Court File No.:

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 PAYLESS HOLDINGS LLC, PAYLESS SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP INC. AND THOSE OTHER ENTITIES LISTED ON SCHEDULE "A" HERETO

APPLICATION OF PAYLESS HOLDINGS LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANT

April 6, 2017

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

Marc Wasserman LSUC# 44066M
Tel: 416.862.4908
mwasserman@osler.com

John MacDonald LSUC# 25884R)
Tel: 416.862.5672
jmacdonald@osler.com

Shawn T. Irving LSUC# 50035U
Tel: 416.862.4733
sirving@osler.com

Fax: 416.862.6666

Lawyers for the Applicant

TO: SERVICE LIST

Court File No.:

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 PAYLESS HOLDINGS LLC, PAYLESS SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP INC. AND THOSE OTHER ENTITIES LISTED ON SCHEDULE "A" HERETO

APPLICATION OF PAYLESS HOLDINGS LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANT

PART I - NATURE OF THE APPLICATION

1. This factum is filed in support of an Application by Payless Holdings LLC (the "**Applicant**"), in its capacity as foreign representative (the "**Foreign Representative**") of itself as well as those entities listed in Schedule "A" that filed voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code (collectively with the Applicant, the "**Chapter 11 Debtors**", and with their non-debtor affiliated companies, "**Payless**") for Orders pursuant to sections 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), *inter alia*:

(a) recognizing the Chapter 11 Cases as foreign main proceedings pursuant to Part IV of the CCAA;

(b) recognizing certain First Day Orders;

(c) appointing Alvarez & Marsal Canada Inc. ("**A&M**") as Information Officer in this proceeding;

(d) granting the DIP ABL Lenders' Charge, Canadian Unsecured Creditors' Charge, and Administration Charge.

2. Capitalized terms used herein and not otherwise defined have the meaning given to them in the affidavit of Michael Schwindle sworn April 6, 2017 (the "**Schwindle Affidavit**").[1] All monetary amounts are in U.S. dollars unless stated otherwise.

PART II - THE FACTS

3. Payless is an iconic American footwear retailer. It was founded in 1956 in Topeka, Kansas, where it is still headquartered today. Payless markets its brands through brick and mortar stores, shopping malls, and e-commerce internet sites. There are nearly 4,400 Payless stores in more than 30 countries and Payless employs approximately 22,000 people.[2]

4. Payless had approximately $2.3 billion in net sales in fiscal year 2016. It is the largest specialty family footwear retailer in the Western hemisphere and is the second largest footwear retailer by unit sales in the United States. If the Chapter 11 Debtors can restructure their balance sheet, Payless is well-positioned for continued success in the budget-conscious family footwear market.[3]

5. Payless's business model depends heavily on its global supply chain, which in turn depends on its long-standing relationships with factories that make shoes to Payless's specifications at the right volume and the right price. Payless is able to bring to market popular brands and designs through design partnerships and license agreements that grant Payless the right to use popular private-label brands such as *Disney*, *DreamWorks*, *Star Wars* and *Marvel*.[4]

6. Payless's global sourcing networks include more than ninety manufacturing partners that produce over 110 million pairs of shoes annually. Payless maximizes its buying power through an

---

1 Application Record, Tab 2.
2 Schwindle Affidavit, Application Record, Tab 2, para. 11.
3 Schwindle Affidavit, Application Record, Tab 2, para. 12.
4 Schwindle Affidavit, Application Record, Tab 2, paras. 14 and 38.

integrated supply chain, which, along with the remainder of the buying and logistics functions, are managed out of Payless's head office in Kansas.[5]

A. The Chapter 11 Cases

7. On April 4, 2017, each of the Chapter 11 Debtors filed voluntary petitions for relief (the "**Petitions**") pursuant to chapter 11 of the U.S. Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Missouri (the "**U.S. Court**").[6]

8. The Chapter 11 Debtors have filed several motions with the U.S. Court and on April 5, 2017 the U.S. Court heard motions (the "**First Day Motions**") for various interim or final orders (collectively, the "**First Day Orders**"), including:[7]

(a) Joint Administration Motion;

(b) Cash Management Motion;

(c) Critical Vendors and Shippers Motion;

(d) Customer Programs Motion;

(e) DIP Motion;

(f) Employee Wages Motion;

(g) Foreign Representative Motion;

(h) Insurance Motion;

(i) Surety Bond Motion; and

(j) Tax Motion.

---

5 Schwindle Affidavit, Application Record, Tab 2, paras. 36 and 39.

6 Schwindle Affidavit, Application Record, Tab 2, para. 4.

7 Schwindle Affidavit, Application Record, Tab 2, para. 7. Certified copies of the Orders are attached to the Affidavit of Francesca Del Rizzo, sworn April 6, 2017, Application Record, tab 3 (the "**Del Rizzo Affidavit**").

B. The Chapter 11 Debtors

9. The Chapter 11 Debtors operate on an integrated basis. The Applicant is the ultimate parent of the Chapter 11 Debtors. The Chapter 11 Debtors consist of: [8]

(a) the Applicant and 25 of its wholly-owned subsidiaries that are incorporated under the laws of the United States;

(b) two (2) wholly-owned subsidiary entities incorporated under the laws of Canada – Payless ShoeSource Canada Inc. and Payless ShoeSource GP Inc.; and

(c) one (1) limited partnership established under the laws of Ontario – Payless ShoeSource Canada LP.

10. The three Canadian entities are collectively referred to herein as the "**Payless Canada Group**".

11. The Applicant seeks to have a stay of proceedings and other benefits of the relief sought in this Application extended to Payless ShoeSource Canada LP, which is carries on operations that are integral to the business of the Payless Canada Group. Payless ShoeSource Canada LP is also a guarantor under the DIP ABL Credit Agreement.[9]

12. For the fiscal year 2016, Payless generated approximately $2,280.5 billion in net revenues on a consolidated basis. Canadian sales accounted for approximately 7% of those net revenues; U.S. sales amounted to almost 75%.[10]

13. At the end of fiscal year 2016, Payless had assets per balance sheet with a book value of approximately $1,041.5 million and liabilities of $1,342.5 million on a consolidated basis.[11]

---

8 Schwindle Affidavit, Application Record, Tab 2, para. 15.
9 Schwindle Affidavit, Application Record, Tab 2, para. 16.
10 Schwindle Affidavit, Application Record, Tab 2, para. 17.
11 Schwindle Affidavit, Application Record, Tab 2, para. 18.

14. As of March 30, 2017, the Chapter 11 Debtors had the following debt obligations: [12]

Debt Obligation	Debt Facility Size	Approximate Amount Outstanding as of Petition Date	Maturity Date
ABL Credit Facility	$300 million	$187 million	March 14, 2019
First Lien Term Loan	$520 million	$506 million	March 11, 2021
Second Lien Term Loan	$145 million	$145 million	March 11, 2022

15. None of the Payless Canada Group entities is a borrower or guarantor under any of these credit facilities, and its assets are currently unencumbered (except in certain limited cases).[13]

C. Business in Canada

16. The Payless Canada Group's operations are fully integrated with Payless's U.S. operations. All corporate and other major decision-making occurs in the U.S., and the Payless Canada Group is entirely reliant on U.S. managerial functions for all overhead services including accounting and finance, buying, logistics, marketing, strategic direction, IT and other functions.[14]

17. The Payless Canada Group employs approximately 2,100 employees, all of whom work in the stores except for five who work at the regional office in Toronto, and another fifteen who work in field management functions throughout Canada. (In contrast, more than 750 employees work out of the corporate headquarters in Kansas.) There is no union representation for the Canadian employees.[15]

18. Payless currently operates 258 leased stores in Canada, with almost half of them in Ontario. These stores are leased from different landlords, including Smart Centres, RioCan, 20 Vic Management, Morguard, Cambridge, Primaris, Bentall, Cadillac Fairview and Oxford.

---

12 Schwindle Affidavit, Application Record, Tab 2, para. 42.
13 Schwindle Affidavit, Application Record, Tab 2, paras. 43, 45, 46, 86.
14 Schwindle Affidavit, Application Record, Tab 2, para. 41.
15 Schwindle Affidavit, Application Record, Tab 2, paras. 26, 27 and 30. The figures in this paragraph are as of March 1, 2017.

Approximately 56 leases are subject to an indemnity with cross-default provisions such that an Event of Default under the lease will occur if the "Indemnifier" becomes bankrupt or insolvent, or takes the benefit of any statute for bankrupt or insolvent debtors. The "Indemnifier" in those leases is Payless ShoeSource, Inc. (incorporated under the laws of Missouri), which is a Chapter 11 Debtor.[16]

19. The Payless Canada Group's assets consist principally of merchandise, much of which is stored at Payless stores in Canada and other warehouses and distribution facilities across Canada. The Payless Canada Group does not independently design or source its own merchandise, nor does it maintain the licensing partnerships described above. The Payless Canada Group, on its own, does not have sufficient buying power to replicate these arrangements; it relies entirely on the buying power and sourcing relationships of the entire Payless enterprise.[17]

20. As of February 25, 2017, the Payless Canada Group had total assets of approximately $142,247,000 and total liabilities of $80,398,903.[18]

21. A significant proportion of the Payless Canada Group's assets is represented by a note payable that is owing to Payless ShoeSource Canada Inc. from Payless Financing Inc., reported on the balance sheet as a note receivable of approximately $101,351,000. In 2014, Payless ShoeSource Canada Inc. agreed to subordinate its right to repayment of this intercompany note receivable to the repayment by Payless Financing Inc. of Senior Indebtedness, as defined in the ABL/Term Loan Intercreditor Agreement, which includes Payless's ABL Credit Facility obligations and its obligations under the First Lien Term Loan (all as described and defined below). Net of the intercompany note payable, the Payless Canada Group's total assets have a book value of approximately $40,896,000 (consisting of

---

16 Schwindle Affidavit, Application Record, Tab 2, paras. 32 - 34.
17 Schwindle Affidavit, Application Record, Tab 2, paras. 35-36 and 39.
18 Schwindle Affidavit, Application Record, Tab 2, paras. 20 and 23.

current assets of $31,623,966 and non-current assets of $9,272,463). Inventory ($25,667,786) represents the vast majority of the Payless Canada Group's current assets.[19]

22. A significant proportion of the Payless Canada Groups' liabilities consist of an intercompany note (in the amount of $61,098,992) that is owed to Collective Brands Cooperatief US, a Netherlands Payless entity that is not a Chapter 11 Debtor, and intercompany trade payables (totalling approximately $9,050,000) owing to various Chapter 11 Debtors for inventory, royalties, service fees, expense reimbursements, merchandise planning and buying fees, store supplies and other matters. The Payless Canada Group acquires all of its inventory from other entities within Payless and is not liable to any third party creditors in respect of any of its inventory.[20]

23. The Payless Canada Group estimates that, as of March 27, 2017, arms'-length trade creditors are owed approximately $2.6 million in unsecured trade debt. The largest arms' length trade creditor, Kuehne & Nagel Ltd. ("**K&N**"), which provides logistics and freight operations, is owed approximately $1.2 million. Approximately $400,000 is owed to various store maintenance contractors. It is anticipated that K&N will be paid in the ordinary course. The Chapter 11 Debtors intend to pay all prepetition amounts owing to K&N through the Critical Vendors Order.[21]

24. PPSA Searches indicate, *inter alia*, that three landlords in Quebec have registered moveable hypothecs against the universality of Payless ShoeSource GP Inc. property located on the premises of specific stores and that several equipment lessors have registered security interests against leased equipment and related assets. These equipment leases generally related to motor vehicles. No creditor has perfected a general security agreement.[22]

---

19 Schwindle Affidavit, Application Record, Tab 2, paras. 20-22.
20 Schwindle Affidavit, Application Record, Tab 2, paras. 24-25, 52.
21 Schwindle Affidavit, Application Record, Tab 2, para. 49.
22 Schwindle Affidavit, Application Record, Tab 2, para. 53.

D. Recent Events and the Need for Canadian Proceedings

25. Since early 2015, Payless has experienced a top-line sales decline driven primarily by (a) a set of significant and detrimental non-recurring events; (b) foreign exchange rate volatility; and (c) challenging retail market conditions. These pressures led to the Chapter 11 Debtors' inability to both service their prepetition secured indebtedness and remain current with their trade obligations. Notwithstanding these pressures, the Chapter 11 Debtors' core business remains strong and operates in an underserved market.[23]

26. In an effort to address their financial difficulties, the Chapter 11 Debtors have taken significant steps to evaluate and implement cost reduction initiatives in recent months, including store closures, terminating approximately 145 employees from their corporate offices and support organizations, pursuing rent concessions and stretching payments to specialized third-party vendors and suppliers.

27. Beginning in February 2017, the Chapter 11 Debtors have also been working closely with a steering committee of their secured term loan lenders to develop a comprehensive financing restructuring and recapitalization plan that will be implemented through the Chapter 11 Cases. Specifically, the Chapter 11 Debtors have entered into a Plan Support Agreement ("**PSA**") that has the support of parties who hold or control approximately 2/3 in amount of each of the Chapter 11 Debtors' first and second lien term loans. In addition, and as described below, the Chapter 11 Debtors have secured access to (i) up to $305 million in new money DIP ABL financing (the "**DIP ABL Facilities**"), and (ii) up to $80 million in new money DIP term financing (the "**DIP Term Loan Facility**" and together with the DIP ABL Facilities, the "**DIP Facilities**").[24]

28. Together, the PSA and DIP Facilities enable the Chapter 11 Debtors to (a) obtain immediate and long-term financial support to address a distressed supply chain and otherwise execute on their

---

[23] Schwindle Affidavit, Application Record, Tab 2, para. 55.
[24] Schwindle Affidavit, Application Record, Tab 2, para. 57-58.

strategic plan, (b) right-size their balance sheet by significantly reducing annual debt service and total outstanding debt from $838 million to $469 million (inclusive of assumed revolving loans), and (c) rationalize their store fleet to eliminate unprofitable store locations and renegotiate above-market leases. At this time, it is not anticipated that any Canadian stores will be closed.[25]

29. Payless requires protection and coordinated relief in Canada to facilitate an effective and efficient restructuring for reasons including:

(a) If the Chapter 11 Debtors are unable to access the funding under the DIP Facilities and are unable to continue as a going concern, the Payless Canada Group is unable to continue as a going concern. The Payless Canada Group depends on its U.S. counterparts to source and obtain high quality, low cost products from Payless's manufacturing partners, and to access Payless's licensing agreements, design partnerships and company-owned brands, and other trademarks and IP (all of which are owned or controlled by U.S. entities outside of the Payless Canada Group). The Payless Canada Group also depends on the U.S. head office for all or nearly all of its accounting, finance, cash management, and other back office functions.[26]

(b) As a pre-condition to agreeing to the DIP financing required to restructure Payless as a going concern, the DIP ABL Lenders required:[27]

(i) That all of the Chapter 11 Debtors, including the Payless Canada Group entities, be guarantors under the DIP APL Agreement and employ their assets as collateral for the indebtedness under the DIP ABL Facilities.

---

25 Schwindle Affidavit, Application Record, Tab 2, paras. 59-60.
26 Schwindle Affidavit, Application Record, Tab 2, para. 85.
27 Schwindle Affidavit, Application Record, Tab 2, paras. 65, 86-87.

(ii) A charge (the "**DIP ABL Lenders' Charge**") be granted on the Chapter 11 Debtors' property, including all of the Payless Canada Group's property in Canada, that ranks in priority to all unsecured claims, but is subordinate to the proposed Administration Charge, the Canadian Unsecured Creditors' Charge and to existing perfected security interests, to secure the Chapter 11 Debtors obligations in respect of the DIP ABL Facilities;

(iii) Payless urgently requires an injection of liquidity. The DIP ABL Lenders have included a condition in the DIP ABL Agreement that requires the Chapter 11 Debtors to obtain an order of this Court recognizing and giving effect to the DIP Order within five (5) business days of the day that the DIP Order is entered by the U.S. Court. The DIP ABL Lenders will not include any collateral of the Payless Canada Group in the Chapter 11 Debtors' borrowing base until such time as the DIP Order is recognized by this Court. The Chapter 11 Debtors need access to all of the funds available under the DIP ABL Facilities forthwith.

(c) Without the protection of a stay, landlords in Canada could seek to terminate approximately 56 of the Canadian store leases due to the commencement of the Chapter 11 Cases. If the landlords seek to exercise rights and remedies under the leases as a result of the commencement of the Chapter 11 Cases, the Payless Canada Group's business could suffer severe and irreparable harm. Moreover, such action could give rise to an event of default under the DIP ABL Facilities, thereby placing Payless's global operations in jeopardy.[28]

30. Given that the viability of the Payless Canada Group wholly depends on the viability of Payless as a whole, the Applicant believes that it is reasonable and appropriate in the circumstances for the Payless Canada Group entities to agree to the DIP ABL Lenders' requirements in order to "keep the lights on" in Canada and preserve approximately 2100 Canadian jobs and approximately

[28] Schwindle Affidavit, Application Record, Tab 2, para. 64.

20,000 international jobs, and avoid significant store closures (or, in a worst case scenario, liquidation of all of the Payless Canada Group's business). The Applicant and the entities in the Payless Canada Group believe that maintaining Payless as a going concern is in the best interest of Payless's many stakeholders, including its employees, landlords, merchandise suppliers, and other trade creditors worldwide, and will allow the Payless Canada Group to continue as a going concern.[29]

31. A coordinated approach provides for the best potential outcome. A Canadian recognition order and stay under the CCAA will allow the Chapter 11 Debtors to implement the pre-arranged restructuring and allow the Payless Canada Group to continue as a going concern, thereby maximizing value for all stakeholders of the Payless Canada Group and the rest of the Chapter 11 Debtors.

PART III - ISSUES AND LAW

32. The issues on this motion are:

(a) Are the Chapter 11 Cases a "foreign main proceeding" under Part IV of the CCAA?

(b) Are the Chapter 11 Debtors entitled to the relief sought in the Initial Recognition Order and Supplemental Order pursuant to sections 46 through 50 of the CCAA including,

(i) Granting the Stay of Proceedings;

(ii) Recognizing certain First Day Orders;

(iii) Appointing A&M as Information Officer;

(iv) Granting the DIP ABL Lenders' Charge and Canadian Unsecured Creditors' Charge; and

(v) Granting the Administration Charge?

[29] Schwindle Affidavit, Application Record, Tab 2, paras. 26 and 86.

A. The Chapter 11 Cases are Foreign Main Proceedings

(a) The Chapter 11 Cases are Foreign Proceedings

33. The purpose of Part IV of the CCAA is to facilitate the administration of cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada.[30] A foreign representative may apply to this Court under section 46(1) for recognition of a foreign proceeding in respect of which he or she is a foreign representative.[31]

34. Section 47 states that two requirements must be met for an order recognizing a foreign proceeding: (1) the proceeding must be a "foreign proceeding"; and (2) the applicant must a "foreign representative" in respect of that foreign proceeding.[32]

35. Section 45(1) defines a "foreign representative" as one who is authorized in a foreign proceeding in respect of a debtor company to: (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.[33] The U.S. Court granted the Foreign Representative Order, which expressly authorizes the Applicant to act as the foreign representative of the Chapter 11 Debtors in recognition proceedings in Canada.

36. This Court has consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.[34] As the Applicant has been declared a "foreign representative" in the Chapter 11 Cases by the U.S. Court, it is submitted

---

30 CCAA, s. 44.
31 CCAA, s. 46(1).
32 CCAA, s. 47.
33 CCAA, s. 45(1).
34 *Lightsquared LP (Re),* 2012 ONSC 2994 [Commercial List], at paras. 18-19 ["*Lightsquared*"]; *Babcock & Wilcox Canada Ltd., (Re*), 2000 CarswellOnt 704 (S.C.J. [Commercial List]), at para. 13 ["*Babcock*"]; *Lear Canada, (Re),* 2009 CarswellOnt 4232 (S.C.J. [Commercial List]), at para. 12 ["*Lear*"].

that this Court should recognize the Chapter 11 Cases as a "foreign proceeding" within the meaning of subsection 47(1) of the CCAA.

(b) The Chapter 11 Cases are Foreign Main Proceedings

37. Once it has determined that a proceeding is a "foreign proceeding", section 47(2) requires the Court to specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding."[35] A "foreign main proceeding" is defined as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("**COMI**").[36]

38. Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its COMI.[37] To rebut this presumption, sufficient evidence is required. Further, because Part IV of the CCAA does not specifically take into account corporate groups, it is necessary to conduct the COMI analysis on an entity-by-entity basis.[38]

39. Of the Chapter 11 Debtors:

(a) Twenty-six are incorporated or established in the U.S. and have registered offices in the U.S. The section 45(2) presumption deems the COMI of each of those entities to be in the U.S.[39]

(b) The three (3) entities in the Payless Canada Group are established under the laws of Canada, with their registered head offices in Etobicoke.[40] For the reasons below, however, the COMI of each of the Payless Canada Group entities is in the U.S.

---

35 CCAA, s. 47(2).
36 CCAA, s. 45(1).
37 CCAA, s 45(2).
38 *Lightsquared*, *supra* at para. 29; *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201 at para. 20 [*Elephant & Castle*].
39 Schwindle Affidavit, Application Record, Tab 2, para. 69.
40 Schwindle Affidavit, Application Record, Tab 2, para. 69.

40. In determining the COMI for a Canadian entity that is part of a larger corporate group, relevant factors include, among others:

(a) the location of the debtor's headquarters, head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location that significant creditors recognize as being the centre of the company's operations.[41]

41. In most cases, these factors will point to a single jurisdiction as the centre of main interests. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.[42]

42. It is submitted that the following factors support a finding that the COMI of the entities in the Payless Canada Group is also in the United States and that the Chapter 11 Cases should be recognized as a "foreign main proceeding" in Canada:[43]

(a) The Payless Canada Group's operations are fully integrated with Payless's U.S. operations;

(b) Canadian sales make up only about 7% of total Payless revenues;

---

41 *Lightsquared*, *supra* at para. 25; *Elephant & Castle* at paras. 26, 30; *Angiotech Pharmaceuticals Inc., (Re)*, 2011 BCSC 115 at para. 7. In *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 115 at para 7, the Court noted the following additional factors as relevant for determining the COMI for a Canadian entity that is part of a larger corporate group: (a) location were corporate decisions are made, (b) location of employee administration, including human resource functions; (c) the location of the company's marketing and communications functions; (d) whether the enterprise is managed on a consolidated basis; (e) the extent of integration of an enterprise's international operations; (f) the centre of an enterprise's corporate, banking, strategic and management functions; (g) the existence of shared management within entities and in an organization; (h) the location where cash management and accounting functions are overseen; (i) the location where pricing decisions are created; and (j) the seat of an enterprise's treasury management functions.

42 *Lightsquared*, *supra* at para. 26.

43 Schwindle Affidavit, Application Record, Tab 2, para. 41.

(c) Only one of the senior executives, and only one of the directors, of the entities in the Payless Canada Group reside in Canada;

(d) All corporate, strategic, financial, inventory sourcing and other major decision-making occurs in the U.S.;

(e) The Payless Canada Group is entirely reliant on U.S. managerial functions for all overhead services including the accounting and finance, buying, logistics, marketing, strategic direction, IT and other functions;

(f) The Payless Canada Group is entirely dependent on the other Chapter 11 Debtors for all of the licensing agreements, design partnerships and company-owned brands;

(g) Most of the data for the Canadian operations is housed within the same IT systems (located and operated out of the U.S.) that support both Canadian and U.S. operations;

(h) The Payless Canada Group's cash management system (consisting of 13 Canadian dollar and U.S. dollar bank accounts at several Canadian banks) operates within the Chapter 11 Debtors integrated, centralized cash management system, which is operated by the Treasury team in the U.S.; and

(i) The Chapter 11 Debtors, including the Payless Canada Group, offer and engage in customer programs, including (a) gift card programs; (b) returns, exchanges and refunds; (c) promotional programs such as "Payless Rewards"; (d) warranty-related programs; and (e) merchant credit card agreements. The Payless Canada Group is dependent on the U.S. head office for the administration of these customer programs.

B. The Chapter 11 Debtors are Entitled to the Initial Recognition Order and the Supplemental Order

(a) Stay of Proceedings is required and appropriate

43. The Applicant seeks a stay of proceedings against the Chapter 11 Debtors. Once the Court finds that a proceeding is a "foreign main proceeding", section 48(1) of the CCAA requires the Court to grant certain mandatory relief, including a stay of proceedings:

> **48** (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor 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 debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.[44]

44. In addition, section 49 provides that the Court may, at its discretion, make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor's property or the interests of one or more creditors.[45] Section 50 provides that an Order under Part IV "may be made on any terms and conditions that the court considers appropriate in the circumstances."[46]

---

44 CCAA, s. 48(1).
45 CCAA, s. 49(1).
46 CCAA, s. 50.

45. Finally, section 52(1) provides that if an order recognizing a foreign proceedings is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."[47]

46. In light of the events leading up to the Chapter 11 Cases and this application, it is both necessary and appropriate for this Court to grant the stay of proceedings sought by the Applicant. Without the stay, the objective of the Chapter 11 Cases – namely, the emergence of Payless as a going concern – cannot be achieved.

47. The CCAA expressly applies, by its terms, to debtor companies, but not partnerships.[48] Where, as here, the partnership's operations are integral and closely related to the debtor companies' operations, the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings and related relief to those partnerships in order to ensure that the purposes of the CCAA can be achieved.[49] In this case, it is appropriate to extend the relief to the partnership, which is a guarantor under the DIP ABL Agreement and carries on operations that are integral to the business of the Payless Canada Group.

(b) Recognition of First Day Orders is appropriate

48. The Applicant seeks an order recognizing and giving effect to certain "First Day Orders".

49. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability

---

47 CCAA, s. 52(1).

48 CCAA, s. 2, "debtor company".

49 See, *e.g.*, *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 at paras. 28-29. While *Canwest* was decided in the context of an initial order under the CCAA, relief has been granted to Chapter 11 debtors in recognition proceedings under Part IV of the CCAA: see, *e.g.*, *Lightsquared*, *supra*.

and fairness. Courts in Canada and the United States have made efforts to complement, coordinate and accommodate each other's proceedings.[50]

50. Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings for the purpose of avoiding multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their locations.[51]

51. To further comity, Canadian courts should allow a foreign court to exercise principal control over the insolvency process if that other jurisdiction has the closest connection to the proceeding. Where, as here, there is interdependence between operations of a company in the United States and Canada as to facilities and services, the granting of relief under Part IV is particularly important.[52]

52. The granting of the Initial Recognition Order and the Supplemental Order is appropriate for the following reasons:

(a) The U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases, including in respect of the Payless Canada Group, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States;

(b) Payless is primarily an American organization. Approximately 75% of its net revenues are generated in the U.S. (compared to approximately 7% in Canada) and all of its head office functions are run out of the U.S.[53] Not only is it sensible for the U.S. Court

---

50 *Babcock, supra* at paras. 4-13; *Matlack Inc., (Re)*, 2001 CarswellOnt 1830 (S.C.J. [Commercial List]), at paras. 3, 9, ["*Matlack*"]; *Lear, supra* at para. 12.

51 *Matlack. id.* at para. 3.

52 *Matlack. id.* at para. 8.

53 Schwindle Affidavit, Application Record, Tab 2, para. 17.

to have principal control over the insolvency process, it would not make sense for Canada to take carriage in this restructuring;

(c) The Chapter 11 Debtors need to move quickly to comply with the terms of the DIP ABL Agreement and PSA, which, among other milestones, requires the Chapter 11 Debtors to file a plan of reorganization and disclosure statement within 21 days following the Petition Date, approval of the disclosure statement within 62 days of the Petition Date and confirmation of the Plan not later than 114 days following the Petition Date .[54] It is in the interests of all stakeholders that there be a coordinated cross-border approach to ensure that the Chapter 11 Debtors can emerge expeditiously from Chapter 11 as a stronger and well-capitalized company;

(d) It is a condition of the DIP ABL Agreement that the Chapter 11 Debtors obtain recognition of the DIP Order within five (5) business days of the of the day that the DIP Order is issued by the U.S. Court; [55] and

(e) Payless requires all of the liquidity under the DIP ABL Facilities forthwith, and the assets of the Payless Canada Group will not be included in the borrowing base under the DIP ABL Facility until this Court recognizes certain of the First Day Orders.[56]

(c) DIP ABL Lenders' Charge and Canadian Unsecured Creditors' Charge should be granted

53. The Applicant seeks an order granting the DIP ABL Lenders' Charge on the Payless Canada Group's property that ranks in priority to all unsecured claims, but is subordinate to the proposed Administration Charge, a charge in the amount of $1.4 million (the "**Canadian Unsecured**

54 Schwindle Affidavit, Application Record, Tab 2, para. 80.
55 Schwindle Affidavit, Application Record, Tab 2, para. 65.
56 Schwindle Affidavit, Application Record, Tab 2, para. 65.

Creditors' Charge") which will be set aside for the pre-filing unsecured trade creditors, aside from K&N (which will be paid pursuant to the Critical Vendors Order), and validly perfected secured claims.

54. The main issue to consider in assessing the charge in this case is: (i) the DIP ABL Lenders require the Payless Canada Group entities to be guarantors and employ their assets as collateral for the indebtedness under the DIP ABL Facilities; ***even though*** (ii) the Payless Canada Group entities are not borrowers under the current credit facilities or the DIP ABL Facilities, and will not receive any advances under the DIP ABL Facilities, and the Payless Canada Group's assets are currently unencumbered (other than certain limited security interests granted to equipment lessors and certain landlords, as described in paragraph 53 of the Schwindle Affidavit).

55. The Applicant submits that it is reasonable and appropriate to grant the DIP ABL Lenders' Charge in the unique circumstances of this case. The broad remedial purpose of and the flexibility inherent in the CCAA allows this Court to consider the interests of the broader stakeholder body in making orders under the CCAA, as the Ontario Court of Appeal specifically recognized in the asset backed commercial paper restructuring:[57]

> […] courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected [citations omitted].
>
> In this respect, I agree with the following statement of Doherty J.A. in [*Elan Corp. v. Comiskey (Trustee of)*[58]]
>
> > [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. [Citations omitted]

---

57 *ATB Financial v. MetCalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 51-53, per R.A. Blair J.A, leave to appeal to SCC refused (September 19, 2008).

58 *Elan Corp. v. Comiskey (Trustee of)* 1990 CarswellOnt 139 (Ontario Court of Appeal) at para. 60.

56. This Court has frequently identified employees as a constituency whose interests can be considered among the various "socio-economic" purposes of the CCAA, in addition to the immediate interests of the debtor company and its creditors.[59] Among other factors, the requested relief will assist in continuing the employment of approximately 2,100 employees across the country, not to mention preserving relationships with landlords, customers and suppliers.

57. In *Re InterTAN Canada Ltd.*, this Court allowed the assets of the Canadian subsidiary to be employed as collateral for over $1 billion of DIP financing made available to its U.S. parent. Morawetz J. (as he then was) held that this approach was acceptable in that case, in part, because the potential upside of a going concern operation was preferable to a liquidation:[60]

> […] I concluded, having considered and balanced the alternatives, that the DIP Facility should be approved. In my view, the potential upside of a going concern operation was preferable to a liquidation, notwithstanding the provisions of the DIP Facility which effectively transfers assets from InterTAN to another member of the enterprise group. It was in my view, appropriate to approve the DIP Facility, taking into account the prospects of a continued going concern operation, the continued employment of over 3000 individuals and the benefits of a continued operation for other third party stakeholders. I also took into account that certain creditor groups would be largely unaffected by the CCAA proceeding and that the creation of the Unsecured Creditors Charge provides in theory, as degree of protection to this group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

58. In considering the appropriateness of a guarantee in connection with a debtor-in-possession loan facility, this Court has considered a variety of factors including:

(a) the benefit of the breathing space afforded by CCAA protection;

(b) the practicality of establishing a stand-alone solution for the Canadian debtors;

---

59 See, *e.g.*, *Skydome Corp. v. Ontario* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.) at paras. 5-7, per Blair J.

60 *InterTAN Canada Ltd., Re*, 2008 CarswellOnt 8040 (S.C.J. [Commercial List]) at 69. In that case, the Canadian subsidiary was a borrower under the existing credit facility.

(c) a balancing of the benefits that may accrue to stakeholders if the request is approved against the prejudice to those stakeholders if the request is denied; and

(d) potential prejudice to the creditors if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing.[61]

59. In terms of the balance of prejudice to any specific creditor, in *Re White Birch Paper Holdings Co.*, Mongeon J. held:[62]

> Even if certain creditors will be materially affected by the DIP loan – and that may include the Petitioners herein - , I have to look at the broader picture as it is presented to me by the Monitor, and conclude that the compromise which Dune may have to accept is outweighed by the positive effects of the DIP Loan on the total business enterprise of the Debtors.

60. It is respectfully submitted that the facts in this case support the granting of the DIP ABL Lenders' Charge:

(a) The order is in the interests of the entire Payless organization and its many stakeholders, particularly the Chapter 11 Debtors' suppliers and employees.

(b) Without immediate access to the DIP Facilities, the Chapter 11 Debtors will be unable to finance their operations, and their ability to preserve and maximize the value of their assets and operations would be irreparably harmed. That would have disastrous effects on the Payless Canada Group, which cannot survive as a going concern enterprise without their U.S. counterparts. Among other problems, the Payless Canada Group would lose access to:

---

61 *Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (S.C.J. [Commercial List]), at para 8.
62 *Re White Birch Paper Holdings Co.*, 2010 QCCS 1176 at para. 33.

(i) the high quality, low cost merchandise from Payless's manufacturing partners that is vital to its business strategy;

(ii) Payless's licensing agreements, design partnerships and company-owned brands, and other trademarks and IP; and

(iii) essential head office services that are vital to its continued operations and to the continued employment of its employees.

(c) The Chapter 11 Debtors sought, but were unable to develop, alternative sources of financing with terms better than those in the DIP ABL Facilities and DIP Term Loan Facility.

(d) Given the degree of integration of the Payless Canada Group entities with their U.S. counterparts, there is no viable stand-alone financing or restructuring option for the Payless Canada Group.

(e) The DIP ABL Lenders' Charge will be subordinate to the proposed Canadian Unsecured Creditors' Charge and to validly perfected security interests of secured creditors.

(f) During the restructuring, it is anticipated that the majority of the Payless Canada Group's creditors (including employees) will be unaffected creditors and will continue to be paid in the ordinary course. At this time, it is not anticipated that any Canadian stores will be closed.

(g) The DIP ABL Lenders' Charge does not secure an obligation of the Payless Canada Group that existed prior to the filing date. The Canadian entities are not borrowers or guarantors under the existing ABL Credit Facilities and do not have any pre-petition obligations that would be secured by the proposed DIP ABL Lenders' Charge. In the alternative, so called "roll up provisions" are permitted in appropriate circumstances

in a recognition proceeding, and roll ups have been approved by this Court in circumstances similar to the present application[63]; and

(h) The Payless Canada Group stands to receive substantial benefit from the DIP ABL Facility, given that the viability of the Payless Canada Group depends on the viability of Payless as a whole. The alternative is a sale of the U.S. business or, in the worst case, a liquidation of both the Canadian and U.S. businesses, with disastrous results for all stakeholders. In a liquidation, the Payless Canada Group's creditors are likely to suffer a serious shortfall in their recoveries on their claims.[64]

61. As above, the Canadian Unsecured Creditors' Charge would rank in priority to the DIP ABL Lenders' Charge, but would be subordinate to the Administration Charge. The effect of the Canadian Unsecured Creditors' Charge would be to ensure that Canadian unsecured creditors will be provided with recovery in these proceedings. The amount of the proposed Canadian Unsecured Creditors' Charge has been determined by the Applicant, in consultation with its financial advisors, as an estimate of the unsecured trade debt of the Payless Canada Group existing as of the date of these proceedings that may be impacted by these proceedings.[65]

(d) Information Officer should be appointed

62. The Applicant asks this Court to appoint A&M as the Information Officer. A&M its principals have acted as information officer in several previous ancillary proceedings under Part IV of the CCAA.

---

63 See, *e.g.*, *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 [Commercial List], at paras. 18-19.
64 See, *e.g.*, *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 [Commercial List], at paras. 18-19.
65 Schwindle Affidavit, Application Record, Tab 2, para. 88.

63. Where one jurisdiction has an ancillary role to another jurisdiction, the ancillary jurisdiction should be kept apprised of the status of the foreign proceedings.[66] Appointing A&M as the Information Officer will help facilitate these proceedings and the dissemination of information concerning the Chapter 11 Cases. The Information Officer will: (i) act as a resource to the Foreign Representative; (ii) act as an Officer of the Court, reporting to the Court on the proceedings as required by the Court, and (iii) provide stakeholders of the Chapter 11 Debtors with material information on the Chapter 11 Cases. The proposed role is consistent with the terms appointing information officers in other recognition orders under the CCAA.[67]

(e) Administration Charge should be granted

64. The Chapter 11 Debtors propose to grant the proposed Information Officer and its legal counsel an administration charge with respect to their fees and disbursements in the maximum amount of $500,000.

65. Section 49(1) of the CCAA provides authority for the court, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, to make any order that it considers appropriate. Section 50 of the CCAA provides the court with the jurisdiction to make any order under Part IV of the CCAA on the terms and conditions it considers appropriate in the circumstances. This includes the jurisdiction to order an administration charge.[68]

66. The Applicant submits that the amount of the proposed Administration Charge is reasonable in the circumstances, having regard to the size and complexity of these proceedings and the role that

---

66 *Lear*, *supra* at para. 23.

67 See, *e.g.*, *LightSquared*, *supra* at para. 37; Supplemental Order in the Application of Hartford Computer Hardware (December 21, 2011), Commercial List, CV-11-9514-00CL.

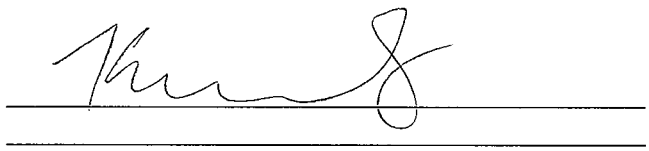
68 CCAA, ss. 49(1), 50; *LightSquared*, *supra*.

will be required of the proposed Information Officer and its legal counsel. The magnitude of the proposed charge is consistent with similar charges granted in other similar recognition proceedings.

PART IV - RELIEF REQUESTED

67. The Applicant requests that this Honourable Court grant the Initial Recognition Order and the Supplemental Order, each substantially in the form of the draft Orders contained at tabs 4 and 5 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2017.



OSLER, HOSKIN & HARCOURT LLP
Marc Wasserman
John MacDonald
Shawn T. Irving

Lawyers for the Applicant

SCHEDULE "A"

LIST OF CHAPTER 11 DEBTORS

Payless Holdings LLC
Payless Intermediate Holdings LLC
WBG PSS Holdings LLC
Payless Inc.
Payless Finance, Inc.
Collective Brands Services, Inc.
PSS Delaware Company 4, Inc.
Shoe Sourcing, Inc
Payless ShoeSource, Inc
Eastborough, Inc.
Payless Purchasing Services, Inc.
Payless ShoeSource Merchandising, Inc.
Payless Gold Value CO, Inc.
Payless ShoeSource Distribution, Inc.
Payless ShoeSource Worldwide, Inc.
Payless NYC, Inc.
Payless ShoeSource of Puerto Rico, Inc.
Payless Collective GP, LLC
Collective Licensing, LP
Collective Licensing International LLC
Clinch, LLC
Collective Brands Franchising Services, LLC
Payless International Franchising, LLC
Collective Brands Logistics, Limited
Dynamic Assets Limited
PSS Canada, Inc.

SCHEDULE "B"

1. *ATB Financial v. MetCalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
2. *Angiotech Pharmaceuticals Inc., (Re)*, 2011 BCSC 115
3. *Babcock & Wilcox Canada Ltd., (Re)*, 2000 CarswellOnt 704 (S.C.J. [Commercial List])
4. *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114
5. *Elan Corp. v. Comiskey (Trustee of)*, 1990 CarswellOnt 139 (Ontario Court of Appeal)
6. *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 (S.C.J. [Commercial List])
7. *Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (S.C.J. [Commercial List])
8. *InterTAN Canada Ltd., Re*, 2008 CarswellOnt 8040 (S.C.J. [Commercial List])
9. *Lear Canada, (Re)*, 2009 CarswellOnt 4232 (S.C.J. [Commercial List]),
10. *Lightsquared LP (Re)*, 2012 ONSC 2994 (S.C.J. [Commercial List])
11. *Massachusetts Elephant & Castle Group Inc., (Re)*, 2011 ONSC 4201 (S.C.J. [Commercial List])
12. *Matlack Inc., (Re)*, 2001 CarswellOnt 1830 (S.C.J. [Commercial List])
13. *Skydome Corp. v. Ontario*, (1998) 16 C.B.R. (4th) 118 (Ont. Gen. Div.)
14. *White Birch Paper Holdings Co., (Re)*, 2010 QCCS 1176
15. Supplemental Order in the Application of Hartford Computer Hardware (December 21, 2011), Commercial List, CV-11-9514-00CL

SCHEDULE "C"

RELEVANT STATUTES

Companies' Creditors Arrangement Act, RSC 1985, c C-36, Part IV

Purpose

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-board insolvencies and to promote

(*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(*b*) greater legal certainty for trade and investment;

(*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(*d*) the protection and the maximization of the value of debtor company's property; and

(*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

Definitions

45. (1) The following definitions apply in this Part.

"foreign court"

« *tribunal étranger* »

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding"

« *principale* »

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding"

« *secondaire* »

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding"

« instance étrangère »

“foreign proceeding” means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

“foreign representative”

« représentant étranger »

“foreign representative” means a person or bod y, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(*a*) monitor the debtor company’s business and financial affairs for the purpose of reorganization; or

(*b*) act as a representative in respect of the foreign proceeding.

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its main interests.

Application for recognition of a foreign proceeding

46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(*a*) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(*b*) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative’s authority to act in that capacity; and

(*c*) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(*a*) and (*b*) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(*a*) and (*b*), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

Order recognizing foreign proceeding

47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary , all proceedings taken or that might be taken against the debtor 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 debtor company;

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (l) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (l) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Other orders

49. (l) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(*a*) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(*c*) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(*a*) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding- up and Restructuring Act* in respect of the debtor company.

Terms and conditions of orders

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended

Court File No:

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO PAYLESS HOLDINGS LLC, PAYLESS SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP INC. AND THOSE OTHER ENTITIES LISTED ON SCHEDULE "A" HERETO

APPLICATION OF PAYLESS HOLDINGS LLC, UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36 AS AMENDED

Applicant

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

FACTUM OF THE APPLICANT

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

Marc Wasserman LSUC# 44066M
Tel: 416.862.4908
mwasserman@osler.com

John MacDonald LSUC# 25884R
Tel: 416.862.5672
jmacdonald@osler.com

Shawn T. Irving LSUC# 50035U
Tel: 416.862.4733
sirving@osler.com

Fax: 416.862.6666

Lawyers for the Applicant