

**ONTARIO
SUPERIOR COURT OF JUSTICE**

TEXTRON FINANCIAL CANADA LIMITED

Applicant

- and -

BETA LIMITEE/BETA BRANDS LIMITED

Respondent

**FOURTH REPORT OF MINTZ & PARTNERS LIMITED IN ITS CAPACITY AS
INTERIM RECEIVER AND RECEIVER OF BETA LIMITEE/BETA BRANDS
LIMITED**

1. Mintz & Partners Limited the (“**Receiver**”), the interim receiver and receiver of Beta Limitee/Beta Brands Limited (“**Beta Brands or the “Company**”) is delivering this Fourth Report in response to a motion being brought by The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 242G (“**Local 242G**”) who are seeking:

- (a) a variation to the Appointment Order (as defined below);
- (b) leave as against the Receiver to:
 - (i) commence and continue proceedings before the Ontario Labour Relations Board (the “**OLRB**”) asserting that the Receiver is a related employer to Beta Brands and a successor employer to Beta Brands; and

- (ii) commence and continue proceedings before an arbitrator asserting various grievances against the Receiver on the assumption that the Receiver is bound by the collective agreement between Beta Brands and Local 242G (the “**Collective Agreement**”); and
- (c) leave as against Beta Brands to:
 - (i) commence and continue proceedings before an arbitrator asserting various grievances against Beta Brands; and
 - (ii) allow it to commence and continue proceedings before the OLRB against Beta Brands, Bremner Food Group, Inc. (“**Bremner**”), the purchaser of certain of Beta Brands assets through the Receiver as described further below, Sun Beta LLC (“**Sun Beta**”), Beta Brands’ parent company, Sun Capital Partners Inc. (“**Sun Capital**”), a company related to Sun Beta, and Beta Brands U.S.A. Ltd. (“**Beta USA**”), a company affiliated with Beta Brands .

2. Notwithstanding that its motion was returnable on March 1, 2007, Local 242G did not serve its materials on the service list in this matter until the afternoon of February 23, 2007. The Receiver has not had a proper opportunity to prepare a response to Local 242G’s motion. However, the Receiver feels that, if Local 242G insists on proceeding with its motion, the Court be advised of certain key facts. This Fourth Report should be read in conjunction with the Receiver’s Third Report dated February 22, 2007 (the “**Third Report**”).

BACKGROUND

3. Pursuant to an Order of Madam Justice Lax of the Ontario Superior Court of Justice (Commercial List) dated January 3, 2007 (the “**Appointment Order**”), Mintz &

Partners Limited (the “**Receiver**”) was appointed as interim receiver and receiver of all of the assets, undertaking and properties of Beta Brands . A copy of the Appointment Order is attached as Appendix “A” to the Third Report.

4. The Appointment Order has not been appealed or varied and remains in full force and effect.
5. Pursuant to an Order dated January 5, 2007 (the “**Approval and Vesting Order**”), the Court approved the sale of substantially all of the assets of the Company’s bakery division and certain finished goods inventory (the “**Purchased Assets**”) to Bremner in accordance with an Asset Purchase Agreement dated December 13, 2006 (the “**APA**”) between Bremner and Beta Brands (the “**Bremner Transaction**”) and vested the Acquired Assets in Bremner free and clear. A copy of the Approval and Vesting Order is attached as Appendix “D” to the Third Report.
6. The Bremner Transaction closed on January 10, 2007 with a number of modifications. The Court was advised of the proposed modifications to the Bremner Transaction prior to the Bremner Transaction closing and the Court advised that a further attendance before the Court to formally approve the modifications was not required.
7. On February 7, 2007, Bremner completed the removal of the Purchased Assets from Beta Brands’ premises in London, Ontario (the “**Premises**”) and on February 9, 2007, the Receiver received the purchase price for the Purchased Assets.
8. On February 20, 2007, the Court made an order (the “**Marketing Process Approval Order**”) approving the Receiver’s proposed marketing strategy for the sale of Beta Brands’ remaining assets (the “**Remaining Assets**”). A copy of the Marketing Process Approval Order is attached as Appendix “F” to the Third Report.
9. Pursuant to the Marketing Process Approval Order, bids for the Remaining Assets are not due until March 20, 2007. Once bids are received, the Receiver anticipates that it will take at least 30 to 60 days to complete a transaction to sell the Remaining Assets.

PROPOSED VARIATION OF THE APPOINTMENT ORDER

10. Paragraph 29 of the Appointment Order permits any interested party to apply to the Ontario Superior Court (Commercial List) to vary or amend the Appointment Order on seven (7) days notice:

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

11. Local 242G is seeking an order varying paragraph 31 of the Appointment Order. Paragraph 31 of the Appointment Order is linked to paragraphs 30 and 32. These paragraphs provide:

30. THIS COURT ORDERS that (subject to obtaining leave from this Court) nothing in this Order shall affect the rights of the Debtor's employees to seek relief from any court of competent jurisdiction, the Receiver be and is hereby authorized and directed to pay to each of the Debtor's employees such wages as may be due for work actually performed by such employees up to and including the date of this Order. This prior sentence shall not be construed as creating any entitlement to vacation pay, severance pay or termination pay owing to such employees.

31. THIS COURT ORDERS that nothing in this Order or the granting of powers or authorities to the Receiver herein shall be relied upon by the Debtor's employees on any application to obtain relief against the Receiver from any court or tribunal of competent jurisdiction.

32. THIS COURT ORDERS that nothing herein shall be construed as affecting any legal proceedings before any court or tribunal dealing with

Local 242G's members' and/or Local 242G's rights under labour and/or employment law, subject to the obtaining of leave in advance from this Court.

12. Paragraphs 30, 31 and 32 of the Appointment Order arose out of Local 242G's objection to the form of order being sought by Textron Financial Canada Limited ("**Textron**") on January 3, 2007.

13. The Commercial List Users' Committee has developed a form of Model Receivership Order for use by parties seeking the appointment of an interim receiver or receiver (the "**Model Order**").

14. The Model Order is premised on the appointed receiver operating the debtor's business. Given that Beta Brands had ceased to carry on business prior to Textron bringing its application to appoint the Receiver, it was not contemplated that the Receiver would operate Beta Brands' business. The Receiver's appointment was intended to be strictly for the purpose of preserving, protecting and realizing on Beta Brands' assets. On that basis, Textron requested a modified form of the Model Order that reflected the true nature of the Receiver's appointment.

15. At the hearing for the application for the appointment of the Receiver, Local 242G:

- (a) objected to the powers given to the Receiver by the Appointment Order varying in any way from the powers provided for in the Model Order notwithstanding that the Receiver had no intention of operating Beta Brands' business; and
- (b) requested that the Appointment Order be clear that, subject to obtaining leave, Local 242G's rights to bring proceedings before the OLRB were not affected.

16. The intention of paragraphs 30, 31 and 32 of the Appointment Order was to ensure that while, subject to obtaining leave, Local 242G could seek to have the Receiver declared a related or successor employer based on the Receiver's actual actions, it would not be able to use the powers afforded to the Receiver by the Appointment Order as a basis for such an application. As such, Local 242G would be restricted to relying on the Receiver's actual operation of Beta Brands' business.

17. The Appointment Order as signed by Madam Justice Lax on January 3, 2007 contained hand-written/modified versions of paragraphs 30, 31 and 32. A copy of Madam Justice Lax's handwritten changes to the Appointment Order is attached hereto as **Appendix "A"**.

18. On January 4, 2007, Textron's counsel circulated via e-mail a "clean" version of the Appointment Order to counsel for approval. A copy of the January 4, 2007 e-mail is attached hereto as **Appendix "B"**. Local 242G's counsel responded requesting changes to paragraph 31. A copy of Local 242G's responding e-mail is attached hereto as **Appendix "C"**. The changes to paragraph 31 requested by Local 242G's counsel were made.

19. Local 242G did not appeal the Appointment Order and has not brought a motion before Madam Justice Lax seeking to vary or amend the Appointment Order. Prior to receiving Local 242G's materials on February 23, 2007, the Receiver had not been advised that Local 242G was even contemplating seeking a variance of the Appointment Order.

RECEIVER NOT RELATED TO BETA BRANDS

20. The Receiver is in no way related to Beta Brands. The Receiver is a licensed trustee in bankruptcy and has no business or financial ties to Beta Brands.

RECEIVER HAS NOT CARRIED ON BETA BRANDS' BUSINESS

21. At the time the Receiver was appointed, Beta Brands had ceased to carry on business. The Receiver has not continued Beta Brands' business and has not carried on any business using the assets and property of Beta Brands.

22. The sole role of the Receiver has been to protect, preserve and realize on Beta Brands' assets and property in accordance with the terms of the Appointment Order, the Approval and Vesting Order and the Marketing Process Approval Order.

REMOVAL OF PURCHASED ASSETS

23. In paragraph 38 of his affidavit, Mr. Norris states that in the weeks following the making of the Approval and Vesting Order, Bremner and/or the Receiver employed individuals to deal with and remove the Purchased Assets.

24. The Receiver did not employ anyone to deal with and remove the Purchased Assets from the Premises.

25. Pursuant to the Approval and Vesting Order, the Court approved an Access Agreement that was attached as a schedule to the Asset Purchase Agreement (the "**Access Agreement**") and directed that the Receiver enter into the Access Agreement (paragraphs 2 and 3).

26. Pursuant to the terms of the Access Agreement, the Receiver was obliged to allow Bremner access to the Premises to allow Bremner to disassemble and remove the Purchased Assets, which, at the time they were disassembled and removed, were Bremner's property. Bremner employed its own people and hired its own agents to carry out the disassembly and removal of the Purchased Assets. The Receiver did not employ or hire any parties to effect the disassembly or removal.

“OFFER” TO EMPLOY LOCAL 242G MEMBERS

27. In paragraph 43 of his affidavit, Mr. Norris indicates that he has been advised by counsel to Local 242G that the Receiver, Sun Beta and Bremner were prepared to employ Local 242G members to perform work after January 5, 2007, but only if Local 242G agreed to waive any rights they might have under the collective agreement between Local 242G and Beta Brands (the “**Collective Agreement**”) and the *Employment Standards Act*, 2000. This is not completely accurate and must be placed in context.

28. On January 3, 2007, the portion of Textron’s application seeking approval for the Bremner Transaction was adjourned to January 5, 2007. Local 242G opposed the approval of the Bremner Transaction and the adjournment was intended to allow Local 242G an opportunity to obtain further information with respect to the Bremner Transaction in an attempt to resolve Local 242G’s opposition.

29. Throughout the day on January 4, 2007, counsel to Textron, the Receiver and counsel to the Receiver provided counsel to Local 242G with requested information relevant to the Bremner Transaction.

30. In the morning of January 5, 2007 prior to the commencement of the hearing seeking approval for the Bremner Transaction, counsel for Local 242G approached the Receiver, the Receiver’s counsel, Textron’s counsel and Sun Beta’s counsel, and suggested that Local 242G might withdraw its objection to the Bremner Transaction if Local 242G members were employed to perform any work required to disassemble and remove the Purchased Assets from the Premises. The proposal was, however, that the Receiver would employ Local 242G members. There was never a suggestion that Sun Beta or Bremner would hire Local 242G members. Furthermore, there was never any intention on the part of the Receiver to re-start the Company’s operations.

31. It was immediately made clear to Local 242G’s counsel that any agreement to employ Local 242G members would be dependent on Bremner consenting – the Access Agreement contemplated that Bremner would undertake the disassembly and removal – and Local 242G acknowledging that the fact that the Receiver employed Local 242G

members for the limited purpose of disassembling and removing the Purchased Assets would not be used as a basis for a successor employer application against the Receiver. Counsel to Local 242G understood these conditions and asked the Receiver to coordinate with Bremner and develop language for an agreement for consideration by Local 242G.

32. The hearing seeking approval for the Bremner Transaction was adjourned to later in the day to allow the parties to attempt to negotiate an acceptable agreement with Local 242G.

33. The Receiver and counsel to the Receiver, Textron, Sun Beta and Bremner met to discuss the proposition put forward by Local 242G. The parties agreed that, assuming protections could be included to ensure that the Purchased Assets would be disassembled and removed by qualified workers and appropriate protections could be put in place to ensure that the Receiver was not exposed to successor employer liability based on the hiring of unionized workers to remove the Purchased Assets, the proposal put forward by Local 242G could be workable.

34. A form of agreement outlining the terms upon which the Receiver would hire Local 242G members (the “**Operations Agreement**”) was drafted. The Operations Agreement contemplated that from and after January 3, 2007, the Receiver would employ only Local 242G members to perform work on the Premises including, but not limited to, the disassembly and removal (under the oversight of Bremner) of the Purchased Assets. The Receiver was prepared to agree to comply with the terms of the Collective Agreement going forward, but asked that Local 242G’s members waive any rights they might have to assert that, based on the Operations Agreement, the Receiver was a successor employer and liable for Beta Brands obligations to Local 242G’s members.

35. The Receiver and counsel for the Receiver, Textron Canada, Sun Beta and Bremner met with counsel for Local 242G and a representative of the union to review the terms of the Operations Agreement and to provide them with a draft of the Operations Agreement.

36. One-half hour before the parties were due to reappear before Madam Justice Lax, Local 242G's counsel called from the Court House to advise that the terms of the Operations Agreement were not acceptable.

TERMINATION OF BETA BRANDS' EMPLOYEES

37. In paragraph 36 of his affidavit, Mr. Norris advises that he received a letter on January 5, 2007 advising him that his employment had been terminated and that it is his understanding that all of the members of Local 242G received the same letter. In fact, all of the employees of Beta Brands were sent a letter advising them that their employment was terminated.

38. In paragraph 51 of his affidavit, Mr. Norris states that the Receiver terminated the employment of Beta Brands' employees and that this "seems consistent with [the Receiver] being an employer". This is a misstatement.

39. The termination of Beta Brands' employees is dealt with in paragraph 13 of the Appointment Order. Paragraph 13 provides:

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

40. The Receiver terminated Beta Brands' employees on behalf of Beta Brands in strict compliance with the terms of the Appointment Order. The Receiver has not hired (or terminated) any of Beta Brands' unionized employees.

PERSONAL LIABILITY OF THE RECEIVER

41. The Appointment Order and the Bankruptcy and Insolvency Act contain various provisions that are intended to protect the Receiver from liability for pre-appointment obligations of Beta Brands.

42. For example, paragraph 16 of the Appointment Order provides:

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out 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 the Receiver by section 14.06 of the BIA or by any other applicable legislation.

LOCAL 242G'S APPLICATION FOR LEAVE AS AGAINST BETA BRANDS

43. On January 2, 2007, Local 242G initiated proceedings before the OLRB as against Beta Brands, Beta USA, Sun Beta and Sun Capital. The Receiver understands that Beta Brands is a necessary party to these proceedings. As a result of the Appointment Order, as set out in Paragraph 8 of the Appointment Order, "all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court".

44. Local 242G also indicated its intention to initiate proceedings before the OLRB against Bremner. Beta Brands is a necessary party to these intended proceedings and, as set out above, leave is also required to commence these proceedings.

45. The Receiver believes that it is likely that Local 242G will wish to initiate proceedings before the OLRB against the purchaser(s) of the Remaining Assets. In the

interests of having all of these matters heard together, the Receiver believes that any leave to initiate proceedings before the OLRB on the basis of the sale of Beta Brands' assets be delayed until such time as the sale(s) of the Remaining Assets is/are completed.

GRIEVANCES INITIATED BY LOCAL 242G

46. On January 19, 2007, Local 242G purported to initiate a grievance against Beta Brands and various other parties including the Receiver without first obtaining leave. As a result of the Appointment Order, leave is required in order for Local 242G to proceed with this grievance as against Beta Brands or the Receiver.

47. As against Beta Brands, the Receiver does not take issue with leave being granted to Local 242G to pursue the grievance so long as the purpose of the grievance is to quantify the unsecured claim that Local 242G has against Beta Brands, and Local 242G does not proceed to enforce any such claim against the assets and property of Beta Brands.

48. The Receiver does not believe, however, that the grievance should proceed against the Receiver until such time as the Receiver is found to be liable to comply with the provisions of the Collective Agreement and legislation that Local 242G asserts were not complied with by the Receiver.

REQUEST/RECOMMENDATION

49. The Receiver requests that:

- (a) The portion of Local 242G's motion seeking leave to take proceedings against the Receiver before the OLRB seeking an order declaring the Receiver to be a related employer to Beta Brands be dismissed;

- (b) The portion of Local 242G's motion seeking to take proceedings against the Receiver before the OLRB seeking an order declaring the Receiver a successor employer to Beta Brands be dismissed or, in the alternative, adjourned to allow Local 242G to provide further and better evidence with respect to its proposed proceedings including, without limitation, a draft application;
 - (c) Any leave given to Local 242G to pursue grievances against the Receiver be conditional upon Local 242G first obtaining an order from a court or tribunal of competent jurisdiction finding that the Receiver was required to comply with the provisions of the Collective Agreement and legislation Local 242G seeks to assert the Receiver breached;
 - (d) Any leave given to Local 242G be conditional upon Local 242G not enforcing any monetary award made against the Receiver without obtaining a further order of the Court on 15 days notice to the Receiver, Textron and Sun Beta.
50. The Receiver recommends that:
- (a) The portion of Local 242G's motion seeking to vary the Appointment Order be dismissed without prejudice to Local 242G's right to bring a fresh motion seeking the same relief returnable before Madam Justice Lax;
 - (b) The portion of Local 242G's motion seeking leave as against Beta Brands be dismissed without prejudice to Local 242G's right to bring a fresh motion seeking the same relief returnable after the Receiver has completed the sale of the Remaining Assets; and
 - (c) Any leave granted to pursue proceedings against Beta Brands be subject to the restriction that Local 242G will not be able to enforce any monetary award against Beta Brands' assets or property.

DATED this 26th day of February, 2007

**Mintz & Partners Limited, solely in its capacity as Interim Receiver and
Receiver of Beta Limitee/Beta Brands Limited and not in its personal capacity**



Daniel R. Weisz, CA•CIRP, CIRP
Senior Vice President

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