

**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
EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.**

Applicants

**NOTICE OF MOTION
(returnable June 23, 2011)**

Tenere of Canada, Inc. (formerly Eddie Bauer of Canada, Inc.) ("**Tenere**") and Yuma Customer Services Inc. (formerly Eddie Bauer Customer Services Inc.) ("**Yuma**" and, with Tenere, the "**Applicants**") will make a motion to the Honourable Justice Morawetz of the Commercial List on June 23, 2011, at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

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

- ☐ in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- ☐ in writing as an opposed motion under subrule 37.12.1(4);
- ☒ orally.

1. THE APPLICANTS MAKE A MOTION FOR AN ORDER:

- (a) If necessary, abridging the time for service of the Notice of Motion and Motion Record in respect of this motion and dispensing with further service thereof;
- (b) Extending the stay of proceedings through to and including December 31, 2011;

- (c) Approving the Settlement Agreement dated May 10, 2011 between Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (“CRA”) and the Applicants (the “**Settlement Agreement**”);
- (d) Authorizing and directing the Monitor to distribute, from the funds of Tenere in the Monitor’s trust accounts, the following amounts:
 - (i) to CRA, the amount of \$75,000 under the Settlement Agreement;
 - (ii) to EBHI Liquidating Trust (as successor of Amargosa, Inc.) the amount of \$1,888,613.00 in full payment of its amended Proof of Claim, net of withholding taxes payable thereon;
 - (iii) to EBHI Liquidating Trust the amount of \$2,531,250.00 as a distribution to the shareholder of Tenere, net of withholding taxes payable thereon; and
 - (iv) to CRA the amount of \$934,773.00 as withholding taxes payable in respect of the amounts to be paid to EBHI Liquidating Trust in paragraphs (ii) and (iii) above;
- (e) Authorizing the Monitor to make further distributions, at such time(s) as the Monitor may deem appropriate from the funds of Tenere in the Monitor’s possession, to EBHI Liquidating Trust as shareholder, net of appropriate withholding taxes, and to remit such withholding taxes to CRA;
- (f) Approving the conduct and activities of the Monitor as set out in the Eleventh Report of the Monitor (the “**Eleventh Report**”), to be completed, served and filed; and
- (g) Granting such further and other relief as counsel may request and this Honourable Court deems just.

2. THE GROUNDS FOR THE MOTION ARE:

Background

- (a) On June 17, 2009, the Honourable Mr. Justice Morawetz granted an Initial Order (as amended and restated, the “**Initial Order**”) in respect of the Applicants under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

(the “**CCAA**”). The Initial Order appointed RSM Richter Inc. as the monitor of the Applicants (the “**Monitor**”) in the CCAA proceedings. Terms not otherwise defined herein shall have the meaning ascribed to them in the Initial Order;

- (b) Also on June 17, 2009, EBHI Holdings, Inc. (formerly Eddie Bauer Holdings, Inc.) (“**EBHI**”), the indirect parent of the Applicants, Amargosa, Inc. (formerly Eddie Bauer, Inc.) (“**Amargosa**”), the direct parent of the Applicants, and certain of EBHI’s subsidiaries (collectively, the “**US Debtors**” and, with the Applicants, the “**Company**”), commenced proceedings in the United States Bankruptcy Court for the District of Delaware (the “**US Bankruptcy Court**”) under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1330;
- (c) By Order dated July 14, 2009, this Honourable Court extended the Stay Period in respect of the Applicants until September 18, 2009, which Stay Period was subsequently extended to December 18, 2009, by a Stay Extension Order dated September 17, 2009, to April 30, 2010, by a Stay Extension Order dated December 8, 2010, to September 30, 2010, by an Order dated April 29, 2010, to December 31, 2010, by an Order dated August 12, 2010, and to June 30, 2011, by an Order dated December 14, 2010;
- (d) Following a joint hearing with the US Bankruptcy Court on June 29, 2009, both this Honourable Court and the US Bankruptcy Court approved a stalking horse sale process, as well as certain bidding procedures (the “**Bidding Procedures**”) in connection with the sale of substantially all of the Company’s business and assets;
- (e) Following the completion of an auction held pursuant to the Bidding Procedures, Everest Holdings LLC (“**Everest**”), a subsidiary of Golden Gate Capital, was selected as the winning bidder and Everest, as buyer, entered into an asset purchase agreement dated July 17, 2009 (the “**Asset Purchase Agreement**”), with EBHI and each of the subsidiaries of EBHI listed on Schedule I of the Asset Purchase Agreement (including the Applicants), as vendors. The sale of the Company’s assets to Everest (the “**Everest Transaction**”) was approved by

Orders of both this Honourable Court and the US Bankruptcy Court following a joint hearing on July 22, 2009;

- (f) On July 22, 2009, this Honourable Court also issued a Claims Procedure Order (the “**Claims Procedure Order**”) which established a Claims Bar Date (as defined in the Claims Procedure Order) in respect of claims against the Applicants, being 4:00 pm (EDT) on September 21, 2009;
- (g) On August 3, 2009, the Everest Transaction closed. In connection with the closing of the transaction, US\$11 million (the “**Sale Proceeds**”) was allocated to the assets of the Applicants and this amount was paid by Everest to the Monitor;
- (h) Everest now operates the worldwide “Eddie Bauer” business, including the Canadian business. The Applicants no longer have any active business operations, employees or assets (save for the funds of Tenere on deposit in the Monitor’s trust account and certain other potential tax refunds);
- (i) On August 20, 2009, this Honourable Court made an Order expanding the Monitor’s powers to authorize it to take certain actions on behalf of the Applicants and make certain payments from the Sale Proceeds including, *inter alia*, the payment of federal and provincial sales taxes, the payment of amounts owing to former employees of the Applicants pursuant to settlement agreements reached regarding the termination of their employment, the payment of professional fees covered by the Administration Charge, and changing the names of the Applicants to Tenere and Yuma in accordance with the Asset Purchase Agreement;
- (j) On December 8, 2009, this Honourable Court made an Order authorizing the Monitor, for and on behalf of the Applicants, to engage Gowling Lafleur Henderson LLP (“**Gowling**”) on a contingency fee basis to perform services in furtherance of the recovery of potential tax refunds of the Applicants related to transfer pricing;

- (k) On May 12, 2010, this Honourable Court made an Order expunging the Intercompany Charge on the Property, approving the allocation of the Sale Proceeds as between Tenere and Yuma (approximately 99.3% or US\$10.9 million to Tenere, and approximately 0.7% or US\$77,000 to Yuma), authorizing the Monitor to distribute a portion of the Sale Proceeds to creditors of the Applicants (most notably US\$7.8 million to Amargosa) and establishing a holdback of the Sale Proceeds in the amount of \$2.5 million pending further Order of the Court;
- (l) On August 12, 2010, this Honourable Court made an Order authorizing the distribution of the balance of the Sale Proceeds to creditors, principally Amargosa, expunging the Directors' Charge, and reducing the Administration Charge to \$250,000;
- (m) In its August 12, 2010, Order, this Court also authorized the Monitor to distribute any other funds held or received by the Monitor on behalf of Tenere to Amargosa on account of its admitted claim of approximately US\$11.2 million until such claim is paid in full, subject to a holdback at all times of \$250,000 on account of the Administration Charge;
- (n) Subsequent to the granting of the August 12 Order, additional payments were made on account of Amargosa's unsecured claim such that, as of the Monitor's Tenth Report dated December 7, 2010 (the "**Tenth Report**"), the Monitor had distributed in total:
 - (i) approximately US\$11.2 million to Amargosa on account of its unsecured claim against Tenere;
 - (ii) approximately \$1,200 to pay in full the holders of three (3) admitted unsecured claims against Tenere; and
 - (iii) US\$70,000 to CRA on account of its claims against Yuma;
- (o) As detailed in the Tenth Report, as at December 7, 2010, there was approximately \$5.1 million in the Monitor's Trust accounts representing tax refunds collected on behalf of Tenere. The Monitor had indicated in the Tenth Report that, all claims

against Tenere having been paid, those funds should be distributed to Tenere's shareholder, Amargosa.

- (p) On December 8, 2010, CRA advised the Applicants and the Monitor that it believed the estates should be substantively consolidated so that CRA could be paid in full on its claims against Yuma before Tenere's shareholders. As a result of subsequent discussions between the Applicants and CRA, the Settlement Agreement was executed and, subject to its approval by the Court, the objections of CRA will be vacated.
- (q) As a result of additional tax refunds having been received and interest on the prior sums, there is now approximately \$5.7 million in the Monitor's trust accounts for Tenere.

Amargosa's Claim

- (r) The Tenth Report also disclosed that, in connection with work being undertaken in connection with the filing of Amargosa's and Tenere's respective 2010 tax returns, it became evident that Amargosa's claim against Tenere is, in fact, greater than previously determined as it was identified that Tenere did not properly account for foreign exchange on pre-filing transactions between Amargosa and Tenere dating back to 2008. On June 1, 2011, the Original Proof of Claim filed by Amargosa was amended and the amount owed to Amargosa was therein adjusted to approximately \$14 million ("**Amended Proof of Claim**"). The Amended Proof of Claim has been admitted under the Claims Procedure;
- (s) Gowling continues to pursue transfer pricing related tax refunds on behalf of the Applicants on a contingency basis;

Stay Extension

- (t) The stay period provided for in the Initial Order currently expires on June 30, 2011;

- (u) The Applicants are seeking an extension of the stay to December 31, 2011, to permit the Monitor and the Company to continue to pursue the transfer pricing related tax refunds and to otherwise deal with the winding up of the Applicants' affairs;
- (v) Since the granting of the Initial Order, the Applicants have acted in good faith and with due diligence;
- (w) No creditor of the Applicants will suffer material prejudice if the stay period is extended;

Miscellaneous

- (x) Rules 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
- (y) The provisions of the CCAA; and
- (z) Such further and other grounds as counsel may advise and this Honourable Court permit.

3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

- (a) The Eleventh Report of the Monitor, to be filed; and
- (b) Such further and other material as counsel may advise and this Honourable Court may permit.

June 9, 2011

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

L. Joseph Latham LSUC#: 32326A
Christopher G. Armstrong LSUC #: 55148B

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Applicants

TO ATTACHED SERVICE LIST

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**NOTICE OF MOTION
(returnable December 14, 2010)**

GOODMANS LLP

Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

L. Joseph Latham LSUC#: 32326A
Christopher G. Armstrong LSUC #: 55148B

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for the Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	THURSDAY, THE 23 rd
)	
JUSTICE MORAWETZ)	DAY OF JUNE, 2011

**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
EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.**

ORDER

THIS MOTION, made by Tenere of Canada, Inc. (formerly Eddie Bauer of Canada, Inc.) and Yuma Customer Services Inc. (formerly Eddie Bauer Customer Services Inc.) (collectively, the “**Applicants**”) for the relief set out in the Applicants’ notice of motion dated June 9, 2011 (the “**Notice of Motion**”), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Eleventh Report of RSM Richter Inc. dated June, 2011 (the “**Eleventh Report**”), in its capacity as monitor (the “**Monitor**”) of the Applicants, and on hearing submissions of counsel for the Applicants, the Monitor, Canada Revenue Agency (“**CRA**”) and those other parties present, no one appearing for any other person on the service list, although duly served as appears from the Affidavit of Service sworn June, 2011, filed.

1. **THIS COURT ORDERS** that the time for the service of the Applicants' motion record and the Eleventh Report be and is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that the Stay Period referred to in the Initial Order of the Honourable Mr. Justice Morawetz dated June 17, 2009, as amended and restated, be and is hereby extended until December 31, 2011, or such later date as this Court may order.
3. **THIS COURT ORDERS** that the Settlement Agreement dated May 10, 2011 between Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue ("CRA"), and the Applicants (the "**Settlement Agreement**") be and is hereby approved.
4. **THIS COURT ORDERS** that the Monitor be and is hereby authorized and directed to distribute, from the funds of Tenere in the Monitor's possession, the following amounts:
 - (i) to CRA, the amount of \$75,000 under the Settlement Agreement;
 - (ii) to EBHI Liquidating Trust (as successor of Amargosa, Inc.) the amount of \$1,888,613.00 in full payment of its amended Proof of Claim, which amount is net of withholding taxes;
 - (iii) to EBHI Liquidating Trust the amount of \$2,531,250.00 as a distribution to the shareholder of Tenere, which amount is net of withholding taxes; and
 - (iv) to CRA the amount of \$934,773.00 as withholding taxes payable in respect of the amounts to be paid to EBHI Liquidating Trust in (ii) and (iii) above.
5. **THIS COURT ORDERS** that the Monitor be and is hereby authorized to make further distributions, at such time(s) as the Monitor may deem appropriate, from the funds of Tenere in the Monitor's possession, to EBHI Liquidating Trust as shareholder, net of appropriate withholding taxes, and to remit such withholding taxes to CRA.

6. **THIS COURT ORDERS** that the conduct and activities of the Monitor as set out and described in the Eleventh Report be and are hereby approved.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST Proceeding commenced at Toronto	
ORDER	
GOODMANS LLP Barristers & Solicitors Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, Ontario M5H 2S7 L. Joseph Latham LSUC#: 32326A Christopher G. Armstrong LSUC #: 55148B Tel: 416.979.2211 Fax: 416.979.1234 Lawyers for the Applicants	