



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-24-718993-00CL DATE: April 26, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: **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.**

BEFORE JUSTICE: **W.D. BLACK**

**PARTICIPANT INFORMATION**

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## **ENDORSEMENT OF JUSTICE BLACK:**

### **Overview**

- [1] This is an application by 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”, and together with Fashion Canada, “Fashion”, and collectively, the “Applicants”), seeking an initial order (the “Initial Order”) and related relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”). The factual references in this endorsement come from the materials filed in support of the application, and I will at times use defined terms from those materials.
- [2] The Applicants operate a clothing business, with retail, wholesale and e-commerce components, under the name Ted Baker in Canada and the U.S., and under the Brooks Brothers and Lucky Brand banners in Canada.
- [3] In March of 2023, Fashion Canada and Fashion Services acquired from No Ordinary Design Label (“NODL”), a subsidiary of Authentic Brands Group (“ABG”), the equity interests of Ted Baker Canada and Ted Baker Limited.
- [4] Concurrently, Ted Baker Canada and Ted Baker Limited entered into a license agreement with NODL in which NODL granted to them an exclusive license to use Ted Baker marks and sell Ted Baker branded merchandise in Canada and the U.S.
- [5] In August of 2023, Ted Baker Canada acquired certain assets in Canada relating to the Lucky Brand and Brooks Brothers brands, including licensed inventory and an exclusive license to use the Lucky Brand and Brooks Brothers marks and to sell licensed merchandise in Canada.

### **Summary of Financial Difficulties**

- [6] Since commencing operations in March of 2023, the Applicants have experienced operational and financial difficulties, and their consolidated business has failed to generate positive cash flows.
- [7] The Applicants attribute these difficulties to a combination of factors. Their evidence is that these include a failure of certain of ABG’s operating partners to make timely payments in respect of Ted Baker NA’s supply chain, impacting Ted Baker NA’s inventory of merchandise, and, as a result of NODL’s insolvency in the UK, suppliers of Ted Baker NA accelerating payment terms.
- [8] The Applicants also explain that they have experienced problems and delays resulting from the tech transition of the Ted Baker NA business from NODL to the Applicants, which have further disrupted the Applicants’ operations and exacerbated the supply chain issues. In addition, the transition of the Ted Baker website URL to “tedbaker.us” is said to have significantly disrupted sales, and relationships with the Applicants’ online customer base.
- [9] The Applicants have made efforts to reduce costs and improve sales performance, but in recent months the Applicants’ financial position has continued to decline. The Applicants are currently in an over advance position on the borrowing base under their Existing Credit Agreement (as defined in the Applicants’ materials), and in significant arrears with a number of key vendors.

- [10] The CIBC, the Applicants' Senior Lender, has recently advised the Applicants that it will not permit any further draws under the Existing Credit Facility outside of a CCAA proceeding.
- [11] The Applicants have also recently received notices of default under certain license agreements as a result of missed royalty payments which, if not cured within five days, may entitle ABG to terminate those agreements. Efforts to negotiate a resolution of these issues with ABG have not been successful.

### **Relevant Details of the Applicants' Operation**

- [12] All or substantially all of the Applicants' key operational and strategic corporate decision-making is performed by and through Fashion's head office in Mississauga, Ontario. This includes executive, M&A and strategic corporate functions, and the approval of material financial decisions for all of the Applicants (while Ted Baker Limited has its own executive leadership team in New York, this team ultimately reports to Canadian employees based in Mississauga).
- [13] Leadership for IT functions are also performed in Mississauga (by an affiliate based out of the head office in Mississauga ("Retail")).
- [14] As of April 19, 2024, Ted Baker Canada employed 58 full-time and 72 part-time employees in Canada, and Ted Baker Limited employed 251 full-time and 97 part-time employees in the U.S. In addition, 19 full-time and 43 part-time employees service the Lucky Brand business, and 32 full-time and 52 part-time employees work for the Brooks Brothers business (all of whom are based in Canada and employed by Ted Baker Canada).
- [15] With respect to their retail operations, the Applicants operate 14 full-line, and 11 outlet stores in Canada, along with 24 full-line and 10 outlet stores in the U.S.
- [16] In terms of wholesale, Ted Baker Canada and Ted Baker Limited are parties to agreements with certain wholesale customers, including major department stores (such as Hudson's Bay, Bloomingdales and Nordstroms), pursuant to which Ted Baker NA sells branded products in bulk.
- [17] In addition, Ted Baker Canada operates six concession locations inside Hudson's Bay in Canada, and Ted Baker Limited operates 31 concession locations inside Bloomingdales stores, and one concession inside a Macy's store in the U.S., subject, respectively, to specific agreements with the relevant department store companies.
- [18] The Ted Baker e-commerce business is conducted through the tedbaker.ca URL in Canada, and the tedbaker.us URL in the U.S.
- [19] All of the Applicants' full-line and outlet retail operations are conducted in leased facilities, with various third-party landlords.
- [20] Sourcing and purchasing of merchandise for both Ted Baker Canada and Ted Baker Limited is centralized, and conducted through Ted Baker NA's team in the New York office. All purchase orders are submitted to PDS Limited ("PDS"), an operating partner of the Applicants that is globally responsible for design, procurement and maintaining relationships with suppliers and manufacturers for the Ted Baker brand.

- [21] Ted Baker NA also has a centralized distribution system. Once manufactured, goods are delivered to Ted Baker NA's primary distribution center in Atlanta, which is managed and operated by Future Forwarding Company, ("Future Forwarding") pursuant to a Warehousing, Storage and Logistics Agreement.
- [22] For the Brooks Brothers and Lucky Brand businesses, all or most of the merchandise is sourced from SPARC Group LLC, and distributed through a third-party logistics provider.

### **Details of Indebtedness**

- [23] Ted Baker Canada and Ted Baker Limited, as borrowers, and Fashion Canada and Fashion Services as guarantors are parties to the Existing Credit Agreement with CIBC. Pursuant to the Existing Credit Agreement, CIBC has provided revolving loans to the borrowers of up to U.S. \$36.5 million. As of April 23, 2024, the outstanding balance under the Existing Credit Facility is \$28,789,728.37.
- [24] Under the terms of the Existing Credit Agreement, the borrowers and guarantors executed a number of security instruments in favour of CIBC, such that the relevant obligations are secured against a continuing security interest in all their present and after-acquired personal property.
- [25] Fashion Canada is also indebted to Retail under a secured promissory note, pursuant to which, on demand, Fashion Canada has promised to pay U.S. \$10 million, secured by a security interest in all of Fashion Canada's present and after-acquired undertakings and property. This debt is, by agreement, subordinated and postponed to the indebtedness of the Ted Baker borrowers to CIBC.

### **Decision to Seek CCAA Protection**

- [26] In the circumstances summarized above, absent CCAA protection, the Applicants risk critical vendors taking potentially damaging enforcement steps, including possible termination of agreements that are critical to the Applicants' continued operation. As a result, after consulting with experts (including KPMG as financial advisor, and Alvarez & Marsal Canada Inc. ("A&M"), the proposed monitor, and in light of the imminent expiry of the cure period under the License Agreements and the word from CIBC that it will not permit further draws under the Existing Credit Facility outside of a CCAA proceeding, the Applicants have determined that commencing these CCAA proceedings is in the best interests of the Applicants and their stakeholders, and that the stay of proceedings is the only practical means of providing the breathing room required to determine appropriate next steps, including potentially a liquidation and orderly wind-down of their operations, or other alternatives to maximize value.

### **Consideration of Factors Relative to an Initial Order**

- [27] The CCAA applies to a "debtor company" if the total claims against it exceed \$5 million. The Applicants are insolvent, and the claims against them, collectively, substantially exceed the \$5 million statutory threshold. As such, the Applicants meet the debtor company definition (including under the expanded concept of insolvency adopted by this Court in *Stelco Inc. (Re) 2004 CarswellOnt 1211*).
- [28] Under section 9 of the CCAA, a debtor company may bring an application under the CCAA in the province within which its head office or chief place of business is situated. The Applicants maintain their head office and much of their business activities in Ontario. I am satisfied that this court is the appropriate forum. Canadian courts have accepted that a multinational enterprise such as the Applicants' business must be restructured as a global unit, even where operating units are located in foreign jurisdictions (see *Chalice Brands Ltd. (Re)*, 2023 ONSC 3174).

- [29] The court may grant a stay of proceedings of up to 10 days on an initial application, provided that a stay is appropriate and that the Applicant has acted in good faith and with due diligence. This threshold for an initial stay is relatively low, and a debtor company need only satisfy the court that a stay would “usefully further” its efforts to reorganize (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60).
- [30] I am satisfied that the stay of proceedings sought by the Applicants is necessary for the Applicants to determine appropriate next steps. As noted by Morawetz C.J. in *Lydian International Limited (Re)*, 2019 ONSC 7473, the initial stay period preserves the status quo and allows for operations to be stabilized and for negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.
- [31] CIBC, counsel for which attended at this hearing, is prepared to permit Ted Baker Canada and Ted Baker Limited to continue to borrow under the Existing Credit Facility during the initial stay period, up to a maximum of \$7 million, subject to the proviso that draw requests must have the consent of CIBC.
- [32] The Applicants seek and I approve an interim financing charge to secure the interim borrowings, to be secured by all of the present and future assets, property and undertaking of the Applicants, to rank behind the Administrative Charge and ahead of all other security interests, charges and liens.
- [33] The Applicants’ cash flow projections demonstrate the clear need for the interim financing, in order to provide a measure of stability and to fund operations during the initial stay period, and the evidence before me is that the interim borrowings are expected to provide sufficient liquidity to allow the Applicants to continue their business operations during this initial stay. The Interim Lender’s Charge, in turn is required as a condition of CIBC advancing the interim funding.

#### **Authorization for Payment of Pre-Filing Obligations**

- [34] The Applicants also seek authorization, with the consent of the Monitor A&M and CIBC, to make payments of pre-filing debts to certain critical third parties, including, critically, Future Forwarding and SDR (the entity that provides third-party logistics services to Ted Baker Canada in respect of the Brooks Brothers and Lucky Brand businesses). The circumstances in which this authorization is sought here meet the factors outlined in *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944, and I grant the authorization sought to make these payments.
- [35] Given that the Applicants have operations, assets and important relationships in the U.S., CIBC requires, as another pre-condition to permitting interim draws, that the relief contemplated under the initial order here be sought and recognized contemporaneously in the U.S. I was advised that, assuming I issue the order sought, Ted Baker Canada intends to initiate a proceeding under Chapter 15 of Title 11 of the Bankruptcy Code to seek an order to recognize and enforce the CCAA proceedings in the U.S.
- [36] The Applicants therefore seek, under s. 56 of the CCAA, an order allowing Ted Baker Canada to act as a foreign representative in respect of this proceeding for the purpose of having orders issued in the course of this proceeding recognized in jurisdictions outside of Canada, including in particular in the Chapter 15 proceedings. I find this to be appropriate, and I grant this relief.
- [37] I also grant, pursuant to s. 11.52 of the CCAA, the Administrative Charge in favour of the Monitor in the amount of \$750,000.00. This charge was developed in consultation with the Monitor and is to be secured

by the Property (as defined) and to have first priority over all other charges and security interests. The Administrative Charge satisfies the factors originally established by *Pepall J. in Canwest Publishing (Re)* 2010 ONSC 222.

[38] The Applicants also seek, and I grant, a directors and officers charge of \$2.5 million for the initial stay period. This charge is also to be secured by the Property, and to rank behind the Administrative Charge, the interim lender's charge and the Existing Facility. I am satisfied that the continued involvement of the directors and officers in this proceeding requires the directors and officers charge, and that a successful restructuring of the Applicants will only be possible with the continued participation of their directors, officers, management and employees.

**Conclusion: Initial Order Granted**

[39] Accordingly, I grant the Order sought.

**Comeback Hearing on May 3, 2024**

[40] The comeback hearing is scheduled before me on May 3, 2024 at 9:30 a.m., for 90 minutes.

A handwritten signature in blue ink, appearing to read 'W.D. Black J.', is written over a horizontal line.

**W.D. BLACK J.**

**DATE: April 29, 2024**