

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association,

Petitioner,

vs.

ONLINESHOES.COM INC., a Washington corporation; SHOES.COM, INC., a Delaware corporation,

Respondents.

No. 17-2-02462-7 SEA

RECEIVER’S OMNIBUS MOTION TO (1) APPROVE FINAL REPORT, (2) AUTHORIZE DISTRIBUTION OF REMAINING ESTATE PROPERTY, (3) AUTHORIZE ABANDONMENT OF RECORDS, (4) DISALLOW AND RE-CHARACTERIZE CERTAIN CLAIMS FILED AS SECURED CLAIMS, (5) EXONERATE THE RECEIVER’S BOND, (6) DISCHARGE RECEIVER AND TERMINATE RECEIVERSHIP, AND (7) FOR RELATED RELIEF

I. RELIEF REQUESTED

Oswego Group LLC, doing business as Inverness Group, the general receiver (“Receiver”) for Onlineshoes.com Inc. (“OLS”), and Shoes.com, Inc. (“Shoes.com,” and together with OLS, the “Debtors”), appointed by this Court pursuant to the February 2, 2017, Stipulated Order Appointing General Receiver (the “Receivership Order”), respectfully requests that this Court enter an order (1) approving the Receiver’s final report (“Final Report”) submitted herewith; (2) authorizing the payment of all unpaid expenses of the Debtors’ receivership estates (together, the “Receivership Estate”), including prospective

RECEIVER’S OMNIBUS MOTION TO APPROVE FINAL REPORT, TERMINATE RECEIVERSHIP, AND FOR RELATED RELIEF - 1

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1 unpaid expenses to complete closing the receivership case and post-receivership fees and
2 expenses; (3) approving a final distribution to the first priority secured creditor, Daniel
3 Gerler (“Gerler”), pursuant to RCW 7.60.230, (4) approving abandonment, in place, of the
4 Receivership Estate’s documents, books, records and files in the Receiver’s possession,
5 custody, and control, pursuant to RCW 7.60.150, (5) disallowing and re-characterizing
6 certain claims submitted as secured claims, (6) discharging the Receiver and terminating this
7 receivership, pursuant to RCW 7.60.290, and (7) exonerating the Receiver’s bond, and for
8 related relief (the “Motion”).

9
10 This Motion is supported by the Receiver’s Final Report, the Declaration of John L.
11 Davidson (“Davidson Decl.”) filed herewith, the records and files herein, and the following
12 memorandum.

13 **II. FACT BACKGROUND**

14 **A. Initiation of the Receivership.**

15
16 1. On or about January 27, 2017, the Debtors’ senior management announced
17 the immediate suspension of business activities and terminated all of their employees. All
18 employees were instructed to leave the Debtors’ offices, final payroll checks were issued,
19 and there was reportedly little or no notice of the decision and the terminations provided by
20 management to the Debtors’ lenders, vendors, customers or other stakeholders. (Davidson
21 Decl., ¶ 3).

22
23 2. The decision to suspend operations and terminate staff reflected a severe
24 liquidity problem and followed Debtors’ inability to obtain new or additional financing to
25 support ongoing operations. At that time, per their records, Debtors, as co-borrowers, owed
26

1 approximately \$25 million to their secured lenders, and owed approximately \$72 million to
2 their unsecured creditors, which included their product suppliers. (Davidson Decl., ¶ 4).

3 3. Prior to the commencement of this receivership case, the Debtors operated
4 online and two fixed location retail sales businesses that were generally focused on the sale
5 of men's and women's quality dress, casual and athletic footwear into the United States
6 market. The larger of the two, OLS, is reportedly the oldest online footwear retailer in the
7 United States. (Davidson Decl., ¶ 5).

9 4. Despite two to three years of significant sales growth, and despite significant
10 investment and debt funding to support their rapid expansion, Debtors were unable to
11 achieve profitability. Consequently, Debtors announced the immediate shutdown of
12 operations on January 27, 2017. (Davidson Decl., ¶ 6).

14 5. Following discussions between representatives of Debtors' boards and their
15 first priority secured lender, Petitioner Wells Fargo Bank, National Association ("Wells
16 Fargo"), on February 2, 2017, Wells Fargo filed its Petition for Appointment of General
17 Receiver and (jointly with Debtors) the Joint Motion for Entry of Stipulated Order
18 Appointing General Receiver. Pursuant to the Receivership Order, Inverness Group was
19 appointed general receiver on February 2, 2017 (the "Appointment Date"). (Davidson Decl.,
20 ¶ 7).

22 6. The Receiver filed with the Court a Receiver's Bond dated effective as of
23 February 7, 2017, in the amount of \$10,000.00, through Western Surety Company, as surety
24 (Bond No. 63069169) (the "Bond"). (Davidson Decl., ¶ 8).

1 **B. Notice of Receivership and Proof of Claim Deadline.**

2 7. On February 23, 2017, the Receiver, through its counsel, served a Notice of
3 Receivership and Proof of Claim form on Debtors' creditors, owners, and other stakeholders.
4 Pursuant to the Notice of Receivership and Proof of Claim form, the deadline for creditors
5 other than state agencies to submit their claims to the Receiver was March 28, 2017. The
6 Notice of Receivership also referred creditors and other stakeholders in the receivership case
7 to a website, established by the Receiver, where significant events and orders of this Court
8 were regularly posted by the Receiver. (Davidson Decl., ¶ 9).

10 **C. Marketing and Sale of Substantially All of the Debtors' Assets.**

11 8. At the outset of the receivership, the Receiver reviewed a number of factors
12 that are key to decisions and timing to provide the best opportunity to maximize recovery for
13 the Receivership Estate's stakeholders. These included: (a) the circumstances at OLS and
14 Shoes.com following management's and the Board's decision to suspend operations and to
15 terminate all staff six days prior to entry of the Receivership Order, (b) the significant and
16 unsustainable financial and operating losses of Debtors for fiscal years 2015 and 2016, (c)
17 the status of customer channels, supplier conditions, and prospects for obtaining necessary
18 financing to purchase product, return qualified staff, and restart operations, and (d) the
19 inability of management and Debtors' equity owners to source necessary funding to continue
20 operations prior to the shutdown. (Davidson Decl., ¶ 10).

23 9. As a result of this review, the Receiver determined that a restart of the
24 Debtors' businesses within the receivership was not feasible, and that a well-solicited, open
25 and competitive sale process offered the potential for best value to creditors and other
26

1 stakeholders. The Receiver retained certain former employees of Debtors to assist with,
2 among other things, records retrieval, background, and technical and marketing support and
3 analysis to support the Receiver's sale steps and to generate interest among qualified buyers
4 for substantially all of Debtors' business assets ("Assets"). (Davidson Decl., ¶ 11).

5
6 10. To assure that the Assets realized the highest value, the Receiver requested
7 that the Court first enter an order approving certain bid and auction procedures (the "Bid
8 Procedures") so that the Assets would be subject to a competitive bid and auction process.
9 To that end, on February 28, 2017, the Receiver filed the Receiver's Motion for Orders: (1)
10 Approving the Sale of Assets Free and Clear of Liens, Claims, Encumbrances and Interests;
11 (2) Approving Bid and Auction Procedures; (3) Scheduling Hearing to Approve Sale of
12 Assets; and (4) Approving Assumption and Assignment of Executory Contracts (the "Sale
13 Motion"). (Davidson Decl., ¶ 12).

14
15 11. On March 8, 2017, the Court entered the Order (1) Scheduling a Sale
16 Approval Hearing, (2) Approving Bid and Auction Procedures, and (3) Granting Related
17 Relief (the "Bid Procedures Order"). Pursuant to the Bid Procedures Order, the Court
18 approved the Bid Procedures for the Receiver's sale of the Assets. (Davidson Decl., ¶ 13).

19
20 12. On March 28, 2017, pursuant to the Court-approved Bid Procedures and the
21 Sale Motion, the Receiver sold substantially all of the assets of the Receivership Estate at
22 public auction, subject to approval of the Court. (Davidson Decl., ¶ 14).

23
24 13. On April 3, 2017, the Court granted the Sale Motion and entered the Order (1)
25 Approving Sale of Assets Free and Clear of Liens, Claims, Encumbrances and Interests, (2)
26 Approving Assumption and Assignment of Executory Contracts, and (3) Granting Related

1 Relief (the “Sale Approval Order”).¹ (Davidson Decl., ¶ 15).

2 14. Pursuant to both (a) the Sale Approval Order and, (b) the April 3, 2017, Asset
3 Purchase and Sale Agreement attached thereto (“Agreement”), on April 21, 2017, the sale of
4 the Assets closed (the “Sale”). Pursuant to the terms of the Agreement, the Receiver
5 received \$6,590,720 (net of certain costs paid at closing), subject to a final inventory count
6 and reconciliation. On February 21, 2018, the Receiver received an additional \$154,633.30
7 in Sale proceeds, as the final adjustment to the purchase price following a final inventory
8 reconciliation. (Davidson Decl., ¶ 16).

9
10 15. Pursuant to RCW 7.60.260(2)(ii) and the terms of the Sale Approval Order,
11 the security interests and liens of secured creditors attached to the proceeds of the Sale to the
12 same extent and priority as such security interests and liens had attached to the purchased
13 Assets prior to the Sale.²

14
15 **D. Court-Approved Payments by the Receiver to Secured Creditors and**
16 **the Remaining Receivership Estate Assets.**

17 16. On June 12, 2017, the Court entered the Agreed Order (1) Allowing Claim of
18 Wells Fargo, and (2) Authorizing Payment of Wells Fargo’s Secured Claim. Pursuant to that
19 order, the Receiver paid Wells Fargo \$4,222,092, inclusive of accrued interest and attorneys’
20 fees, in full satisfaction of Wells Fargo’s secured claim. The Receivership Estate
21 subsequently received \$249,237.65 from Wells Fargo, refunding that portion of the payment
22 to Wells Fargo representing an unfunded standby letter of credit balance. (Davidson Decl., ¶
23

24
25 ¹ Capitalized terms not otherwise defined in this Motion have the meanings ascribed
to them in the Sale Approval Order.

26 ² Sale Approval Order, p. 11, at ¶ 9.

1 17).

2 17. On September 29, 2017, the Court entered the Agreed Order on Motion of
3 GEODIS Logistics, LLC for Order Directing Payment of its Secured Claim. Pursuant to that
4 order, the Receiver paid GEODIS Logistics \$237,500.00, and the balance of GEODIS
5 Logistics' claim was disallowed. (Davidson Decl., ¶ 18).

6
7 18. On January 16, 2018, the Court entered the Stipulated Order (1) Allowing
8 Claims of Daniel Gerler and Caleres Investment Company, Inc., and (2) Authorizing
9 Distribution of Estate Property to Daniel Gerler and Caleres Investment Company, Inc. (the
10 "January Distribution Order"). Pursuant to that order, on January 18, the Receiver (a) paid
11 Gerler \$1,600,000 and transferred the Litigation Claim (as that term is defined in the January
12 Distribution Order), as an interim distribution on the Gerler Secured Claim (defined below),
13 and (b) paid Caleres Investment Company, Inc. ("Caleres"), \$235,000 as a final distribution
14 on its secured claim. (Davidson Decl., ¶ 19, and Exhibit 2).

15
16 19. Gerler has the first priority security interest in the remaining assets of the
17 Receivership Estate, including the proceeds of Sale, because the claims of other secured
18 creditors have either been paid, disallowed, waived, or withdrawn. Specifically, (a) Wells
19 Fargo's claim has been paid in full, (b) the unpaid balance of GEODIS Logistics' claim has
20 been disallowed by order of this Court, (c) Deans Knight Capital Management Ltd. has
21 withdrawn its secured claim, and (d) pursuant to an agreement between Gerler and Caleres,
22 Caleres has waived any remaining claims against the Receivership Estate.³ (Davidson Decl.,
23

24
25 ³ In addition to those four creditors, pursuant to this Motion the Receiver seeks
26 disallowance of or, alternatively, subordination of certain allegedly secured claims. (See
Section II.E, *infra.*).

1 ¶ 20).

2 20. Pursuant to the January Distribution Order, Gerler's secured claim was
3 allowed in the principal amount of \$3,000,000, plus interest accrued as of March 28, 2017, in
4 the amount of \$13,750, plus interest thereafter at the rate of 5.50% per annum.

5
6 21. After application of the January 18, 2018, interim distribution to Gerler, the
7 unpaid balance of Gerler's secured claim is the principal amount of \$1,547,124.93, plus
8 interest accruing thereafter at the rate of 5.50% per annum (\$233.13 per diem), until paid (the
9 "Gerler Secured Claim"). The Gerler Secured Claim will also include attorneys' fees and
10 costs to the extent, if any, that such fees and costs are allowed by court order entered in the
11 Receivership Case. (Davidson Decl., ¶ 21, and Exhibit 2, at ¶ 3).

12
13 22. On July 8, 2014, OLS executed a Security Agreement, pursuant to which it
14 granted a security interest to Gerler in substantially all of OLS's assets, including but not
15 limited to its inventory, accounts receivable, general intangibles, and proceeds therefrom (the
16 "OLS Collateral"). (Davidson Decl., ¶ 22).

17
18 23. On July 8, 2014, Gerler perfected his security interest in the OLS Collateral
19 by filing a Financing Statement with the Washington Department of Licensing, at document
20 number 2014-189-7473-4. (Davidson Decl., ¶ 23).

21
22 24. As a result of the Sale of substantially all of the Debtor's assets, and the
23 Receiver's prior, Court-approved payments to Wells Fargo, GEODIS Logistics, Caleres, and
24 Gerler, the Receivership Estate currently holds the following assets: (a) approximately
25 \$270,000 in cash, comprised of proceeds from the Sale, and collection of accounts
26 receivable, (b) certain accounts receivable and payment intangibles (together, the "Accounts

1 Receivable)⁴, and (c) documents, books, records and other data of the Debtors, which are
2 stored electronically (the “Records”). (Davidson Decl., ¶ 24).

3 **E. Claims of Other Alleged Secured Creditors.**

4 25. General Unsecured Claims. Three creditors, J/Slides, Portland Product
5 Werks, LLC, and City Saver Guide, Inc. (together, the “Alleged Secured Claimants”),
6 submitted claims on an allegedly secured basis. However, the Proofs of Claim that they
7 submitted to the Receiver do not identify either (a) any agreement, statute, or other law that
8 would grant them a lien or security interest to secure their claims, or (b) any specific assets of
9 the Debtors that would be collateral for their alleged security interests or other liens
10 (together, the “Alleged Secured Claims”). (Davidson Decl., ¶ 25, and Exhibits 4-6).

11 26. Outlet Mall Properties, L.C. In addition to the Alleged Secured Claimants,
12 Outlet Mall Properties, L.C. (“Outlet Mall”), OLS’ former commercial landlord for a retail
13 store in Virginia Beach, Virginia (the “Premises”), submitted two allegedly secured Proofs of
14 Claim. Outlet Mall’s Proof of Claim dated March 6, 2017, is for \$4,036.90 in rent that
15 accrued prior to the February 2, 2017 Appointment Date (including \$1,000 of attorneys’
16 fees), which it claims is secured by a landlord’s lien under Virginia law (“Outlet’s First
17 Claim”). OLS’s books and records, however, show that OLS was current on its lease
18 obligations to Outlet Mall as of January 31, 2017, and that Outlet Mall held a security deposit
19 of \$2,100. Accordingly, there were no amounts due to Outlet Mall, net of the security
20 deposit, as of the Appointment Date. (Davidson Decl., ¶ 26 and Exhibit 7).
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26 ⁴ A schedule of the Accounts Receivable is submitted herewith. (Davidson Decl., ¶ 24 and Exhibit 3).

1 27. On May 15, 2017, the Court entered the Order Approving Rejection of
2 Executory Contracts and Unexpired Leases (the “Lease Rejection Order”). Pursuant to the
3 Lease Rejection Order, (a) certain contracts and leases, including OLS’s lease with Outlet
4 Mall, were rejected effective as of the February 2, 2017 Appointment Date, and (b)
5 counterparties to rejected leases, such as Outlet Mall, were given 30 days to submit claims
6 arising from the rejection of their contracts and leases.⁵

7
8 28. Outlet Mall timely submitted a lease rejection claim (“Outlet’s Second
9 Claim”) which asserts, among other things, a secured claim for both (a) rent accrued from the
10 Appointment Date through May 15, 2017 (\$7,777), and (b) additional secured amounts
11 arising from rejection of the lease (\$6,157.65). No particular collateral, value of any
12 collateral, or priority of the alleged lien is identified in Outlet’s Second Claim. Outlet Mall’s
13 secured claims are based solely on Virginia’s landlord’s lien statute. (Davidson Decl., ¶ 27,
14 and Exhibit 7, at p. 3 and Exhibit 8, at p. 3).

15
16 29. To the best of the Receiver’s knowledge, substantially all of the inventory and
17 other OLS Collateral located at the Premises were brought to the Premises after July 8, 2014,
18 the date on which Gerler was granted, and perfected, his security interests in the OLS
19 Collateral. (Davidson Decl., ¶ 28).

20
21 **F. Accounts Receivable.**

22 30. As of the Appointment Date, the Accounts Receivable on the Debtors’ books
23 and records totaled \$1,633,569. The Receiver has sought to reconcile the accounts based on
24 returns and chargebacks which occurred after the shutdown of the Debtors’ operations on
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⁵ Lease Rejection Order, ¶¶ 4 and 5.

1 January 27, 2017, and collect on the net balances of the fully reconciled Accounts
2 Receivable, all of which are subject to the first priority security interest held by Gerler.
3 (Davison Decl., ¶ 29).

4 31. As of the time of filing this Motion, the Receiver had collected \$329,769, and
5 determined that not less than \$841,337 of the balance was likely uncollectible owing to setoff
6 and/or other defenses to collection, as reflected in the monthly operating reports filed by the
7 Receiver. The obligors on the Accounts Receivable are parties that either served as conduits
8 for orders from OLS's consumers or provided payment processing services. To the extent
9 that they have responded to the Receiver's claims, the major obligors on Accounts
10 Receivable have asserted offset defenses which exceed their individual Accounts Receivable
11 balances, and are based, in large part, on consumers' returns of shoes, for which they have
12 not been reimbursed by Debtors. (Davidson Decl., ¶ 30).

13 32. The Receiver has determined that expending additional time and Receivership
14 Estate resources to try to collect the Accounts Receivable is not likely to provide a cost
15 effective means of generating a significant net return to the Receivership Estate and, in any
16 event, will not generate sufficient funds to pay any dividend to unsecured creditors.
17 (Davidson Decl., ¶ 31).

18 33. As reflected in the Final Report and further detailed below, the remaining
19 proceeds of the asset Sale, plus collections on the Accounts Receivable and Litigation Claim
20 (if any), are unlikely to exceed the unpaid balance of the Gerler Secured Claim and the
21 administrative expenses to wind-up this receivership case.⁶ (Davidson Decl., ¶ 32 and
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26 ⁶ On January 18, 2018, pursuant to the January Distribution Order, the Receiver distributed \$1.6 million and the Litigation Claim to Gerler, leaving a balance owing on the

1 Exhibit 1).

2 **G. Remaining Assets and Liabilities of the Estate.**

3 34. The remaining assets in the estate are (a) approximately \$270,000 in cash,
4 consisting of proceeds from the Sale, and collection of Accounts Receivable, (b) the
5 Accounts Receivable, and (c) the Records. (Davidson Decl., ¶ 34).

6
7 35. As reflected in the Final Report and OLS's records, the Accounts Receivable
8 balances owing to OLS total \$579,607. Based on the Receiver's review of the Accounts
9 Receivable and prior collection efforts, in the Receiver's opinion the net realizable value of
10 the Accounts Receivable, excluding the Amazon account receivable, is \$0. (Davidson Decl.,
11 ¶ 35).

12
13 36. The Receiver has received, but not yet analyzed, extensive data from Amazon
14 (the "Amazon Data") with respect to the balance owing from Amazon, if any, to OLS. As
15 reflected in the Final Report, the maximum recovery on the Amazon account, before
16 reduction for setoffs or other defenses, is \$536,469. In light of the approximately
17 \$1,550,000 balance owing on the Gerler Secured Claim and the estimated final cash
18 distribution of \$185,000 against that claim, the Receiver has determined in the exercise of his
19 reasonable business judgment that a comprehensive analysis of the Amazon Data is unlikely
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22 _____
23 Gerler Secured Claim of approximately \$1,550,000. The Receiver anticipates that Gerler
24 will receive approximately \$185,000 as a final cash distribution from the Receivership
25 Estate, in addition to the Accounts Receivable and Litigation Claim. In the Receiver's
26 opinion, the Accounts Receivable and Litigation Claim are very unlikely to result in full
satisfaction of the Gerler Secured Claim. If, however, Gerler does not foreclose on the
Accounts Receivable and/or the Litigation Claim, or take those assets in partial satisfaction
of his claim, then he is responsible to account to the Receiver, for the benefit of the
Receivership Estate and its creditors, for any proceeds that he recovers in excess of the
Gerler Secured Claim. (Davidson Decl., ¶ 33, Exhibit 2, at ¶ 3, and Exhibit 9, at ¶ 3).

1 to result in any recovery for the Receivership Estate in excess of the Gerler Secured Claim.
2 In short, even if there is some value to the Amazon account, that value will accrue to the
3 benefit of Gerler, and it is not in the best interests of the Receivership Estate or its creditors
4 for the Receiver to expend further resources analyzing the Amazon data. (Davidson Decl., ¶
5 36).
6

7 37. In addition, in the Receiver’s opinion, the Records are of inconsequential
8 value or benefit to the Receivership Estate and its creditors. (Davidson Decl., ¶ 37).

9 38. Expenses of the receivership estate have been accruing since the Appointment
10 Date. The Final Report itemizes the receipts and disbursements associated with liquidating
11 and managing the estate property. The Receiver and the Receiver’s counsel will continue
12 accruing fees and costs until this receivership is terminated by the Court and its affairs are
13 wound-up. Unpaid fees and costs incurred by the receivership estate through the closing of
14 this matter total an estimated \$85,000, including but not limited to an estimated \$32,500 for
15 the Receiver’s fees and costs from January 1, 2018, an estimated \$50,000 in fees and costs
16 for Receiver’s counsel from January 13, 2018, and an estimated \$2,500 for third party
17 certified destruction of personal information stored on equipment abandoned by the Asset
18 buyers, and other final costs to close the receivership estate (together, the “Administrative
19 Expenses”). (Davidson Decl., ¶ 38).⁷
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22 39. All unpaid fees, costs and expenses to date, plus estimated additional fees,
23 costs and expenses will be paid from funds held by the Receiver. Pursuant to the
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25 ⁷ The Receiver will not incur expenses to prepare tax returns for the Debtors or the
26 Receivership Estate. Pursuant to the Receivership Order, the Receiver has “no obligation to
file tax returns on behalf of Debtor[s].” (Receivership Order, ¶ 16).

1 Receivership Order, the Receiver and its counsel have a first position surcharging lien on
2 assets of the estate for the administrative expenses of the Receivership Estate, including the
3 estimated Administrative Expenses described above. (Davidson Decl., ¶ 39; Receivership
4 Order, ¶ 12).

5
6 40. The Receiver requests authorization to (a) distribute any available funds, after
7 payment in full of the Administrative Expenses, and (b) distribute and assign the Accounts
8 Receivable, to Gerler in partial satisfaction of the Gerler Secured Claim. Transfer of the
9 Accounts Receivable will be made pursuant to an assignment instrument in substantially the
10 form submitted herewith. (Davidson Decl., ¶ 40, Exhibit 9).

11 41. Because the remaining assets in the Receivership Estate will not generate
12 sufficient proceeds to pay the Gerler Secured Claim in full, there will be no distribution to
13 any other creditors of the Receivership Estate. (Davidson Decl., ¶ 41).

14
15 42. Pursuant to RCW 7.60.150, the Receiver requests authorization to abandon
16 the Records in place. (Davidson Decl., ¶ 42).

17 43. The Receiver has carried out its duties with due care and in substantial
18 compliance with the Receivership Order and RCW 7.60 *et seq.* (Davidson Decl., ¶ 43).

19
20 **II. ISSUES PRESENTED**

21 44. This Motion presents the following issues:

22 A. Should the Court approve the Receiver's Final Report?

23 B. Should the Court approve the payment of all unpaid expenses of the
24 receivership estate, including prospective unpaid expenses to complete closing the
25 receivership case?
26

1 C. Should the Court approve final distributions of cash and the Accounts
2 Receivable to the first priority secured creditor, Daniel Gerler?

3 D. Should the Court authorize the Receiver to abandon the Records, in
4 place?

5 E. (i) Should the claims of the Alleged Secured Claimants be
6 disallowed as secured claims, and re-characterized to be allowed as general unsecured
7 claims?
8

9 (ii) Should the alleged secured claims of Outlet Mall be disallowed
10 or, alternatively, be declared subordinate to the Gerler Secured Claim?

11 F. Should the Court terminate the receivership and discharge the
12 Receiver?
13

14 G. Should the Court exonerate the Receiver's Bond?

15 **III. EVIDENCE RELIED ON**

16 In support of this Motion, the Receiver relies upon the records and files herein, the
17 Declaration of John L. Davidson, and the Receiver's Final Report.

18 **IV. ARGUMENT AND AUTHORITY**

19 **A. The Court Should Approve the Final Report.**

20 45. Pursuant to RCW 7.60.290(2), "[t]he Receiver's final report and accounting
21 setting forth all receipts and disbursements of the estate shall be annexed to the petition for
22 discharge and filed with the court." The Receiver has filed its Final Report
23 contemporaneously with this Motion.⁸ The Final Report provides all necessary information
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⁸ Davidson Decl., Exhibit 1.

1 required under RCW 7.60.290. Accordingly, the Receiver respectfully requests that the
2 Court accept the Final Report, approve all expenditures and distributions described therein
3 and in this Motion, and relieve the Receiver of any further obligations under RCW 7.60.005
4 *et seq.*

5
6 **B. The Court Should Approve the Payment of all Unpaid Expenses of the**
7 **Receivership Estate, Including Anticipated Expenses to Close the**
8 **Receivership Case.**

9 46. Expenses of the receivership estate have been accruing since the Appointment
10 Date. The Final Report itemizes the receipts and disbursements associated with liquidating
11 and managing the estate property. The Receiver and the Receiver's counsel will continue
12 accruing fees and costs until this receivership is terminated by the Court and its affairs are
13 wound-up. (Davidson Decl., ¶ 38, and Exhibit 1). Pursuant to the Receivership Order, the
14 Receiver has been authorized to pay the Administrative Expenses and all other necessary and
15 reasonable expenses incurred by the receivership. (*See* Receivership Order, ¶¶ 4 and 11).

16 47. To the extent that any excess funds remain after paying the Administrative
17 Expenses if full, such funds shall be remitted by the Receiver to Gerler. (Davidson Decl., ¶
18 44).

19 48. The Receiver estimates additional fees, costs and expenses of \$85,000 to
20 complete the closing of the receivership case and post-receivership fees, costs and expenses.
21 These amounts are based on the anticipated receivership expenses, including expenses for the
22 Receiver and its counsel to wind-up the estate, and costs to destroy personal and confidential
23 information from abandoned equipment housing this data. (Davidson Decl., ¶ 45). The
24 approved fees and costs of the Receiver and its counsel, together with all other necessary and
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1 reasonable expenses incurred by the receivership estate, are subject to “a first and paramount
2 surcharging lien against the Assets [of the Receivership Estate].” (Receivership Order, ¶ 12).

3 All unpaid administrative fees, costs and expenses to date, plus estimated additional fees,
4 costs and expenses will be paid from funds held by the Receiver. (Davidson Decl., ¶ 45).

5
6 **C. The Court Should Approve a Final Distribution to the First Priority
Secured Creditor, Daniel Gerler.**

7 49. Pursuant to RCW 7.60.230, creditors with secured claims shall receive the
8 proceeds of the disposition of collateral of the estate “in accordance with their respective
9 priorities under applicable law.” RCW 7.60.230(1)(a). The first priority secured creditor,
10 Daniel Gerler, is owed approximately \$1,550,000 on the Gerler Secured Claim. The allowed
11 secured claims of other creditors have either been paid, disallowed, waived or withdrawn, as
12 set forth above. The purported secured claims of the Alleged Secured Claimants and Outlet
13 Mall should be disallowed pursuant to the relief sought in this Motion.

14
15 50. As noted above, the remaining cash on hand is approximately \$270,000, and
16 the estimated recoverable value of the Accounts Receivable is \$0. The estimated additional
17 Administrative Expenses total \$85,000.⁹ Even if the Receiver (or Gerler) were able to collect
18 substantially all of the Accounts Receivable, all of the proceeds would be for the benefit of
19 Gerler, and even then the Gerler Secured Claim would not be paid in full. Simply put, the
20 Receivership Estate does not have sufficient cash and other assets to satisfy Gerler’s claim in
21 full. Accordingly, the Receiver requests Court approval to (a) assign the Accounts
22 Receivable to Gerler, and (b) distribute to Gerler all remaining cash net of payment of the
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25 _____
26 ⁹ The estimated additional Administrative Expenses includes those amounts that are
the subject of the Receiver’s Twelfth Notice of Compensation of Receiver and Professionals,
which was filed on February 20, 2018.

1 Administrative Expenses, in partial satisfaction of the Gerler Secured Claim. (Davidson
2 Decl., ¶¶ 33 and 38).

3 **D. The Claims of the Alleged Secured Claimants and Outlet Mall Should**
4 **be Disallowed as Secured Claims.**

5 51. The receivership statute provides that a general receiver or any party interest
6 may object to a claim at any time prior to entry of an order approving the general receiver's
7 final report. RCW 7.60.220(1). The Final Report has not yet been approved by this Court,
8 so the deadline to object to the claims of the Alleged Secured Claimants and Outlet Mall has
9 not passed.

10
11 52. As detailed below, the claims of the Alleged Secured Claimants should be
12 disallowed as secured claims, but be allowed as general unsecured claims in the amounts
13 claimed. In addition, Outlet's First Claim should be disallowed in its entirety or,
14 alternatively be declared junior in priority to the Gerler Secured. Claim. Likewise, at a
15 minimum, the secured portion of Outlet's Second Claim should also be declared junior in
16 priority to the Gerler Secured Claim.

17
18 53. Substantially all of the inventory and other OLS Collateral was brought on to
19 the Premises after July 2014, when Gerler's security interests were granted and perfected.

20 54. The Alleged Secured Claimants. The Receiver objects to the alleged secured
21 status of the three Alleged Secured Claimants. The Proofs of Claim that they submitted to
22 the Receiver do not allege either (a) any agreement, applicable statute, or other law that
23 would give rise to a lien or security interest for their claims, or (b) any specific assets of the
24 Debtors that would be collateral for their alleged security interests or other liens. Because no
25 legal basis for claiming a security interest or lien is even alleged, and because no particular
26

1 collateral is identified, the claims of the Alleged Secured Claimants - J/Slides, Portland
2 Product Werks, LLC, and City Saver Guide, Inc. - should be disallowed as secured claims,
3 and re-characterized and allowed as general unsecured claims in the amounts provided in
4 their respective Proofs of Claim.

5
6 55. Outlet Mall Properties, L.C. Outlet Mall submitted two Proofs of Claim
7 regarding its lease of the Premises to OLS. For the reasons discussed below, Outlet's First
8 Claim should be disallowed in its entirety or, alternatively, declared to be subordinate to the
9 first priority security interest that collateralizes the Gerler Secured Claim. Similarly, the
10 secured portion of Outlet's Second Claim should also be disallowed or, alternatively,
11 declared to be subordinate to the Gerler Secured Claim.

12
13 56. Outlet's First Claim is for rent that allegedly accrued as of the February 2,
14 2017 Appointment Date, in the amount of \$4,036.90. OLS's books and records, however,
15 reflect that rent and other charges for the Premises were current as of January 31, 2017. In
16 addition, OLS's records show that Outlet Mall held a security deposit of \$2,100. In short,
17 OLS's records reflect that no amounts, net of the security deposit, were owing to Outlet Mall
18 as of the Appointment Date. Second, Outlet's First Claim identifies no particular assets to
19 which its alleged secured claim attaches, and no particular value for any such collateral. As a
20 result, there is no basis to assert a claim for any particular assets (or the proceeds of the sale
21 of those assets). Accordingly, Outlet's First Claim should be disallowed in its entirety.

22
23 57. Finally, any lien in favor of Outlet Mall is, for the reasons discussed below,
24 junior to the security interests held by Gerler. Therefore, if Outlet's First Claim is allowed at
25 all, the lien claimed by Outlet Mall should be declared junior and subordinate to the first
26

1 priority security interests that collateralize the Gerler Secured Claim.

2 58. Outlet's Second Claim includes secured claims for both (a) rent accrued from
3 the Appointment Date through May 15, 2017 (\$7,777), and (b) additional allegedly secured
4 amounts arising from rejection of the lease (\$6,157.65). The secured portions of Outlet's
5 Second Claim should be disallowed. First, because the Rejection Order rejected the lease
6 with Outlet as of the Appointment Date, it is not entitled to claim the rent that accrued after
7 that date (February 2, 2017), through May 15, 2017, let alone claim that those amounts
8 (\$7,777) are secured by a lien.¹⁰

9
10 59. Second, as with Outlet's First Claim, Outlet's Second Claim also identifies no
11 particular assets to which its alleged secured claim attaches, and no particular value for any
12 such collateral. As a result, there is no basis to assert a claim for any particular assets (or the
13 proceeds of the sale of those assets).

14
15 60. Finally, even if there were a valid lien against assets situated at the Premises,
16 under Virginia law that lien would be subordinate to Gerler's priority security interest, which
17 secures payment of the Gerler Secured Claim. The landlord's lien statute in Virginia, on
18 which Outlet Mall relies, provides that if goods "when carried on the premises, are subject to
19 a lien, which is valid against his creditors"¹¹ then only the "lessee's interests" are subject to
20 the landlord's lien. Here, because the lessee's (OLS's) interests in inventory were subject to
21 Gerler's pre-existing security interests when the inventory was "carried on the" Premises,
22 Outlet Mall's landlord's lien is subject to the prior existing security interest held by Gerler.
23

24
25 ¹⁰ Davidson Decl., ¶ 27, and Exhibit 8, at p. 3.

26 ¹¹ Code of Virginia § 55-231 (2017). See Davidson Decl., ¶¶ 26-28, and Exhibit 7, at p. 3, and Exhibit 8, at p. 3.

1 Accordingly, even if there is a lien in favor of Outlet Mall, this Court should declare that it is
2 subordinate to Gerler's priority security interests.

3 61. For the foregoing reasons, the amounts claimed as secured in Outlet's First
4 Claim and Outlet's Second Claim should be disallowed. Alternatively, they should be
5 declared to be subordinate to the security interests that collateralize the Gerler Secured
6 Claim.
7 Claim.

8 **E. The Court Should (i) Authorize the Receiver to Abandon the Records**
9 **in Place, (ii) Terminate the Receivership, and (iii) Exonerate the**
10 **Receiver's Bond.**

11 62. Under RCW 7.60.150, the Court may authorize the receiver to abandon estate
12 property "that is burdensome to the receiver or is of inconsequential value or benefit." As
13 discussed above, the Records are of inconsequential value or benefit to the Receivership
14 Estate. There is no value for general unsecured creditors, and the Receiver is not aware of
15 any other assets in the Receivership Estate. The Receiver proposes to abandon the Records
16 in place, after removal of private and confidential information from equipment housing the
17 records.

18 63. The Receiver may move the Court to be discharged upon distribution or
19 disposition of all property of the estate. RCW 7.60.290(1). Here, substantially all assets of
20 the Receivership Estate, other than cash and the Accounts Receivable, were sold. The cash
21 and Accounts Receivable are collateral for the Gerler Secured Claim. The value of the cash
22 and the Accounts Receivable (and the previously distributed Litigation Claim) are
23 insufficient to pay the unpaid balance of the Gerler Secured Claim in full. As a result, there
24 will be no distribution to unsecured creditors of the Debtors. Therefore, discharge of the
25
26

1 Receiver is appropriate at this time. RCW 7.60.290 provides:

- 2 (1) Upon distribution or disposition of all property of the estate, or the
3 completion of the receiver's duties with respect to estate property,
4 the receiver shall move the court to be discharged upon notice and a
5 hearing.
- 6 (2) The receiver's final report and accounting setting forth all receipts
7 and disbursements of the estate shall be annexed to the petition for
8 discharge and filed with the court.
- 9 (3) Upon approval of the final report, the court shall discharge the
10 receiver.
- 11 (4) The receiver's discharge releases the receiver from any further
12 duties and responsibilities as receiver under this chapter.
- 13 (5) Upon motion of any party in interest, or upon the court's own
14 motion, the court has the power to discharge the receiver and
15 terminate the court's administration of the property over which the
16 receiver was appointed. * * *

17 64. All assets of the estate, other than cash, the Accounts Receivable and Records,
18 have been sold or previously distributed pursuant to order of this Court. Following the
19 proposed distributions described above and in the Final Report, no property will remain in
20 the Receivership Estate for sale or for distribution to general unsecured creditors. With no
21 property remaining for the Receiver to administer, the Receiver will have completed its
22 duties and discharge of the Receiver is appropriate. RCW 7.60.290(1). Accordingly, the
23 Receiver requests that the Court approve the Receiver's discharge and terminate this
24 receivership.

25 65. Through its discharge, the Receiver requests confirmation that both the
26 Receiver and the Receiver's counsel be released from any liability or further obligation
arising in or related to this receivership. RCW 7.60.170 provides that the Receiver shall have

1 no personal liability to any person for acts or omissions of the Receiver performed in
2 connection with the Receiver's duties under RCW 7.60 *et seq.* or any order of this Court.

3 66. The Receiver further requests that the Receiver's Bond be exonerated.
4

5 **V. CONCLUSION**

6 The Receiver respectfully requests that the Court grant this Motion, enter an order
7 substantially in the form attached hereto as Exhibit A, and grant such other relief as is just
8 and proper under the circumstances.

9 Dated this 5th day of March, 2018.

10 SCHWABE, WILLIAMSON & WYATT, P.C.

11 By: /s/ Farron Curry
12 Alex I. Poust, WSBA #22660
13 apoust@schwabe.com
14 Farron Curry, WSBA #40559
15 fcurry@schwabe.com
16 1420 5th Avenue, Suite 3400
17 Seattle, WA 98101
18 Attorneys for Oswego Group LLC, dba
19 Inverness Group, Receiver

20 *I certify that this memorandum contains*
21 *5,957 words, in compliance with the*
22 *Local Civil Rules.*

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 5th day of March, 2018, I arranged for service of the foregoing (1) *RECEIVER'S OMNIBUS MOTION TO (1) APPROVE FINAL REPORT, (2) AUTHORIZE DISTRIBUTION OF REMAINING ESTATE PROPERTY, (3) AUTHORIZE ABANDONMENT OF RECORDS, (4) DISALLOW AND RE-CHARACTERIZE CERTAIN CLAIMS FILED AS SECURED CLAIMS, (5) EXONERATE THE RECEIVER'S BOND, (6) DISCHARGE RECEIVER AND TERMINATE RECEIVERSHIP, AND (7) FOR RELATED RELIEF*, and (2) *EXHIBIT A ([Proposed] Order: (1) Approving Final Report, (2) Authorizing Distribution of Remaining Estate Property, (3) Authorizing Abandonment of Records, (4) Disallowing and Re-Characterizing Certain Claims, (5) Exonerating the Receiver's Bond, (6) Discharging the Receiver and Terminating the Receivership, and Granting Related Relief)* to the parties to this action as follows:

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16 17 18 19 20 21	Mark J. Kalla mkalla@laplibra.com Lapp, Libra, Thomson, Stoebner & Pusch, Chartered 120 South 6 th Street, Suite 2500 Minneapolis, MN 55402 Direct: 612.343.4964 Facsimile: 612.338.6651 <i>Counsel for Red Wing Brands of America, Inc. Via email and U.S. Mail</i>	Todd M. Martin, Esq. tmartin@alvarezandmarsal.com Tom Powell, Esq. tpowell@alvarezandmarsal.com Alvarez & Marsal Canada Inc. Commerce Place 400 Burrard Street, Suite 1680 Vancouver, BC V6C 3A6 Telephone: 604.638.7440 Facsimile: 604.638.7441 <i>Canadian Receiver Via email and U.S. Mail</i>

CERTIFICATE OF SERVICE - 2

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<p>11 Kara C. Herschkowitz, Esq., WSBA #40569 12 Nordstrom, Inc. 13 1700 7th Avenue, Suite 700 14 Seattle, WA 98101-4404 15 Telephone: 206.303.2546 16 <i>Counsel for Nordstrom, Inc.</i> 17 <i>Via U.S. Mail only</i></p>	<p>Katriana L. Samiljan, Esq., WSBA #28672 ksamiljan@bskd.com Bush Kornfeld, LLP 601 Union Street, Suite 5000 Seattle, WA 98101-2373 Telephone: 206.292.2110 Facsimile: 206.292.2104 <i>Counsel for Wolverine Outdoors, Inc. and Tiger Capital Group, LLC</i> <i>Via email and U.S. Mail</i></p>
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Michael E. Barney Outlet Mall Properties, L.C. 1080 Laskin Rd., #103 Virginia Beach, VA 23451 Email: mebarney@kaufcan.com <i>Via email and U.S. Mail</i>	Michael E. Barney Kaufman & Canoles, P.C. 2101 Parks Avenue Suite 700 Virginia Beach, VA 23451 email: mebarney@kaufcan.com Tel.: 757.491.4040 Fax: 800.360.9092 <i>Counsel for Outlet Mall Properties, L.C.</i> <i>Via email and U.S. Mail</i>
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/s/ Farron Curry
Farron Curry, WSBA #40559

EXHIBIT A

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Ex Parte
Hearing Date: April 10, 2018
Time of Hearing: 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association,

Petitioner,

vs.

ONLINESHOES.COM INC., a Washington corporation; SHOES.COM, INC., a Delaware corporation,

Respondents.

No. 17-2-02462-7SEA

[PROPOSED] ORDER: (1) APPROVING FINAL REPORT, (2) AUTHORIZING DISTRIBUTION OF REMAINING ESTATE PROPERTY, (3) AUTHORIZING ABANDONMENT OF RECORDS, (4) DISALLOWING AND RE-CHARACTERIZING CERTAIN CLAIMS, (5) EXONERATING THE RECEIVER'S BOND, (6) DISCHARGING THE RECEIVER AND TERMINATING THE RECEIVERSHIP, AND GRANTING RELATED RELIEF

THIS MATTER came before the Court on the Receiver's Omnibus Motion to (1) Approve Final Report, (2) Authorize Distribution of Remaining Estate Property, (3) Authorize Abandonment of Records, (4) Disallow and Re-Characterize Certain Claims Filed as Secured Claims, (5) Exonerate the Receiver's Bond, (6) Discharge Receiver and

[PROPOSED] ORDER APPROVING FINAL REPORT, TERMINATING RECEIVERSHIP, AND GRANTING RELATED RELIEF - 1

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1 Terminate Receivership, and (7) for Related Relief (the “Motion”).¹ The Court having duly
2 considered the Motion, the Declaration of John L. Davidson, the Final Report attached as
3 Exhibit 1 thereto, the briefs in response to the Motion, if any, and the records and files
4 herein, and it appearing that notice of the hearing on the Motion was proper and sufficient
5 under the circumstances; the Court being fully advised, now, therefore,

6
7 IT IS HEREBY FOUND AND ORDERED as follows:

- 8 1. The Motion is granted in its entirety
- 9 2. Oswego Group LLC, doing business as Inverness Group, the general receiver
10 (“Receiver”) for Onlineshoes.com Inc. (“OLS”), and Shoes.com, Inc. (“Shoes.com,” and
11 together with OLS, the “Debtors”), has carried out its duties with due care and in substantial
12 compliance with the February 2, 2017, Stipulated Order Appointing General Receiver, and
13 with RCW 7.60, *et seq.*
- 14 3. The Receiver’s Final Report is hereby approved. The Receiver is relieved of
15 all further reporting and accounting obligations.
- 16 4. The Receiver is authorized to make payments for all outstanding receivership
17 fees and expenses incurred through the termination of this receivership and the winding up of
18 its affairs, from the funds currently held by the Receiver, including but not limited to an
19 estimated \$32,500 for the Receiver’s fees and costs from January 1, 2018, an estimated
20 \$50,000 in fees and costs for Receiver’s counsel from January 13, 2018, and an estimated
21 \$2,500 for third party certified destruction of personal information stored on equipment
22 abandoned by the Asset buyers, and other final costs to close the receivership estate
23 (together, the “Administrative Expenses”).
- 24 5. The Receiver is authorized to distribute to Daniel Gerler, the first priority

25
26 ¹ Capitalized terms not otherwise defined in this Order have the meanings ascribed to them in the Motion.

1 secured creditor, (a) any and all available funds after payment in full of the Administrative
2 Expenses, and (b) the Accounts Receivable.

3 6. The Alleged Secured Claims submitted to the Receiver by creditors (i)
4 J/Slides, (ii) Portland Product Werks, LLC, and (iii) City Saver Guide, Inc., are hereby (a)
5 disallowed as secured claims, and (b) re-characterized and allowed as general unsecured
6 claims in the amounts set forth in the Alleged Secured Claims.

7 7. Outlet's First Claim is disallowed in its entirety.

8 8. The secured portion of Outlet's Second Claim, totaling \$13,934.65, is
9 disallowed. The balance of Outlet's Second Claim is allowed as a general unsecured claim.

10 9. Pursuant to RCW 7.60.150, the Debtors' documents, books, records, and files
11 in the Receiver's possession, custody and control are hereby abandoned in place, and no
12 longer property of the Receivership Estate.

13 10. This receivership is terminated and the Receiver is discharged, effective
14 immediately. The Receiver and its professionals shall have no liabilities or obligations
15 arising in or related to the receivership of Debtors, all of which are hereby released.

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