

**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
LOYALTYONE, CO.**

**NOTICE OF MOTION
(Motion to Set Aside Disclaimer)**

Bread Financial Holdings, Inc. ("**Bread**") will make a motion to a judge presiding over the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**") on a date to be scheduled at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard,

- In writing under subrule 37.12.1(1);
- In writing as an opposed motion under subrule 37.12.1(4);
- In person;
- By telephone conference;
- By video conference.

THE MOTION IS FOR an order:

- (a) if necessary, that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that further service thereof is dispensed with;

- (b) in accordance with subsection 32(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), that the Tax Matters Agreement (as defined and described below) is not disclaimed pursuant to the Notice of Disclaimer of LoyaltyOne, Co. ("**LoyaltyOne**") dated October 27, 2023;
- (c) declaring that the Tax Matters Agreement binds LoyaltyOne and/or is otherwise enforceable against it; and
- (d) such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Background and LoyaltyOne's CCAA Proceedings

2. LoyaltyOne is an indirect subsidiary of Loyalty Ventures Inc. ("**LVI**") and operated the marketing program known as the AIR MILES® Reward Program (the "**AIR MILES® Reward Program**" or "**AIR MILES®**").
3. On March 10, 2023, LoyaltyOne was granted protection under the CCAA pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). Most recently, the stay of proceedings under the Initial Order was extended to June 28, 2024.
4. Also on March 10, 2023, LVI and three affiliated entities commenced proceedings (the "**Chapter 11 Proceedings**") by filing voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas (the "**US Court**").
5. On April 27, 2023, the US Court entered an order confirming LVI's joint Chapter 11 plan (the "**US Plan**").
6. On June 2, 2023, the effective date of the US Plan, a Liquidating Trust (as defined in the US Plan) was established to, among other things, hold, investigate and pursue, as appropriate,

claims and causes of action against the Bread Parties (as defined in the US Plan) in connection with the Separation and Distribution Transaction (as defined below). Bread is not aware of any other alleged assets held or claims being pursued by the Liquidating Trust.

7. Within the CCAA proceedings, LoyaltyOne sold AIR MILES to Bank of Montreal ("**BMO**") for an approximate purchase price of US\$160 million. Upon closing of the transaction with BMO, LoyaltyOne's existing directors and most officers resigned, LoyaltyOne discontinued its operations and substantially all LoyaltyOne's employees became employees of BMO. LoyaltyOne does not carry on any operations at this time.

8. LoyaltyOne's primary account receivable is a tax refund claim of approximately CAD\$100 million (the "**Tax Refund**") which is disputed by the Canada Revenue Agency and, if unresolved, will proceed to trial before the Tax Court of Canada in the fall of 2024 (the "**CRA Litigation**"). As described below, pursuant to the Tax Matters Agreement, LoyaltyOne agreed to hold the Tax Refund as agent for Bread and to pay over to Bread the Tax Refund within 30 days of receipt.

9. LoyaltyOne has not sought approval of a claims process from the Court. Based on the reports of KSV Restructuring Inc. (the "**Monitor**"), LoyaltyOne's creditors include the Credit Agreement Lenders (as defined and described below), various contractors and other vendors in respect of goods and services provided to LoyaltyOne for which LoyaltyOne has been invoiced less than CAD\$14 million, and Bread.

10. Bread has an estimated claim against LoyaltyOne in the approximate amount of CAD\$146 million arising from a certain indemnity related to a lease disclaimed by LoyaltyOne, among other claims.

Separation and Distribution Transaction and the Distribution Agreements

11. AIR MILES® launched in Canada in 1992. From July 1998 until November 5, 2021, the ultimate parent of LoyaltyOne (or its corporate predecessors) was Alliance Data Systems

Corporation (“**ADS**”), now Bread. Bread’s loyalty programs business line included both: (a) AIR MILES®; and (b) the “BrandLoyalty” business.

12. On October 13, 2021, the Board of Directors of ADS approved the previously announced separation (the “**Separation and Distribution Transaction**”) of its LoyaltyOne segment, consisting of its Canadian AIR MILES® Reward Program and BrandLoyalty businesses, into an independent, publicly traded company, LVI. On November 3, 2021, in an initial step of the Separation and Distribution Transaction and in consideration for assets that ADS was conveying to LVI, LVI made a cash distribution of US\$750 million to ADS. On November 5, 2021, the date the Separation was consummated, 81% of the outstanding shares of LVI were distributed pro rata based on the outstanding shares of ADS common stock at the close of business on the record date of October 27, 2021, with ADS retaining the remaining 19% of the outstanding shares of LVI. ADS stockholders of record that did not sell their rights to receive LVI stock before the close of business on November 5, 2021, received one share of LVI common stock for every two and one-half (2.5) shares of ADS common stock. The distribution qualified as a tax-free reorganization and a tax-free distribution to ADS and its stockholders for U.S. federal income tax purposes.

13. In connection with the Separation and Distribution Transaction, LVI on behalf of itself and the members of the LVI Group (as defined and described below) entered into several agreements with ADS and the ADS Group (as defined and described below) to govern the relationship of the parties following the Separation and Distribution Transaction (collectively, the “**Distribution Agreements**”), including:

- (a) the Separation and Distribution Agreement dated November 3, 2021, by and between LVI and ADS (the “**Separation and Distribution Agreement**”);
- (b) the Tax Matters Agreement dated November 5, 2021, by and between LVI on behalf of itself and the members of the LVI Group and ADS and the ADS Group (the “**Tax Matters Agreement**”);

- (c) the Transition Services Agreement dated November 5, 2021, by and between LVI and ADS (the “**Transition Services Agreement**”); and
 - (d) the Employee Matters Agreement dated November 5, 2021, by and between LVI and ADS (the “**EMA**”).
14. Notably, the Tax Matters Agreement was signed by:
- (a) ADS on behalf of a group comprised of itself and its listed subsidiaries (the “**ADS Group**”); and
 - (b) LVI on behalf of the Loyalty Ventures Group, which is defined in the agreement as LVI and all of its subsidiaries listed in Schedule 1.01(i) to the Tax Matters Agreement (the “**LVI Group**”), which includes LoyaltyOne.
15. Pursuant to section 27 of the Tax Matters Agreement, each of ADS and LVI represented and warranted, among other things, that it had the power and authority to execute the Agreement on its behalf and on behalf of each member of its Group and that the Tax Matters Agreement created a legal, valid and binding obligation on each party and each member of its Group.
16. The Tax Matters Agreement was signed by Jeffrey Fair, the Senior Vice President of LVI and the Vice President of Taxation at LoyaltyOne. The Separation and Distribution Agreement, the Transition Services Agreement and the EMA were signed by Charles Horn, the President and Chief Executive Officer of LVI and the Treasurer of LoyaltyOne.
17. The Distribution Agreements are part of one integrated agreement and provide that the Separation and Distribution Agreement, the Tax Matters Agreement and the Transition Services Agreement constitute an entire agreement.
18. The Distribution Agreements are governed by, and shall be construed and enforced in accordance with, the laws of the State of Delaware.

Transition Services Agreement

19. Shortly prior to the commencement of the CCAA proceedings, LVI purported to assign a portion of the Transition Services Agreement to LoyaltyOne.

20. On July 14, 2023, LoyaltyOne delivered a Notice of Disclaimer to LVI and Bread seeking to disclaim the Transition Services Agreement.

21. Bread disagreed with LoyaltyOne's ability to disclaim all or a portion of the Transition Services Agreement. However, given that the obligations of the parties under the Transition Services Agreement had expired or been rendered largely inoperative through the sale of the LoyaltyOne business to BMO, Bread did not oppose the disclaimer, without prejudice to Bread's rights to assert Bread's rights with respect to the Tax Matters Agreement and any other agreements entered into in connection with the Separation and Distribution Transaction.

Tax Matters Agreement

22. The Tax Matters Agreement expressly contemplates the anticipated Tax Refund and provides that LoyaltyOne agrees to pay the Tax Refund over to Bread within 30 days of receipt thereof. In particular, pursuant to section 8(a) "[e]xcept as provided by Section 8(b) [which is inapplicable to the Tax Refund], ADS shall be entitled to all Tax Refunds received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C." The Tax Refund at issue on this motion is expressly listed on Schedule C. Pursuant to section 8(c), a Company receiving or realizing a Tax Refund to which another party is entitled shall pay over the amount of the Tax Refund within 30 days of receipt thereof. Section 12(b) of the Tax Matters Agreement further requires LoyaltyOne to hold the Tax Refund amount as agent for Bread, once received.

23. The Tax Matters Agreement also incorporates general administrative provisions related to, among other things: (a) the agreed upon allocation of taxes among and between the parties;

(b) filing tax returns; (c) the apportionment of earnings and profits and tax attributes; (d) the utilization of tax attributes; and (e) deductions and reporting for certain awards.

24. Prior to delivery of the Notice of Disclaimer to Bread, LoyaltyOne had performed its contractual obligations in accordance with the Tax Matters Agreement.

Loans in Connection with the Separation and Distribution Transaction

25. In the context of the Separation and Distribution Transaction, LVI, among other things, borrowed (and LoyaltyOne guaranteed) US\$675 million from the Credit Agreement Lenders. LVI and certain affiliates (collectively, the “**Borrowers**”), a group of lenders (collectively, the “**Credit Agreement Lenders**”) and Bank of America N.A., as administrative agent (the “**Credit Agreement Agent**”), entered into a credit agreement dated as of November 3, 2021 (as amended, the “**Credit Agreement**”) whereby the Credit Agreement Lenders established credit facilities for the Borrowers. Certain of LVI’s subsidiaries, including LoyaltyOne, are guarantors under the Credit Agreement (collectively, the “**Guarantors**”).

26. The Credit Agreement contemplated that the funds borrowed by LVI thereunder would be used to effect the Separation and Distribution Transaction. Among other provisions: (a) pursuant to section 4.01(h), it was a condition precedent to the initial extension of credit that the Spinoff (as defined in the Credit Agreement) shall have been initiated prior to, or substantially simultaneously with, the Closing Date; and (b) pursuant to section 6.11, the proceeds of the Credit Extensions were to be used for, among other things, to finance a portion of the Spin Payment and the other Form 10 Transactions (as these terms are defined in the Credit Agreement).

27. The obligations under the Credit Agreement are secured by, among other things, a first priority security interest in all present and after-acquired personal property of the Borrowers and the Guarantors, including LoyaltyOne, but expressly excluding the Excluded Property. The Credit Agreement specifically lists the Tax Refund as one type of Excluded Property that is not part of the Credit Agreement Lenders’ collateral.

28. As of March 9, 2023, there was approximately US\$656 million of principal outstanding under the Credit Facilities. LoyaltyOne has made certain distributions to the Credit Agreement Agent during its CCAA proceedings; however, it appears that the Credit Agreement Lenders remain the largest creditor group in the estate of LoyaltyOne and are the directing minds of the proceeding at this time.

Contemplated Litigation by LoyaltyOne and LVI against Bread

29. On October 18, 2023, LoyaltyOne filed a statement of claim in the Ontario Superior Court of Justice against Bread and Joseph L. Motes III seeking damages in the amount of US\$775 million (the “**Statement of Claim**”). In the Statement of Claim, LoyaltyOne, as directed by its largest stakeholder group, the Credit Agreement Lenders, is alleging that the Separation and Distribution Transaction was “simply a value-stripping scheme orchestrated and implemented by ADS and Motes for the benefit of ADS and to the corresponding detriment of LoyaltyOne.”

30. LoyaltyOne has not taken steps to serve the Statement of Claim on Bread (despite Bread’s solicitors offering to accept service) and appears to be delaying commencing the determination of its allegations in the Statement of Claim.

31. Despite the non-service of the Statement of Claim on Bread, on November 11, 2023, LoyaltyOne and the Monitor served motion materials seeking, among other things, a determination that the provisions in the Tax Matters Agreement requiring LoyaltyOne to pay Bread an amount equivalent to the Tax Refund are oppressive and a transfer at undervalue and are void and unenforceable by Bread against LoyaltyOne.

32. The motion materials further evidence that LoyaltyOne’s attempted disclaimer of the Tax Matters Agreement is merely an improper attempt to litigate the same issue in more than one context and forum.

33. In addition, while Bread has not been served with a claim, LVI has established a liquidating trust in the Chapter 11 Proceedings to pursue claims against Bread and other parties to provide for potential recovery for the Credit Agreement Lenders.

Notice of Disclaimer or Resiliation of the Tax Matters Agreement

34. Despite closing the transaction with BMO in June 2023 and ceasing operations at that time, LoyaltyOne only delivered a Notice of Disclaimer to LVI and Bread seeking to disclaim the Tax Matters Agreement on October 27, 2023.

35. The disclaimer or resiliation of the Tax Matters Agreement will not enhance the prospects of a viable compromise or arrangement being made in respect of LoyaltyOne. As noted above, LoyaltyOne has already sold substantially all of its assets to BMO, has no ongoing operations, and has only relatively modest trade obligations.

36. In seeking to disclaim the Tax Matters Agreement, LoyaltyOne is attempting to improperly utilize the disclaimer provisions in the CCAA to unwind one aspect of the completed Separation and Distribution Transaction.

37. LoyaltyOne is improperly relying on the disclaimer provisions of the CCAA for the sole purpose of shifting value from Bread to LoyaltyOne's sophisticated secured lenders who explicitly agreed to the Credit Agreement, including that:

- (a) the funds they advanced under the Credit Agreement would be utilized to fund the Separation and Distribution Transaction, which included the entering into of the Tax Matters Agreement;
- (b) they were fully aware of and acknowledged that the Tax Refund is an asset that belongs to Bread (and not to LoyaltyOne or LVI) under the terms of the Tax Matters Agreement; and

- (c) the Tax Refund forms part of the Excluded Property and does not form part of their collateral.

38. The effect of LoyaltyOne's purported disclaimer would be the effective conversion, for the primary benefit of LoyaltyOne's controlling minds, of funds that were intended to be held in escrow by LoyaltyOne and transferred to Bread in completion of obligations between those parties. The disclaimer would give effect to an effective breach of trust and appropriation of funds.

39. The disclaimer of the Tax Matters Agreement will cause significant financial hardship to Bread, particularly when compared to the effect of an order denying the disclaimer on the Credit Agreement Lenders.

40. It is not fair, appropriate or reasonable in the circumstances for LoyaltyOne to disclaim the Tax Matters Agreement.

General

41. The CCAA, including sections 11 and 32 thereof.

42. Rules 2.03, 3.02, 10.01, 12.07 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

43. Sections 95 and 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

44. Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

45. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

46. Affidavits to be filed.

47. Such further and other materials as counsel may advise and this Honourable Court may permit.

November 13, 2023

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Proceeding commenced at Toronto

**NOTICE OF MOTION
(MOTION TO SET ASIDE DISCLAIMER)**

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