

## **Synopsis of Select Retail Cases**

### **The Great Atlantic and Pacific Tea Company (“A&P”)**

- Case No. 15-23007
- Filed on July 19, 2015 – SDNY
- This is A&P’s second Chapter 11 case in only five years, following a failed merger attempt in 2014
- On the Petition Date:
  - 296 retail grocery and/or liquor stores in six northeastern states
  - 28,500 employees, 90% of them unionized (35 separate CBAs)<sup>1</sup>
  - Reported about \$1.6 billion in assets against \$2.3 billion in liabilities
  - Privately held since emergence from 2010 bankruptcy cases
- Debt Structure:
  - Senior Debt (first-priority liens on all of the Debtors’ assets – split collateral)
    - ABL Facility - \$198M (LOCs) (Wells Fargo as Agent) – 1st priority all-asset liens (two tranches)
    - Term Loan Facility - \$262.5M (Wells Fargo as Agent)
  - PIK Toggle Notes - \$215M (U.S. Bank as Trustee)
    - Intercreditor expressly subordinates their liens to liens on the Common Collateral granted in support of the ABL Facility and the Term Loan Facility
  - Convertible Notes - \$250M (U.S. Bank as Trustee)
    - Intercreditor expressly subordinates their liens to liens on the Common Collateral granted in support of the ABL Facility and the Term Loan Facility AND to liens granted in support of the PIK notes
- Immediate Reason for Filing - liquidity crunch on account of supplier demands re. cash in advance/COD as news of the company’s weak financial position spread (drained \$24million in weeks before filing) and major supplier issue default for \$17M deferred payment and ABL Lender issued default and accelerated obligations
- Proposed a 3-tier sale strategy
  - Tier I: sale of 120 “core” stores (employing 12,000 employees) pursuant to pre-negotiated APAs (3 stalking horse bidders, for 76 stores, 25 stores, and 19 stores, respectively) for an aggregate of about \$600M
  - Tier II: sale of 150 stores not in the Tier I group
  - Tier III: sale of everything else not sold in Tier I or Tier II
- DIP from Fortress Credit Group
  - Fully committed new money, \$100 million

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<sup>1</sup> Union issues were a big component of these cases

- \$50 million to be drawn upon interim approval, and the other \$50 million to be drawn upon entry of a final order
  - Secured third-lien postpetition term loan facility (junior DIP facility)
  - Matures – earliest of one year after closing of the DIP loan, a sale of substantially all of the debtors’ assets, or the effective date of a plan
  - i-rate = LIBOR + 11.5% (+2% for the default rate)
  - fees:
    - \$25,000 administrative fee,
    - 2.5% closing fee,
    - make-whole provision applicable in first six months (calculated as present value of required payments of interest on the prepaid amount using an interest rate of LIBOR + 11.25%, the default rate of 2%, and a discount rate equal to the treasury rate + 0.50%)
  - Milestones:
    - 10 days after filing: Debtors to reject/close 25 stores that are cash-flow negative
    - 20 days after filing: Filing of sale motion with minimum value of \$275 million (entry into stalking horse purchase agreements of a minimum of \$275M)
    - 30 days after filing: entry of order authorizing retention of liquidation consultant to conduct GOB sales for 25 stores
    - 30 days after filing petition: reach agreement to modify CBAs to implement store closing programs and other accommodations needed to implement the sale strategy or file a motion under 1113(e)
    - 45 days after filing: Court order authorizing 1113(e) relief, if needed
    - 45 days after filing: Bid procedures order submitted
    - 60 days after filing: Debtors to vacate 25 closed stores
    - 60 days after filing: order approving general sale procedures for all non-Tier I stores and assets
    - 75 days after filing: lease extension order shall be filed (seeking extension of rejection/assumption to 210 days)
    - 88 days after filing (Oct. 15): Approval of 363 sale
    - 103 days (Oct. 30): Consummation of 363 sale
    - 120 days after filing: entry of lease extension order
  - Other Conditions Precedent to Closing:
    - payment of all rent due with respect to leases covered by the stalking horse agreements
- Sale Process: Most sales completed very early on, with separate procedures established for the Tier I assets (“global” procedures) and Tier II assets (“discrete” sale procedures)
  - Tier I Sale –
    - two of the original Stalking Horse Bids were approved by 9/22/15 (Acme, 70 stores & Stop&Shop, 24 stores)

- an auction was held with respect to an additional 177 stores, with bid submission deadline of 9/21/15
    - Tier I on 10/7/15 and 10/8/2015
  - Tier II Sales – using “discrete” procedures
    - There was an auction on Oct. 1
- During the first 11 months of the case:
  - sold, auctioned, or otherwise liquidated the leasehold interests and related assets of 207 of the 296 stores they owned on the Petition Date, realizing about \$910 million and preserving over 18,000 jobs<sup>2</sup>
  - successfully rejected 73 burdensome leases
  - primary assets that remained unsold were 16 operating, profitable liquor stores
    - 11 of these stores and 3 of the licenses were sold at auction for about \$17.5M and approved by the Court on August 26, 2016
  - paid down a significant portion of their secured debt:
    - satisfied in full their prepetition revolver and term loan, and the DIP
    - paid down approximately \$300 million of secured debt on account of the PIK Notes pursuant to the first and second amended orders authorizing the further use of cash collateral
- Debtors sought and obtained 3 exclusivity extensions during process of case, to date (January 19, 2017 and March 20, 2017 are the current filing and solicitation dates)
- June 6, 2016: Court approved a Global Settlement:
  - \$11.25 million in cash made available from the collateral of the secured lenders for the Debtors’ estates
  - The secured lenders and the Debtors’ estates will share the net recoveries from the prosecution of avoidance actions, to be prosecuted by the UCC
  - Although the Global Settlement provides for and fixes the consideration that will be made available to the Debtors’ estates from the secured lenders’ collateral, it does not fix the mechanic for distributions – still under negotiation

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<sup>2</sup> Much of that was accomplished even earlier in the case, with 176 stores sold for a total of \$665M by mid-November, 2015. Further, as explained in a pleading filed on January 14, 2016 – “Since the entry of the Final DIP Order, the Debtors effectively used funds available from the DIP Facility and Cash Collateral to successfully sell, auction or otherwise liquidate their leasehold interests relating to over 202 stores, the pharmaceutical assets located at 178 stores, intellectual property and certain furniture, fixtures, equipment and inventory, resulting in total sale proceeds of approximately \$900 million.”

## Aeropostale

- Case no. 16-11275
- Filed on May 4, 2016 – SDNY
- On the Petition Date:
  - 811 physical stores and online sales operations<sup>3</sup>
    - 745 Aeropostale locations in all 50 states and Puerto Rico,
    - 41 Aeropostale locations in Canada (owned/operated by the Canadian Subsidiary) and
    - 23 “P.S.” stores from Aeropostale locations in 12 states
  - brands licensed internationally and sold in over 300 additional locations in 17 different countries
  - 14,500 employees, 11,500 of whom are part-time
  - reported \$354 million in assets and \$390 million in liabilities
  - common stock listed on NYSE under the ticker “ARO”
  - stated intent to file parallel CCAA proceeding<sup>4</sup>
- Debt Structure on Petition Date:
  - ABL facility - \$73 million in principal and \$240,000 in an undrawn letter of credit (BOA as Agent)
  - Term loan facility – \$100 million in “Tranche A” and \$50 million in “Tranche B” (Aero Investors, LLC, affiliate of Sycamore Partners, as agent)
  - Unsecured trade debt: \$23 million (including \$2.5 million for 503(b)(9) claims)
- Proposed a dual track plan and sale process
  - intent to conduct store closing sales at 154 locations, and
  - either pursue a standalone plan of reorganization based on a smaller, more profitable footprint, or conduct a 363 sale process
- Immediate Reason for Filing - to avoid default under the term loan and crossdefault under the prepetition ABL agreement and to restore access to inventory (a supply chain disruption had occurred due to actions of two key suppliers, which drained the debtors’ cash and deprived Aeropostale of critical merchandise)
- DIP from Crystal Financial
  - \$160 million:
    - \$75 million term loan facility (\$45 million on an interim basis)
    - \$85 million revolver (\$55 million on an interim basis)
  - secured by priming liens on the prepetition ABL collateral and a junior lien on the prepetition term loan collateral
  - Matures the earliest of 12 months or effective date of a plan or consummation of a sale of substantially all the debtors’ assets
  - i-rate = 90-day LIBOR +5%, (plus 2% for the default rate)

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<sup>3</sup> The post-closing chain will have 229 locations

<sup>4</sup> The Canadian subsidiary, Aeropostale Canada Corp., filed under the CCAA on July 1, 2016, in Halifax, Nova Scotia. On July 18, 2016, the chapter 11 case of Aeropostale Canada Corp. was dismissed by the SDNY Bankruptcy Court.

- fees:
  - \$650,000 work fee (credited towards the underwriting fee),
  - 5% interim commitment fee (credited towards underwriting fee),
  - 0.25% interim fee (credited towards final arrangement fee)
  - 0.25% final arrangement fee
  - 0.375% unused facility fee
  - \$7,500 agency fee
- Milestones: Plan (and Sale) - debtors permitted to abandon the plan process at any time, but may not abandon the sale process without the lenders' consent. Chart below shows milestone date changes during case

<b>MILESTONES</b> (#s in columns to R reflect # of days after Petition)	DIP Motion	Interim DIP Order	Final DIP Order	Aug. 12 extension order	Actual Date of Occurrence in Chapter 11 Case
Interim DIP order entered	3 bus. Days (b.d.s)	3 b.d.s	-	-	2
Motion to extend lease assumption/rejection deadline to 210 days filed	10	10	10	-	12
Final DIP order entered, Lease extension order entered	30	30	41	-	40
Plan/DS filed	60	60	72	-	72 <sup>5</sup>
Bid Procedures Motion filed,	75	75	89	-	72
Bid Packages (including alternative bid packages to liquidation firms) sent	75	75	2 after bid procedures order entry	-	unknown
DS order entered	95	95	83	-	86
Plan solicitation commenced	100	100	7 after DS Order entered	-	TBD
Bid Procedures Order entered	105	105	103	-	86
Confirmation hearing	130	130	111	125	TBD
Confirmation order entered	140	140	112	126	TBD
Auction	141	141	113	117	117
Sale Order entered	143	143	114	126	132
Plan consummation	145	145	113	127	TBD
Sale closing	145	145	114	1 after Sale Order entry	134

- Other DIP covenants and conditions precedent to closing:
  - DIP Agent has right to Credit Bid at a sale
  - UCC investigation period = 60 days from

<sup>5</sup> At the time the Plan was filed, the Debtors expected that the Sale Transaction would be effectuated pursuant to the Plan. Consequently, the Debtors filed the Plan and the Disclosure Statement, solicited votes on the Plan, and prepared for confirmation.

- appointment
  - DIP proceeds to be used to pay down the prepetition ABL facility
- Early days of the case were characterized by dispute between the Debtors and Sycamore (PE sponsor of (1) prepetition Term Loan Lender Aero Investors, LLC, and (2) the Debtors' largest manufacturer/supplier, MGF Sourcing US LLC)
  - In May 2014, as a condition to Aero Investors providing financing to the Debtors, one of the Debtors, Aéropostale Procurement Company, Inc. entered into a non-exclusive Sourcing Agreement with MGF
    - Obligations guaranteed by Aéropostale, Inc.
    - required the Debtors to purchase a minimum volume of product for a period of 10 years commencing on the first fiscal quarter of 2016 of between \$240 million and \$280 million per annum depending on the year (failure to purchase requires Debtors to pay a shortfall commission to MGF)
    - MGF obligated to pay the Debtors an annual rebate based on the volume of annual purchases, with rebate to be applied to annual amortization payments on the "Tranche B" Term Loan.
  - MGF's demands for cash in advance terms of delivery precipitated the filing (and the Debtors allege that Sycamore also tipped off their other major supplier which caused that other supplier to demand COD terms, exacerbating the company's liquidity crisis)
  - First-day motion to compel MGF to comply with terms of the Sourcing Agreement
  - On July 22, the Debtors moved to (i) bar the Sycamore parties from credit bidding their \$150 million secured claim in relation to their bid for the upcoming asset sale, (ii) equitably subordinate the Sycamore parties' claims under the prepetition term loan agreement and (iii) recharacterize MGF's claims arising from the \$50 million "Tranche B" facility under the prepetition Term Loan agreement
- Out of the gate, the Debtors sought permission to close 154 stores (first day motion), 113 in the U.S. and all 41 in Canada, and authority for Debtors to assume prepetition contract with liquidation consultants (Tiger and Great American, who later formed a JV to bid on the remaining assets – see below)
- Sale Process
  - Initially, was contemplated that sale would occur under a confirmed plan, but as negotiations progressed, it was decided to proceed under §363
  - 6 Qualified Bids were submitted before the August 25, 2016 Bid Deadline:
    - The prepetition Term Loan Lenders (Aero Investors LLC and MGF Sourcing Holdings, Limited) submitted a bid for all assets of the Debtors, other than cash and receivables, for a cash purchase price in the amount necessary to repay the DIP Facility in full, and no assumption of liabilities
    - Two bids were received from liquidators:

- A JV between Hilco Merchant Resources, LLC and Gordon Brothers Retail Partners, LLC, for the Debtors' inventory and intellectual property for a purchase price of ~ \$175 million
  - A JV between Tiger Capital Group, LL and Great American Group WF, LLC for the Debtors' inventory only, for a purchase price of approximately \$184 million
- Two bids limited to the Debtors' "GoJane" assets (an online women's fashion footwear and apparel retailer that was acquired by the Debtors in November 2012):
  - Chelsea, Inc., an entity controlled by GoJane's current management, submitted a bid for substantially all of the Debtors' assets associated with the GoJane name and brand for a cash purchase price of \$4,500,000
  - Dese Enterprise Inc. (d/b/a Amiclubwear) submitted a bid for certain identified intellectual property of GoJane LLC for a cash purchase price of \$250,000 (plus the assumption of liabilities of up to \$10,000 in the aggregate)
- Ardene USA Inc. submitted a bid for eight unexpired leases for an aggregate of up to \$200,000
- Auction took place over three days – Aug. 29 – Sept. 1
  - On August 30, the Tiger/Great American liquidation bid was initially declared the highest and best
  - But shortly thereafter, a new "going concern" bid was submitted by Aero Opco LLC (a JV among Authentic Brands Group, General Growth Properties, Simon Property Group, Hilco Merchant Resources and Gordon Brothers Retail Partners), for a purchase price of \$243.3M
  - On August 31, the Term Loan Lenders submitted a revised bid, contemplating a full chain liquidation, no assumption of leases and no stores remaining open, and consideration comprised of approximately \$120 million in cash to repay the DIP Facility in full, and a credit bid of \$124.3 million, subject to certain adjustments
  - JV "going concern" bid announced as the winning bid on 9/1/16.
- Sale Hearing, Order, and Closing on Sept. 12, 13, and 15, respectively
  - Purchase price was \$243.3M in cash, assumption of \$240M in outstanding postpetition purchase orders, certain gift card liabilities, and cure costs for leases to be assumed
  - keeps at least 229 of Aéropostale's stores operational, (potential to keep an additional 40 or more stores open depending upon buyer's negotiations with landlords), saves at least 7,000 jobs
  - \$74M in assets excluded from sale to be treated under ch. 11 plan
- exclusive plan filing and solicitation periods extended to Oct. 31 and Dec. 31, 2016, respectively

## **The Wet Seal**

- Case No. 15-10081
- Filed on January 15, 2015
- On the Petition Date:
  - National specialty retail chain selling “fast fashion” and catering to young women ages 13-24
  - 173 retail stores (42 states and Puerto Rico); had closed 338 retail stores in the prior week, terminating employees who worked there
  - 721 full-time and 2,104 part-time employees
  - e-commerce business generated 6.5% of total sales in first 11 months of 2014 (\$26.5 million)
  - Public company, listed on the NASDAQ, but share price fell below required threshold (which resulted in de-listing on Jan. 27, 2016, and trading in “pink sheets” by the time the DS was filed)
- Debt Structure:
  - Secured
    - Prepetition Credit Facility with BOA, no amounts outstanding under credit facility, but \$10.8M in LOCs to support factoring arrangements, which Debtors were required to cash-collateralize under the contract terms shortly prior to filing
      - First lien on cash, cash equivalents, investments, receivables, and inventory of principal operating entity and three wholly-owned subs (two of which are co-borrowers and the other which is a guarantor of the obligations)
  - Unsecured
    - Senior unsecured convertible notes, bearing 6% annual interest, mature in March 2017, convertible to stock
    - \$31.1M in trade debt
- Immediate Reason for Filing - liquidity crunch caused by factors demanding standby LOCs in late 2014, suppliers demanding COD terms, prepetition lender (BOA) required Debtor to cash-collateralize all LOCs issued under its facility (\$10.8M at the time of filing)
  - Industry-wide weakness contributed to tightening terms: first-day declaration noted the filing of bankruptcy/ABC of three market competitors in prior weeks (dELiA\*s, Deb Stores, and Body Central Corp.) which now found themselves in liquidation
- Filed with proposed DIP financing and plan sponsorship agreement (PSA) from B. Riley in place (agreement to receive 80% of the stock in the reorganized company in exchange for \$20M cash – includes a conversion of amount borrowed under the \$20M DIP to equity on effective date and payment of the balance in cash), and a DIP L/C Facility from BOA
- PSA with B. Riley



- Reorganized company to be a privately held corporation
- Milestones:
  - 22 days postpetition:
    - entry of order authorizing assumption of PSA
    - filing of plan and disclosure statement
    - debtor to provide sponsor with list of executory contracts for assumption and associated cure costs
  - 65 days postpetition: entry of DS Order
  - 83 days postpetition: delivery of notices re. intent to assume and cure costs, notice of deadline for objections
  - 86 days postpetition: Debtors to provide sponsor with new bylaws, charter, BOD slate, stockholders agreement
  - 91 days postpetition: file plan supplement with information re. new bylaws, charter, BOD slate, stockholders agreement and listing contracts to be assumed and associated cure costs
  - 106 days postpetition: Plan confirmation and entry of order authorizing assumption of designated contracts and cure cost amounts
  - 121 days postpetition: Plan Effective Date
- Contemplated Plan terms:
  - full payment of all administrative expenses,
  - satisfaction of all allowed secured claims
  - full payment of all allowed priority claims
  - 20% of newly issued common stock in the reorganized Wet Seal distributed pro rata to holders of allowed general unsecured claims, whose claims are not satisfied in cash
- Break-up Fee of \$1M plus reasonable fees and expenses upon termination/decision to enter into Alternative Transaction (limits re. notice imposed along with right to amend terms to match any Superior Proposal and a “no shop” requirement)
- DIP from B. Riley Financial, Inc.
  - Fully committed new money, \$20 million
    - \$1 million interim borrowing limit until entry of final order
  - Secured super-priority term loan facility
  - Matures – 1 month UNLESS final DIP Order is entered earlier, in which case 4 months, to be extended in discretion of lender, OR upon termination of the PSA
  - i-rate = 10.25% (+2% for the default rate)
  - fees:
    - commitment fees:
      - on Jan. 24, 2015, 2.5% of the amount by which the Commitment exceeds the Availability Block in effect (\$5,000,000 subject to reduction at discretion of lender)
      - on any other date when the lender reduces the Availability Block, 2.5% the amount of the reduction

- Milestones:
    - 90 days after filing – Lease Extension Motion (extending deadline to reject or assume nonresidential leases to 210 days)
    - (most are contained in PSA)
- DIP L/C Facility from BOA –
  - Commitment of \$18,328,777 in postpetition L/Cs
    - \$10,828,777 in “rolled up” prepetition L/Cs
    - \$7.5M in new commitments
  - first priority lien on a Postpetition Cash Collateral Account of \$1.5M to be opened and funded at BOA
  - matures: earliest of April 30, 2015, plan effective date, sale closing
  - default i-rate is 4.5%
  - fees:
    - \$56,250 closing fee (0.75% of new commitments)
    - 0.5% per annum undrawn line fee
    - 2.5% per annum letter of credit fee
- At the First Day Hearing, another party interested in acquiring the Debtors’ assets objected to the B. Riley DIP and PSA terms, and B. Riley responded by improving them
  - purchase price was increased to \$25M
  - the “no shop” provision was replaced with a “go shop” provision
- On Feb. 5, 2015 (22 days postpetition), Court allowed the Debtors to assume the PSA Agreement as amended
- The next day, the Debtors filed a Bid Procedures Order, which was approved on Feb. 18, with a Bid Deadline of March 5.
- Auction held on March 10 (54 days postpetition) – winning bid was by Mador Lending, which proposed to acquire all assets via 363 Sale and provide an alternate DIP (very similar terms but more favorable interest rate (8% and default rate of 10%), no facility fees
- On March 12, 2015, Debtors entered into the APA with Mador and filed the Sale Motion on March 16, 2015, all with the support of the UCC
- Sale Terms:
  - \$7.5M cash purchase
  - Assume and assign at least 140 leases
  - All employee obligations
  - All admin claims incurred prior to closing date of Sale
  - Payment of breakup fee to B. Riley
  - Claims for stub rent
- Disclosure Statement filed 9/15/15
- Liquidating Plan Confirmed 10/30/2015, Effective 12/31/2015