

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MADAM) MONDAY, THE 10th
)
JUSTICE CONWAY) DAY OF AUGUST, 2020

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
MENDOCINO CLOTHING COMPANY LTD., A CORPORATION WITH A HEAD
OFFICE IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

ORDER

THIS MOTION, made by Mendocino Clothing Company Ltd. (the “**Company**”), for an order, *inter alia*: approving a sale process in respect of the Company’s remaining inventory, intellectual property and other assets; extending the time for the Company to file a proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the “**BIA**”); approving an Administration Charge (as defined and described below); and for certain other relief as described in the Company’s Notice of Motion, was heard this day virtually via videoconference as a result of the Covid-19 pandemic.

ON READING the Notice of Motion, the Affidavit of Jan Kaplan sworn on July 30, 2020 and the exhibits thereto (the “**Kaplan Affidavit**”) and the First Report of KSV Kofman Inc. (“**KSV**”) in its capacity as proposal trustee of the Company (in such capacity, the “**Proposal Trustee**”) and the appendices thereto (the “**First Report**”), and on hearing the submissions of

counsel for the Proposal Trustee, for the Company, and such other counsel in attendance on the videoconference,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Company's Notice of Motion, Motion Record and First Report is hereby abridged and validated, and the manner of service of the Notice of Motion, Motion Record and First Report is hereby validated, so that this motion is properly returnable today, and hereby dispenses with further service thereof.

EXTENSION OF TIME TO FILE A PROPOSAL

2. **THIS COURT ORDERS** that pursuant to Section 50.4(9) of the BIA, the time for the Company to file a proposal is hereby extended to September 28, 2020.

APPROVAL OF SALE PROCESS

3. **THIS COURT ORDERS** that the Sale Process including the Bidding Procedures (as defined in the First Report) and the auction process as described in the First Report is hereby approved. The Proposal Trustee is hereby authorized to perform its obligations under and in accordance with the Sale Process and to take such further steps as it considers necessary or desirable in carrying out the Sale Process, subject to prior approval of this Court being obtained before completion of any transaction(s) under the Sale Process.

4. **THIS COURT ORDERS** that the execution of the Stalking Horse Agreement (as defined in the First Report) by the Company is hereby authorized and approved (for the purposes of being

the stalking horse bid), with such minor amendments as the Company (with the consent of the Proposal Trustee) and the Purchaser may agree to in writing.

5. **THIS COURT ORDERS** that the Expense Reimbursement Fee (as defined in the Stalking Horse Agreement) be and is hereby approved.

6. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Proposal Trustee, the Company and each of their representatives are hereby authorized and permitted to disclose and transfer to each potential bidder (the “**Bidders**”) and to their representatives, if requested by such Bidders, personal information of identifiable individuals, including, without limitation, all human resources and payroll information in the Company’s records pertaining to the Company’s past and current employees, but only to the extent desirable or required to negotiate or attempt to complete a sale pursuant to the Sale Process (a “**Sale**”). Each Bidder or representative to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Sale, and if it does not complete a Sale, shall return all such information to the Proposal Trustee, or in the alternative destroy all such information and provide confirmation of its destruction if requested by the Proposal Trustee.

7. **THIS COURT ORDERS** that the Proposal Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded to the Proposal Trustee under the BIA or any applicable legislation.

CASH MANAGEMENT

8. **THIS COURT ORDERS** that the Company shall be entitled to continue to utilize the cash management system currently in place as described in the Kaplan Affidavit or replace it with another substantially similar central cash management system (the “**Cash Management System**”) and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Company of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person other than the Company, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor with regard to any claims or expenses it may suffer or incur in connection with the provisions of the Cash Management System.

ADMINISTRATION CHARGE

9. **THIS COURT ORDERS** that the Proposal Trustee, counsel for the Proposal Trustee, and counsel for the Company (collectively, the “**Administrative Professionals**”) shall be entitled to the benefit of and are hereby granted a charge (the “**Administration Charge**”) on all of the Company’s present and future assets, undertakings and property of every nature and kind whatsoever and wherever situate, including all proceeds thereof (collectively, the “**Property**”), which charge shall not exceed an aggregate amount of \$250,000, as security for payment of their respective professional fees and disbursements incurred at their standard hourly rates, both before and after the making of this Order, in respect of this proceeding.

10. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge shall not be required, and that the Administration Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Administration Charge coming into existence, notwithstanding any failure to file, register, record or perfect.

11. **THIS COURT ORDERS** that the Administration Charge shall constitute a charge on the Property and such Administration Charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the “**Encumbrances**”), in favour of any individual, firm, corporation, governmental body or agency or any other entities (all of the foregoing, collectively being “**Persons**” and each being a “**Person**”), except any security interests registered in favour of BMW Canada Inc.

12. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Administration Charge, unless the Company also obtains the prior written consent of each of the Administrative Professionals, or upon further Order of this Court.

13. **THIS COURT ORDERS** that the Administration Charge shall not be rendered invalid or unenforceable, and the rights and remedies of the Administrative Professionals shall not otherwise be limited or impaired in any way, by (a) the pendency of this proceeding and the declarations of insolvency made herein; (b) any motion(s) or application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such motions or applications; (c) the filing of any assignments for the general benefit of creditors made or deemed to have been

made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan document, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which binds the Company, and notwithstanding any provision to the contract in any Agreement:

- (a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;
- (b) none of the Administrative Professionals shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and
- (c) the payment made by the Company pursuant to this Order and the granting of the Administration Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

14. **THIS COURT ORDERS** that any charge created by this Order over leases of real property in Canada shall only be a charge in the Company’s interest in such real property leases.

LANDLORDS

15. **THIS COURT ORDERS** that with respect to landlords of retail locations (“**Landlords**”), the Company shall pay to such Landlords of store locations that are open and operating on or after July 14, 2020 all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other

amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges and costs arising as a result of the insolvency of the Debtors and the abandonment, if any, of furniture, fixtures, equipment and signage) or as otherwise may be negotiated between the Company and the applicable Landlord from time to time (“**Rent**”) in accordance with the terms of the applicable lease.

16. **THIS COURT ORDERS** that with respect to Rent owing for the period from and after July 14, 2020 (including rent owing for notice periods for leases that are disclaimed), Landlords shall be entitled to and are hereby granted a charge (the “**Landlords’ Charge**”) on the Property as security for the payment of all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges and costs arising as a result of the insolvency of the Company and the abandonment, if any, of furniture, fixtures, equipment and/or signage) or as otherwise may be negotiated between the Company and the applicable Landlord from time to time, for the period commencing on the Filing Date, up to and including the effective date of the disclaimer of any such lease (“**Post-Filing Rent**”).

17. **THIS COURT ORDERS** that the Landlords’ Charge shall form a charge on the Property in priority to all Encumbrances, in favour of any Person, but subordinate in priority to (i) the Administration Charge, (ii) any Encumbrance in favour of The Toronto Dominion Bank, (iii) any Encumbrance in favour of a secured creditor who would be materially affected by this Order and who has not been given notice of this motion, (iv) the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA, (v) any valid claims to the Property of the Company asserted

pursuant to section 81.1 of the BIA; and (vi) any valid priority charges which exist in relation to provincial sales taxes and taxes pursuant to the *Excise Tax Act* (Canada).

18. **THIS COURT ORDERS** that the amount of Post Filing Rent subject to the Landlords' Charge in favour of any particular Landlord shall be determined on a basis consistent with the applicable lease, or as otherwise may be negotiated between the Company and the applicable Landlord from time to time, and , the Landlords' Charge shall be shared by affected Landlords rateably in accordance with the amounts of their respective unpaid Post Filing Rent. In the event of any dispute between a Landlord and the Company as to the Post Filing Rent payable to a Landlord, this Court shall have the authority to determine such dispute on a summary basis on a motion made by the Company or the applicable Landlord, as the case may be.

19. **THIS COURT ORDERS** that the Landlords' Charge shall not be enforced without the written consent of the Proposal Trustee, or leave of this Court.

20. **THIS COURT ORDERS** that the filing, registration or perfection of the Landlords' Charge shall not be required, and that the charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

21. **THIS COURT ORDERS** that the Landlords' Charge shall not be rendered invalid or unenforceable as to the rights and remedies of the Landlords entitled to the benefit of the Landlords' Charge and the Landlords shall not otherwise be limited or impaired in any way by: (i) any application(s) for bankruptcy order(s) issued pursuant to the BIA as against the Company, or any bankruptcy order made pursuant to such applications; (ii) the filing of any assignments for the

general benefit of creditors made pursuant to the BIA by the Company; (iii) any deemed bankruptcy of the Company; and (iv) the provisions of any federal or provincial statutes. Further, any payments made to Landlords pursuant to the Landlords' Charge do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions pursuant to the BIA or any other applicable law.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 of the *Rules of Civil Procedure* (the "**Rules**"), this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules. Subject to Rule 3.01(d) of the Rules and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://www.ksvadvisory.com/insolvency-cases/case/mendocino-clothing>'.

23. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Company and the Proposal Trustee are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Company's creditors or other interested parties at their respective addresses as last shown on the records of the Company and that any such service or

distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

24. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

25. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States, to give effect to this Order and to assist the Company, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist the Company and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

26. **THIS COURT ORDERS** that each of the Company or the Proposal Trustee shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

27. **THIS COURT ORDERS** that any interested party (including the Company and the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



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COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

ORDER

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