

**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 a motion by Payless Holdings LLC (the "**Applicant**"), in its capacity as foreign representative (the "**Foreign Representative**") of itself as well as Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., Payless ShoeSource Canada LP (collectively, the "**Payless Canada Group**") and those other 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 an Order pursuant to sections 49, 50 and 52 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"):

- (a) Recognizing certain Final Orders entered in the cases commenced by the Chapter 11 Debtors in the U.S. Court; and
- (b) Approving the First Report of the Information Officer, the Second Report of the Information Officer, and the activities of the Information Officer described therein.

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 “**Initial Affidavit**”) or the affidavit of Michael Schwindle sworn June 19, 2017 (the “**Second Schwindle Affidavit**”).¹ All monetary amounts are in U.S. dollars unless stated otherwise.

PART II - THE FACTS

A. Background and History of Proceedings

3. Payless is an iconic American footwear retailer. 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.²

4. The Applicant’s operations are closely integrated with those of the Chapter 11 Debtors, and the Chapter 11 Debtors are the Applicant’s sole source of inventory.³ A successful restructuring in the Chapter 11 Proceedings is essential for the Applicant’s survival as a going concern.

5. On April 4, 2017, each of the Chapter 11 Debtors filed voluntary petitions for relief 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**”).⁴ On April 5, the U.S. Court granted certain orders (the “**First Day Orders**”), a number of which were granted on an interim basis.⁵

¹ An unsworn copy of which is found at Tab 4 of the Motion Record.

² Initial Affidavit at para 12.

³ Initial Affidavit at paras 35-36, 39, and 41.

⁴ Initial Affidavit at para 4.

⁵ Second Schwindle Affidavit, Motion Record, Tab 4 at para 5.

6. By Order dated April 7, 2017, this Court recognized the Chapter 11 Proceedings as Foreign Main Proceedings and recognized the appointment of the Foreign Representatives, and established related stays of proceedings in favour of the Chapter 11 Debtors.⁶

7. By Order dated April 12, 2017, this Court recognized and enforced certain of the First Day Orders granted by the U.S. Court in the Foreign Main Proceeding, and appointed Alvarez & Marsal as the Information Officer in respect of these CCAA Recognition Proceedings (the “**Supplemental Order**”).⁷

8. The First Day Orders recognized by this Court in the Supplemental Order included interim versions of all but one of the Final Orders for which recognition is sought by this motion.⁸

B. Chapter 11 Debtors’ Plan

9. On June 15, 2017, the U.S. Court entered an order approving the Chapter 11 Debtors’ Disclosure Statement and the process for solicitation of votes in respect of the Plan.⁹ This order established timelines and procedures related to the Chapter 11 Debtors’ proposed Plan. The hearing on confirmation of the Chapter 11 Debtors’ Plan is set to begin on July 24, 2017.¹⁰

10. The Plan provides that the claims of unsecured creditors of Payless Canada Group are unaffected and will be reinstated following the effective date of the Plan, along with any defences the Payless Canada Group may have in respect of such claims.¹¹ Key aspects of the Plan are discussed in

⁶ Second Schwindle Affidavit, Motion Record, Tab 4 at para 6.

⁷ Second Schwindle Affidavit, Motion Record, Tab 4 at para 7.

⁸ Second Schwindle Affidavit, Motion Record, Tab 4 at para 29; Second Report of the Information Officer dated June 19, 2017 (the “**Second Report**”) at para 4.2.

⁹ Second Report at para 5.3.

¹⁰ Second Schwindle Affidavit, Motion Record, Tab 4 at para 12.

¹¹ Second Schwindle Affidavit, Motion Record, Tab 4 at para 13

more detail in the Second Schwindle Affidavit and the First Report of the Information Officer dated June 7, 2017 (the “**First Report**”).¹²

C. Final Orders of the U.S. Court

11. As discussed in more detail in the Initial Affidavit, the U.S. Court entered a number of interim First Day Orders that were recognized in the Supplemental Order by this Court. Subsequently, the Chapter 11 Debtors obtained final orders approving the relief granted in the interim orders on a final basis. The Foreign Representative is seeking recognition of the following Final Orders issued by the U.S. Court:

- (a) *Final Order (I) Authorizing the Debtors to (A) Honor Certain Prepetition Obligations to Customers and Partners and (B) Continue Certain Customer and Partner Programs in the Ordinary Course of Business and (II) Granting Related Relief* (the “**Final Customer and Partner Order**”): This Order authorizes the Chapter 11 Debtors to honour and continue various customer programs that Payless offers, including but not limited to the following: customer gift card programs; returns, exchanges, and refunds; warranty programs related to Payless’ products, merchant credit card agreements, and other similar policies, programs and practices. It is essential that Payless maintain customer loyalty and goodwill by maintaining and honouring these programs.

- (b) *Final Order (I) Authorizing The Debtors to (A) Continue Insurance Coverage Entered into Prepetition and Satisfy Prepetition Obligations Related Thereto and (B) Renew, Supplement, or Purchase Insurance Policies, and (II) Granting Related Relief* (the “**Final Insurance Order**”): This Order authorizes the Chapter 11 Debtors to pay certain prepetition amounts owing (policy audit fees, deductible fees and brokerage

¹² First Report at paras 5.1-5.9 (a copy of the First Report, without exhibits, is attached as Appendix B to the Second Report).

and insurance administrator fees) on account of the Chapter 11 Debtors' insurance programs, which include a number of insurance programs that cover the Payless Canada Group. The Final Insurance Order also authorizes the Chapter 11 Debtors to continue the Insurance Policies (as defined in the Insurance Motion), and to renew, supplement, modify or purchase Insurance Policies to the extent that the Chapter 11 Debtors determine that such action is in the best interest of their estates.

- (c) *Final Order (A) Authorizing the Debtors to Pay Certain Prepetition Claims of (I) Critical Vendors and (II) Carrier, Warehousemen, and Section 503(B)(9) Claimants and (B) Granting Related Relief* (the "**Final Critical Vendors Order**"): This Order relates to critical brokers that provide specific merchandise, and critical carriers and warehousemen that transport and store that merchandise. The Order authorizes the Chapter 11 Debtors to pay certain pre-petition amounts, up to a maximum of \$113 million, owed to such critical third parties to avoid jeopardizing the Chapter 11 Debtors' ability to serve their customers going forward.
- (d) *Final Order (I) Authorizing the Debtors to (A) Continue Using the Cash Management System and (B) Maintain Existing Bank Accounts and Business Forms; (II) Authorizing Continued Intercompany Transactions; (III) Granting Superiority Administrative Expense Status to Post-Petition Intercompany Payments; and (IV) Granting Related Relief* (the "**Final Cash Management Order**"): This Order authorizes, among other things, the Chapter 11 Debtors to continue using their cash management system, including the Canada Operations Accounts, and permits ongoing intercompany advances.

- (e) *Final Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and Reimbursable Expenses and (B) Continue Employee Benefits Programs, and (II) Granting Related Relief* (the “**Final Prepetition Wages and Benefits Order**”): This Order authorizes the continuation of the Chapter 11 Debtors’ prepetition employee obligations in the ordinary course of business, and permits them to pay and honour certain prepetition claims relating to, among other things, wages, salaries and other compensation. With respect to Canada in particular, the Chapter 11 Debtors are authorized, among other things, to (i) pay all outstanding prepetition amounts on account of unpaid wage and salary obligations for the employees of the Payless Canada Group consistent with past practice, and to continue paying such wage and salary obligations in the ordinary course of business; (ii) pay in a manner consistent with historical practice any unpaid withholding obligations and to continue to honour withholding obligations in the ordinary course of business during the administration of the Chapter 11 Proceedings; (iii) to pay all outstanding prepetition amounts incurred by Payless Canada Group employees on account of reimbursable expenses, and continue to pay such reimbursable expenses on a postpetition basis; and (iv) continue paying obligations under the Canada Store Leader Extreme Rewards Incentive Program and the Canada Group Leader Incentive Program (as both those terms are defined in the Employee Wages Motion) on a postpetition basis in the ordinary course of business and consistent with their prepetition practices.
- (f) *Final Order (I) Authorizing the Debtors to Continue and Renew the Surety Bond Program on an Uninterrupted Basis, and (II) Granting Related Relief* (the “**Final Surety Bond Order**”): In the ordinary course of business, certain third parties require the Chapter 11 Debtors to post surety bonds to secure their payment or performance

of obligations, including customs and tax obligations. The Canada Customs and Revenue Agency is one such obligee. The Final Surety Bond Order authorizes the Chapter 11 Debtors to maintain the existing surety bond program, including paying premiums as they come due, and to remit certain prepetition premiums. Failure to maintain or replace the surety bonds may prevent the Chapter 11 Debtors from undertaking essential functions.

- (g) *Final Order (I) Authorizing the Payment of Certain Prepetition Taxes and Fees and (II) Granting Related Relief* (the “**Final Prepetition Taxes and Fees Order**”): In the ordinary course of business, the Chapter 11 Debtors collect, withhold, and incur various taxes and fees, and remit them to various federal, state, local and foreign governments, including taxing authorities in Canada. This Order authorizes the Chapter 11 Debtors, among other things, to pay certain taxes and fees accrued or incurred prepetition but not paid prepetition, and to maintain certain tax payments to avoid disruption to business operations.
- (h) *Final Order (I) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (II) Determining Adequate Assurance of Payment for Future Utility Service, (III) Establishing Procedures for Determining Adequate Assurance of Payment, and (IV) Granting Related Relief* (the “**Final Utilities Order**”): This Order, among other things, (i) prohibits all Utility Providers from altering, refusing, or discontinuing service on account of any unpaid prepetition charges, the commencement of the Chapter 11 Proceedings, or any perceived inadequacy of the Proposed Adequate Assurance; (ii) authorizes the Chapter 11 Debtors to pay any prepetition or postpetition obligations related to Utility Agent Fees in accordance with their prepetition practices; and (iii) approves certain Adequate Assurance Procedures

for future utility services (all capitalized terms not defined here as defined in the Motion for Continuation of Utility Service filed by the Chapter 11 Debtors).

Copies of the Final Orders are attached as Exhibits “B” through “I” to the affidavit of Michael Shakra, sworn June 16, 2017 (the “**Shakra Affidavit**”).¹³

12. Except for the Final Utilities Order, this Court has previously recognized and enforced the interim versions of each of the Final Orders in the Supplemental Order.

13. Based on their degree of integration and the centrality of the U.S. business, the Payless Canada Group and the Chapter 11 Debtors have determined that recognition of the Final Utilities Order is necessary to allow all Payless entities to adopt a co-ordinated approach to addressing utility matters while continuing to operate their business. The Payless Canada Group has been addressing a number of inquiries from Canadian utility providers, and the Final Utilities Order would create certainty and stability for Payless entities and creditors on both sides of the border as this restructuring approaches its final stage.¹⁴

14. It is anticipated that voting on the Chapter 11 Debtors’ restructuring Plan will conclude on July 17, 2016.¹⁵ Payless Holdings, the Payless Canada Group and the other Chapter 11 Debtors require the recognition of the Final Order in order to maintain the status quo and protect the assets of the Payless Canada Group during this crucial period of the restructuring, while permitting the Payless Canada Group to continue operating its business as usual during the Chapter 11 proceedings.

¹³ Motion Record, Tab 3.

¹⁴ Second Report at para 4.3.

¹⁵ Second Schwindle Affidavit, Motion Record, Tab 4 at para 14

PART III - ISSUES AND LAW

15. The issue on this motion is whether this Court should exercise its jurisdiction under section 49 of the CCAA to recognize and enforce the Final Orders of the U.S. Court.

A. This Court has Jurisdiction to Recognize the Final Orders under Part IV of the CCAA

16. When a Foreign Main Proceeding has been recognized under Part IV of the CCAA, section 49 of the CCAA empowers this Court, at its discretion, to make any order that it considers appropriate if it is satisfied that such an order is necessary for the protection of the debtor's property or the interests of one or more creditors.¹⁶ 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."¹⁷

17. The central principle animating Part IV of the CCAA is comity, which mandates that Canadian courts should generally recognize and enforce the judicial acts of other jurisdictions. Comity is particularly important in an insolvency context, as reflected in section 52(1) of the CCAA: if an order recognizing a foreign proceeding is made, the Court must "cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."¹⁸

18. Canadian courts have emphasized the importance of comity, cooperation, and accommodation between courts in cross-border insolvency proceedings in order to enable enterprises to restructure on a cross-border basis.¹⁹ To that end, it has been customary for Canadian CCAA courts to recognize orders made by courts in Foreign Main Proceedings, so long as those orders are not contrary to public policy or the purposes of the CCAA, in deference to the judgment of the court charged with

¹⁶ CCAA, s. 49(1).

¹⁷ CCAA, s. 50.

¹⁸ CCAA, s. 52(1).

¹⁹ *Payless Holdings Inc LLC (Re)*, 2017 ONSC 2242 at para 35; *Lear Canada (Re)*, 2009 CarswellOnt 4232 (OSCJ) at para 11.

overseeing a restructuring.²⁰ Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their locations.²¹

19. The significance of comity is particularly acute where, as here, there is interdependence between operations of a company in the United States and Canada. Under such circumstances, exercising discretion granted under Part IV in co-operation with the restructuring proceedings underway in the U.S. Court is particularly important.²²

20. With these principles in mind, this Court should exercise its discretion granted under section 49 of Part IV of the CCAA to recognize the Final Orders of the U.S. Court.

B. The Final Orders are Necessary for the Restructuring

21. Recognizing the Final Orders will protect the interest of creditors in Canada and the U.S. by protecting the status quo and giving the Chapter 11 Debtors (including the Payless Canada Group) breathing space in the lead-up to Plan confirmation. No creditors are prejudiced by recognition of the Final Orders; rather, the Final Orders affirm steps already taken on an interim basis, and allow the Payless entities to co-ordinate a unified cross-border approach to ensure creditors are treated appropriately through this restructuring. Accordingly, recognizing the Final Orders meets the criteria outlined for the exercise of the Court's discretion under section 49 of the CCAA.

22. The Final Orders, with one exception, are simply final versions of interim Orders that this Court has already recognized as necessary to maintain the status quo as the Chapter 11 Debtors restructure their affairs. As the U.S. Chapter 11 Proceedings have moved forward, the U.S. Court has reaffirmed the orders it granted on an interim basis. This Court should recognize the Final Orders

²⁰ *Hardford Computer Hardware Inc (Re)*, 2012 ONSC 964 at para 14; *Matlack Inc (Re)*, 2001 CarswellOnt 1830 (OSCJ) [*Matlack*] at para 5; *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201 at para 39.

²¹ *Matlack* at para 3.

²² *Matlack* at para 8; *Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712 [*Caesars*] at para 38.

for the same reason that it recognized certain First Day Orders in the Supplemental Order: because they further the goals of an orderly and expeditious restructuring for the Chapter 11 Debtors, ensuring stability for the Payless Canada Group.

23. The recognition of the only order that this Court has not already recognized, the Final Utilities Order, is necessary to permit a co-ordinated approach to utilities providers in this restructuring. Although the Payless Canada Group has been in communication with domestic utilities providers, the Payless entities' restructuring decisions have been centralized in the U.S. The Final Utilities Order establishes a uniform protocol for addressing utilities providers fairly on both sides of the border.

24. It is in the interests of all stakeholders that there be a co-ordinated cross-border approach to ensure that the Chapter 11 Debtors can emerge expeditiously from Chapter 11 as a stronger and well-capitalized company.²³ This Court can further the aims of Part IV of the CCAA by exercising its discretion under section 49 to recognize the Final Orders, which will enable the Chapter 11 Debtors to maintain an even state of affairs as they prepare to emerge from restructuring.

PART IV - RELIEF REQUESTED

25. The Applicant requests that this Honourable Court grant recognition of the Final Orders substantially in the form of the draft Order contained at Tab 2 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of June, 2017.



OSLER, HOSKIN & HARCOURT LLP

Marc Wasserman

John MacDonald

Shawn T. Irving

Lawyers for the Applicant

²³ *Matlack* at para 3; *Caesars* at para 38.

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. *Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712 (S.C.J. [Commercial List])
2. *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 (S.C.J. [Commercial List])
3. *Lear Canada, (Re)*, 2009 CarswellOnt 4232 (S.C.J. [Commercial List])
4. *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201 (S.C.J. [Commercial List])
5. *Matlack Inc., (Re)*, 2001 CarswellOnt 1830 (S.C.J. [Commercial List])
6. *Payless Holdings Inc. LLC, (Re)*, 2017 ONSC 2242 (S.C.J. [Commercial List])

SCHEDULE "C"

RELEVANT STATUTES

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

Other orders

49. (1) 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.

Cooperation

52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

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

Court File No: CV-17-11758-00CL

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

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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