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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
BAD BOY FURNITURE WAREHOUSE LIMITED  
IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**FACTUM  
Motion for Liquidation Approval Order  
Returnable November 17, 2023**

November 15, 2023

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## FACTUM

### PART I. OVERVIEW

1. On November 9, 2023 (the “**Filing Date**”), Bad Boy Furniture Warehouse Limited (the “**Company**”) filed a Notice of Intention to Make a Proposal under subsection 50.4(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”). KSV Restructuring Inc. (“**KSV**”) is the proposal trustee (the “**Proposal Trustee**”) in the proceedings (the “**NOI Proceedings**”).

2. This factum is filed in support of the Company’s motion for an order (the “**Liquidation Approval Order**”), among other things:

- (a) approving the Accommodation Agreement dated as of November 15, 2023 between the Company, as borrower, Laurentian Bank of Canada (“**LBC**”), as lender, and the guarantors party thereto (as it may be amended or modified in accordance with its terms, the “**Accommodation Agreement**”) and authorizing the Company to borrow under, and perform its obligations pursuant to, the Accommodation Agreement and the Financing Agreement;
- (b) approving the letter agreement between the Company and Infinity Asset Solutions Inc. (the “**Consultant**”) dated as of November 15, 2023 (as it may be amended or modified in accordance with its terms, the “**Consulting Agreement**”) pursuant to which the Consultant will assist the Company in carrying out a liquidation sale

(the “**Sale**”) of the Company’s inventory, merchandise and furniture, fixtures and equipment;

- (c) approving the guidelines appended as Schedule “A” to the proposed Liquidation Approval Order governing the Sale (the “**Sale Guidelines**”);
- (d) approving relief in connection with the *Wage Earner Protection Program Act* (“**WEPPA**”) for employees whose employment with the Company is terminated as part of the NOI Proceedings; and
- (e) extending the time for the Company to file a proposal pursuant to the BIA (the “**Proposal Period**”) to January 23, 2024 (being 45 days from the current expiry of the Proposal Period on December 9, 2023).

3. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Second Report of the Proposal Trustee dated November 15, 2023 (the “**Second Report**”).

## **PART II. FACTS**

### **A. The Company**

4. As further described in the First Report of the Proposal Trustee dated November 9, 2023 (the “**First Report**”) and the Second Report, the Company sells furniture, appliances and electronics through 12 retail stores across Ontario (the “**Stores**”) and through an e-commerce platform. The Company also sells appliances to real estate developers and property managers (the “**Builder Business**”). The Company’s head office and main warehouse (the “**Warehouse**”) is located in Pickering, Ontario.

5. As of the Filing Date, the Company had approximately 275 employees, including head office, Warehouse and Store employees. The Company's workforce is not unionized.<sup>1</sup>

**B. Secured Creditors**

6. The Company's principal secured creditor is Laurentian Bank of Canada ("**LBC**"). LBC made an operating line facility (the "**Operating Facility**") and certain other facilities available to the Company pursuant to a Financing Offer dated December 31, 2019 (as amended, the "**Financing Agreement**").

7. The security granted to secure the Company's obligations under the Financing Agreement and the documentation delivered thereto (the "**Existing LBC Security**") includes, *inter alia*, a security interest in all of the Company's business and assets pursuant to a general security agreement dated December 21, 2012. The Proposal Trustee's counsel has reviewed the Existing LBC Security and provided the Proposal Trustee with a verbal opinion confirming the validity and enforceability of the Existing LBC Security, subject to customary restrictions, assumptions and qualifications.<sup>2</sup>

8. The Company's obligations under the Financing Agreement are guaranteed by Solid Gold Warranty Ltd. and Lastman Furniture Inc. (both of which are affiliates of the Company) and by Blayne Lastman and his wife, in each case subject to the terms and limitations set forth in such guarantees.<sup>3</sup>

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<sup>1</sup> Second Report at paras 2(1)-2(5) [CL p [E73:E16](#)].

<sup>2</sup> Second Report at paras 2.2(1) and 2.2(5) [CL p [E74:E17](#) and [E76:E19](#)].

<sup>3</sup> Second Report at para 2.2(1) [CL p [E74:E17](#)].

9. On November 8, 2023, LBC issued a notice of default and demand in respect of the obligations under the Financing Agreement and a notice of intention to enforce security in respect of the Company pursuant to section 244(1) of the BIA. As of the Filing Date, the outstanding obligations under the Financing Agreement were approximately \$3.8 million.<sup>4</sup>

10. Certain parties in addition to LBC have registered security interests in respect of the Company under the *Personal Property Security Act* (Ontario) relating to certain motor vehicles, inventory and equipment.<sup>5</sup>

### **C. Unsecured Creditors**

11. As of November 4, 2023, the Company's unsecured liabilities totaled \$13.8 million based on a preliminary list of creditors and excluding certain off-balance sheet obligations. The Company's preliminary accounts payable listing is summarized in section 2.2 of the First Report.<sup>6</sup>

12. As described in the First Report, the Company has in the ordinary course of business historically taken deposits and payments from customers for future delivery of merchandise. These monies were not held in trust by the Company and the Company did not represent to its customers that they would be. As of the Filing Date, the Company's records indicate that it had received customer deposits (including, in certain circumstances, deposits constituting payment-in-full) totalling approximately \$4.5 million.<sup>7</sup>

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<sup>4</sup> Second Report at paras 2.2(2)-2.2(3) [CL p [E74:E17](#)].

<sup>5</sup> Second Report at para 2.2(8) [CL p [E76:E19](#)].

<sup>6</sup> Second Report at para 2.2(9) [CL p [E77:E20](#)]; First Report at para 2.2, Appendix "F" to the Second Report [CL p [E126:E69](#)].

<sup>7</sup> Second Report at para 2.2(10) [CL p [E77:E20](#)].

13. In light of the commencement of the NOI Proceedings, the Company has advised customers that it is not in a position to fulfill uncompleted orders or refund customer deposits. The Company does not have the funds available to repay customer deposits and LBC is not prepared to advance additional funding to the Company for that purpose. The Proposal Trustee notes that, given their quantum, the payment of customer deposits in priority to the secured obligations owing to LBC would materially impact the Company's restructuring and the outcome of these NOI Proceedings.<sup>8</sup>

#### **D. The NOI Proceedings**

14. The Company commenced the NOI Proceedings on November 9, 2023 in order to obtain the benefit of a stay of proceedings under the BIA and to provide stability while the Company reviews and advances its restructuring options.<sup>9</sup>

15. On November 10, 2023, Justice Penny granted the Company's motion for an order (the "**Stay Order**"), *inter alia*, expanding the scope of the stay of proceedings in the NOI Proceedings and approving an Administration Charge and a Director's Charge (each as defined in the Stay Order).<sup>10</sup>

#### **E. The Accommodation Agreement**

16. The Company and LBC have negotiated the Accommodation Agreement, pursuant to which LBC has agreed to make the Operating Facility available to the Company during the NOI

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<sup>8</sup> Second Report at para 2.2(11) [CL p [E77:E20](#)].

<sup>9</sup> Second Report at para 1(1) [CL p [E71:E14](#)].

<sup>10</sup> Second Report at para 2.1 [CL p [E73:E16-E74:E17](#)]; [Bad Boy Furniture Warehouse Limited et al \(10 November 2023\), Toronto 23-03008133-0031 \(ONSC\) at para 15](#).

Proceedings. The Accommodation Agreement is attached as Appendix “E” to the Second Report and its key terms are summarized in section 2.2 of the Second Report.<sup>11</sup>

17. The Accommodation Agreement provides, among other things:<sup>12</sup>

- (a) subject to the terms and conditions of the Accommodation Agreement, during the Accommodation Period LBC will forbear from exercising any rights or remedies with respect to the Existing Defaults and will continue to make advances to the Company up to the lower of (i) the Maximum Facility Amount (which is \$5 million), and (ii) the Admissible Borrowing Base;
- (b) the Accommodation Period commences on the date of the Accommodation Agreement and ends on the earliest of (i) February 16, 2024, subject to extension by LBC in its sole discretion, and (ii) the occurrence of an Accommodation Termination Event;
- (c) the Company shall comply with certain covenants, including that (i) the Company will deliver a rolling 13-week Budget on Wednesday of each week during the Accommodation Period, (ii) during each week, the Company will not have a negative cash flow variance exceeding the greater of (A) 10% on a net basis; and (B) \$100,000, relative to the applicable Budget; (iii) the Company will deliver to LBC a Turnaround Plan, in form and substance satisfactory to LBC, by December

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<sup>11</sup> Accommodation Agreement, Appendix “E” to Second Report [CL p [E105;E48](#)].

<sup>12</sup> Second Report at para 2.2(4) [CL p [E75;E18](#)].



11, 2023; and (iv) the outstanding indebtedness under the Financing Agreement will not be compromised or affected in any proposal made by the Company;

- (d) LBC may by written notice to the Company declare the Accommodation Period to have terminated upon the occurrence of an Accommodation Termination Event, including where (a) the outstanding indebtedness under the Financing Agreement exceeds the Admissible Borrowing Base, (b) any Credit Party fails to perform any term, covenant or obligation contained in the Accommodation Agreement or any Loan Document, other than an Existing Default, (c) the NOI Proceeding is terminated for any reason other than the successful implementation of a BIA Proposal, or (d) any order is made in the NOI Proceedings that LBC determines in its sole discretion is materially adverse to LBC, which shall include any order granted without the consent of LBC to lift the stay of proceedings in respect of the Borrower or to permit any person to exercise pre-post set-off; and
- (e) in consideration for entering into the Accommodation Agreement, LBC is to be paid a fee of \$40,000, which is to be added to the balance of the Operating Facility.<sup>13</sup>

## **F. The Consulting Agreement and Sale Guidelines**

18. In order to maximize value and reduce the cost structure of the Company's business, it is necessary to proceed immediately with a liquidation sale of the Company's inventory and merchandise (the "**Merchandise**") and furniture, fixtures and equipment ("**FF&E**"). In connection

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<sup>13</sup> Second Report at 2.2(4) [CL p [E75:E18](#)].

with the proposed Sale, the Company has entered into the Consulting Agreement with the Consultant, subject to Court approval.<sup>14</sup>

19. Pursuant to the Consulting Agreement, the Consultant is appointed as consultant for the purposes of conducting the Sale. The Sale is to be carried out in accordance with the Sale Guidelines appended to the proposed Liquidation Approval Order.<sup>15</sup>

20. The Sale is contemplated to commence on the day that the Court grants the Liquidation Approval Order and end on a date for each Store to be mutually agreed upon between the Company and the Consultant in consultation with the Proposal Trustee, but in no event will the Sale at any particular Store end later than February 15, 2024 (the “**Sale Term**”) other than with the consent of the applicable landlord or pursuant to further Court order.<sup>16</sup>

21. The Consulting Agreement provides, among other things, that:<sup>17</sup>

- (a) the Sale will be conducted at all of the Stores for the first 30 days (the “**Initial Sale Period**”). After conclusion of the Initial Sale Period, certain Stores determined by the Company in consultation with the Consultant and the Proposal Trustee will be closed and consolidated into the remaining open Stores;

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<sup>14</sup> Second Report at para 3(1) [CL p [E78;E21](#)].

<sup>15</sup> Second Report at para 3(2) [CL p [E78;E21](#)]; Consulting Agreement, Appendix “G” of the Second Report [CL p [E132;E75](#)].

<sup>16</sup> Consulting Agreement, Appendix “G” of the Second Report [CL p [E132;E75](#)].

<sup>17</sup> Second Report at para 3(3) [CL p [E79;E22](#)]; Consulting Agreement, Appendix “G” of the Second Report [CL p [E132;E75](#)].

- (b) the Consultant will coordinate and manage the cadence and quantum of sale discounts and reductions at the Stores, as well as the consolidation of Merchandise between and among the Stores and the Warehouse;
- (c) the Consultant may also conduct a series of online auctions (“**Online Sale Auctions**”) to maximize realizations in the required time frame;
- (d) all sales will be final and made on an “as is, where is” basis, with no right of return;
- (e) the Company and Consultant will not honour or accept gift cards or promotional discounts issued, granted or offered prior to the date of the NOI Proceedings, nor will they accept returns of Merchandise sold and delivered to customers prior to the commencement of the Sale Term;
- (f) the Company is responsible for all expenses incurred in operating the Stores during the Sale;
- (g) as consideration for its services in accordance with the Consulting Agreement, the Consultant will be entitled to:
  - (i) a “Base Fee” (net of applicable HST) on the sale of Merchandise equal to (A) 3% on the first \$4,000,000 in gross proceeds from the sale of Merchandise (the “**Gross Retail Sales**”); (B) 2% on all Gross Retail Sales over \$4,000,000 and up to \$6,000,000; and (C) 1% on all Gross Retail Sales over \$6,000,000; and

- (ii) a “FF&E Fee” equal to 15% of the gross proceeds from the sale of FF&E (net of applicable HST);
  - (h) the Consultant is entitled to charge and retain a premium of 18% of the gross proceeds of the Merchandise (net of applicable HST) sold at the Online Sale Auctions; and
  - (i) the Sale will be conducted in accordance with the Sale Guidelines.
- 22. The Consulting Agreement is conditional on the Court granting the Liquidation Approval Order approving the Consulting Agreement and the Sale.

**G. Extension of the Proposal Period**

- 23. The Company is seeking to extend the Proposal Period during which the Company must file a BIA proposal to January 23, 2024 (being 45 days from its current expiry of December 9, 2023).
- 24. The purpose of the extension is to maintain stability while the Company undertakes the Sale and advances its restructuring options. Subject to approval of the Accommodation Agreement, the Cash Flow Forecast projects that the Company will have sufficient liquidity to operate throughout the extended Proposal Period.<sup>18</sup>

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<sup>18</sup> Second Report at para 6 [CL p [E83;E26](#)].

**PART III. ISSUES AND THE LAW**

25. On this motion, the issues for consideration are whether the Court should:

- (a) approve the Accommodation Agreement;
- (b) approve the Consulting Agreement and the Sale Guidelines and authorize the Company to proceed with the Sale;
- (c) declare that, pursuant to section 5(5) of the WEPPA, the Company meets the criteria established by section 3.2 of the Wage Earner Protection Program Regulations, SOR/ 200822 (“**WEPPR**”); and
- (d) extend the Proposal Period to January 23, 2024.

**B. The Court Should Approve the Accommodation Agreement**

26. Pursuant to the Accommodation Agreement, LBC has agreed to continue to make the Operating Facility available to the Company during the Accommodation Period. If the Accommodation Agreement is approved, the Company will be able to borrow under the Operating Facility up to \$5 million, subject to the Admissible Borrowing Base. As the outstanding obligations under the Operating Facility as at the Filing Date were approximately \$3.8 million, the Accommodation Agreement will enable the Company to obtain incremental funding during the NOI Proceedings. The Operating Facility is projected to revolve in the ordinary course during the NOI Proceedings.<sup>19</sup>

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<sup>19</sup> Second Report at para 2.2(4) [CL p [E74:E17](#)].

27. The obligations under the Accommodation Agreement, including any incremental advances to the Company made during the NOI Proceedings, will be secured by the Existing LBC Security. Accordingly, while the Company is seeking Court approval of the Accommodation Agreement and an authorization for the Company to borrow pursuant to the Accommodation Agreement and the Financing Agreement, it is not seeking approval of a Court-ordered charge securing such borrowings on a super-priority basis.<sup>20</sup>

28. Section 50.6 of the BIA permits the Court to grant a super-priority charge to secure interim financing made available to a debtor company during BIA proposal proceedings. While section 50.6 is not strictly applicable given that the Company is not seeking a super-priority charge to secure Operating Facility indebtedness, the Court may have regard to the factors set out in section 50.6(5) for determining whether to approve interim financing. Pursuant to section 50.6(5), the Court is to consider, among other things:

- (a) the period during which the Company is expected to be subject to the NOI Proceedings;
- (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 Accommodation Agreement would enhance the prospects of a viable proposal being made in respect of the Company;

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<sup>20</sup> Second Report at para 2.2(6) [CL p [E76:E19](#)].

- (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 trustee's report on the Cash Flow Forecast.<sup>21</sup>

29. In light of these factors, the Accommodation Agreement should be approved for the following reasons:

- (a) the Company requires access to funding in order to fund the cost of these proceedings and pursue its restructuring initiatives, including undertaking the Sale. The Company is experiencing a liquidity crisis and the Accommodation Agreement is critical to its ability to advance its restructuring and make a viable proposal to its creditors;<sup>22</sup>
- (b) the Company will undertake the Sale with the assistance of the Consultant, and the Company's business and financial affairs will be overseen by the Proposal Trustee during the NOI Proceedings;<sup>23</sup>
- (c) LBC is the Company's principal secured creditor and it is prepared to advance funding to the Company during the NOI Proceedings;<sup>24</sup>

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<sup>21</sup> BIA, s. [50.6\(5\)](#).

<sup>22</sup> Second Report at para 2.2(6) [CL p [E76:E19](#)].

<sup>23</sup> Second Report at para 3(1) [CL p [E78:E21](#)].

<sup>24</sup> Second Report at para 2.2(4) [CL p [E74:E17](#)].

- (d) since much of the Company's value lies in its Merchandise, it is crucial that the Company has access to the funding needed to conduct the Sale and maximize value for stakeholders. In the absence of the Accommodation Agreement, the Company will not have sufficient liquidity to conduct the Sale in a controlled and orderly manner, which will result in lower realizations to the prejudice of all stakeholders;<sup>25</sup>
- (e) the Company requires funding under the Accommodation Agreement to pay post-filing expenses, including those owing or that will become owing to employees, merchandise suppliers, vendors and professionals;
- (f) no creditor would be materially prejudiced by the approval of the Accommodation Agreement because the Court is not being asked to grant a priority charge and the Accommodation Agreement effectively continues the pre-filing arrangements under the Financing Agreement (i.e. the Company can borrow up to \$5 million under the Operating Facility, subject to the Admissible Borrowing Base). In this regard, unsecured creditors are subject to the prior-ranking security of LBC in the same manner as the pre-filing period;<sup>26</sup>
- (g) the Cash Flow Forecast indicates that the Company requires funding and, if the Accommodation Agreement is approved, is projected to have sufficient funding to operate through the end of the requested extended Proposal Period;<sup>27</sup>

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<sup>25</sup> Second Report at para 2.2(7) [CL p [E76:E19](#)].

<sup>26</sup> Second Report at 2.2(6) [CL p [E76:E19](#)].

<sup>27</sup> Second Report at 5.1(5) [CL p [E83:E26](#)].



- (h) approval of the Accommodation Agreement is in the best interests of the Company and its stakeholders and is supported by the Proposal Trustee.<sup>28</sup>

**C. The Court Should Approve the Consulting Agreement and the Sale Guidelines**

30. It is well-recognized that courts have jurisdiction to approve a sale authorizing the liquidation of a debtor's assets in an insolvency process. Courts have frequently done so in the context of retail liquidations, including in BIA proposal proceedings.<sup>29</sup>

31. Section 65.13(1) of the BIA permits the Court to authorize a disposition of a debtor's assets outside of the ordinary course.<sup>30</sup> This section is applicable when a Court is considering approval of a liquidation sale, as is being requested in this case in connection with approval of the Consulting Agreement and the Sale. Section 65.13(4) of the BIA provides a non-exhaustive list of factors the Court is to consider in determining whether to approve a disposition:

- (a) *Whether the process leading to the proposed sale or disposition was reasonable in the circumstances:* The professional fees associated with running an extensive process calling for proposals from several liquidators would exceed the benefit given the Consultant's commission structure and the projected economics of the Sale. The Company is generating significant negative cash flow which needs to be curtailed immediately through the commencement of the liquidation. The Company

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<sup>28</sup> Second Report at para 2.2(7) [CL p [E76:E19](#)].

<sup>29</sup> See, for example, the proceedings in respect of [Bed Bath & Beyond \(21 February 2023\), Toronto CV-23-00694493-00CL \(ONSC\)](#)[*BBB*, Sale Approval Order]; [Nordstrom Canada Retail Inc et al \(20 March 2023\), Toronto CV-23-00695619-00CL \(ONSC\)](#) [*Nordstrom*, Liquidation Sale Approval Order]; [Danier Leather Inc \(7 March 2016\), Toronto 31-CL-2084381 \(ONSC\)](#); [Nine West Canada LP and Jones Canada, Inc \(11 April 2018\), Toronto 31-2363758 and 31-2363759 \(ONSC\)](#); [Scotch & Soda Canada Inc \(16 May 2023\), Toronto 31-2941767 \(ONSC\)](#) [*Scotch & Soda*, Extension and Liquidation Sale Approval Order].

<sup>30</sup> BIA, s. [65.13](#).

selected the Consultant because it is a well-known liquidator with experience in retail liquidations and this type of Merchandise in particular. The Proposal Trustee is of the view that the Consultant's fee structure is consistent with or lower than market and other liquidation sales in which the Proposal Trustee has been involved. The Consultant is ready to commence the sale immediately.<sup>31</sup>

- (b) *Whether the proposal trustee approved the process leading to the proposed sale or disposition:* The Proposal Trustee supports the hiring of the Consultant and the commencement of the Sale on an urgent basis. The Proposal Trustee and its counsel have been actively involved in the process to engage the Consultant, the review and negotiation of the Consulting Agreement, and discussions with the Company and counsel to certain of the Company's landlords (the "**Landlord Counsel**") regarding the manner in which the Sale will be conducted. The Proposal Trustee notes that the Consultant has extensive experience in retail liquidations (including furniture and home décor sales) and that it has the skills to efficiently perform the Sale.<sup>32</sup>
- (c) *Whether the trustee 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:* Undertaking the Sale in these NOI Proceedings in an orderly manner – with funding provided by LBC to enable the Sale to occur over a commercially-reasonable timeframe supported by the Consultant – is intended to

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<sup>31</sup> Second Report at para 4(1) [CL p [E81;E24](#)].

<sup>32</sup> Second Report at para 4(1) [CL p [E81;E24](#)].

maximize the value of the Merchandise and FF&E and avoid a disorderly and time-compressed sale in bankruptcy sale that would result in lower overall recoveries;<sup>33</sup>

- (d) *The extent to which the creditors were consulted:* The Company has consulted with LBC, which is the Company's primary secured creditor and has a security interest over the Merchandise and FF&E to be sold in the Sale. LBC supports approval of the Consulting Agreement and the commencement of the Sale on an immediate basis. The Company and the Proposal Trustee have also consulted with Landlord Counsel, who have substantial experience in retail liquidations and have been extensively involved in the evolution of the Sale Guidelines. The proposed forms of Liquidation Approval Order and Sale Guidelines reflect feedback received from Landlord Counsel.<sup>34</sup>
- (e) *The effects of the proposed sale or disposition on the creditors and other interested parties:* The immediate commencement of the Sale is in the best interests of the Company and its stakeholders. The Company is generating significant negative cash flow and it is critical to proceed with the Sale on an expedited basis in order to generate revenue and ultimately reduce the Company's retail footprint and cost structure. In the circumstances, the Sale is the most practical path forward to realize value for the Company's stakeholders.<sup>35</sup>

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<sup>33</sup> Second Report at para 4(1) [CL p [E82;E25](#)].

<sup>34</sup> Second Report at para 4(1) [CL p [E81;E24](#)].

<sup>35</sup> Second Report at paras 3(1) and 4(1) [CL p [E78;E21](#) and [E81;E24](#)].

- (f) *Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value:* The Sale will enable the Company to liquidate Merchandise and FF&E in an open and controlled process and achieve market value. The Consultant's ability to conduct Online Sale Auctions will expose the Company's assets to a broader market with fewer geographical limitation. The Base Fee payable to the Consultant is commission-based, meaning the Company and the Consultant have a common objective of maximizing sale proceeds during the Sale.<sup>36</sup>

32. The Consulting Agreement and the proposed Liquidation Approval Order provide that the Sale is to be undertaken in accordance with the Sale Guidelines. The Company, the Consultant, and the Proposal Trustee support approval of the Sale Guidelines in the form attached to the proposed Liquidation Approval Order.<sup>37</sup> The Sale Guidelines are substantially similar to the form of sale guidelines approved in recent retail liquidations, including *Nordstrom*, *David's Bridal*, *Bed Bath and Beyond*, and *Scotch & Soda* and reflect feedback from Landlord Counsel.<sup>38</sup>

#### **D. WEPPA Declaration**

33. The WEPPA provides employees whose employment is terminated in connection with certain insolvency proceeds access to government funds for unpaid wages, vacation pay, and severance and termination pay, up to certain limits. Although access to the WEPPA resources are available in any bankruptcy or receivership proceeding, access to the WEPPA resources for former

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<sup>36</sup> Second Report at paras 3(3) and 4(1) [CL p [E80:E23](#) and [E81:E24](#)].

<sup>37</sup> Second Report at paras 3(2) and 4(1) [CL p [E78:E21](#) and [E81:E24](#)].

<sup>38</sup> [Nordstrom, Liquidation Sale Approval Order](#); [David's Bridal, LLC \(26 April 2023\), Toronto CV-23-00698107-00CL \(ONSC\)](#); [BBB, Sale Approval Order](#); [Scotch & Soda Canada Inc \(16 May 2023\), Toronto BK-23-02941767-0031 \(ONSC\)](#) at paras 31 and 34 [*Scotch & Soda*, Endorsement of J Steele].

employees in an NOI or CCAA proceeding is only available if a Court order is made under section 5(5) of the WEPPA.<sup>39</sup>

34. Section 5(5) of the WEPPA provides that on application by any person in proceedings under Division I of Part III of the BIA, a Court may determine that a former employee meets the criteria prescribed by regulation. Section 3.2 of the WEPPR (the WEPPA regulations) provides that, for purposes of section 5(5) of the WEPPA, “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”.<sup>40</sup>

35. The Company expects to reduce its geographical and operating footprint as part of its restructuring efforts, including closing Stores and reducing its workforce. The Company has terminated a small number of employees since the Filing Date and there will be substantial further employee terminations in connection with the closure of Stores, including terminations during and following the 30-day Initial Sale Period. Remaining employees are currently assisting with the wind-down of the Company’s business operations and will ultimately be terminated if there is not a going concern restructuring outcome for the business. Accordingly, the Company submits that the requirements of Section 3.2 of the WEPPR are satisfied.<sup>41</sup>

36. Similar relief has been granted in other insolvency proceedings including *Bed Bath and Beyond*, *FIG 4*, *Nilex* and *Scotch & Soda*.<sup>42</sup> In *Scotch & Soda*, the Court granted the WEPPA

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<sup>39</sup> WEPPA, s. [5\(5\)](#).

<sup>40</sup> WEPPR, s. [3.2](#).

<sup>41</sup> Second Report at para 5 [CL p [E82;E25](#)].

<sup>42</sup> [BBB Canada Ltd \(21 February 2023\), Toronto CV-23-00694493-00CL \(ONSC\)](#) at para 23; [FIGR Brands Inc \(2 February 2022\), Toronto CV-21-00655373-00CL](#) at para 4; [Nilex Inc \(13 December 2022\), Edmonton 24-2878531 \(ABKB\)](#) at para 3; [Scotch & Soda, Endorsement of J Steele at paras 38-41](#).

declaration in the initial stages of the BIA proposal proceedings on the basis that the debtor would need to terminate the employment of some or all of its employees during the proceedings if there was no purchaser or going-concern outcome for the debtor's business.<sup>43</sup>

37. Given the Company's financial circumstances, the Company will not be able to satisfy the termination and severance claims of terminated employees. Terminated employees will have pre-filing unsecured claims against the Company in respect of such entitlements. The timing and quantum, if any, for recoveries on pre-filing unsecured claims is uncertain. Accordingly, the Company and the Proposal Trustee believe it is appropriate to enable terminated employees to access WEPPA in order to obtain a near-term recovery in respect of termination and severance pay and lessen the financial impact to employees resulting from the Company's need to significantly reduce its workforce.<sup>44</sup>

38. Accordingly, the Company respectfully requests that the Court make the WEPPA Declaration.

#### **E. The Court Should Extend the Proposal Period**

39. The Company commenced the NOI Proceedings on November 9, 2023. Pursuant to section 50.4(8) of the BIA, the Company is required to file a proposal with the official receiver within 30 days (being December 9, 2023), unless the Proposal Period is extended by the Court.<sup>45</sup>

40. Pursuant to section 50.4(9) of the BIA, a debtor may apply to the Court, before the expiry of the Proposal Period, for an order extending the Proposal Period, and the Court may grant the

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<sup>43</sup> [Scotch & Soda, Endorsement of J Steele at para 37.](#)

<sup>44</sup> Second Report at para 5 [CL p [E82;E25](#)].

<sup>45</sup> BIA, s. [50.4\(8\)](#).

extension, not exceeding 45 days for any individual extension and not exceeding in aggregate five months after the expiry of the initial 30-day Proposal Period. Section 50.4(9) of the BIA provides that, in order to extend the Proposal Period, the Court must be satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.<sup>46</sup>

41. The Company submits that these factors are satisfied and that a 45-day extension of the Proposal Period to January 23, 2023 is appropriate in the circumstances:

- (a) the Company is acting with good faith and with due diligence. In the six days since the NOI Proceedings were commenced, the Company has sought and obtained the Stay Order, negotiated and finalized the Accommodation Agreement with LBC, negotiated and finalized the Consulting Agreement with the Consultant, finalized the proposed Sale Guidelines with feedback from Landlord Counsel, filed its motion for the Sale Approval Order, and engaged in discussions with a broad range of stakeholders, including its vendors and builders, as well as its customers with the assistance of the Proposal Trustee, with a view to stabilizing the Business as the Company embarks on the Sale;<sup>47</sup>

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<sup>46</sup> BIA, s. [50.4\(9\)](#); [Scotch & Soda, Endorsement of J Steele at para 43](#).

<sup>47</sup> Second Report at para 6(1) [CL p [E83;E26](#)].

- (b) the extension of the Proposal Period will enable the Company to generate proceeds from the Sale, pursue the collection of accounts receivable, and take initial steps to reduce the Company's operational footprint, all of which are necessary to enable the Company to make a viable proposal to its creditors;
- (c) the extension of the Proposal Period would not materially prejudice the Company's creditors, as the Company is projected to have sufficient funding to satisfy its post-filing obligations in the amounts contemplated by the Cash Flow Forecast (subject to Court approval of the Accommodation Agreement);<sup>48</sup>
- (d) the extension of the Proposal Period is supported by LBC, the Company's primary secured lender; and
- (e) the Proposal Trustee supports the requested extension of the Proposal Period for the reasons set out in the Second Report.

**PART IV. ORDER REQUESTED**

42. For the reasons set out above, the Company requests that this Honourable Court grant the relief in the form of the proposed Liquidation Approval Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of November, 2023.

GOODMANS LLP

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Goodmans LLP

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<sup>48</sup> Second Report at para 6(1) [CL p [E83;E26](#)].



**SCHEDULE A**  
**LIST OF AUTHORITIES**

1. [\*Bed Bath & Beyond\* \(21 February 2023\), Toronto CV-23-00694493-00CL \(ONSC\)](#)
2. [\*Nordstrom Canada Retail Inc et al\* \(20 March 2023\), Toronto CV-23-00695619-00CL \(ONSC\)](#)
3. [\*Danier Leather Inc\* \(7 March 2016\), Toronto 31-CL-2084381 \(ONSC\)](#)
4. [\*Nine West Canada LP and Jones Canada, Inc\* \(11 April 2018\), Toronto 31-2363758 and 31-2363759 \(ONSC\)](#)
5. [\*Scotch & Soda Canada Inc\* \(16 May 2023\), Toronto 31-2941767 \(ONSC\)](#)
6. [\*David's Bridal, LLC\* \(26 April 2023\), Toronto CV-23-00698107-00CL \(ONSC\)](#)
7. [\*Scotch & Soda Canada Inc\* \(16 May 2023\), Toronto BK-23-02941767-0031 \(ONSC\)](#)
8. [\*BBB Canada Ltd\* \(21 February 2023\), Toronto CV-23-00694493-00CL \(ONSC\)](#)
9. [\*FIGR Brands Inc\* \(2 February 2022\), Toronto CV-21-00655373-00CL](#)
10. [\*Nilex Inc\* \(13 December 2022\), Edmonton 24-2878531 \(ABKB\)](#)

**SCHEDULE B**  
**TEXT OF STATUTES, REGULATIONS & BY – LAWS**

***Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3***

**Notice of intention**

**50.4 (1)** Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

**Where assignment deemed to have been made**

**50.4 (8)** Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

**Extension of time for filing proposal**

**50.4 (9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that

the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

### **Order – interim financing**

**50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

### **Factors to be considered**

**50.6 (5)** In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

### **Restriction on disposition of assets**

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

### **Individuals**

**(2)** In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

### **Notice to secured creditors**

**(3)** An insolvent person who applies to the court for an authorization shall 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**

**(4)** 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 trustee approved the process leading to the proposed sale or disposition;

**(c)** whether the trustee 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**

**(5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), 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 insolvent person; 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**

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

(a) a director or officer of the insolvent person;

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

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

### **Assets may be disposed of free and clear**

(7) 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 insolvent person 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.

### **Courts vested with jurisdiction**

**183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;...

***Wage Earner Protection Program Act, SC 2005, c 47, s 1***

### **Prescribed criteria – other proceedings**

**5 (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 Act, SC 2005, c 47, s 1, Wage Earner Protection Program Regulations, SOR/2008-222***

**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.

*Courts of Justice Act, R.S.O. 1990, c C.43, Rules of Civil Procedure, R.R.O. 1990, Reg 194*

**RULE 1 CITATION, APPLICATION AND INTERPRETATION**

*General Principle*

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

**Orders on Terms**

**1.05** When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

**RULE 2 NON-COMPLIANCE WITH THE RULES**

**Court May Dispense with Compliance**

**2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

**RULE 3 TIME**

**Extension or Abridgment**

*General Powers of Court*

**3.02** (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed. R.R.O. 1990, Reg. 194, r. 3.02 (2).

**RULE 37 MOTIONS — JURISDICTION AND PROCEDURE**

**Notice of Motion**

**37.01** A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. R.R.O. 1990, Reg. 194, r. 37.01.

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BAD BOY  
FURNITURE WAREHOUSE LIMITED IN THE CITY OF TORONTO, IN THE PROVINCE  
OF ONTARIO**

Court File No.: BK-23-03008133-0031  
Estate File No.: 31-3008133

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY AND INSOLVENCY**  
Proceeding commenced at Toronto

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**FACTUM  
(Returnable November 17, 2023)**

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