

**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 COPPLEY APPAREL GROUP LIMITED**

**AFFIDAVIT OF RICHARD SEXTON
(sworn June 10 2009)**

I, RICHARD SEXTON, of the City of Burlington in the Province of Ontario **MAKE OATH AND SAY:**

1. I am the Chief Financial Officer for Copley Apparel Group Limited ("Copley") and, as a result, I have personal knowledge of the matters herein deposed to save and except for where I refer to matters on the basis of information and belief in which case I identify the source of that information and verily believe it to be true.

2. I am swearing this affidavit in support of an application being brought by Copley to commence reorganization proceedings pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**").

I. Qualification for Protection under the CCAA and Jurisdiction

3. Copley is currently unable to satisfy its obligations generally as they become due. Copley is, as a result, insolvent.

4. As set forth in the attached financial statements and as described below, Copley owes its creditors approximately \$11 million. Attached hereto and marked as **Exhibit "A"** is a true copy of the Anticipated Receipts and Disbursements cash flow

projection through July 17, 2009 (the "DIP Budget"). Attached and marked as **Exhibit "B"** are true copies of the unaudited financial statements for Copley as at April 25, 2009. Attached as **Exhibit "C"** are copies of all other financial statements produced in the past 12 months (unaudited).

II. Copley

5. Copley is a manufacturer and distributor of fine menswear throughout Canada and the United States.

6. What is now Copley was founded over 100 years ago in Hamilton Ontario under the name John Calder & Co. In 1883 John Calder & Co. was purchased by Messrs. Copley, Noyes, and Randall and they formed a new company, Copley, Noyes & Randall Ltd ("CNR"). In 1950 CNR was purchased by the Enkin family and from that time through the 1960's and 1970's the business enjoyed rapid and steady growth manufacturing quality menswear under American and European fashion brands under license for distribution in Canada and the United States.

7. The Enkin family grew the business to the point where in 1998 CNR employed approximately 600 people at 3 locations in downtown Hamilton; 56 York Boulevard, 107 McNab Street North, and 127-131 Hughson Street North, Hamilton.

8. In November 1998 Hartmarx Corporation, a corporation incorporated pursuant to the laws of the State of Delaware, purchased all the issued and outstanding shares in CNR through a wholly owned numbered company, 1315751 Ontario Inc. In December of that year 1315751 Ontario Inc. filed articles of amendment and changed its name to Copley Apparel Group Limited. At the same time CNR and Copley amalgamated.

9. In June 2000 Copley acquired the custom tailored men's shirt manufacturer Royal Shirt Company Limited ("Royal Shirt") based at 40 Adesso Drive, Concord Ontario. At the time of the purchase Royal Shirt employed approximately 75 people. In November 2004 Royal Shirt amalgamated with Copley.

III. Current Operations

10. Copley continues to operate from the 3 sites in downtown Hamilton and from the Royal Shirt site in Concord Ontario (the "Copley Facilities"). Copley leases these sites from the former owners or controlling shareholders of the respective companies.

11. Copley is a separate legal entity and stand alone business from Hartmarx Corporation (the "Parent") and is neither integrated with nor reliant upon the Parent. The only part of Copley's business that is integrated with the Parent is Copley's operating facility, which is part of the overall U.S. lending arrangement.

12. Copley remains one of the largest manufacturer and distributor of men's fine clothing in Canada and distributes across Canada and into the United States. It currently employs 96 salaried and 379 hourly employees across the four sites. 324 are employed at the York Boulevard site, 17 are employed at the McNab Street site, 77 are employed at the Hughson Street site and 57 are employed at the Concord site.

13. With the strong Canadian dollar as against the US dollar, and the impact of the current economic recession, high-end clothing manufacturers in Canada have experienced a particularly difficult time competing with manufacturers from other countries. The entire industry experienced a sudden drop in business from September 2008 to March 2009, and while there are some signs of improvement in the market, sales are still well below historic levels.

14. The Parent and certain of its subsidiaries (collectively with the Parent, "the U.S Sellers") have sought protection under Chapter 11 of Title II of the United States Code in the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "US Court") and are presently seeking potential buyers of its business or shares, including the business or shares of Copley ("the US Case").

15. By Order dated June 2, 2009, the US Court approved a “stalking horse bid” for the purchase of most of the assets comprising the businesses of both the U.S. Sellers and Copley as set out in further detail below.

IV. Assets

16. Copley’s assets consist of the Copley brand which is used on suits, sport coats, trousers, and shirts sold throughout North America. Copley’s current financial statements (Exhibit B) also show receivables of approximately \$10 million, inventories of approximately \$8 million, and equipment less accumulated depreciation of slightly over \$2 million, and leases to the respective sites. Liquidation or sale values on these assets is unknown and has yet to be determined.

V. Creditors

A. Secured Creditors

17. Copley’s secured creditors are listed on a search conducted under the *Personal Property Security Act* (Ontario) which is attached hereto as **Exhibit “D”**.

18. Copley’s total secured debt is approximately \$9 million which is owing to Wachovia Capital Finance Corporation (Canada) (“Wachovia Canada”).

B. Remittances

19. Copley is remitting PST and GST as and when due. Copley is current with all employee and other tax remittances. Copley is the employer under one defined benefit pension plan (the “Defined Benefit Pension”) and in accordance with the terms of a collective agreement between Copley and the union, contributes a specified amount to a pension plan for which the union is responsible (the “Union Pension”). Copley has made all required contributions to the Union Pension. However, as a result of recent declines in financial markets, the value of the assets of the Defined Benefit Pension has declined and the plan is in deficit by approximately \$2 million. The most recent actuarial valuation on the Defined Benefit Pension shows a continuing solvency deficiency requiring special payments to fund past service obligations of

approximately \$30,000 per month (the "Special Payments") . Copley is current on all required Special Payments. The most recent actuarial valuation of the Defined Benefit Pension dated August 13, 2008 and valued as at December 31, 2007 is attached hereto as **Exhibit "E"**

C. Unsecured Creditors

20. As of April 25, 2009, Copley owed trade creditors approximately \$2.2 million. The amount owing to trade creditors fluctuates on a daily basis, as bills are paid and new raw materials ordered.

D. Unions

21. Copley has collective agreements with unionized employees involving the Workers United Ontario Council Local 210C – Hamilton, the Workers United Ontario Council Local 300 – Concord, and the International Union of Operating Engineers Local 772 – Engineers and mechanics Hamilton.

VI. Future Prospects

22. Copley has been a viable and profitable company. However, difficulties faced by the Parent company in the United States, and the current challenges facing manufacturers of fine clothing generally, has created a situation where Copley is not generating sufficient cash flow in the business to fund all of its current obligations beyond the next 3 to 4 weeks. It has exhausted its availability under its secured lending facility with Wachovia Canada, and the DIP financing facility (the US DIP) in the US Case (under which the current Canadian facility is operated) is in default, as described more fully below. Wachovia Canada has no current obligation to fund Copley under the Canadian facility. Copley needs protection from its creditors to allow Copley to be sold as a "going concern" to protect jobs and maintain the value of the business for the reasons set out in greater detail below.

VII. The Restructuring Process

23. As stated above, the U.S. Sellers have filed a voluntary petition for relief commencing the Chapter 11 cases under Chapter 11 in the United States.

24. The U.S. Sellers, Copley Apparel Group Limited, and Hartmarx have entered into an asset purchase agreement with Emerisque Brands U.K Limited, a company formed under the laws of England and Wales, ("Emerisque") and SKNL North America, B.V., a company incorporated under the laws of the Netherlands ("SKNL", collectively with Emerisque and any of their permitted designees, the "Purchasers") dated May 21, 2009, as amended by agreement dated June 1, 2009 (collectively the "US APA"). Attached hereto and marked as **Exhibit "F"** is a true copy of the US APA.

25. The US APA is a "stalking horse bid" in the US Case.

26. The US bid procedure was commenced prior to this CCAA application and is well advanced with one bidder. On June 2, 2009 the US Court approved a bid procedure as more particularly set out in the order of the US Court dated June 2, 2009, attached hereto as **Exhibit "G"** (the "US Bid Procedure Order").

27. Under the US Bid Procedure Order the Purchasers are the stalking horse bidder pursuant to the US APA.

28. Under the US Bid Procedure Order the relevant milestones in the US sale process are;

i) On or before June 5, 2009 (the "Mailing Date") or as soon thereafter as possible, the U.S. Sellers shall provide notice of the sale by publication in newspapers or such other publications as the Debtor considers advisable.

ii) On or before the Mailing Date the U.S. Sellers (or their agent) shall serve notice of the sale hearing with all bid procedure documents to all potentially interested parties or affected parties as set out in the order.

- iii) Prior to the Mailing Date, the U.S. Sellers shall have served a cure notice to all parties to contracts to be assumed and assigned to the Purchasers or a successful bidder as defined in the order, and the parties to the assumed contracts shall have until June 19, 2009 to file any objections.
- iv) Any Potential Bidders must complete qualification requirements to become Qualified Bidders by no later than June 19, 2009.
- v) Notice of all Qualified Bidders shall be sent to non-Debtor parties to assumed or assigned contracts permitting objections to be made up until June 24, 2009 at 4pm.
- vi) The Bid Deadline is 5pm on June 22, 2009
- vii) In the event there is more than one Qualified Bid which the U.S. Sellers determine in consultation with the creditors committee, and after obtaining the agreement of the DIP Agent, will provide greater value to the estate than the US APA, the U.S. Sellers may conduct an auction on June 24, 2009 at 10am.
- viii) The Court shall hold a Sale Hearing on June 25, 2009 at 2:00pm to approve the successful bidder and confirm the results of the Auction, if any

29. The Purchasers under the US APA have sought to purchase the business of Copley other than the former Royal Shirt manufacturing facility in Concord Ontario. Under the terms of the US APA, the purchase price for the Parent's assets is set at 72 per cent of the amount of the outstanding secured debt owing to the US secured lending syndicate at the date of closing, and the purchase price for Copley's assets is set at 72 per cent of the amount outstanding to Copley's secured operating lender, Wachovia Canada, as at the date of closing. An affiliate of Wachovia Canada, Wachovia Capital Finance Corporation (Central), ("Wachovia Central") is the agent and a member of the US lending syndicate.

VIII. DIP Financing and the Canadian Forbearance Agreement

30. The Parent, its subsidiaries and Copley previously entered into a loan and security agreement with Wachovia Central as agent on behalf of a lending syndicate on August 30, 2002. The loan and security agreement provided for various credit facilities of up to \$200,000,000, including an operating loan from Wachovia Canada to Copley for up to \$10,000,000 U.S. (the "Canadian Loan Amount"). Copley granted Wachovia Canada a continuing security interest in its assets to cover the Canadian Loan Amount only.

31. Following the filing of the U.S. Case, the lending syndicate agreed to provide the Parent with debtor in possession financing under the US DIP. Pursuant to a ratification and amendment agreement dated January 23, 2009, the loan and security agreement was amended to provide the Parent with up to \$160,000,000 in DIP financing. The Canadian Loan Amount and the security granted by Copley was unchanged by these amendments, and is accordingly included therein. There are currently defaults under the ratification and amending agreement such that the US DIP is in default.

32. The terms of Copley's secured lending with Wachovia Canada does not include the use of lockbox facilities to direct receipts to Wachovia Canada. Therefore, absent enforcement of its security by Wachovia Canada, Copley has access to its cash receipts to fund its operations. Wachovia Canada and Wachovia Central have agreed to the terms of a forbearance agreement, a copy of which is attached as **Exhibit "H"** (the "Forbearance Agreement") in order to enable Copley to carry on business so as to participate in a sale process as described below. Subject to the terms of the Forbearance Agreement, Wachovia Canada has agreed that it will not take steps to exercise dominion over Copley's cash receipts despite its insolvency. Wachovia Canada has agreed to fund Copley's projected cash flow shortfall over the next six weeks as set out in the DIP Budget (Exhibit A). Copley agrees in the Forbearance Agreement to seek a court-ordered DIP charge in favour of Wachovia Canada in the

amount of its advances to Copley during these CCAA proceedings plus the amount of any decline in Copley's Working Capital during these proceedings.

33. In the absence of the advances under the Forbearance Agreement from Wachovia Canada to finance the costs and expenses associated with the CCAA proceedings and the working capital requirements of Copley during the CCAA proceedings in accordance with the 6 week cash flow projections (Exhibit A) , Copley is not able to engage in any going concern sale process in respect of its assets.

34. The Parent and the Purchasers agreed, with the support of the US lending syndicate, and Wachovia Canada has agreed to support the business of Copley under the Forbearance Agreement, in view of the following requirements of the US APA:

i) the Canadian bid procedure under the CCAA procedure will mirror the US Bid Procedure and particularly that the auction date under any Canadian bid procedure occur prior to the U.S Auction Date; and

ii) the Canadian bid procedure will have the following relevant milestones;

a) Copley is to forthwith (i) engage one or more professional advisers to assist it with the conduct of the sale process; and (ii) commence the sale process by, among other things, notifying appropriate parties that may have an interest in purchasing the Acquired Assets, as defined therein, or a portion thereof and providing or being in a position to provide sufficient information to enable such parties to conduct appropriate due diligence;

b) if interested parties want to submit a competing offer, they will be required do so on or before June 21, 2009 (the "Bid Deadline") by way of a binding offer for the Acquired Assets or relevant portion thereof (an "Other Offer");

c) if at least one Other Offer is received by Copley prior to the Bid Deadline, and Copley believes in good faith that such Other Offer represents a better offer than the Canadian APA for the Acquired Assets (a "Competing Offer"), Copley shall so notify Purchasers by noon on the day following the Bid Deadline and must

conduct an auction in respect of the Acquired Assets on or before June 23, 2009, open only to Purchasers and each party that has submitted a Competing Offer (the "Auction"), in accordance with auction procedures to be agreed upon between Copley and the Purchasers.

(the "Canadian Bid Procedure")

IX. The Canadian APA and Bid Process

35. In light of the US APA and the terms of the Forbearance Agreement, Copley has entered into an asset purchase agreement with the Purchasers (the Canadian APA). It is contemplated that the Canadian APA be a "stalking horse bid" in the CCAA proceedings. Attached hereto as **Exhibit "I"** is a true copy of the Canadian APA.

36. Under the terms of the Canadian APA, Copley Apparel Group Limited agreed to commence these proceedings and to seek an order establishing the Canadian Bid Procedure.

37. The Canadian APA is in the best interests of Copley and its stakeholders for the following reasons:

- a) Copley cannot continue operate unless it continues to have access to its cash receipts and receives funding for its projected cash shortfall as is being provided under the terms of the Forbearance Agreement;
- b) given the business and financial challenges faced by the industry in general and Copley specifically, a sale to the Purchasers or a higher bidder under the Canadian APA represents the best option available to Copley and its stakeholders;
- c) it is expected that a substantial percentage of the workforce of Copley will continue to be employed;

d) the Purchasers will continue to operate out of the Copley Facilities other than its location in Concord Ontario, which does not form part of the Acquired Assets and will be offered for sale separately;

e) it has the support of Copley's senior lender.

38. If Copley is not granted CCAA protection and the approval of the Canadian Bid Procedure, Copley will be forced to shut down its operations and terminate all of its employees.

39. Copley cannot responsibly carry on business and continue to incur trade credit knowing that it is insolvent, and that its business and assets will either be sold or closed.

40. I verily believe that the Canadian Bid Procedure and the proposed Canadian sale process, though of short duration, is necessary because:

- i) the stalking horse bid establishes a going concern floor value;
- ii) they are the only available option to Copley to preserve the possibility of a going concern sale;
- iii) the existence of the pension deficit and the risk of successor employer liability, I am advised by counsel and believe that it is impractical to consider an operating receivership as an alternative to CCAA proceedings as a viable option;
- iv) they provide the opportunity to determine what is the best "going concern" offer.

41. The existence of the Canadian APA and the stability offered in a CCAA proceeding will better serve the need to provide Copley's customers with the confidence to continue to support Copley' business.

X. CCAA Proceedings

42. Proceedings under the CCAA will provide stability and ensure that Copley is able to carry on business in the ordinary course while the Canadian Bid Procedure is allowed to complete its course and a buyer is found for both the US and Canadian businesses. The goal is a “going concern” sale and CCAA proceedings are necessary if that goal is to be achieved.

XI. Unaffected Creditors

43. It is intended that the Monitor and its counsel, FTI Consulting Canada ULC as financial advisor to Copley, and Copley’s counsel, Gowlings, will all be paid their fees and disbursements incurred prior to the date hereof in connection with these proceedings, and a provision to that effect is contained in the draft Initial Order.

44. Under the terms of the Forbearance Agreement, Wachovia Canada will be an unaffected creditor and Copley seeks a charge for its DIP advances and any diminution in its security during these proceedings.

XII. Urgency

45. Copley is making the within application at this time as it has now entered into the Canadian APA and it wishes to complete the Canadian Bid Procedure within the stipulated timeframe.

XIII. Monitor

46. BDO Dunwoody Limited has agreed to act as monitor of Copley. Attached as **Exhibit “J”** is a true copy of the consent of BDO Dunwoody Limited.

XIV. Corporate Authority

47. Copies of the following shareholder's resolutions are attached as **Exhibits "K" – "M"**:

- a. Resolution authorizing Copley to enter into the Canadian APA (**Exhibit "K"**);
- b. Resolution authorizing Copley to enter into the Forbearance Agreement (**Exhibit "L"**);
- c. Resolution authorizing Copley to bring this proceeding under the CCAA (**Exhibit "M"**);

SWORN before me at the City of
 Toronto, in the Province of Ontario,
 on, June 10, 2009.


 Name of Commissioner: *ROBERT C. DURNFORD*
 Commissioner for Taking Affidavits



RICHARD SEXTON

HAM_LAW\237283\1