

**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

July 31, 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**”), OSL Fashion Services Canada Inc., and OSL Fashion Services, Inc. (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. On May 3, 2024, the Court granted an Amended and Restated Initial Order (the “**ARIO**”), which, among other things, extended the stay of proceedings granted pursuant to the Initial Order to August 2, 2024. On the same day, the Court also granted a Realization Process Approval Order (the “**Realization Process Approval Order**”), which, among other things, approved sale guidelines for the orderly realization of Ted Baker’s Merchandise and FF&E (the “**Sale**”). The Applicants, working with the Monitor and with the assistance of the Consultant (as defined below), have significantly advanced these CCAA proceedings since that time, including by commencing and conducting the Sale. The Sale is now almost entirely complete, and all but a small group of Ted Baker’s remaining corporate and store-level employees have been provided with their termination dates and/or a termination letter.

3. On this motion, the Applicants seek an order (the “**Stay Extension Order**”), *inter alia*:

- (a) extending the Stay Period (as defined below) to January 31, 2025; and
- (b) declaring that, pursuant to ss. 5(1)(b)(iv) and 5(5) of the *Wage Earner Protection Program Act* (“**WEPPA**”),² the Applicants meet the criteria prescribed by s. 3.2 of

¹ R.S.C. 1985, c. C-36, as amended.

² SC 2005, C47, s. 1, as amended.

the *Wage Earner Protection Program Regulations* (“**WEPP Regulation**”)³ and that their former employees in Canada are eligible to receive payments under and in accordance with WEPPA (“**WEPP Payments**”) following the termination of their employment.

4. The Stay Extension Order is necessary in the circumstances and should be granted by the Court. The extension of the Stay Period is necessary in order to complete the Sale, vacate the Applicants’ retail stores in Canada and the US, and implement various steps necessary for the orderly wind-down of the Applicants’ business, while the requested declaratory relief is necessary to help terminated employees access WEPP Payments in a timely manner.

PART II - SUMMARY OF FACTS

5. The facts are more fully set out in the Affidavit of Antoine Adams sworn July 26, 2024.⁴

A. Background and Update on the CCAA Proceedings

6. On April 24, 2024, the 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 in an amount not to exceed \$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 various customary charges; and (vi) authorized Ted Baker Canada to act as

³ SOR/2008-222, as amended.

⁴ Affidavit of Antoine Adams, sworn July 26, 2024 [Third Adams Affidavit]. The Applicants further rely on the facts as set out in the Affidavit of Antoine Adams, sworn April 24/May 1, 2024. Capitalized terms not otherwise defined have the same meaning as in the Third Adams Affidavit. Dollar amounts are given in US dollars unless otherwise specified.

foreign representative (the “**Foreign Representative**”) of the Applicants and to apply for foreign recognition and approval of these CCAA proceedings.⁵

7. On May 3, 2024, the Court granted the ARIO, which, among other things: (i) extended the Stay Period to August 2, 2024; (ii) approved a key employee retention plan (the “**KERP**”), and granted a Court-ordered charge as security for payments under the KERP and a sealing order in relation to the KERP; (iii) authorized the Applicants to enter into the DIP Term Sheet with CIBC, as lender, and granted the DIP Lender’s Charge; and (iv) increased the amounts of various charges.⁶

8. On the same day, the Court also granted the Realization Process Approval Order, which, among other things, (i) approved a consulting agreement between Ted Baker Canada and Ted Baker Limited (together, the “**Merchant**”) and Gordon Brothers Canada ULC and Gordon Brothers Retail Partners, LLC (together, the “**Consultant**”) dated as of April 30, 2024 (as may be amended and restated in accordance with the terms of the Realization Process Approval Order, the “**Consulting Agreement**”); (ii) approved the Sale Guidelines for the orderly realization of the Merchandise and FF&E at concession locations in Canada or the United States or at the Merchant’s Stores and as located at the Warehouses through sales in accordance with the terms of the Sale Guidelines (as defined above, the “**Sale**”); and (iii) authorized 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.⁷

9. Immediately following the granting of the Initial Order, the Applicants commenced proceedings in the United States Bankruptcy Court for the Southern District of New York (the “**US**

⁵ Third Adams Affidavit at paras. 6-7.

⁶ Third Adams Affidavit at para. 9.

⁷ Third Adams Affidavit at para. 6.

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. On May 17, 2024, the US Court granted: (i) the Final Order Recognizing and Enforcing the Realization Process Approval Order and Granting Related Relief; and (ii) the Modified Order Recognizing the Foreign Main Proceedings and Granting Additional Relief.⁸

10. Since the last extension of the Stay Period, the Applicants, working with the Monitor and with the assistance of the Consultant, have significantly advanced these CCAA proceedings, including by:⁹

- (a) commencing and conducting the Sale, as contemplated in the Realization Process Approval Order;
- (b) issuing termination notices to certain corporate and store-level employees of the Applicants;
- (c) entering into the United Legwear Transaction (as defined below);
- (d) terminating various agreements with the Applicants’ suppliers, effective August 7, 2024;
- (e) pursuing certain tax refunds that may be available to Ted Baker Limited in the United States related to the Employee Retention Credit program administered by the Internal Revenue Service;

⁸ Third Adams Affidavit at paras. 8, 11.

⁹ Third Adams Affidavit at para. 13.

- (f) working with the DIP Lender to reach an agreement to extend the Maturity Date under the DIP Term Sheet; and
- (g) communicating with the Applicants' employees, landlords and other stakeholders regarding the Sale and other matters related to these CCAA proceedings and the Chapter 15 Case.

B. The Sale

11. The Applicants, with the assistance of the Consultant and the Monitor, commenced the Sale on May 10, 2024 (the “**Sale Commencement Date**”). Of the \$40.6 million in Merchandise possessed by the Applicants on the Sale Commencement Date, \$22.8 million had been sold as of July 20, 2024, with the remaining on-hand inventory and FF&E being anticipated to be sold in the coming weeks, including as part of the United Legwear Transaction.¹⁰ Similarly, of the \$7.3 million of accounts receivable balances owing from wholesale customers as of the Sale Commencement Date, \$5.7 million had been collected as of July 20, 2024.¹¹

12. The Sale will conclude on August 2, 2024, as anticipated, except with respect to approximately 35 Store locations in Canada and United States (the “**Remaining Stores**”) for which the Sale has been extended to August 4, 2024, in order to maximize recoveries. This extension was implemented in consultation with the Monitor and the Consultant, and the Applicants have been in contact with most of the applicable Landlords for the Remaining Stores, none of which have objected to the extension.¹²

¹⁰ Third Adams Affidavit at paras. 15-17.

¹¹ Third Adams Affidavit at para. 20

¹² Third Adams Affidavit at para. 18.

C. Employees

13. As of the Sale Commencement Date, the Applicants had approximately 587 employees, comprised of 270 retail employees in the United States, 240 retail employees in Canada, and 77 corporate employees in the Applicants' corporate offices in Toronto and New York. Following the commencement of the Sale, a significant number of the Applicants' employees resigned, and were replaced on a temporary basis where needed. As of July 20, 2024, the Applicants continued to employ approximately 180 retail employees in the United States, 240 retail employees in Canada, and approximately 30 corporate employees in Toronto and New York.¹³

14. As of the date of this Factum, all but a small group of the Applicant's employees have been provided with their termination dates and have been (or will be) provided with a termination letter. Following the conclusion of the Sale, a small group of corporate employees will continue to assist with the wind-up of the Applicants' business.¹⁴

D. United Legwear Transaction

15. On or about July 12, 2024, Ted Baker as seller, and United Legwear, as purchaser, entered into a term sheet (the "**Term Sheet**") pursuant to which Ted Baker agreed to sell certain inventory and FF&E to United Legwear (the "**United Legwear Transaction**").¹⁵

16. The inventory included in the United Legwear Transaction included: (a) all inventory located at Bloomingdale's Inc.'s ("**Bloomingdale's**") Ted-Baker branded concession stores (the "**Concession Locations**") as at the opening of business on the Closing Date (as defined below),

¹³ Third Adams Affidavit at paras. 25-28.

¹⁴ Third Adams Affidavit at paras. 27-28.

¹⁵ Third Adams Affidavit at para. 29.

and (b) certain additional wholesale inventory purchased from the Applicants' warehouse facility.¹⁶

17. As set out in Schedule 1 of the Term Sheet, the purchase price paid by United Legwear was based on the original cost value of the inventory, plus a premium to account for important duties and a 10% mark-up on certain merchandise.¹⁷

18. In addition to the sale of the inventory described above, the Term Sheet included the following terms, among others:¹⁸

- (a) Ted Baker Canada agreed to sell to United Legwear the FF&E located at the Bloomingdale's Concession Locations for a purchase price of \$125,000 inclusive of eligible taxes;
- (b) United Legwear agreed to offer employment on the same terms and conditions to the current Ted Baker employees at the Bloomingdale's Concession Locations, including assuming such employees' accrued vacation balances. United Legwear can assume further retail, concession and/or wholesale employees if available; and
- (c) United Legwear agreed to pay all exigible Taxes (as defined in the Term Sheet) arising in connection with the United Legwear Transaction.

19. The United Legwear Transaction closed effective July 22, 2024 (the "**Closing Date**").¹⁹ The total aggregate purchase price for the inventory included in the United Legwear Transaction is currently estimated to be \$4,169,305.23, subject to a final reconciliation to be conducted no later

¹⁶ Third Adams Affidavit at para. 30.

¹⁷ Third Adams Affidavit at para. 31.

¹⁸ Third Adams Affidavit at para. 34.

¹⁹ Third Adams Affidavit at para. 29.

than sixty days from the Closing Date.²⁰ United Legwear is also in ongoing discussions with certain of the Applicants' vendors and brokers to purchase certain merchandise which was in-transit at the commencement of these CCAA proceedings.²¹

20. Further, and with the consent of Bloomingdale's, Ted Baker and United Legwear also entered into: (i) an agreement (the "**Assignment Agreement**"), effective July 22, 2024, whereby Ted Baker assigned to United Legwear the Department License Agreement dated August 26, 2011, between Ted Baker Limited and Bloomingdale's; and (ii) a transition services agreement (the "**TSA**"), effective July 22, 2024, whereby Ted Baker agreed to provide certain temporary services to United Legwear from and following the Closing Date until August 30, 2024 (the "**Transition Period**") to allow for the current Ted Baker employees at the Bloomingdale's Concession Locations to be transferred to United Legwear and migrated to United Legwear's payroll systems.²²

21. The United Legwear Transaction was subject to certain condition precedents, including that Ted Baker and ABG enter into an amendment to the license agreement between Ted Baker and No Ordinary Designer Label Limited dated March 11, 2023, as same may be amended from time to time, that authorizes the United Legwear Transaction (the "**ABG License Amendment**"). The ABG License Amendment was executed by Ted Baker and ABG, effective July 3, 2024.²³

22. Court approval is not required for the United Legwear Transaction, as the sale of inventory and FF&E is captured by the Realization Process Approval Order, and the remainder of the United

²⁰ Third Adams Affidavit at para. 33.

²¹ Third Adams Affidavit at para. 32.

²² Third Adams Affidavit at para. 36.

²³ Third Adams Affidavit at para. 37.

Legwear Transaction (including the assignment to Bloomindale's) falls under the *de minimis* provision in paragraph 11(a) of the ARIO.²⁴

E. ERC Tax Refund

23. Prior to these CCAA proceedings, Ted Baker Limited had identified \$6,162,972.24 in tax refunds to which it may be entitled in the United States related to the Employee Retention Credit (“ERC”) program administered by the Internal Revenue Service (“IRS”) and had submitted an application asserting its entitlement to the ERC refunds. As the IRS has temporarily paused the ERC program and has stopped processing new applications, the timeline for recovery, if any, is unknown at this time.²⁵

PART III - THE ISSUES AND THE LAW

24. This Factum addresses the following issues:

- (a) The Court should extend the Stay Period until January 31, 2025; and
- (b) The Court should declare that the Applicants meet the criteria prescribed by the WEPP Regulation and that their former employees in Canada are eligible to receive WEPP Payments following the termination of their employment.

A. The Stay Period Should be Extended

25. 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

²⁴ Third Adams Affidavit at para. 39.

²⁵ Third Adams Affidavit at paras. 46-47. See Third Adams Affidavit at para. 46 for a detailed description of the refunds to which Ted Baker Limited may be entitled.

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.

26. The stay of proceedings currently expires on August 2, 2024. The Applicants request that the Stay Period be extended up to and including January 31, 2025, for the following reasons:

- (a) an extension of the Stay Period is necessary in order to: (i) complete the Sale and associated reconciliation; (ii) implement the post closing aspects of the United Legwear Transaction; (iii) collect remaining account receivable balances; (iv) continue to pursue the ERC refunds; and (v) proceed with the orderly wind-down of the business of the Applicants in Canada and the US;²⁶
- (b) the Applicants have acted in good faith and due diligence throughout these CCAA proceedings, and the proposed extension is the best interest of the Applicants and their stakeholders;²⁷
- (c) the Monitor believes that the granting of the extension of the Stay Period will not materially prejudice any creditor of the Applicants;²⁸ and
- (d) the Applicants are expected to have sufficient liquidity to fund their operations and the costs of these CCAA proceedings during the proposed extension of the Stay Period.²⁹

²⁶ Third Adams Affidavit at para. 51; Second Report of the Monitor dated July 30, 2024, at paras. 8.2(i)-(ii) [Second Report].

²⁷ Third Adams Affidavit at para. 53; Second Report at para. 8.2(iii).

²⁸ Second Report at para. 8.2(v).

²⁹ Third Adams Affidavit at para. 52; Second Report at paras. 6.8(v), 8.2(iv), and footnote 1. As set out in para. 6.8(v) of the Second Report, a reserve has been included in the Updated Cash Flow Forecast, attached as Appendix B to the Second Report, to provide liquidity for the period between September 29, 2024 and the end of the Stay Period, when it is anticipated that there will be little to no activity in the Applicants' business.

27. The Monitor supports the proposed extension.³⁰

B. The Applicants' Employees are Eligible for WEPP Payments

28. The WEPPA enacts the Wage Earner Protection Program, pursuant to which eligible former employees may be entitled to payments in respect of outstanding eligible wages, including termination and severance pay (as defined above, "**WEPP Payments**") if certain criteria are met. Section 5(1) of the WEPPA provides that an individual is eligible to receive WEPP Payments if, among other things: (i) the individual's employment is ended for a reason prescribed by regulation; (ii) the individual is owed eligible wages by a former employer; (iii) the former employer is subject to proceedings under the CCAA; and (iv) a court determines under s. 5(5) of the WEPP Act that the criteria prescribed by regulation are met.

29. Section 3.2 of the WEPP Regulations establishes the criteria which the court must consider under s. 5(5) of the WEPPA. Pursuant to s. 3.2 of the WEPP Regulations, the court "may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations." If the court so determines, the former employees are entitled to WEPP Payments.

30. The Applicants fulfil the criteria prescribed by s. 3.2 of the WEPP Regulations. The Applicants have sent notices to all Canadian store employees, advising of the date of their respective store closures and providing notice of their termination on that date. Further, aside from a small number of corporate employees whose services are required to wind down the Applicants' business, all Canadian-based corporate employees have been provided with their respective dates of termination.³¹ For store level employees, the effective dates of these terminations align with

³⁰ Second Report at para. 7.22

³¹ Third Adams Affidavit at para. 55.

their individual store closure dates, and for corporate employees the effective dates range from late July into early August 2024, depending on final activities required by certain employees.³²

31. As a result, the Applicants seek a declaration that, pursuant to ss. 5(1)(b)(iv) and 5(5) of the WEPPA, the Applicants meet the criteria prescribed by s. 3.2 of the WEPP Regulations and that the Applicants' former employees are eligible to receive payments under and in accordance with the WEPPA.

32. Declaratory relief in relation to WEPP Payments is commonly granted in CCAA proceedings,³³ and the requested declaration is necessary in order to assist eligible former employees in obtaining timely access to the WEPP Payments.³⁴ The requested declaration is supported by the Monitor, who will work with Ted Baker Canada to identify all eligible employees and will assist those employees in their claim submissions.³⁵

PART IV - NATURE OF THE ORDER SOUGHT

33. The Applicants therefore request a Stay Extension Order substantially in the form attached as Tab 3 to the Applicants' Motion Record.

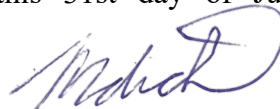
³² Third Adams Affidavit at para. 27.

³³ See, i.e., *Bed Bath & Beyond Canada Ltd. (Re)*, [2023 ONSC 1230](#) at para. 16; *DCL Corporation (Re)*, (May 8, 2023), Ont S.C.J. [Commercial List], Court File No. CV- 22-00691990-00CL ([Endorsement of Justice Osborne](#)) at paras. 13-14; *Inscape Corporation et al. (Re)*, (January 20, 2023), Ont S.C.J. [Commercial List], Court File No. CV- 23-00692784-00CL ([Amended and Restated Initial Order](#)) at para. 41.

³⁴ Third Adams Affidavit at para. 57.

³⁵ Second Report at paras. 5.2-5.3.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2024:

A handwritten signature in blue ink, appearing to read 'Marleigh Dick', is written above a horizontal line.

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

SCHEDULE “A”: LIST OF AUTHORITIES

1. *Bed Bath & Beyond Canada Ltd. (Re)*, [2023 ONSC 1230](#)
2. *DCL Corporation (Re)*, (May 8, 2023), Ont S.C.J. [Commercial List], Court File No. CV-22-00691990-00CL ([Endorsement of Justice Osborne](#))
3. *Inscape Corporation et al. (Re)*, (January 20, 2023), Ont S.C.J. [Commercial List], Court File No. CV- 23-00692784-00CL ([Amended and Restated Initial Order](#))

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

COMPANIES’ CREDITORS ARRANGEMENT ACT

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

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.

WAGE EARNER PROTECTION PROGRAM ACT

SC 2005, c 47, s 1, as amended

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the Bankruptcy and Insolvency Act and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

[...]

(5) On application by any person, a court may, in proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act, determine that the former employer meets the criteria prescribed by regulation.

WAGE EARNER PROTECTION PROGRAM REGULATIONS

SOR/2008-222, as amended

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985,
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INC., AND OSL FASHION SERVICES, INC.**

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

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANTS

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