Court File No. . CV-23-00695619-00CL

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 **NORDSTROM CANADA RETAIL, INC., NORDSTROM CANADA HOLDINGS, LLC and NORDSTROM CANADA HOLDINGS II, LLC**

APPLICANTS

FACTUM OF THE APPLICANTS (COMEBACK HEARING)

March 8, 2023

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PART I - NATURE OF THE APPLICATION

1. On March 2, 2023, Nordstrom Canada Retail, Inc., Nordstrom Canada Holdings, LLC, and Nordstrom Canada Holdings II, LLC (the "**Applicants**") were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "**CCAA**") pursuant to an Initial Order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). The stay of proceedings in the Initial Order was extended to Nordstrom Canada Leasing LP (together with the Applicants, the "**Nordstrom Canada Entities**"). Alvarez & Marsal Canada Inc. was appointed as monitor within these CCAA proceedings (the "**Monitor**).

2. At this comeback hearing, the Applicants now seek an Amended and Restated Initial Order ("**ARIO**"). The ARIO would, among other things:

(a) extend the Stay Period and the Parent Stay to March 20, 2023;

(b) approve a key employee retention plan (the "**KERP**") and related charge (the "**KERP Charge**") as security for payments under the KERP; and

(c) increase the Administration Charge to $1.5 million and the Directors' Charge to $13.25 million.

3. The Applicants have acted with good faith and due diligence since the date of the Initial Order. The limited and tailored relief requested in the ARIO will facilitate the next steps in the orderly wind-down of the Nordstrom Canada Entities' operations, pending their return to Court on March 20, 2023 to: (i) seek Court approval of the Realization Process (defined below); (ii) obtain a further extension of the stay of proceedings; and (iii) address any remaining stakeholder issues.

PART II -SUMMARY OF FACTS

4. The facts regarding this motion are more fully set out in the affidavit of Misti Heckel.[1]

5. As directed by this Court, this hearing is restricted to matters set out in the Applicants' original Application Record and the relief requested below is limited accordingly. Additional matters will be addressed at the hearing scheduled for March 20, 2023. As such, the Applicants seek to extend the Stay Period and the Parent Stay, only until the date of that hearing.[2]

6. As detailed further below, since the granting of the Initial Order, the Nordstrom Canada Entities, in close consultation and with the assistance of the Monitor, have been working in good faith and with due diligence to stabilize their business and operations to prepare for a responsible and orderly wind-down as part of these CCAA proceedings.[3]

PART III -THE ISSUES AND THE LAW

7. The issues on this motion are whether this Court should grant the requested ARIO, including whether:

(a) This Court should extend the Stay Period and the Parent Stay until March 20, 2023;

(b) This Court should approve the KERP and grant the KERP Charge; and

(c) This Court should approve the requested increases to the Directors' Charge and the Administration Charge.

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1 Affidavit of Misti Heckel, sworn March 8, 2023 ["**ARIO Heckel Affidavit**"]. The Applicants further rely on the facts as set out in the Affidavit of Misti Heckel, sworn March 1, 2023 in support of the Initial Order ["**Initial Heckel Affidavit**"]. Unless otherwise specified, capitalized terms in this factum have the same meaning as in the ARIO Heckel Affidavit.

2 ARIO Heckel Affidavit at para 35. The legal basis for the Parent Stay was discussed in paras 48-58 of the Factum of the Applicants dated March 2, 2023 ["**Applicants' Initial Order Factum"].**

3 ARIO Heckel Affidavit at para 10.

A. The Stay Should be Extended to March 20, 2023

8. The Applicants seek to extend the Stay Period and the Parent Stay up to and including March 20, 2023, at which point the Applicants will put forward a Realization Process for Court approval and seek a further extension of the stay of proceedings. The targeted completion date for liquidation and store closures is June 30, 2023.

9. S. 11.02(2) of the CCAA provides that the Court may extend a stay order for any period necessary, if the Court is satisfied that (a) circumstances exist that make the order appropriate, and (b) the applicant has acted, and is acting, in good faith and with due diligence. The Applicants have acted in good faith and with due diligence in pursuing the orderly wind-down of their business since the date of the Initial Order and the requested extension of the Stay is therefore justified.

(a) Stakeholder Engagement

10. Upon receiving the Initial Order, the Nordstrom Canada Entities and the Monitor gave notice of these CCAA proceedings to stakeholders including employees, landlords, merchandise vendors, and customers.[4] They have proceeded with due diligence to engage with these stakeholders.

11. With respect to employees, the Nordstrom Canada Entities undertook a comprehensive outreach program. All employees in Canada received a letter notifying them of the CCAA proceedings, providing information regarding the Employee Trust and Employee Representative Counsel, and including a Frequently Asked Questions document addressing common employee issues. The Nordstrom Canada Entities organized a call with all Canadian store managers, followed up by an email to store managers setting out essential operating steps. Additionally, the Nordstrom

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4 ARIO Heckel Affidavit at paras 12-23.

Canada Entities held three "all employee" calls via Microsoft Teams to advise employees of next steps and to answer, to the extent possible, employee questions.[5]

12. The Nordstrom Canada Entities have also had numerous communications with Employee Representative Counsel since the date of the Initial Order. Nordstrom Canada delivered a letter to all Represented Employees (as defined in the Initial Order) providing information about Employee Representative Counsel.[6] Employee Representative Counsel has established dedicated contact methods for Represented Employees and a website through which they can obtain information about these CCAA proceedings.[7]

13. With respect to Landlords, on March 2, 2023, Osler (on behalf of the Nordstrom Canada Entities) sent a letter to all the Landlords of Nordstrom Canada's retail locations advising that the Applicants had been granted an Initial Order under the CCAA.[8] The letter further advised that Nordstrom Canada intends to wind down its operations and close each of its 13 stores with the help of a liquidator, and to seek Court approval of the proposed Realization Process on March 20, 2023, with the aim to complete final store closings on or before June 30, 2023. Draft sale guidelines were also circulated for Landlord feedback.[9] Finally, Landlords were notified of the Parent Stay.[10]

14. The Nordstrom Canada Entities, with the assistance of the Monitor, intend to continue to engage with the Landlords, in particular leading up to the March 20, 2023 hearing dealing with the Realization Process, with the hope of achieving a consensual resolution of issues involving the Landlords.[11]

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5 ARIO Heckel Affidavit at para 12.
6 ARIO Heckel Affidavit at para 14.
7 ARIO Heckel Affidavit at para 13.
8 ARIO Heckel Affidavit at para 17.
9 ARIO Heckel Affidavit at para 17.
10 ARIO Heckel Affidavit at para 17.
11 ARIO Heckel Affidavit at para 18.

15. With respect to vendors, since the Initial Order was granted the Nordstrom Canada Entities, in close consultation with the Monitor, have been in contact with an extensive number and wide variety of vendors and suppliers.[12] On March 2, 2023, Osler sent letters to a number of vendors, services providers, supply chain entities, and others. The letters advised the stakeholders of these CCAA Proceedings and provided information about the proposed Realization Process.[13]

16. Representatives of the Nordstrom Canada Entities have also spoken directly with a number of their vendors and suppliers, often with the participation of the Monitor.[14] Counsel for the Nordstrom Canada Entities has been communicating with counsel representing certain suppliers to seek to resolve any issues consensually.[15]

17. Finally, with respect to customers, on March 3, 2023, Canadian customers were notified that Nordstrom Canada was winding down its operations in Canada, including closing all 13 stores and removing transactional functionality from Nordstrom.ca. Customers were advised that stores will continue operating in the normal course until the start of a Court-approved liquidation process beginning later in March, and were provided details regarding purchases and orders going forward.[16]

(b) Development of Realization Process

18. On March 2, 2023, pursuant to the authority set out in the Initial Order, the Monitor sent emails to five potential third-party liquidators seeking liquidation bids with respect to Nordstrom Canada.[17] Those interested in participating in the bidding process must execute and return a non-

[12] ARIO Heckel Affidavit at para 19.
[13] ARIO Heckel Affidavit at para 20.
[14] ARIO Heckel Affidavit at para 21.
[15] ARIO Heckel Affidavit at para 21.
[16] ARIO Heckel Affidavit at para 22.
[17] ARIO Heckel Affidavit at para 24.

disclosure agreement ("**NDA**"). Upon receipt of an executed NDA by the Monitor, the third-party liquidators are entitled to: (i) access a populated data room including financial and operational details about the Nordstrom Canada Entities and their inventory; and (ii) coordinate site visits to selected Nordstrom Canada stores.[18]

19. Since the Monitor began outreach to third-party liquidators, five NDAs have been signed by third-party liquidators, who have entered the data room and scheduled or conducted site visits.[19] Two additional third-party liquidators subsequently contacted the Monitor and executed NDAs.[20] The third-party liquidators were asked to provide their bids by March 9, 2023. It is anticipated that the Applicants will seek approval of the successful third-party liquidator bidder at the hearing on March 20, 2023 when they seek court approval of a Realization Process.[21]

20. Extending the Stay Period is necessary and appropriate in the circumstances to permit ongoing stakeholder dialogues and to allow the Applicants to finalize arrangements for the liquidation and bring the proposed Realization Process to this Court for approval.[22]

B. The Proposed KERP

(a) Basis for and Scope of the Proposed KERP

21. Retaining employees who have expertise in the operations of Nordstrom Canada's stores will be key to a successful Realization Process.[23] Nordstrom Canada, in consultation with the Monitor, has developed a proposed KERP to incentivize the retention of certain key active

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18 ARIO Heckel Affidavit at para 24.
19 ARIO Heckel Affidavit at para 25.
20 ARIO Heckel Affidavit at para 25.
21 ARIO Heckel Affidavit at para 26.
22 ARIO Heckel Affidavit at para 35.
23 Initial Heckel Affidavit at para 16(a).

employees (the "**KERP Participants**") who are identified as critical to a successful CCAA proceeding.[24]

22. The vast majority of proposed KERP participants and KERP funds are directed toward store-level employees, since these individuals are key to maximizing value from the Realization Process.[25] The KERP is proposed to encompass 228 store-level employees and 37 non-store employees, for a maximum aggregate amount of $2.6 million.[26] Specifically the KERP includes:

(a) Up to 13 Store Managers, for a total maximum payout of approximately $359,000;

(b) Up to 117 Department Managers, for a total maximum payout of approximately $1.2 million;

(c) Up to 42 Assistant Department Managers, for a total maximum payout of approximately $193,000;

(d) Up to 56 Asset Protection personnel, for a total maximum payout of approximately $263,000; and

(e) 37 non-store personnel, for a total maximum payout of approximately $532,000.[27]

23. It is proposed that a KERP Charge of $2.6 million be granted to secure amounts payable under the KERP.[28] The KERP Charge would rank behind the Administration Charge and the

24 Initial Heckel Affidavit at para 182.
25 Initial Heckel Affidavit at para 183.
26 ARIO Heckel Affidavit at para 27.
27 Initial Heckel Affidavit at para 184; ARIO Heckel Affidavit at para 29.
28 ARIO Heckel Affidavit at para 31.

Directors' Charge, but in priority to all other security interests.[29] The Monitor and Employee Representative Counsel support the KERP.[30]

(b) The Proposed KERP Should be Approved

24. A KERP is aimed at retaining important employees who are necessary to a CCAA proceeding and who may otherwise depart the company.[31] This Court has discretion to approve a KERP pursuant to its power under s. 11 of the CCAA to make any order it considers appropriate in a CCAA proceeding.[32] KERPs have been approved in numerous CCAA proceedings,[33] including in situations that similarly involved an orderly wind-down of Canadian retail operations.[34]

25. The factors considered in granting a KERP vary from case to case; however, some factors are generally present.[35] The following factors support granting the proposed KERP:

(a) The KERP is necessary and the KERP Participants are crucial to a successful CCAA proceeding.[36] The Monitor has concluded that the KERP will provide stability and facilitate the orderly wind-down process by encouraging key active employees to remain with Nordstrom Canada. The KERP Participants are key to

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29 ARIO Heckel Affidavit at para 31.

30 Initial Heckel Affidavit at para 182.

31 *Grant Forest Products (Re)*, 2009 CanLII 42046 (Ont. S.C.J. [Commercial List]) [*Grant Forest Products*] at para 14.

32 CCAA s. 11; *Re Cinram International*, 2012 ONSC 3767 [*Cinram*] at para 91; *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586 [*MEC*] at para 66.

33 See, for example, *MEC* at para 71; *Cinram* at paras 90-93; *Grant Forest Products* at paras 8-10.

34 See, for example, *Target Canada Co. (Re)*, 2015 ONSC 303, at para 59 [*Target*]; *Bed Bath & Beyond Canada Ltd. (Re)*, 2023 ONSC 1230 at para 12.

35 *Walter Energy Canada Holdings Inc. (Re)*, 2016 BCSC 107 [*Walter*] at para 58, citing *Grant Forest Products*.

36 *Aralez Pharmaceuticals Inc. (Re),* 2018 ONSC 6980 [Commercial List] [*Aralez*] at para. 30.

the execution of an orderly wind-down and their participation will assist in maximizing realizations for the benefit of all stakeholders.[37]

(b) The KERP Participants will likely consider other employment opportunities if the KERP is not approved.[38] Employees have informed Nordstrom Canada that the KERP is a significant factor in whether they will choose to stay with the company during the proposed Realization Process.[39]

(c) The process of designing the KERP was fair and objectively reasonable.[40] Nordstrom Canada has no funded secured indebtedness and no secured creditors affected by the KERP Charge have objected.[41] Moreover, the KERP was developed by Nordstrom Canada with the involvement, oversight, and support of the Monitor. CCAA Courts generally place "a great deal of confidence" in the Monitor's support for a KERP.[42]

(d) The KERP is reasonable and appropriate in the circumstances to ensure that value is preserved and maximized.[43] Given the nature of the merchandise and scale of store operations, particularly at full-line stores, it is significant that the vast majority of KERP Participants are store-level employees who are needed to assist with the Realization Process.[44]

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37 Pre-Filing Report of the Proposed Monitor at para 13.5.
38 *Walter* at para 59; *Grant Forest Products* at para 14.
39 ARIO Heckel Affidavit at para 31.
40 *Aralez* at para 30.
41 *Aralez* at para 35. See Initial Heckel Affidavit at paras 143-149.
42 *Grant Forest Products* at paras 18-19.
43 *Aralez* at para 30.
44 Pre-Filing Report of the Proposed Monitor at para 13.5.

(e) The KERP design is fair and contains safeguards. An employee is only eligible for the KERP if Nordstrom Canada, in consultation with the Monitor, concludes that the employee is critical to a successful CCAA proceeding.[45] The KERP is a one-time payment calculated based on an employee's base pay to ensure that KERP payments are commensurate with an employee's responsibility and duties.[46] Further, the KERP is only payable if the employee remains employed until their services are no longer needed. Employees who resign – or who are terminated for cause – are not eligible for any KERP payment.[47]

26. Courts will defer to the business judgment of a debtor regarding the scope and quantum of a KERP where the process for designing the KERP has been fair and objectively reasonable and where the end result is also reasonable.[48] On this basis, and on the basis of the factors identified above, this Court should approve the KERP and grant the associated KERP Charge.

C. Increase to the Administration Charge and Directors' Charge

27. The Initial Order approved an Administration Charge in the amount of $750,000. With the concurrence of the Monitor, Nordstrom Canada now seeks to increase the Administration Charge to $1.5 million.[49]

28. Similarly, the Initial Order approved the Directors' Charge in the amount of $10.75 million. With the approval of the Monitor, Nordstrom Canada seeks to increase the Directors' Charge to

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45 Initial Heckel Affidavit at para 183.
46 ARIO Heckel Affidavit at para 28.
47 Initial Heckel Affidavit at para 186.
48 *Grant Forest Products* at paras 17-18.
49 ARIO Heckel Affidavit at para 32.

$13.25 million. The proposed increase in the Directors' Charge relates primarily to a forecasted increase in sales tax obligations during the peak of the Realization Process.[50]

29. As submitted in the Applicants' Initial Order factum, the Court has discretion to grant and increase these charges in an amount that the Court considers appropriate pursuant to sections 11.51 and 11.52 of the CCAA.[51] These relatively modest requested increases reflect greater potential obligations and liabilities that may arise as a result of these CCAA proceedings, including during the proposed Realization Process.

PART IV - NATURE OF THE ORDER SOUGHT

30. For the foregoing reasons, the Applicants submit that this Court should grant the ARIO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of March, 2023:

OSLER, HOSKIN & HARCOURT, LLP
per Marleigh Dick
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Lawyers for the Applicant

TO: THE ATTACHED SERVICE LIST

50 ARIO Heckel Affidavit at para 33.
51 Applicants' Initial Order Factum at paras 70-74.

SCHEDULE "A": LIST OF AUTHORITIES

Cases

1. *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 [Commercial List].
2. *Bed Bath & Beyond Canada Ltd. (Re)*, 2023 ONSC 130.
3. *Cinram International (Re)*, 2012 ONSC 3767.
4. *Grant Forest Products (Re)*, 2009 CanLII 42046 (Ont. S.C.J. [Commercial List]).
5. *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586.
6. *Target Canada Co. (Re)*, 2015 ONSC 303.
7. *Walter Energy Canada Holdings Inc. (Re)*, 2016 BCSC 107.

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

COMPANIES' CREDITORS ARRANGEMENT ACT

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

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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 10 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.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

NORDSTROM CANADA RETAIL, INC., ET AL
Applicant

Court File No: CV-23-00695619-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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