams Affidavit at paras. 42, 44.

⁶⁸ Second Adams Affidavit at para. 44.

⁶⁹ *BZAM Ltd. (Re)*, (February 28, 2024), Ont S.C.J. [Commercial List], Court File No. CV- 24-00715773-00CL ([Endorsement of Justice Osborne](#)) at para. 56 [*BZAM*].

Lender's Charge satisfies these conditions, as it is sized appropriately to the Applicants' needs, does not operate to secure any of the DIP Lender's pre-filing obligations, and is consistent with pre-filing priorities. Numerous CCAA courts have approved interim financing arrangements in which post-filing receipts are applied to pre-filing debts of the interim lender (so called "creeping roll-ups") and have found that arrangements of this type are in accordance with the Court's jurisdiction under s. 11.2(1).⁷⁰

47. Section 11.2(4) of the CCAA lists the factors to be considered by the court in deciding whether to approve interim financing and grant an interim financing charge. These factors favour the requested relief. The DIP Facility is expected to provide the Applicants with sufficient liquidity to continue their business operations during these CCAA proceedings while completing the Sale for the benefit of the Applicants and their shareholders.⁷¹ The DIP Lender has indicated that it is not prepared to advance funds without the security of the DIP Lender's Charge, including the proposed priority thereof,⁷² and the Monitor supports the approval of the DIP Term Sheet and the granting of the DIP Lender's Charge.⁷³

E. The Administration Charge and Directors' Charge Should be Increased

48. The Initial Order approved the Administration Charge in the amount of USD \$750,000. The Applicants now seek to increase the Administration Charge to USD \$1.5 million, with the concurrence of the Monitor. Similarly, the Initial Order approved the Directors' Charge in the

⁷⁰ See, i.e., *MEC*, at paras. 47-51; *Performance Sports Group Ltd. (Re)*, [2016 ONSC 6800](#) at para. 22; *Comark Inc. (Re)*, [2015 ONSC 2010](#) at paras. 17-29; *BZAM*, at paras. 56, 61-63.

⁷¹ Second Adams Affidavit at para. 43.

⁷² Second Adams Affidavit at para. 45.

⁷³ Second Adams Affidavit at para. 46; First Report, at para. 5.5.

amount of USD \$2.5 million which the Applicants seek to increase to USD \$5 million, with the concurrence of the Monitor.⁷⁴

49. The Court has discretion to grant and increase these charges in an amount that the Court considers appropriate pursuant to sections 11.51 and 11.52 of the CCAA.⁷⁵ The DIP Lender does not object to either requested increase.⁷⁶

F. The Stay Period Should be Extended

50. Pursuant to section 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence. There is no statutory time limit on how long a stay of proceedings can be extended.

51. The Applicants, as supported by the Monitor, ask that the Stay Period be extended up to and including August 2, 2024, to coincide with the anticipated conclusion of the Sale. The proposed Stay extension will, among other things, (i) permit the Applicants, with the assistance of the Consultant and under the oversight of the Monitor, to conduct the Sale in accordance with the Consulting Agreement and Sale Guidelines with a view to maximizing the value of the Applicants' Merchandise and FF&E; and (ii) provide the Applicants with additional time and stability necessary to continue discussions in respect of a potential going concern sale transaction and, if successful in this regard, return to Court to seek approval of such transaction. The Applicants have

⁷⁴ Second Adams Affidavit at paras. 47-48.

⁷⁵ See Applicants' Initial Order Factum at paras. 52-55.

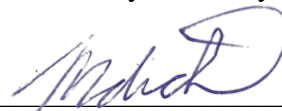
⁷⁶ Second Adams Affidavit at paras. 47-48

acted in good faith and with due diligence in these CCAA proceedings, including by giving notice of these CCAA proceedings to their stakeholders.⁷⁷

PART IV - NATURE OF THE ORDER SOUGHT

52. The Applicants therefore request an Amended and Restated Initial Order and Realization Process Approval Order substantially in the form of the draft Orders attached as Tabs 3 and 5, respectively, to the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2024:



OSLER, HOSKIN & HARCOURT, LLP per Marleigh Dick
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Lawyers for the Applicants

TO: THE ATTACHED SERVICE LIST

⁷⁷ Second Adam Affidavit at paras. 41-43.

SCHEDULE “A”: LIST OF AUTHORITIES

1. *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#)
2. *Bed Bath & Beyond Canada Ltd. (Re)*, (February 21, 2023), Ont S.C.J. [Commercial List], Court File No. CV- 23-00694493-00CL ([Sale Approval Order](#))
3. *Bed Bath & Beyond Canada Ltd. (Re)*, [2023 ONSC 1230](#)
4. *Body Shop Canada Ltd. (Re)*, (April 5, 2024), Ont. S.C.J. [Commercial List], Court File No. BK-24-03050417-0031 ([Endorsement of Justice Osborne](#))
5. *Brainhunter Inc (Re)*, [2009 CanLII 72333](#) (ONSC)
6. *BZAM Ltd. (Re)*, (February 28, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-00715773-00CL ([Endorsement of Justice Osborne](#))
7. *Comark Inc. (Re)*, [2015 ONSC 2010](#)
8. *Cinram International (Re)*, [2012 ONSC 3767](#)
9. *Forever XXI ULC (Re)*, (October 7, 2017), Ont S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Sale Approval Order](#))
10. *Grant Forest Products (Re)*, [2009 CanLII 42046](#) (ONSC)
11. *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, [2013 ONSC 5933](#)
12. *Mastermind GP Inc. (Re)*, (November 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00710259-00CL ([Liquidation Sale Approval Order](#))
13. *Mastermind GP Inc. (Re)*, (November 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00710259-00CL ([Endorsement of Justice Steele](#))
14. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#)
15. *Nordstrom Canada Retail Inc.*, [2023 ONSC 1631](#)
16. *Nordstrom Canada Retail Inc. (Re)*, (March 20, 2023), Ont S.C.J. [Commercial List], Court File No. CV- 23-00695619-00CL ([Liquidation Sale Approval Order](#))
17. *Nordstrom Canada Retail Inc. (Re)*, [2023 ONSC 1814](#)
18. *Nortel Networks Corp (Re)*, [2009 CanLII 39492](#) (ONSC)
19. *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#)
20. *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, [2023 ONSC 753](#)
21. *Performance Sports Group Ltd. (Re)*, [2016 ONSC 6800](#)

22. *Sears Canda Inc. (Re)*, (July 18, 2017), Ont S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([Liquidation Sale Approval Order](#))
23. *Sears Canada Inc. (Re)*, [2017 ONSC 6235](#)
24. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
25. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
26. *Target Canada Co. (Re)* (February 4, 2015), Ont S.C.J. [Commercial List], Court File No. CV-15-10832-00CL ([Approval Order – Agency Agreement](#))
27. *Target Canada Co. (Re)*, [2015 ONSC 846](#)
28. *Walter Energy Canada Holdings Inc. (Re)*, [2016 BCSC 107](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C., 1985, c. C-36, as amended

General power of court

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

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[...]

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

[...]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[...]

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

COURTS OF JUSTICE ACT

R.S.O. 1990, c. C.43, as amended

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985,
C. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
TED BAKER CANADA INC., TED BAKER LIMITED, OSL FASHION SERVICES CANADA
INC., AND OSL FASHION SERVICES, INC.**

Court File No: CV-24-00718993-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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