

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS
SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.**

(the "Applicants")

**MOTION RECORD OF THE MONITOR
(Returnable October 29, 2019)**

October 23, 2019

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*Lawyers for FTI Consulting Canada Inc., solely in its
capacity as Court-appointed Monitor*

TO: THE SERVICE LIST

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TAB NO.	DOCUMENT
1.	Notice of Motion
2.	Draft Receivership Order

TAB 1

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS
SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.**

(the "**Applicants**")

NOTICE OF MOTION

FTI Consulting Canada Inc. ("**FTI**"), in its capacity as court-appointed monitor (the "**Monitor**") of Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (the "**Applicants**", and with Payless ShoeSource Canada LP, the "**Payless Canada Entities**") will make a motion to a judge of the Commercial List on Tuesday October 29, 2019 at 10:00 a.m., or as soon after that time as the motion can be heard, at the court house at 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

PROPOSED METHOD OF HEARING: The Motion is to be heard orally.

THE MOTION IS FOR:

- (a) an order (the "**Receivership Order**") substantially in the form attached hereto as Schedule "B", *inter alia*:
 - (i) abridging the time for service of the Notice of Motion herein, if necessary, and validating service thereof;
 - (ii) lifting the stay of proceedings granted by this Court under the Initial Order in these proceedings dated February 19, 2019 (the "**Initial Order**") with respect to the Payless Canada Entities and the Receivership Property (as defined below) solely

to allow: (i) the appointment of FTI as receiver (in such capacity, the "**Receiver**") over the Receivership Property on the Receivership Effective Date (as defined below), and (ii) the Receiver to act in respect of the Receivership Property, each in accordance with the provisions of the Receivership Order;

- (iii) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the "**BIA**"), appointing the Receiver, without security, over all Employee Distributions¹ and Cash in the amount of \$100.00 to be transferred by Payless Canada LP to the Receiver (collectively, the "**Receivership Property**"), and no other property of the Payless Canada Entities, effective upon service on the Service List (as defined in the First Amended CCAA Plan, which is defined below) of the certificate attached as Schedule "A" to the Receivership Order (the "**Receivership Effective Date**") confirming that the Affected Creditor Distribution Date (as defined in the First Amended CCAA Plan) has occurred, ;
- (iv) relieving the Receiver from compliance with the provisions of Sections 245(1), 245(2) and 246 of the BIA; and
- (v) such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- (a) on February 18, 2019, Payless Holdings LLC and twenty six of its affiliated companies (collectively, the "**U.S. Debtors**") commenced insolvency proceedings (the "**U.S.**

¹ "Employee Distributions" is defined in the First Amended CCAA Plan as any distribution under the First Amended CCAA Plan to an employee or former employee of any of the Payless Canada Entities who is, to the best of the Monitor's knowledge, not ineligible under section 6 of WEPPA to receive a payment under WEPPA, in his or her capacity as an employee or former employee, on account of such employee or former employee's General Unsecured Claim. A copy of the First Amended CCAA Plan is accessible on the Monitor's website for the CCAA Proceedings (as defined below) at the following address: <http://cfcanada.fticonsulting.com/paylesscanada/>

Proceedings) by filing voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code. The Payless Canada Entities are U.S. Debtors in the Chapter 11 Proceedings. The U.S. Proceedings are pending before the United States Bankruptcy Court for the Eastern District of Missouri (the "**U.S. Bankruptcy Court**");

- (b) on February 19, 2019, the Applicants sought and obtained the Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA Proceedings**"). The Initial Order's protections extend to Payless ShoeSource Canada LP as the operating entity of the Payless Canada Entities;
- (c) on February 21, 2019, the Court granted an order approving, among other things, a liquidation consulting agreement (the "**Liquidation Consulting Agreement**") with a contractual joint venture comprised of Great American Group, LLC and Tiger Capital Group, LLC (together, "**Consultant**") dated February 12, 2019 pursuant to which certain of the U.S. Debtors engaged the Consultant as their exclusive consultant with respect to the liquidation of inventory and certain fixtures at the stores identified in the Liquidation Consulting Agreement (the "**Liquidation Sales**"). The Liquidation Sales in the U.S. and Canada have concluded and the Payless Canada Entities have vacated all of their Canadian stores and the Canadian corporate head office;
- (d) on September 19, 2019, the Court granted an order (the "**Meetings Order**"), *inter alia*, accepting the filing of the Payless Canada Entities' proposed plan of compromise and arrangement dated September 17, 2019 (the "**CCAA Plan**") and authorizing the convening of the meetings of creditors to consider and vote on the CCAA Plan (the "**Creditors' Meetings**");

- (e) on October 16, 2019, the Payless Canada Entities served on the Service List the First Amended and Restated CCAA Plan (the "**First Amended CCAA Plan**") and plan supplement to the First Amended CCAA Plan (the "**Plan Supplement**");
- (f) on October 23, 2019, the Payless Canada Entities, in accordance with the Meetings Order, held the Creditors' Meetings wherein the First Amended CCAA Plan was approved by the Requisite Majorities (as defined in the First Amended CCAA Plan) of each class of Affected Creditors (as defined in the First Amended CCAA Plan);
- (g) the Wage Earner Protection Program Act, S.C. 2005, c. 47, s.1 ("**WEPPA**") entitles eligible individuals to receive certain payments in respect of "eligible wages", which includes termination and severance pay in certain circumstances where such individual's former employer is subject to a bankruptcy or receivership;
- (h) the former employees of the Payless Canada Entities are currently not eligible to receive payments under WEPPA because the Payless Canada Entities are not subject to bankruptcy or receivership proceeding;
- (i) the receivership will result in a greater recovery for the eligible former employees of the Payless Canada Entities than they would receive if they simply received their distributions contemplated by the First Amended CCAA Plan;
- (j) the appointment of the Receiver on the Receivership Effective Date over the Receivership Property would not result in any disruptions to the CCAA Proceedings, or cause any material prejudice to any stakeholder of the Payless Canada Entities;
- (k) as further detailed in the Monitor's Seventh Report dated October 23, 2019 (the "**Seventh Report**"), the Monitor proactively engaged in discussions with Service Canada and the

Wage Earner Protection Program, Policy and Oversight office (the "**WEPP Office**") in respect of the proposed administration of the Wage Earner Protection Program;

- (l) it is just and convenient in the circumstances that the Receiver be appointed over the Receivership Property on the Receivership Effective Date pursuant to section 243(1) of the BIA on the terms set out in the Receivership Order;
- (m) given that FTI has been appointed the Monitor of the Payless Canada Entities and is subject to reporting obligations under the CCAA and the Initial Order, no party will be prejudiced by an order relieving the Receiver from compliance with Sections 245(1) , 245(2) and 246 of the BIA;
- (n) the Payless Canada Entities support this motion and it is not opposed by the relevant agencies, namely, Service Canada or the WEPP Office;
- (o) the provisions of the CCAA and this Court's equitable and statutory jurisdiction thereunder;
- (p) section 243(1) and 243(2) of the BIA;
- (q) the provisions of WEPPA;
- (r) Rules 2.03, 3.02, 16 and 37 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Rect. 194, as amended; and
- (s) such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) the affidavit of Stephen Marotta, sworn October 23, 2019;
- (b) the Seventh Report; and

(c) such further and other evidence as counsel may advise and this Court may permit.

October 23, 2019

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TO: The Service List

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PROCEEDING COMMENCED AT
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NOTICE OF MOTION

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TAB 2

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR
JUSTICE McEWEN

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TUESDAY, THE 29TH
DAY OF OCTOBER, 2019

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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(the “**Applicants**”)

RECEIVERSHIP ORDER

THIS MOTION made by FTI Consulting Canada Inc. (“**FTI**”), in its capacity as court-appointed monitor (the “**Monitor**”) of the Applicants and Payless ShoeSource Canada LP (the “**Payless Canada Entities**”) for an Order (the “**Receivership Order**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) appointing FTI as receiver (in such capacity, the “**Receiver**”) without security, of all Employee Distributions (as defined in the First Amended and Restated Plan of Compromise and Arrangement of the Payless Canada Entities dated October ●, 2019, as may be further amended from time to time (the “**CCAA Plan**”), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Monitor, the Affidavit of Stephen Marotta sworn October [●], 2019 including the exhibits thereto, the [seventh] report of the Monitor dated October [●], 2019, and on hearing the submissions of counsel for the Payless Canada Entities, the Monitor, FTI (as the proposed Receiver), the Term Loan Agent and the Supporting Term Loan Lenders, and no one else

appearing although duly served as appears from the affidavit of service of Taschina Ashmeade sworn October [●], 2019, and on reading the consent of FTI to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the CCAA Plan.

LIFTING OF THE STAY

3. **THIS COURT ORDERS** that the stay of proceedings granted by this Court under the Initial Order dated February 19, 2019, (the "**Initial Order**") is hereby lifted with respect to the Payless Canada Entities and the Receivership Property (as defined below) solely to allow: (i) the appointment of the Receiver over the Receivership Property on the Receivership Effective Date (as defined below); and (ii) the Receiver to act in respect of the Receivership Property, each in accordance with the provisions of this Receivership Order.

APPOINTMENT

4. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and effective upon service on the Service List of the certificate attached as **Schedule "A"** hereto (the "**Receivership Effective Date**") confirming that the Affected Creditor Distribution Date has occurred, FTI will hereby be appointed Receiver, without security, of all Employee Distributions and Cash in the amount of \$100.00 to be transferred by Payless ShoeSource Canada LP to the Receiver (the "**Receivership Property**"), and no other property of the Payless Canada Entities.

5. **THIS COURT DECLARES** that the Receiver is a receiver within the meaning of section 243(1) of the BIA.

RECEIVER'S POWERS

6. **THIS COURT ORDERS** that, from and after the Receivership Effective Date, the Receiver will be empowered and authorized, but not obligated, to act at once in respect of the Receivership Property

and the Receiver will be expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) subject to paragraphs 11, 13 and 14 of this Receivership Order, to exercise control over the Receivership Property;
- (b) to perform its statutory obligations under the *Wage Earner Protection Program Act* (Canada) (the “**WEPPA**”);
- (c) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and
- (d) to engage counsel to assist with the exercise of the Receiver’s powers conferred by this Receivership Order,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusions of all other Persons (as defined below), including the Payless Canada Entities and without interference from any other Person.

7. **THIS COURT ORDERS** that the Receiver be and is hereby relieved from compliance with the provision of sections 245(1), 245(2) and 246 of the BIA, provided that the Receiver shall provide notice of its appointment in the prescribed form and manner to the Superintendent of Bankruptcy, accompanied by the prescribed fee.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

8. **THIS COURT ORDERS** that (i) the Payless Canada Entities, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and members, and all other persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Receivership Order (all of the foregoing, collectively, being “**Persons**” and each being a “**Person**”) shall forthwith grant access to the Receivership Property to the Receiver upon the Receivership Effective Date.

9. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the Receivership Property and the current (if any) and former employees of the Payless Canada Entities for the purposes of complying with the Receiver’s

statutory obligations under the WEPPA, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the “**Records**”) in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 9 or in paragraph 10 of this Receivership Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to applicable laws prohibiting such disclosure.

10. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER OR THE RECEIVERSHIP PROPERTY

11. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a “**Proceeding**”), shall be commenced or continued against the Receiver or the Receivership Property except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Receiver or the Receivership Property are hereby stayed and suspended pending further Order of this Court.

EMPLOYEES

12. **THIS COURT ORDERS** that employees of the Payless Canada Entities, if any, shall remain the employees of the Payless Canada Entities until such time as the Payless Canada Entities may terminate the employment of such employees and the Receiver shall not be liable for any employee-related liabilities or obligations, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA.

LIMITATION ON ENVIRONMENTAL LIABILITIES

13. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, “**Possession**”) of any of the Receivership Property or any of the Payless Canada Entities’ other assets, property or undertaking, including (without limitation) property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial, or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “**Environmental Legislation**”).

POSSESSION OF RECEIVERSHIP PROPERTY

14. **THIS COURT ORDERS** that the Receiver shall take no part whatsoever in the management or supervision of the management of the Business (as defined in the Initial Order) and the Receiver shall not, as a result of this Receivership Order or anything done in pursuance of the Receiver’s duties and powers under this Receivership Order, be deemed to be in possession of or be deemed to have taken any steps to dispose of any of the Receivership Property, or of any other assets, property or undertaking of the Payless Canada Entities, including (without limitation) within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER’S LIABILITY

15. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its delivery of the Receivership Certificate, its appointment or the carrying out the provisions of this Receivership Order, including any liability or obligation in respect of taxes, withholdings, interest, penalties, or other like claims, save and except for any gross negligence or wilful misconduct on its part,

and it shall have no obligations under sections 81.4(5) or 81.6(3) of the BIA. Nothing in this Receivership Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

COSTS OF ADMINISTRATION

16. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, in an amount up to but not exceeding the amount of the Receivership Property, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Receivership Property, as security for such fees and disbursements, both before and after the making of this Receivership Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Receivership Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

17. **THIS COURT ORDERS** that, if requested by the Court or any interested person, the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

18. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the Receivership Property, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

TERMINATION OF THE RECEIVERSHIP

19. **THIS COURT ORDERS** that unless otherwise ordered by the Court following the completion of the Receivers' duties under this Receivership Order, any Receivership Property remaining after payment of all fees and expenses of the Receiver and its counsel shall be remitted to Service Canada as subrogee of Claims paid in respect of eligible wages (as defined in WEPPA), as contemplated by WEPPA.

SERVICE AND NOTICE

20. **THIS COURT ORDERS** that, subject to further Order of the Court, service and notice with respect to this Receivership Order and the appointment of the Receiver shall be in accordance with paragraphs 54, 55, 56, and 57 of the Initial Order.

INITIAL ORDER, CCAA PLAN AND SANCTION ORDER

21. **THIS COURT ORDERS** that, except as expressly stated herein with respect to the Receivership Property, nothing herein amends the terms of the Initial Order, including the powers, authorizations, obligations and protections for the Monitor, the Payless Canada Entities and the Payless Canada Entities' directors and officers contained in the Initial Order.

22. **THIS COURT ORDERS** that, nothing herein amends the terms of the CCAA Plan or the Sanction Order, including the compromises, discharges, releases and injunctions provided for therein.

WEPPA

23. **THIS COURT ORDERS** that (i) notwithstanding subsection 21(1)(d) of WEPPA and subsection 16(1)(b) of the WEPPA Regulations, each individual (as such term is used in WEPPA) will not be required to, and shall not, deliver a proof of claim for wages owing, and the Receiver will instead accept the individual's CCAA claim for purposes of administration of WEPPA in this proceeding, and (ii) notwithstanding subsection 15(1)(d) of the WEPPA Regulations, the Receiver shall advise the Minister (as defined in WEPPA), and the Minister shall accept, that the requirement of an individual to deliver a proof of claim for wages owing was met given the acceptance of claims referred to immediately above.

24. **THIS COURT ORDERS** that, for the purposes of WEPPA and these receivership proceedings, (i) Payless ShoeSource Canada LP is subject to the CCAA Proceedings, (ii) the wage eligibility period for the purpose of establishing eligible wages under WEPPA in accordance with subsection 2(1)(a)(ii) of WEPPA has occurred, and (iii) the wage eligibility period began six months prior to the date of commencement of the CCAA Proceedings.

GENERAL

25. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

26. **THIS COURT ORDERS** that nothing in this Receivership Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Payless Canada Entities (or any of them).

27. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Receivership Order and to assist the Receiver and its agents in carrying out the terms of this Receivership Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Receivership Order or to assist the Receiver and its agents in carrying out the terms of this Receivership Order.

28. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Receivership Order and for assistance in carrying out the terms of this Receivership Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

29. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Receivership Order on not less than seven (7) days' notice to the Receiver and the Payless Canada Entities 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.

SCHEDULE "A"

RECEIVER CERTIFICATE

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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RECEIVERSHIP CERTIFICATE

The undersigned confirm that this is the "Receivership Certificate" referred to in the Receivership Order of the Ontario Superior Court of Justice (Commercial List) made on October 29, 2019, and that in accordance with paragraph 4 of the Receivership Order, the Affected Creditor Distribution Date as defined in the First Amended and Restated Plan of Compromise and Arrangement of the Payless Canada Entities dated October [●], 2019, as may be further amended from time to time, has occurred and that the Receivership Effective Date shall be effective upon service of this certificate on the Service List.

PAYLESS SHOESOURCE CANADA
INC., PAYLESS SHOESOURCE
CANADA GP INC. AND PAYLESS
SHOESOURCE CANADA LP

FTI CONSULTING CANADA INC., SOLELY IN
ITS CAPACITY AS PROPOSED RECEIVER, AND
NOT IN ITS PERSONAL OR CORPORATE
CAPACITY

Per: _____
Name:
Title

Per: _____
Name:
Title

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**ONTARIO
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