

# SUPERIOR COURT

COMMERCIAL DIVISION

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL

No: 500-11-050409-164

DATE: May 6, 2016

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**PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.**

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In the matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C36:

**7098961 CANADA INC. (FORMERLY KNOWN AS BEYOND THE RACK ENTERPRISES INC.)**

Petitioner / Applicant

and

**RICHTER ADVISORY GROUP INC.**

Monitor / Applicant

and

**PAYSAFE MERCHANT SERVICES INC.**

and

**PAYSAFE MERCHANT SERVICES CORP.**

and

**PAYPAL CA LIMITED**

and

**PAYPAL, INC.**

and

**AMEX BANK OF CANADA**

and

**AMERICAN EXPRESS TRAVEL RELATED SERVICE COMPANY, INC.**

Mis en cause

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JUDGMENT

on

- MOTION FOR THE ISSUANCE OF AN ORDER EXTENDING THE STAY OF PROCEEDINGS; AND

- APPLICATION FOR THE ISSUANCE OF (i) CLAIMS AND MEETING PROCEDURE ORDER (ii) ORDER APPROVING AN ASSET PURCHASE AGREEMENT AND (iii) ORDER APPROVING AN INCREASE OF THE DIP FACILITY; AND
  - AMENDED APPLICATION FOR DIRECTIONS PERTAINING TO THE UNAUTHORIZED COMPENSATION OF CANCELLED PRE-FILING ORDERS BY THE MIS-EN-CAUSE CREDIT CARDS SETTling INSTITUTIONS  
(SECTIONS 4, 5, 9, 10 AND 11 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36)
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## **INTRODUCTION**

[1] 7098961 Canada Inc. (formerly known as Beyond the Rack Enterprises Inc.) ("**BTR**" or the "**Company**"), is a private corporation incorporated on December 24, 2008, under the *Canada Business Corporations Act* (the "**CBCA**"), with its principal place of business in Montreal, Canada. BTR started its commercial operations in January 2009, its principal business activity being the online sale of designer brand apparel, accessories, beauty, toys and books for children, as well as furniture, art and other small home appliances and home decor products, through its website ([www.beyondtherack.com](http://www.beyondtherack.com)), primarily to customers in Canada and the United States.

[2] More particularly, the Company operates as an online shopping company for men and women, offering designer brand apparel and accessories at a discounted price to its members through limited-time events, each of which starts at a specific time and typically lasts only 48 hours. In order to view the merchandise available on the Company's website, a browser must subscribe as a member.

[3] BTR reports having approximately 14 million consumer members, with over 450,000 of these being active buyers.

## **THE INITIAL ORDER OF MARCH 24<sup>th</sup>, 2016**

[4] On March 24<sup>th</sup>, 2016, BTR sought the protection of the Court under the provisions of the *Companies' Creditors Arrangement Act* (the "**CCAA**") to facilitate the reorganization of its business and operations, with the ultimate objective of submitting a CCAA restructuring plan to its creditors and/ or selling its assets and operations as a going concern, to the extent possible.

[5] On the same day, an Initial Order was issued by Justice Martin Castonguay (the "**Initial Order**").

[6] The following elements of the Initial Order have a bearing on the present Applications.

### The Stay Period

[7] The Stay Period stipulated in the Initial Order expired on April 22<sup>nd</sup>, 2016<sup>1</sup>. Presently, the Stay Period has been subsequently extended until May 6<sup>th</sup>, 2016 under same terms and conditions of the Initial Order.

[8] In the Initial Order, Justice Castonguay declared, *inter alia*, that the following payment services providers were "Critical Suppliers<sup>2</sup>" to the Company, as contemplated by Section 11.4 of the CCAA:

- "Paysafe Merchant Services Inc. (previously known as NBX Merchant Services Inc.).
- Paysafe Merchant Services Corp. (previously known as NBX Merchant Services Corp).

[collectively "**Paysafe**"]

- PayPal CA Limited. ["**PayPal**"]
- Braintree. ["**Braintree**"]
- American Express. ["**AMEX**"]

[collectively the "**Payment Processors**"]

[9] In his initial report dated March 23<sup>rd</sup>, 2016 (the "**Initial Report**"), the proposed Monitor mentioned that the Company should enjoy "*continued service by the payment providers*" and in its First Report dated April 19<sup>th</sup>, 2016, the Monitor confirmed that an agreement had been reached between the Company and Paysafe, its principal payment processor during the week following the issuance of the Initial Order<sup>3</sup>.

[10] In connection with the foregoing, the Court understands that the aforesaid provisions of the Initial Order resulted from the representations made to Justice Castonguay by the Company and the Monitor who favoured pursuing their efforts to sell BTR as a going concern, thus the necessity of authorizing an Interim Financing and declaring the Payment Processors as Critical Suppliers, otherwise their restructuring measures would have been moot from the outset.

[11] In paragraph 14 of its Initial Report, the proposed Monitor stated the following:

"14. The Company seeks the issuance of an Initial Order with the necessary reliefs to allow the continuation of the activities while a sale process is implemented under Court supervision, the whole with a view to execute a going

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<sup>1</sup> Initial Order, paragraph 8.

<sup>2</sup> Initial Order, paragraphs 25 to 33.

<sup>3</sup> The first Report of the Monitor dated April 19<sup>th</sup>, 2016, paragraph 16.

concern sale providing transition employment to a significant number of employees and maximize the underlying value of the business for the benefit of all stakeholders (including the employees, the trade creditors, the suppliers, the customers and the shareholders)."

[12] As Justice Castonguay declared the Payment Processors to be Critical Suppliers, the judge also stipulated the following at paragraph 26 of the Initial Order:

"26. **ORDERS** and **DECLARES** that each Critical Supplier shall continue to supply the Debtor with the goods and/or services on terms and conditions that are consistent with existing contractual arrangements, as may be amended by this Order."

[Emphasis added]

[13] For a better understanding, it must be pointed out that the main question at issue to be dealt with by the Court is in connection with the Application for directions filed by the Monitor in virtue of which the Payment Processors are, to all intents and purposes, called upon to refund to the Company an amount in excess of \$1.9 million resulting from an alleged "Unauthorized Compensation".

[14] After the Initial Order, the Company continued to refund the purchase price paid by numerous customers who requested a cancellation as they had not received delivery of their purchases. The cancellations increased noticeably in the month prior to the Initial Order and thereafter. As it did before the Initial Order, the Company would instruct from time to time the Payment Processors to process on its behalf those refunds by crediting its customers' credit card accounts with an amount equivalent to the price paid by each consumer in connection with their cancelled open orders (regardless that those open orders were pre-filing orders ("**Pre-filing orders**") or post-filing orders ("**Post-filing orders**"). Subsequently, the Payment Processors would debit the accounts that BTR held with each of them for the same amounts.

[15] Four weeks after the Initial Order, the Monitor and the Company raised for the very first time that the Payment Processors who complied with BTR's instructions to refund various Pre-filing open orders' customers, unlawfully debited the Company's accounts with each of those service providers with the amount of the said refunds.

[16] In a nutshell, the Monitor and the Company adopted the position that those specific refunds totalling \$1,944,243 as at May 1<sup>st</sup>, 2016 were Pre-filing provable claims that could not be compensated with the funds generated by BTR with Post-filing orders, those funds being Post-filing accrued assets, thus the issue of the "Unauthorized Compensation" that will be dealt with in the present judgement.

**The Interim Financing authorized by the Initial Order**

[17] The Initial Order also authorized BTR to borrow moneys from 9523669 Canada Inc. (the "**Interim Lender**") up to a maximum of \$1,150,000 to fund the ongoing expenditures of the Company<sup>4</sup> (the "**Interim Financing**").

[18] As a condition precedent to the Interim Financing being extended to BTR, the Interim Lender had to be subrogated in the claims and rights of the senior secured lender Silicon Valley Bank ("**SVB**"). The Court understands that the Interim Lender has fulfilled that prerequisite.

[19] The Interim Financing was authorized with a charge and security for an aggregate amount of \$1,800,000 in favour of the Interim Lender<sup>5</sup>.

**Additional powers granted to the Monitor under the Initial Order**

[20] Among the powers granted by the Court to the Monitor under the Initial Order, the Monitor was authorized in particular to initiate and conduct a sale and investment solicitation sale process in respect of BTR's assets and business<sup>6</sup>.

[21] In short, during the Stay Period contemplated in the Initial Order, the stated goal was to maintain the ongoing operations of the Company to the extent possible, which included the fulfillment of the thousands of pre-filing open orders placed online by consumers in the amount of \$6,952,000<sup>7</sup>, bearing in mind that all such orders had already been entirely pre-paid by BTR's customers, and that for the greater part, these funds were in the possession of the Company.

**THE PROCEDURAL CONTEXT**

[22] The Court is seized with the three Applications or Motions mentioned above in the heading made by the Company, except for the Application for directions that was initially submitted by the Monitor. The Company subsequently joined the Monitor as a co-applicant.

[23] The Motion to extend the Stay of proceedings, the Claims and Vesting Order Application and the Application for directions e heard during a three-day hearing held on April 25<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup>, 2016.

[24] The evidence adduced at the hearing was common to the three proceedings, to the extent applicable. A single judgment shall deal with all of them.

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<sup>4</sup> Initial Order, paragraph 34.

<sup>5</sup> Initial Order, paragraph 38.

<sup>6</sup> Initial Order, paragraph 52 (f).

<sup>7</sup> Cash Flow Projections dated March 23<sup>rd</sup>, 2016 submitted in connection with the issuance of the Initial Order.

**I- Motion for the issuance of an order extending the stay of proceedings**

[25] This Motion dated April 13<sup>th</sup>, 2016 was the first one filed by the Company on April 18<sup>th</sup>, 2016.<sup>8</sup>

[26] Although the Company was seeking an extension of the Stay Period on the same terms and conditions of the Initial Order until June 20<sup>th</sup>, 2016, this Motion was only extended until April 25<sup>th</sup>, 2016<sup>9</sup>, at which time the Court would hear the same together with a second Motion entitled *"Application for the issuance of (I) a claims and meeting procedure order (II) an order approving an asset purchase agreement and (III) an order approving an increase of the DIP Facility"*.<sup>10</sup>

[27] The extension sought by the Company was essentially to enable it to complete and submit to its creditors its Plan of Arrangement and complete a proposed transaction with a purchaser.

**The First Report of the Monitor on the state of the Debtor's financial affairs dated April 19, 2016<sup>11</sup>**

[28] In support of the Company's Motion to extend, the Monitor produced its First Report dated April 19<sup>th</sup>, 2016, which was accompanied with the following financial documents:

- A Cumulative Comparative Cash Flow Statement covering the 4-week period between March 23<sup>rd</sup> to April 17<sup>th</sup>, 2016<sup>12</sup> (for the initial 30-day period covered by the Cash Flow Projections submitted to Justice Castonguay in the context of the Initial Order hearing)<sup>13</sup> (the **"First Comparative Cash Flow Statement"**); and
- Cash Flow Projections covering the 1-week period between April 18<sup>th</sup> to April 24<sup>th</sup>, 2016 (the **"First Cash Flow Projections for the week of April 24<sup>th</sup>, 2016"**);

[29] The Monitor reported, among other things, that *"the Company was maintaining its operations and focusing on the fulfilment of customers' orders through delivery of items held on inventory and purchases made depending on cash flow availability"*.<sup>14</sup>

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<sup>8</sup> Hereinafter the **"Motion to extend"**.

<sup>9</sup> The Stay Period was subsequently extended until April 27<sup>th</sup>, then April 28<sup>th</sup> and finally until May 6<sup>th</sup>, 2016.

<sup>10</sup> Collectively referred to hereinafter as the **"Claims and Vesting Order Application"** or the **"Second Motion"**.

<sup>11</sup> Hereinafter the **"First Report"**.

<sup>12</sup> Exhibit **A-4**, Appendix A (filed under seal).

<sup>13</sup> The First Report of the Monitor on the state of the Debtor's financial affairs (April 19, 2016), Appendix C (filed under seal).

<sup>14</sup> The First Report of the Monitor, paragraph 17.



[30] On April 15<sup>th</sup>, 2016, the Company launched an inventory liquidation campaign to raise funds for the on-going operations. All items were advertised on its website as “in stock” and the campaign was to end on April 19<sup>th</sup> or “*until inventory is available*”. The campaign was expected to generate approximately \$250,000 in sales as a result of liquidating the equivalent cost of inventory.<sup>15</sup>

[31] At paragraphs 41 and 42, the Monitor also reported:

“41. Since the filing of the CCAA, the Debtor is paying its suppliers based on negotiated terms or on cash on delivery basis. The Debtor advises that it has not incurred significant unpaid liabilities since the filing.

42. The cash receipts for the payment processors have been significantly impaired as a result of the payment processors offsetting, from their remittance, customers’ order cancellations totalling \$1,276,000 pertaining to pre-filing orders. For the 4-week period ended April 17, 2016, new orders totalled \$2.5 million, which are \$200,000 higher than initially projected.”

[32] Referring to the First Cash Flow Projections for the week of April 24<sup>th</sup>, 2016, the Monitor also indicated at paragraphs 44 and 45:

“44. The Projections reflect the following general assumptions:

- Extension of the Stay Period;
- Continued service by the payment providers;
- Continued service by the different outsourcing companies and individuals;

45. More particularly, the Projections reflected the following assumptions:

**Cash Receipts**

- The forecasted sales were based on the recent trending since the filing of the CCAA.
- Receipts assume that the payment processors will continue to offset, from their remittance, the customers’ cancellations of pre-filing orders.
- Receipts from the payment processors assume a holdback of 12% for Paysafe.

**Cash Disbursements**

- Funds will be used in priority to pay employees and expenses to maintain the operations of the business. Purchases, shipping and marketing expenses will depend on the level of funds collected from the payment processors. Therefore, such disbursements were projected as a function of the payment processors receipts. Management expects to purchase

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<sup>15</sup> The First Report of the Monitor, paragraph 35.

more products and fulfill more open customers' orders in the eventuality that the funds received from payment processors are higher than projected.

[...]"

[Emphasis added]

[33] At the end<sup>16</sup> of its First Report, the Monitor expressed the opinion that BTR's Motion to extend was reasonable and recommended that the Court grants the same given certain factors, among which were:

- "If the extension is granted, we are not aware of any other issue that may materially prejudice creditors.
- Since the issuance of the Initial Order, the Debtor has continued to act diligently, in good faith and in the interest of its creditors.
- Since March 24, 2016, the Debtor has continued to pay its employees and suppliers of goods and services on time and/or according to existing agreements.

[...]"

[Emphasis added]

[34] At paragraph 56, the Monitor concluded its First Report as follows:

"56. The Monitor believes that the issuance of an Order Extending the Stay of Proceedings is necessary and reasonable in the circumstances and will allow the Debtor to implement the transaction being proposed by the party having submitted the highest proposal in the context of the solicitation process, the whole for the benefit of all Debtor's stakeholders since it is contemplating the submission of a plan of Arrangement under the CCAA."

[35] Based on the foregoing evidence and representations, the Court granted on April 20<sup>th</sup>, 2016, an extension of the Initial Order until April 25<sup>th</sup>, 2016.

**The Second Report of the Monitor on the state of the Debtor's financial affairs dated April 22, 2016<sup>17</sup>**

[36] The Second Report was undoubtedly prepared by the Monitor in anticipation of the April 25<sup>th</sup>, 2016 hearing.

[37] With his Second Report, the Monitor submitted to the Court the following financial information:

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<sup>16</sup> The First Report of the Monitor, paragraph 54.

<sup>17</sup> Hereinafter the "**Second Report**".



- An Amended Cumulative Comparative Cash Flow Statement dated April 22<sup>nd</sup>, 2016, covering the 4-week period between March 23<sup>rd</sup> to April 17<sup>th</sup>, 2016<sup>18</sup> (the **"Second Comparative Cash Flow Statement"**); and
- Cash Flow Projections dated April 22<sup>nd</sup>, 2016, covering the 9-week period between April 18<sup>th</sup> to June 19<sup>th</sup>, 2016<sup>19</sup> (the **"Second Cash Flow Projections"**).

[38] All in all, in the Second Report, the Monitor reiterated its findings and comments mentioned in its First Report while placing a little bit more emphasis on the cash flow restrictions stemming from the "setoff or compensation" carried out by the Payment Processors with refunds made by the Company as a result of customers' cancellations of the Pre-filing orders.

[39] It must be noted that the same "setoff or compensation" is operated by the Payment Processors for the Post-filing orders as well, in compliance with the arrangements that have been prevailing between them and BTR from the outset of their business relationships.

[40] When mentioning to "setoff or compensation" in its First and Second Reports, the Monitor did not refer to the "Unauthorized Compensation".

[41] Notwithstanding the foregoing, the Second Cash Flow Projections were prepared with the same general assumptions, including that *"Receipts assume that the payment processors will continue to offset, from their remittance, the customers' cancellations of pre-filing orders"*.

[42] Moreover, although the First Cash Flow Projections were silent on the subject, the Second Cash Flow Projections forecasted that the Interim Lender was expected to inject an additional \$2,000,000 into the Company during the week ending May 1<sup>st</sup>, 2016, subject obviously to the prior approval of the Court.

[43] The Monitor's conclusion and recommendation found at paragraph 26 of the Second Report are identical to those found at paragraph 56 of its First Report.<sup>20</sup>

**II- Application for the issuance of (I) a claims and meeting procedure order (II) an order approving an asset purchase agreement and (III) an order approving an increase of the DIP Facility**

[44] The Claims and Vesting Order Application is dated April 21<sup>st</sup>, 2016.

[45] As its title reveals, the Second Motion raises three different issues.

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<sup>18</sup> The Second Report of the Monitor on the state of the Debtor's financial affairs (April 22, 2016), Appendix A (filed under seal).

<sup>19</sup> The Second Report of the Monitor, Appendix B (filed under seal).

<sup>20</sup> Kindly refer to paragraph 34 above.

[46] As authorized by the Initial Order, the Company and the Monitor used the initial Stay Period to conduct an expedited sale and solicitation process.

[47] As a result thereof, the Company and the Monitor entertained an offer submitted by Gestion Optifer Inc. ("**Optifer**") and indicated that they were in the process of finalizing an agreement in connection with the restructuring of BTR's business and assets.

[48] It is, to all intents and purposes, an asset purchase agreement in virtue of which the Interim Lender will recover most of its secured claims, provided that the creditors of the Company with unsecured claims in excess of \$25 million accept a basket proposal of \$310,000.

[49] The Second Motion also reveals that the proposed purchaser, Optifer, is an affiliate of 9523669 Canada Inc., the Company's Interim Lender.

[50] The key business terms and conditions of the agreement with Optifer are the following:

"4a) the sale of all or substantially all of the assets of the Company to Optifer or one of its affiliates in consideration of the assumption of: i) the full amount owing (currently about \$1,150,000, and expected to be higher by the time of closing) under the Amended DIP Facility (as defined hereinafter) at closing, ii) a significant portion of the pre-filing senior secured facility held by 9523669 Canada Inc. (the "**DIP Lender**"), and iii) the Company's obligations under certain contracts to be assumed by Optifer<sup>21</sup>; and

b) the compromise of any and all claims against the Company through the CCAA Plan (as defined hereinafter) pursuant to which the Company's creditors will be offered a distribution equal to a pro-rata share of a basket amount of \$310,000."

[Underline added]

[51] In order to complete the claims process and submit a \$310,000 basket proposal to the unsecured creditors, the Company would require additional funding of \$2,000,000 to maintain its ongoing operations until the restructuring process has been completed by June 15<sup>th</sup>, 2016.

[52] It was therefore proposed that the Interim Financing should be increased by an additional \$2,000,000 to be extended by the Interim Lender, who would seek under such circumstances to have its first charge against the Company's assets<sup>22</sup> increased to \$4,000,000.

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<sup>21</sup> Schedule 1.1(a) of the unsigned draft agreement produced as Exhibit **R-2** (under seal) does not disclose any of the contracts that would be assumed by Optifer.

<sup>22</sup> Defined as "Collateral" in the "Amended and restated interim financing Term Sheet" (**R-7**).

[53] In conclusion, in the Second Motion, the Company, with the support of the Monitor, is seeking from the Court the issuance of the following orders<sup>23</sup>:

"a) an order establishing a process for the treatment of claims against the Company and setting out the procedure for the calling and holding of a meeting of creditors to consider, and if deemed acceptable, approve the CCAA Plan (the **"C&M Procedure Order"**);

b) an approval and vesting order in connection with the sale of all or substantially all of the assets of the Company to Optifer or one of its affiliates (the **"Approval and Vesting Order"**), the whole upon the terms and conditions set forth in the APA<sup>24</sup> (as defined hereinafter); and

c) an order approving an increase of the existing DIP Facility (as defined in the Initial Order) from \$1,150,000 to \$3,150,000 in order to provide the Company with sufficient liquidity while the Company completes the various steps leading to the above mentioned restructuring transactions (the **"DIP Increase Order"**)."

**III- Amended Application for directions pertaining to the unauthorized compensation of cancelled pre-filing orders by the Mis-en-cause credit cards settling institutions<sup>25</sup>**

[54] During the evening of Friday April 22<sup>nd</sup>, 2016, the Monitor attempted to serve upon the Payment Processors the Third Motion with one ultimate goal in mind, order the latter to refund to the Company up to \$1.9 million that were allegedly unlawfully withheld or more precisely, unlawfully compensated with Post-filing accrued assets belonging to or due and destined to be remitted to BTR.

[55] In its capacity as Monitor, Richter Advisory Group Inc. was seeking the issuance of an order from this Court at the upcoming April 25<sup>th</sup>, 2016 hearing that the Payment Processors stop the "Unauthorized Compensation<sup>26</sup>" between the remittances owed to the Company of credit card payments relating to credit card sales made after the date of the Initial Order, which are claims accrued to the Company after the Initial Order, and "*amounts owed to the Payment Processors*" relating to cancelled credit card sales made before the date of the Initial Order, which are claims of theirs against the Company that existed before the Initial Order, according to the Monitor.

<sup>23</sup> Paragraph 5 of the Second Application.

<sup>24</sup> The Asset Purchase Agreement for the sale of BTR's assets to Optifer.

<sup>25</sup> Hereinafter referred to the **"Third Motion"**.

<sup>26</sup> 17. However, it seems that the Mis-en-cause [the Payment Processors] did effect compensation (the **"Unauthorized Compensation"**) between:

(a) remittances owed to the Company of credit card payments relating to credit card sales made after the date of the Initial Order, which are claims accrued to the Company after the Initial Order, and

(b) amounts owed to the Mis-en-cause relating to cancelled credit card sales made before the date of the Initial Order, which are claims of the Mis-en-cause against the Company that existed before the Initial Order.

[56] More precisely, in the Third Motion, the Monitor is seeking the following remedies:

**“ORDER** the Mis-en-cause Institutions [the Payment processors] to stop effecting compensation between any claim of the Institutions against the “Company” that existed before the Initial Order, including any claim relating to cancelled credit card sales made by the Company before the date of the Initial Order, and any claims accrued to the Company after the Initial Order, including remittances to the Company of credit card payments relating to credit card sales made by the Company after the date of the Initial Order;

**ORDER** the Institutions to remit to the Company, within 24 hours of the date of the order to be rendered herein, all credit card payments relating to credit card sales made by the Company after the date of the Initial Order which, as of the date of the order to be rendered herein, have been withheld in contravention of the Initial Order;

**ORDER** the Institutions to collaborate with the Monitor in order to ensure the proper execution of the order to be rendered herein, including by providing to the Monitor any document or information requested by the latter;

**ORDER** the provisional execution of the judgment notwithstanding any appeal and without the necessity of furnishing any security;”

[57] In other words, the Monitor is seeking to “force” Paysafe, BTR’s principal Payment Processor with some 70% of its overall online credit card transactions, to refund the greater portion of \$1,944,243 as a result of the alleged “Unauthorized Compensation”. The stakes of PayPal and of AMEX are significantly less given their lesser implication in BTR’s sales.

[58] Given the fact that the Court has to rule at once on all three Motions and Applications, it is relevant to set out hereinafter the relevant events as they unfolded over the three-day hearing.

**The first day of hearing on the Motion to extend and the Second Motion (April 25<sup>th</sup>, 2016)**

[59] At the outset of the April 25<sup>th</sup>, 2016 hearing, the attorneys for Paysafe expressed their client’s surprise, let alone their utter shock at this unexpected last minute change of position adopted in particular by the Monitor, regarding the “Unauthorized Compensation” and disputed quite appropriately the legal interest of the Monitor to initiate such proceedings by itself. The Court learned that the Monitor’s involvement was prompted by the fact that the Company’s lawyers Stikeman Elliott would have found themselves in a conflict of interest situation as their firm also represents the interests of Paysafe in other matters.

[60] In light of the insufficient delays given to the Payment Processors, the hearing on the Third Motion was postponed to April 27<sup>th</sup>, 2016 in order to grant additional time for Paysafe to prepare adequately and enable the Company to regularize the situation with respect to its own representation in the said Motion<sup>27</sup>.

[61] On the first day of the hearing, despite the objections of Paysafe lawyers who felt that given the nature of the Third Motion, the three Motions were so closely intertwined that no judgment should be rendered on the first two before hearing the evidence on the third one, the Court nevertheless agreed to hear the evidence on the Motion to extend and on the Second Motion. However, by the end of this first day's hearing, it became obvious that the initial objections of the lawyers for Paysafe were well founded.

[62] The financial evidence offered on the first day of hearing by the Company and the Monitor, with the assistance of the Second Report and the Second Cash Flow Projections, did not provide anywhere for the immediate refund of the "Unauthorized Compensation" by the Payment Processors in order to enable the additional injection of \$2,000,000 by the Interim Lender and the completion of the proposed Arrangement and the proposed transaction with Optifer.

[63] On the contrary, the Company and the Monitor represented to the Court that with the additional \$2 million from the Interim Lender, they could continue BTR's operations for the 9-week period contemplated in the Second Cash Flow Projections with the Payment Processors continuing to "compensate" the refunds granted by the Company for Pre-filing and Post-filing orders.

[64] However, at the end of the first day, the lawyer representing the Interim Lender stated that his client refused to disburse any additional funds to the Company before the Third Motion was disposed of and that the Payment Processors have remitted to the Company the \$1,944,243 representing the alleged "Unauthorized Compensation".

[65] The Monitor then informed the Court that the Third Motion was indeed prompted by the new position adopted by the Interim Lender on the morning of April 22<sup>nd</sup>, 2016. On that day, the Interim Lender indicated that, in its view, the situation arising from the "Unauthorized Compensation" constituted a "material change" that justified its modified position regarding the injection of the additional \$2 million into BTR's operations.

[66] Under such circumstances, the Second Cash Flow Projections became of very little assistance to the Court.

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<sup>27</sup> The Third Motion was amended on April 26<sup>th</sup>, 2016 to reflect the addition of the Company as a co-Applicant with the Monitor. The Company was "officially" represented by another lawyer for the presentation of the Third Motion although, with all due respect, 99% of the representations were made by the lawyer for the Monitor.



[67] The Court decided to reserve its judgment on the Motion to Extend and on the Second Motion until the parties had the opportunity to present their evidence with respect to the Third Motion.

[68] The Initial Order was nevertheless extended to April 27<sup>th</sup>, 2016.

**The second day of hearing (April 27<sup>th</sup>, 2016)**

[69] At the outset, the parties agreed that the Third Motion would only proceed against Paysafe and not against any of the other Payment Processors for the time being, each party reserving their respective rights and recourses should the Company wish to present again its Third Motion against PayPal, Braintree and/or AMEX.

[70] As it ended on the first day of hearing, the second day began with new developments that would ultimately impact on the outcome of all three Motions.

[71] The lawyer for the Monitor informed the Court that during the one-day recess, the Company, with the assistance of the Monitor, had prepared new financial documents and projections reflecting the new position voiced by the lawyer for the Interim Lender at the end of the first day hearing, namely that it would only start to advance a portion of its \$2,000,000 additional funds once and only once the Payment Processors refund to the Company a first tranche of approximately \$1,000,000 from the \$1,944,243<sup>28</sup> they allegedly debited illegally with their "Unauthorized Compensation".

[72] The Court cannot help noticing that the Interim Lender<sup>29</sup> is, to all intents and purposes, dictating the Company's course of action with the concurrence of the Monitor, in all appearances.

[73] This turn of events prompted the Company to prepare new and updated financial statements and cash flow projections taking into consideration the new requirements of the Interim Lender<sup>30</sup>. This time, the Company decided to take into account the refund of \$1,944,243 to be made by the Payment Processors with respect to the "Unauthorized Compensation" to and assess as well the latter's exposure with respect to Pre-filing orders and Post-filing orders.

[74] Consequently, the Monitor filed the following new financial documents<sup>31</sup>:

- Exhibit **A-4**: An Amended Cumulative Comparative Cash Flow Statement, covering the 5-week period between March 23<sup>rd</sup> to April 24<sup>th</sup>, 2016 (the **"Third Comparative Cash Flow Statement"**);

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<sup>28</sup> As of May 1<sup>st</sup>, 2016 according to the Second Cash Flow Projections dated April 26<sup>th</sup>, 2016 (Exhibit **A-5**).

<sup>29</sup> Bearing in mind that the Interim Lender is affiliated to the proposed purchaser Optifer.

<sup>30</sup> The Court was not presented however with a re-amended DIP Facility Agreement (**R-7**).

<sup>31</sup> All produced under seal.



- Exhibit **A-5**: Amended Cash Flow Projections dated April 26<sup>th</sup>, 2016, covering the 8-week period between April 24<sup>th</sup> to June 19<sup>th</sup>, 2016 (the **"Third Cash Flow Projections"**); and
- Exhibit **A-6**: Tables entitled "Payment processors' exposure" showing their pre-filing and post-filing open customer orders and a combined table for each of the Payment Processors (the **"Payment Processors Exposure Tables"**).

[75] The Monitor testified again to present these new financial documents.

[76] The Monitor informed the Court that the Third Cash Flow Projections took into considerations the following general assumptions that were previously absent:

- The Payment Processors would refund the "Unauthorized Compensation" of \$1,944,243 to the Company between the week ending on May 8<sup>th</sup> (with approximately \$1 million on that first week) and the week ending May 29<sup>th</sup>;
- The Payment Processors would cease immediately to apply any "Unauthorized Compensation" against any future cancellations of Pre-filing orders; and
- The Interim Lender would only start to inject a portion of its additional \$2 million into the Company, with a first \$1 million installment to be made during the week following the refund by the Payment Processors to BTR of their first tranche of \$1 million.

[77] According to the Third Cash Flow Projections dated April 26<sup>th</sup>, 2016, the Company was now expecting the Payment Processors to refund an additional \$954,329<sup>32</sup> representing the balance of the "Unauthorized Compensation" during the three weeks following their initial refund of approximately \$1,000,000 in the week of May 8<sup>th</sup>, 2016.

[78] On the second day, it became even more obvious that the outcome of the additional DIP or Interim Lending Facility and of the survival of the Company as a going concern hinged on whether or not the Payment Processors are ordered to refund to the Company \$1,944,243<sup>33</sup> stemming from Pre-filing orders' sales that BTR agreed to voluntarily refund in response to cancellation requests made by many of its customers.

[79] Needless to say, the decision of the Court with respect to the "Unauthorized Compensation" is now paramount to the outcome of the Motion to Extend and to the Second Motion, as not only Paysafe objects vigorously to paying to the Company any of the funds mistakenly branded, in its view, as "Unauthorized Compensation" by the

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<sup>32</sup> \$93,900 during the week ending on May 15<sup>th</sup>, 2016, \$693,900 during the week ending on May 22<sup>nd</sup>, 2016 and \$166,529 during the week ending on May 29<sup>th</sup>, 2016.

<sup>33</sup> Amount established by the Company as at May 1<sup>st</sup>, 2016.

Company and the Monitor but, if ordered to refund the same, it would also object to the Stay Period of the Initial Order being extended upon its original terms and conditions.

- **The testimony of Mr. David Farrant, Vice-President - Operations of the Company**

[80] On the second day, the testimony of the Monitor's representative, Mr. Benoit Gingues ("Gingues"<sup>34</sup>) was followed by the one of Mr. David Farrant.

[81] Mr. David Farrant ("Farrant") is Vice-President - operations of the Company who is responsible for the logistics, the distribution centre and the customer service. He has been working at BTR since August 2009.

[82] Farrant testified that, at the date of the Initial Order, the Company had some 20,000 to 25,000 open orders in the 21-day range, 41,000 open orders in the 22+-day range and 20,000 open orders in the 61+-day range. 70% of those open orders had been completed through Paysafe payment services.

[83] Farrant indicated that the Company's shipping policy appeared on BTR's website and that its customers were well aware of the two to three weeks shipping policy, generally speaking.

[84] The cancellation rate rose approximately up to the 33% range prior to the Initial Order while it had been historically in the 6.5% range.

[85] While the priority was given to fulfilling orders with inventory in stock, it became harder for the Company to fulfil open orders when the suppliers did not want to release the goods without a payment, thus adding pressure on the level of cancellations.

[86] With respect to the cancellation process, Farrant explained that no customer can initiate a cancellation of his or her open order online via BTR's website. The Company does not offer website cancellations and it does not invite cancellations neither. They only respond to requests for cancellation to the extent that a customer has contacted their Customer Service Centre. Even, then the Customer Service Representatives ("CSR") never offer proactively to cancel an open order.

[87] According to the witness, the cancellation process is only initiated by the customer who must communicate the Customer Service Center ("CSC") where he or she will be put in contact with a CSR.

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<sup>34</sup> The use of last names in this judgment reflects how the parties were generally identified during the hearing and is meant solely to lighten the text. It should not be interpreted as a sign of lack of respect toward the persons concerned.

[88] Once the cancellation has been requested by the customer and approved internally, the customer will receive an email later on from the CSC confirming that the cancellation order has been initiated and that his or her credit card account will be credited shortly, unless the ordered products have been shipped already.

[89] Internally, only very few employees of the Company are authorized to actually proceed to the cancellation of an open order and thus, grant a refund a credit cardholder.

[90] If the order was placed with a VISA or a MasterCard, the transaction was originally processed via Paysafe as BTR's principal Payment Processor. The refund will normally take the same path in reverse. In other words, the Company will credit the refund to the same credit card that was used to make the purchase.

[91] The few employees of the Company that are authorized to cancel an open order and proceed to refund the credit cardholder will enter into contact with Paysafe through the latter own proprietary secure online payment gateway called Netbanx<sup>35</sup>. Once logged in, the authorized employee of the Company will enter the necessary instructions to enable Paysafe to process the refund by crediting the account of the credit cardholder by providing the name of the customer, the credit card number and the date of the purchase.

[92] The Court understands that the need to link the refund to the original credit card transaction is not a transaction reversal as such, but rather to make sure that the credit refund is channeled to the right customer (credit cardholder) and to appropriate credit card account.

[93] Paysafe, via Netbanx, will comply with BTR's instructions and will then refund the credit cardholder's account accordingly. Once the refund has been completed, BTR's account with Paysafe (the "**BTR Paysafe Account**") is automatically debited with the same amount.

[94] Farrant claimed that despite the fact that the refund process is initiated by an authorized representative of the Company, no money ever comes out of the Company's pockets *per se*. In his view, in this particular process, it is Netbanx (Paysafe) that makes the refund that it subsequently sets off with BTR's other current sales in the BTR Paysafe Account.

[95] Farrant added that it is difficult to predict customers' behaviour when it comes to cancellations. One month prior to the Initial Order, their cancellation ratio reached 1/3 of the open orders as most of the orders were significantly old. The CSRs were nevertheless trying to reassure the customers by asking them to be patient, hoping that in the meantime, they would get their vendors who are withholding shipments pending receiving payments from BTR, to nevertheless release the purchased goods.

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<sup>35</sup> Used for the payment processing of credit/debit cards serviced by Paysafe.

[96] Again, on the issue of cancellations that are at the heart of the Third Motion, Farrant insisted that:

*"We will not proactively cancel."*

[97] According to Farrant, the Company does not offer any refunds with store credits and coupons neither.

[98] Asked by the lawyer for Paysafe whether after a 13-week waiting period, BTR would unilaterally offer to a customer a refund via a store credit in the same amount, Farrant replied *"We do not offer store credit unless a customer insisted."* They would only accede to such a request from a customer in order to maintain a good relationship.

[99] Farrant was finally asked by the lawyer that if the Company adopted the approach of cancelling and refunding open orders with proactive refunds granted with store credits of same value, shouldn't the Interim Lender and Optifer be made aware of such a commercial practice?

[100] Farrant simply responded:

*"I imagine."*

- **The testimony of Mr. Patrick Lemay**

[101] Immediately after the witness Farrant was excused, the lawyer for Paysafe called Mr. Patrick Lemay ("**Lemay**") as a witness, whose testimony clearly contradicted Farrant's testimony.

[102] Lemay is an employee of Paysafe who is also a member and a customer of BTR. His purchases and transactions with BTR are totally foreign to his employment and have never been made at the request of his employer until a situation arose unexpectedly on April 21<sup>st</sup>, 2016.

[103] On February 25<sup>th</sup>, 2016, Lemay purchased online on BTR's website Van Houtte's K-cup coffee pods for the total amount of \$252.90 (**PS-1**). His credit card account was debited with the same amount on February 26<sup>th</sup>, 2016 (**PS-2**).

[104] Without any solicitation on his part, Lemay received on April 21<sup>st</sup>, 2016, an email from BTR entitled "An update on your order 17820253" (**PS-3**) with the following message:

"Dear Patrick,

Although we told you that your order 17820253 was scheduled to arrive at Beyond the Rack, our suppliers are occasionally unable to ship all of the items they reserved for us. The item(s) we were unable to secure for you is listed below.

We've already refunded you in the amount of 252.90\*, to your Beyond the Rack account, which can be viewed on the top right side of your account page, for the unavailable item(s).

We sincerely apologize for the disappointment. In an effort to compensate you for the inconvenience, we've included a promotional code for the value of \$25. Please enter WELOVEYOU25X1 at checkout."

[Emphasis added]

[105] Lemay insisted that he never requested at any time a cancellation of that order that was unilaterally converted by BTR into a \$252.90 store credit to be used on future purchases as opposed to receiving a full refund by way of a cheque or a credit applied to his credit card, which was never credited with the said amount. [Emphasis added]

[106] Earlier on February 11<sup>th</sup>, 2016, Lemay had made a previous purchase via BTR's website. He had ordered two products for a total amount of \$89.65 (PS-4) that was debited from his credit card account on the following day, February 12<sup>th</sup>, 2016 (PS-5).

[107] One of the two products was delivered to him at an unknown date. However, on April 26<sup>th</sup>, 2016, having not received the second product (2-pack Samsung Galaxy S6 & Galaxy S6 Edge Headsets in white), Lemay went to BTR's web site and he was able to enter into a live chat with a representative of the Customer Service Center (Johnny) to enquire about the status of that order.

[108] Lemay was basically informed that BTR was still waiting for the product to arrive at its warehouse from their supplier. The Company expected the same to arrive any day now (*hopefully at the end of this week or early next week*) (PS-6<sup>36</sup>).

[109] Although Johnny suggested that Lemay wait a little longer, the latter indicated that he preferred to receive a full refund. Johnny replied that he would pass on his request to cancel the sale of the said item and that Lemay would shortly receive an email confirming the cancellation request. Johnny ended the chat by mentioning that the cancellation process would take 24 hours and that Lemay should allow 5-7 business days for his refund to appear on his credit card.

[110] On April 26<sup>th</sup>, 2016, Lemay received an email entitled "Case Update: CS55399149 – 17781234 – CI" (PS-7) confirming his request to cancel the sale of the item in question. At the time of writing this judgment, the Court is unaware whether the refund had been credited to Lemay's credit card account.

[111] The Court had the distinct impression that Lemay's testimony came somehow as a surprise to the Monitor's lawyer. Neither the lawyer for the Monitor nor the lawyer for the Company chose to cross-examine Lemay.

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<sup>36</sup> This is a full transcript of the live chat between Lemay and Johnny of BTR.



[112] However, the lawyer for the Monitor asked that the Court allows the witness Farrant to resume his testimony given the nature of Lemay's allegations.

[113] Confronted with the April 26<sup>th</sup>, 2016 email sent unilaterally to Lemay (**PS-3**) indicating that his order had been cancelled and converted into a \$252.90 store credit, Farrant indicated (after some hesitations) that it was a sort of a "*test*" to see if Lemay would be happy with a store credit instead of a full refund. Farrant added unconvincingly that the email was apparently a form of automated reply. If so, a reply to what? Lemay never approached BTR to request a cancellation of his order.

[114] Then, the "*test*" with Lemay became a "*small scale test*" made by the Company to gauge the reaction of customers with older open orders (Pre-filing orders).

[115] Suddenly, it was revealed that the "*small scale test*" involved between 800 and 1,000 customers with orders in the "*older bucket*", as the Vice-President of operations described it.

[116] While Farrant acknowledged that BTR had over 20,000 open orders older than 61 days, he insisted that BTR's Customer Service Representatives never offer outright to give a credit to a customer.

[117] However, the witness changed his previous testimony saying now that they were initiating refunds "*when we know we are not going to get the goods*", adding that the unavailability of products had increased substantially.

[118] With respect to Lemay K-cup coffee pods order, Farrant mentioned that the coffee products were purchased by Lemay as part of an "Event".

[119] An "Event" is an offer of products that lasts typically between 24 to 72 hours. An "Event" is determined when BTR's suppliers have the products in stock.

[120] At the end of the "Event", BTR produces a purchase order that is sent to the vendor of the products offered for sale during the said "Event". The Court understands that at the time, BTR knows exactly the amount of products it needs to buy and ship to its customers as the Company already holds the funds paid for such purchases, bearing in mind that no such order can be placed by its customers without them paying for the same up front and in full.

[121] If that was the case, then why couldn't Lemay get his K-cup coffee pods soon after the end of the "Event" on February 21<sup>st</sup>, 2016?

[122] During his cross-examination to Paysafe's lawyer, Farrant indicated that in the context of the "*small scale test*", the Company was sending emails to customers like Lemay every day as BTR's inventory is constantly diminishing.



[123] In the end, it was not possible to know the true extent of the “*small scale test*” and neither the witness nor the Monitor were able to inform the Court whether these hundreds of unilaterally issued store credits were indeed reflected in the financial information submitted to the Court, including the Cash Flow Projections.

[124] With all due respect, the foregoing evidence leads the Court to seriously question the reliability of the Cash Flow Projections prepared by the Company and whether the Monitor and the proposed purchaser are actually aware of all the Company’s practices with respect to the thousands of open orders, given their potential impact on the Payment Processors who are nevertheless obliged to continue extending their services to BTR.

[125] Must the Court remind all that in the context of the Motion to extend and the Second Motion, it is of the utmost importance that the Company already under the protection of the CCAA satisfies the Court, *inter alia*, that it has acted, and is acting, in good faith and with due diligence<sup>37</sup>. [Emphasis added]

[126] The good faith extends to all concerned. This includes the obligation of the Company to act in good faith towards the Payment Processors, even more so when the Company has managed to get a declaration in the Initial Order that they are Critical Suppliers who must continue to offer their payment processing services to BTR as they did before the Initial Order.

### **The third day of hearing (April 28<sup>th</sup>, 2016)**

[127] The third day began with new unexpected developments.

[128] At the outset, the lawyer for the Monitor informed the Court that the Interim Lender had once again reassessed its position and changed the terms and conditions of its continued involvement and, more precisely, those relating to its additional funding of \$2 million to BTR.

[129] In the absence of any representative of the Interim Lender, the latter’s lawyer advised the Court that henceforth, the Interim Lender was also making it an additional condition precedent to any further advances that the Company stops forthwith honouring all of the open Pre-filing orders, which should therefore be cancelled forthwith by BTR.

[130] The Court understood from this latest message from the Interim Lender<sup>38</sup> that the latter no longer wished that the Company continues operating as a going concern by fulfilling as usual all open orders, be it Pre-filing and Post-filing orders, the whole as it

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<sup>37</sup> Section 11.02 (3)(b) of the CCAA.

<sup>38</sup> Bearing in mind that the Interim Lender is, to all intents and purposes, the Company’s proposed purchaser via its affiliate Optifer.

was represented to Justice Castonguay on March 24<sup>th</sup>, 2016 and to the undersigned on April 25<sup>th</sup> and on 27<sup>th</sup>, 2016.

[131] However, with respect to the Post-filing orders, the lawyer for the Interim Lender indicated that his client would now endeavour to replace Paysafe as the principal Payment Processor of the Company within 45 days and that in the meantime, it would guarantee Paysafe against any Post-filing orders' losses by providing to the latter a security in the form of a letter of credit in an amount to be determined later on.

[132] Moreover, the lawyer indicated that his client would increase the \$310,000 basket proposal with an additional \$125,000 provided that these additional funds would come from the moneys to be refunded by Paysafe to the Company.

[133] With all due respect, as none of these modifications were confirmed in writing and in the absence of any representative of the Interim Lender other than its lawyer, and without a proper response from the Company and a more thorough analysis of the situation to be made by the Monitor given these new developments, the Court does not feel inclined, at this juncture, to seriously consider such additional conditions other than to realize that we are now quite far from the circumstances described by the Company and the Monitor to justify the extension sought with respect to the Stay Period of the Initial Order and the granting of the Second Motion.

[134] Clearly, the Company, the Monitor, the Interim Lender, the proposed purchaser and the Payment Processors must now have beforehand a definite and complete resolution of the issue relating to the "Unauthorized Compensation" raised by the Monitor (and subsequently by the Company on April 26<sup>th</sup>) for the very first time on the Friday night of April 22<sup>nd</sup>, 2016, after 4 weeks of operations that were supposed to be carried out upon the same terms and conditions and with the goal of maintaining as much as possible BTR's operations as a going concern.

[135] Moreover, at this juncture, the Court is unaware of the position of the proposed purchaser faced with all these undocumented changes, keeping in mind that the "Unauthorized Compensation" constitutes a "material change" in the eyes of the Interim Lender, justifying its refusal to advance further funds.

[136] Under such circumstances, the Third Cash Flow Projections presented by the Monitor are useless as that did not take into consideration the Interim Lender's latest condition that the Company should cease immediately from fulfilling any of the open Pre-filing orders and consequently should cancel all such sales unilaterally.

[137] Should that occur, the customers with unfulfilled open Pre-filing orders would definitely have provable claims as unsecured creditors of the Company, not Paysafe and the other Payment Processors.

[138] The Court will now address the issue of the "Unauthorized Compensation".

### **The Unauthorized Compensation**

[139] The main questions at issue are the following:

- Do the voluntary refunds granted by the Company, as a result of the cancellations of Pre-filing orders requested by its customers and processed by the Payment Processors<sup>39</sup>, constitute Pre-filing provable claims of the Payments Processors?
- Could the Payment Processors seek to compensate such provable claims with Post-filing funds found in the Company's accounts held with each of the Payment Processors, including the BTR Paysafe Account?
- Is the compensation operated by Paysafe with respect to Pre-filing orders' refunds, an "Unauthorized Compensation" that is susceptible of being annulled by the Court, hence forcing Paysafe to refund the same to the Company?

[140] The Monitor and the Company have expressed the view that upon payment to the customers of all refunds relating to Pre-filing orders that were processed through the services of Paysafe, the proceeds of those refunds automatically became Pre-filing "provable claims" of Paysafe, the latter becoming an unsecured creditor of the Company for the same amounts paid by Paysafe on behalf of BTR.

[141] Needless to say that in order to make such a proposition, the Monitor and the Company had to somehow (i) make a direct link between the Pre-filing orders and the refunds processed by Paysafe, just as if they were, from Paysafe's standpoint, a single operation that retained the date of the initial order upon completion of the refund or (ii) consider that Paysafe's refunds triggered in its favour a sort of subrogation of the customer's unsecured provable claim against the Company.

[142] Bearing in mind that a customer with a Pre-filing open and an unfulfilled order has a provable claim against the Company for the amount of the purchase price paid to it, it was somehow proposed that upon making a full refund to the customer, Paysafe could not claim greater rights against the Company than those that its former customers had until being refunded, hence making it impossible for Paysafe to debit BTR Paysafe Account and use the Post-filing funds in it.

[143] In other words, despite the fact that those refunds were all initiated by the Company who decided to issue the same without Paysafe's involvement and that they were processed by Paysafe in accordance with BTR's instructions given after the Initial Order, the amounts of these refunds paid by Paysafe to those customers on behalf of the Company would have become Pre-filing "provable claims" of Paysafe against the Company, thus preventing the service provider from legally compensating such a refund by simply debiting the Company's account as it has always done until now.

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<sup>39</sup> With an emphasis being made at this juncture on Paysafe for the purposes of the present ruling.

[144] Based on the foregoing reasoning, the Court takes for granted that the funds used in the BTR Paysafe Account to compensate the Pre-filing orders' refunds initiated by BTR were all generated after the Initial Order with Post-filing orders and that they constitute Post-filing accrued assets or Post-filing claims that do not form part of the Company's property covered by or subject to a Plan of Arrangement under the CCAA<sup>40</sup>. Therefore, Paysafe was legally barred from using these Post-filing funds to satisfy its alleged Pre-filing provable claims stemming from the refunds in question.

[145] With all due respect, under the particular set of facts that governs the present situation, such a proposition just does not make any sense, especially given the terms and conditions of the Initial Order regarding the Payment Processors.

[146] How can a service provider who was not a creditor of BTR at the time of the Initial Order, be declared a Critical Supplier and, as a result thereof, be ordered to continue providing its payment processing services upon the same terms and conditions, suddenly find itself becoming an unsecured creditor of the Company for more than \$1 million after executing its contractual obligations and processing the refunds requested specifically by the Company?

[147] This is simply mindboggling.

[148] Based on the evidence adduced at the hearing, this proposed scenario whereby the Payment Processors would become unsecured creditors of the Company for the value of all Pre-filing orders' refunds ordered by BTR, was never raised nor ever discussed with the representatives of Paysafe by the representatives of the Company and of the Monitor. Had this subject been raised at the time, the Court is absolutely convinced that Paysafe would have never agreed to the terms and conditions of the Initial Order to become one of the Critical Suppliers of the Company with such an outcome.

[149] Wouldn't it have been a good time to raise such a fine legal argument when the Company was seeking a declaration that Paysafe be considered a Critical Supplier of BTR, and as such be ordered to continue extending its payment processing services to the Company that would include \$1.9 million of credit card refunds that would ultimately have to be absorbed financially by Paysafe together with the other Payment Processors?

[150] The practical result of such a legal argument is that under the protection of the CCAA, BTR could discharge its own financial obligations towards thousands of Pre-filing order customers by simply cancelling, unilaterally or at the customers' request, such sales through the payment processing of Paysafe and having the latter assume the entire financial consequences resulting therefrom and, that regardless of the fact

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<sup>40</sup> Or bankruptcy proceedings.

that BTR may have in its possession funds that are now “untouchable” by Paysafe as they were generated with Post-filing orders.

[151] This way, the Company maintains a positive image with its customer base by granting voluntary refunds and thanks to the insolvency proceedings under the CCAA, Paysafe and the other Payment Processors have to assume some \$1.9 million in liabilities that they will never be able to recover from BTR for the most part.

[152] One has to bear in mind that the alleged unsecured claim of \$1.9 million of the Payment Processors does not even form part of the \$25,000,000 unsecured claims already covered by the proposed \$310,000 basket proposal to be submitted to the unsecured creditors of the Company. On the assumption that the sum of \$1,944,243 presently claimed from the Payment Processors constitutes an unsecured provable claim that would be part of the \$310,000 proposed basket proposal and assuming that the said unsecured claim is added to the other unsecured claims of \$25 million, according to the Motion seeking the issuance of the Initial Order, the Payment Processors would be entitled to the global amount of a little more than \$2,000 for the payment processing services that they were ordered to render in favour of the Company after and as a result of the Initial Order. [Emphasis added]

[153] The foregoing entails that in all circumstances, regardless of who or how the refunds were triggered and regardless that the Company had the funds or not to complete the Pre-filing orders' refunds, Paysafe would have had a legal obligation to refund the Pre-filing credit card customers of the Company by somehow reversing the initial transaction.

[154] But, this is not the case here.

[155] As long as the Company is in operation, as acknowledged at the hearing of the Initial Order, the Payment Processors are not actual creditors of it for the credit card sales that they processed under their contractual arrangements with BTR.

[156] In the present instance, the Court is not in the presence of chargebacks that are quite different from voluntary refunds. The Court shall discuss of the chargebacks later on in this judgment.

[157] Before dealing with the legal aspects of this particular situation, it is necessary, in the Court's view, to understand the procedure that has been adopted and that has prevailed since 2009 between the Company and Paysafe with respect to the use of its payment processing services.

### **The involvement of the Critical Suppliers (Paysafe) in the operations of the Company**

[158] The Court understands that given BTR's business model, consumers make their purchases online and must complete their transactions by providing the Company with



the required information relating to the credit card (Visa, MasterCard or Amex) or to the payment method (PayPal) that they want to use. Once the consumers have completed their purchases, their respective credit card accounts are debited and the proceeds are then sent and credited to BTR's account held, for instance at Paysafe, when it comes to online payments made with Visa and MasterCard credit cards.

[159] All these transactions are made, to all intents and purposes, in real-time after having been confirmed by the consumers. But, generally, the credit card account of the consumer is debited by the credit card issuer within 24 hours of the transaction.

[160] The Court further understands that in the case of Paysafe, all transactions (purchases, service fees, refunds and chargebacks, if any) involving BTR are reflected in the latter's account with Paysafe, namely the BTR Paysafe Account which is netted daily. Paysafe transfers to BTR's bank the net funds in the BTR Paysafe Account, as the case maybe, twice a week.

[161] It could somehow be compared to a certain degree to a bank account without any credit being extended by Paysafe.

[162] In other words, twice a week, BTR receives from Paysafe an amount of money representing the net balance of all sales generated on its website during any given period, less the credit card refunds initiated by BTR, the chargebacks initiated by the consumers, as well as all Paysafe agreed upon processing fees (such fees including the fees payable by BTR to the credit card issuers for each transaction).

[163] During his final remarks, the lawyer for the Monitor questioned whether in any event, Paysafe had the contractual right to compensate refunds made to credit cardholders with the Company's funds held in the BTR Paysafe

[164] The evidence overwhelmingly confirms that this process has been the *modus operandi* agreed upon and implemented by the parties from the outset of their business relationship in 2009. There is no doubt in the Court's mind about it.

[165] Firstly, until April 22<sup>nd</sup>, 2016, the Company treated the refunds stemming from customers' cancellations in the same manner after the Initial Order than it did before the same, regardless that the refunds related to Pre-filing or Post-filing orders. This is even reflected in the Initial Report of the Monitor submitted to Justice Castonguay<sup>41</sup>

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<sup>41</sup> In fact, the initial Cash Flow Projections submitted on March 24<sup>th</sup>, 2016, to Justice Castonguay and commented at the time by the Proposed Monitor incorporated and took into consideration those refunds stemming from the assumption that cancellations of sales would continue to be deducted or offset by the Payment Processors with the current sale proceeds. The same projections indicated that the cash receipts of the Company for the following 5-week period would be net of said refunds stemming from cancellations, Payment Processors agreed upon fees and holdbacks (12% of the value of the sales).



and in the Second Report<sup>42</sup> submitted to the undersigned.

[166] Secondly, the Company and the Monitor are still in agreement that the Payment Processors can continue to proceed in the same manner when it comes to treating cancellations of Post-filing orders. Surely, it cannot be interpreted as being a brand new arrangement between the Company and the Payment Processors. [Emphasis added]

[167] Thirdly, the lawyer for the Monitor argued that as the "Unauthorized Compensation" was not specifically authorized in the Initial Order, it thus precluded the Payment Processors from using Post-filing funds to compensate their "provable claims" resulting from Pre-filing orders' refunds.

[168] Mr. David Chazonoff ("**Chazonoff**"), Paysafe's Chief Operating Officer stated that he negotiated personally with Mr. Yona Shtern ("**Shtern**"), representing the Company and Gingues, representing the then proposed Monitor, the terms and conditions of the draft Initial Order insofar as his company was to be part of the Critical Suppliers.

[169] Chazonoff testified in a credible and convincing manner that the alleged issue of the "Unauthorized Compensation" was never raised nor discussed with the Company and the Monitor at the time. According to the witness, until April 22<sup>nd</sup>, 2016 in the evening, this "compensation" process that was in place since 2009 was never contested by BTR nor did it ever become an issue in the context of the CCAA proceedings. In a sense, it was simply business as usual, save and except for the fact that a significant increase in sales' cancellations reduced by as much the net funds available to the Company with its current sales.

[170] Based on the evidence, the Court retains that the declaration made by Justice Castonguay in the Initial Order that the Payment Processors were Critical Suppliers, as well as the additional terms and conditions relating thereto appearing from paragraphs 27 to 33, reflected an agreement entered into between the Company, the Interim Lender and Paysafe. Paysafe's continued support was critical for the survival of the Company that depended heavily on online commercial transactions beyond the Initial Order.

[171] Indeed, the Monitor confirmed in its First Report that an agreement had been reached between BTR and Paysafe<sup>43</sup> regarding its continued support.

[172] Paragraph 26 of the Initial Order is particularly important in the present case.

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<sup>42</sup> Four weeks later with its report on the Second Cash Flow Projections dated April 22<sup>nd</sup>, 2016 (**A-3**), the Monitor made essentially the same comments on the said Projections that once again incorporated the same *modus operandi* but this time one of the cancellations was specifically identified as "*Cancellation of Pre-filing orders*" with significant amounts being deducted every week by the Payment Processors from the current Post-filing sale proceeds before remittance to BTR.

<sup>43</sup> First Report, paragraph 16.

[173] Justice Castonguay ordered and declared "that each Critical Supplier shall continue to supply the Debtor with the goods and/or services on terms and conditions that are consistent with existing contractual arrangements, as may be amended by this Order." [Emphasis added]

[174] The lawyer for the Monitor argued that as the Case law is well settled on the issue of compensation between pre-filing provable claims and post-filing accrued claims, Paysafe could not operate such a form of compensation without making sure that it was specifically authorized to do so in the Initial Order. Therefore, as the Initial Order was silent on that specific issue, the "Unauthorized Compensation" made by Paysafe with Pre-filing orders' refunds was illegal.

[175] With all due respect, the Court does not share the same point of view on that issue.

[176] The CCAA, at Section 11.4 and following, grants wide powers to the Court when it comes time to declare a person to be a critical supplier of the debtor company if that person's continued involvement will be critical to the company's continued operations.

[177] Under such circumstances, the powers of the Court are such that it can even charge, in whole or in part, the property of the debtor company as security in favour of such critical supplier and even grant it a priority over the claim of other secured creditors.

[178] In the present instance, granting such a priority to Paysafe would have obviously impeded the proposed Interim Financing.

[179] In any event, the Court is of the view that the Initial Order confirmed that as a Critical Supplier, Paysafe was to continue extending its services to BTR "*on terms and conditions that are consistent with existing contractual arrangements*".

[180] The Court is satisfied that the "*terms and conditions*" included the right of Paysafe to continue debiting the BTR Paysafe Account with the proceeds of all refunds granted voluntarily by the Company to its customers, regardless of the fact that the refunds related to Pre-filing orders or Post-filing orders.

[181] One must bear in mind that the Initial Order was issued on the basis of the representations made to Justice Castonguay that the Company wanted to maintain its operations as a going concern and that all open orders were to be fulfilled by BTR<sup>44</sup> to the extent possible depending on the Company's financial resources. The same representations were made to the undersigned on April 25<sup>th</sup> and on 27<sup>th</sup>, 2016, until the Interim Lender decided to impose its decision on the Company that all open Pre-filing orders should be cancelled and not fulfilled by BTR.

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<sup>44</sup> Pre-filing orders as well as Post-filing orders without distinction.

[182] Again, until April 22<sup>nd</sup>, 2016, the behaviour<sup>45</sup> of the Company<sup>46</sup> regarding those cancellations was consistent with the Court's interpretation above.

[183] Moreover, under CCAA proceedings where the ultimate goal is to give the opportunity to a company to restructure its operations and business with the critical assistance of certain key suppliers, nothing would prevent the Court to allow a critical supplier to make such a type of compensation, if necessary, even if the process could go against the rules between pre-filing claims and post-filing ones.

[184] However, in the present instance, it was not necessary for Justice Castonguay to specify it in his Initial Order as this process was already part of the "*terms and conditions that are consistent with existing contractual arrangements*".

[185] The Court respectfully disagrees with the Monitor's proposition that the amendments made by Justice Castonguay to the Critical Suppliers' "*existing contractual arrangements*" in paragraphs 27 to 33<sup>47</sup> of the Initial Order purported to replace or substitute the alleged right of Paysafe to operate compensation under such circumstances.

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<sup>45</sup> As evidenced by the initial Cash Flow Projections and the Second Cash Flow Projections.

<sup>46</sup> And of the Monitor who did not notice anything wrong with this compensation process for more than four weeks after the Initial Order.

<sup>47</sup> [27] **ORDERS** that each that each Critical Supplier shall be permitted to continue to retain as a holdback reserve, all of the amounts which it is currently retaining as such.

[28] **ORDERS** and **DECLARES** that each Critical Supplier shall be entitled to hold-back, in addition to the applicable payment processing service fees and costs, an amount equal to twelve percent (12%) of the face value of every credit card sale to be made by the Debtor and processed by such Critical Supplier after the date of this Order.

[29] **ORDERS** and **DECLARES** that the Debtor and each Critical Supplier (or any financial advisor retained by such Critical Supplier) shall establish each Critical Supplier's actual or potential exposure in connection with any and all unfulfilled orders and cancelled pre-filing orders or sales as of the date of this Order (the "**Pre-Filing Exposure**"), which in the case of Paysafe, is estimated by the Debtor at the date hereof to be \$4,043,000.

[30] **ORDERS** and **DECLARES** that, twice weekly following the issuance of this Order and subject to further order of this Court, the Debtor and each Critical Supplier (or any financial advisor retained by such Critical Supplier) shall establish each Critical Supplier's actual or potential exposure in connection with any and all unfulfilled orders and cancelled pre-filing orders or sales as at that date (the "**Current Exposure**").

[31] **ORDERS** that in the two weeks following the issuance of this Order an amount equal to any positive difference between i) the Current Exposure and ii) the Pre-Filing Exposure shall be immediately held back by the Critical Supplier on future sales.

[32] **ORDERS** that as of the third week following the issuance of this Order, an amount equal to any positive difference between i) the Current Exposure and ii) 97% of the Pre-Filing Exposure (which in the case of Paysafe is estimated by the Debtor to be \$3,967,000 as at the date of this Order) shall be immediately held back by the Critical Supplier on future sales.

[33] **ORDERS** and **DECLARES** that the Debtor shall provide reasonable access to its books, records and premises to Paysafe's representatives and consultants during regular business hours in order to assess Paysafe's Current Exposure.

[186] The Court is rather of the opinion that these amendments made by Justice Castonguay following his declaration that Paysafe, among others, would “*continue to supply the Debtor with [...] the services on terms and conditions that are consistent with existing contractual arrangements*” were in addition to those existing terms and conditions. Nothing evidences that they were meant to reduce in any manner whatsoever the existing contractual arrangements.

[187] Under such particular circumstances, when the continued support of a supplier is deemed critical in the view of the Court who is called upon to exercise its powers under the provisions of the CCAA, to the extent that the judge feels that the same terms and conditions binding the two parties should continue to prevail after the Initial Order, any restrictions, limitations, amendments or modifications having the effect of reducing those existing terms and conditions must be specified clearly so that the critical supplier knows exactly and unequivocally under what terms and conditions it must continue to supply services the debtor company.

[188] Consequently, if a Critical Supplier is ordered to continue to offer services or sell goods to the debtor company, such a supplier must know beforehand exactly what are the applicable terms and conditions to its continued support and if reference is made to existing terms and conditions of their contractual arrangements, any restriction, limitation, reduction or modification to those existing terms and conditions whereby the supplier would end up with less contractual rights, must be specified clearly in the Initial Order.

[189] This is definitely not the case in the present instance.

[190] Therefore, the Court concludes that with respect to the refunds stemming from voluntary cancellations and subsequent refunds made by BTR to its customers, Paysafe acted not only in full compliance with the terms and conditions of its “*existing contractual arrangements*”, but as well in compliance of the Initial Order. Consequently, after the Initial Order, Paysafe could legitimately continue to debit from the BTR Paysafe Account the proceeds of any such refunds granted by the Company, regardless of the date at which the customers who were refunded by the Company placed their orders.

[191] Moreover, as the current arrangements with the Payment Processors that existed before the Initial Order remained in full force and effect, it was obvious that with a significant greater level of cancellations, the Company would receive less net funds from the Payment Processors for its Post-filing sales, thus reducing its capacity to buy more stock to fulfil the open orders.

[192] Wasn't that a highly foreseeable situation that should have be addressed by the Company with its Interim Lender instead of having the Payment Processors assume, unexpectedly four weeks after the fact, the financial consequences of the Company's business decisions to refund so many customers?



[193] By the Initial Order, the Payment Processors were obligated to remain at the service of the Company. Their contractual obligations required that they process credit card transactions on behalf of and for the benefit of their client BTR, but not to suddenly and unexpectedly become unsecured lenders for almost \$2 million. It was never contemplated that they would assume involuntarily, in whole or in part, the role of an Interim Lender without any form of security.

[194] The Payment Processors were never involved in the decision made to refund those numerous customers. They simply continued to offer to the Company their payment processing services as they were ordered to do so by the Initial Order.

[195] Suddenly, after 4 to 5 weeks of operations, when more than \$1.9 million of orders have already been voluntarily cancelled and refunded by BTR in connection with Pre-filing orders and absorbed as usual with debits made to the BTR Paysafe Account, the Interim Lender sees in this normal situation a "material change" and no longer wants to extend its financial support upon the same terms and conditions that were nevertheless agreeable previously under the same circumstances.

[196] In fact, accepting the proposition of the Monitor's lawyer tantamount to saying that the Initial Order authorized the Company to cancel unilaterally more than \$6 million in open Pre-filing orders and "force" the Payment Processors, not only to process these refunds on its behalf as part of their continued payment processing services as Critical Suppliers, but to assume as well the entire cost of these voluntary refunds in the absence of available Pre-filing funds.

[197] Not a single Payment Processor in its right mind would have accepted such a preposterous proposal, had it been submitted to them in the course of their pre-Initial Order negotiations.

[198] As late as on April 25<sup>th</sup> and again on April 27<sup>th</sup>, 2016, the Monitor affirmed upon presenting the First and the Second Cash Flow Projections that with the additional \$2 million injection from the Interim Lender, the Company believed that it could maintain its ongoing operations for the following 8 to 9-week period despite the pressure on its cash flow stemming from the cancellations continuing to be offset by the Payment Processors. [Emphasis added]

[199] Referring to Appendix B of his Second Report (A-3), the Monitor's representative Gingues stated, with respect to the Second Cash Flow Projections (A-3), that "*ça passe*" with the \$2 million additional injection from the Interim Lender while maintaining the *status quo* with respect to the Payment Processors. This arrangement would enable the Company to continue its operations as a going concern with a view of submitting to its creditors a Plan of Arrangement before June 15<sup>th</sup>, 2016 and complete the proposed transaction with Optifer.

[200] Gingues still understood at the time that the proposed purchaser would continue to honour the Pre-filing and the Post-filing orders.

[201] Suddenly, after 4 to 5 weeks of operations and voluntary refunds, the legal argument of the "Unauthorized Compensation" is raised for the first time on Friday April 22<sup>nd</sup>, 2016 by the Interim Lender.

[202] After 4 to 5 weeks of operations and with the continued support of the Payment Processors, they are suddenly and unexpectedly "converted" from Critical Suppliers, credit card payment processors to "unsecured involuntary lenders" for almost \$2 million, a "loss" that they should now absorb in lieu of the Company. Needless to say that such a turn of event would undoubtedly benefit the Interim Lender and its affiliate Optifer who proposes to acquire BTR's business and assets.

[203] Needless to say also that the fundamental obligation to act in good faith applies to all concerned, including the Company and the Interim Lender.<sup>48</sup>

[204] The Court has already decided that pursuant to the Initial Order, the Payment Processors were authorized to continue supplying their payment processing services to BTR upon the same terms and conditions enhanced with the provisions of paragraphs 27 to 33.

[205] However, setting aside for a moment the terms and conditions of the Initial Order regarding the Critical Suppliers, the Court is also of the view that Paysafe was nevertheless allowed to act as it did regarding its processing of the voluntary refunds of the Pre-filing orders made by BTR, even in the context of the CCAA.

[206] The Court does not believe that those voluntary refunds granted by the Company and executed via Paysafe constituted "Unauthorized Compensation" under our insolvency laws once these funds were debited from the BTR Paysafe Account by Paysafe in the normal course of their contractual relationship.

[207] Here is why.

[208] Under the present circumstances, the debits made to BTR Paysafe Account after the Initial Order for the Pre-filing orders' refunds granted voluntarily by the Company constitute, in the opinion of the Court, Post-filing claims resulting from Post-filing services rendered in compliance with the Initial Order.

[209] The nature of the debt voluntarily refunded by the Company or its date of creation had no bearing on the contractual obligations of the service provider, who simply acted as an intermediary between the Company and its customers who received the refunds.

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<sup>48</sup> Article 1375 of the Civil Code of Quebec: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished."



[210] With respect to Paysafe, the Company's voluntary decision to refund a Pre-filing order does convert the refund processing service itself into a Pre-filing transaction binding Paysafe vis-à-vis BTR who is suddenly transformed into an unsecured creditor with a Pre-filing provable claim.

[211] There is no doubt that the *modus operandi* adopted and implemented on a daily basis by the Payment Processors and the Company has been in place and adhere to since 2009 insofar as Paysafe is concerned.

[212] The Court views as Post-filing services the services rendered by Paysafe, who executed, as per the terms of its contractual arrangements with BTR, the latter's instructions to refund the account of credit card holders. This Post-filing service once executed enabled the service provider to debit from its client account the necessary funds to cover the refund in question. Again, from Paysafe's standpoint, the nature of the debt paid by BTR and its date of creation are totally foreign to the Post-filing services that the Payment Processors rendered. Again, they simply acted as an intermediary between the Company and its customers, as usual. [Emphasis added]

[213] In other words, the refunds credited into the credit cardholders' accounts with the assistance of Paysafe nevertheless remain payments made by the Company (and not by Paysafe) to its own customers, thus extinguishing BTR's liability towards them stemming from their purchase orders.

[214] There was nothing that prevented Paysafe from treating differently the refunds relating to Pre-filing orders by debiting the BTR Paysafe Account with the amounts that were credited back to the Company's customers.

[215] The Monitor (with the subsequent support of the Company) sees in that situation an unlawful attempt by Paysafe to offset or compensate a Pre-filing claim with Post-filing moneys generated with Post-filing funds owned or due to BTR. Under such circumstances, the Monitor argues that once the customer's credit card account has been refunded by Paysafe, the aforementioned "Pre-filing claim" becomes a provable claim of Paysafe as it is directly linked to a Pre-filing order. Under the rules of compensation applicable in insolvency matters, a creditor having a provable claim (having arisen prior to the filing under the CCAA) cannot operate compensation of that provable claim with a post-filing claim.

[216] Section 21 of the CCAA, deals with the notion of set-off as follows:

**"21. [Law of set-off or compensation to apply]** The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be."

[217] It is true that the rules of compensation apply even in a context of insolvency.

[218] In that regard, the Court agrees with the analysis made by Madam Justice Marie-Anne Paquette *in the Matter of Métaux Kitco inc.*<sup>49</sup> regarding compensation in the context of insolvency proceedings under Quebec Law:

« [74] Tel qu'expliqué ci-après, pour opérer compensation dans le cadre d'une restructuration ou d'une faillite au Québec, le tribunal doit être satisfait que les conditions générales du droit civil québécois en matière de compensation sont respectées. Ainsi, les dettes en cause doivent être réciproques, certaines, liquides, exigibles et connexes.

[75] Il est également nécessaire que les deux parties soient devenues mutuellement débitrices et créancière avant la date de la faillite ou la date d'institution des procédures en vertu LACC, selon la plus ancienne de ces deux dates.

### 6.2.1 Les conditions qui découlent des règles générales du droit civil québécois

[76] L'article 21 LACC incorpore le mécanisme de la compensation en matière d'insolvabilité sans le définir. Les règles applicables au mécanisme de la compensation, dans un contexte d'insolvabilité, sont donc établies à la lumière du texte de la loi pertinente, et à la lumière du droit supplétif provincial. Au Québec, le droit civil québécois, et non la *Common law*, agit comme droit supplétif en matière de faillite et d'insolvabilité. Cela exclut entre autres l'application du concept d'*equitable set-off*, propre à ce dernier régime et étrangère au droit civil québécois.

[77] En droit civil québécois, les règles de la compensation sont énoncées à l'article 1673 du *Code civil du Québec*, qui prévoit qu'elle s'opère entre des dettes (1) réciproques, (2) liquides, (3) certaines et (4) exigibles.

**1673.** La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une et l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fungibles de même espèce.

Une partie peut demander la liquidation judiciaire d'une dette afin de l'opposer en compensation.

[Soulignements du Tribunal]

**1673.** Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.

A party may apply for judicial liquidation of a debt in order to set it up for compensation.

[Emphasis added]

<sup>49</sup> 2016 QCCS 444.

[78] L'article 1681 du *Code civil du Québec* ajoute que si des tiers ont acquis des droits avant que ne s'ouvre le droit à la compensation, la compensation ne peut avoir pour effet de leur retirer ces droits :

<p><b>1681.</b> La compensation n'a pas lieu, et on ne peut non plus y renoncer, au préjudice des droits acquis à un tiers.</p>	<p><b>1681.</b> Compensation may neither be effected nor be renounced to the prejudice of the acquired rights of a third person.</p>
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[79] Revenons sur chacune des conditions mentionnées précédemment.

[80] La notion de réciprocité exige une coexistence de dettes « en sens inverse » ou de « dettes croisées ». Les deux créances doivent donc avoir pour titulaires les mêmes personnes prises dans les mêmes qualités.

[81] La liquidité d'une créance se rapporte à son montant. Une dette non chiffrée n'est pas liquide.

[82] La certitude d'une créance concerne sa validité juridique. Une dette contestée quant à sa validité n'est pas certaine.

[83] Une créance est exigible si elle est susceptible d'exécution forcée. Une obligation assortie d'un terme ou d'une condition n'est pas exigible tant que ce terme ou cette condition ne sont pas atteints.

[84] Par ailleurs, la compensation peut s'opérer suivant divers mécanismes. Elle peut s'opérer de plein droit (compensation légale) ou dans le cadre d'un jugement qui statue sur le différend entre les parties quant au respect des conditions de la compensation (compensation judiciaire).

[85] La compensation légale s'opère de plein droit lorsque les deux dettes remplissent les quatre conditions mentionnées précédemment.

[86] La compensation judiciaire s'opère lorsque le tribunal tranche un différend entre les parties sur cette question et conclut que les conditions mentionnées précédemment sont remplies.

[87] Une exigence s'ajoute cependant pour opérer compensation judiciaire. En effet, le tribunal doit être convaincu qu'en plus d'être (1) réciproques, (2) liquides, (3) certaines et (4) exigibles, les dettes sont (5) connexes.

[88] La notion de connexité est souvent discutée en lien avec l'article 172 C.p.c., qui exige la connexité entre la demande principale et la demande reconventionnelle. Les réflexions développées dans ce contexte peuvent être utilisées aux fins d'apprécier la connexité entre deux dettes aux fins de compensation.

[89] Cette jurisprudence nous enseigne que la connexité correspond à une « affinité directe », à un « rapport intime », à une « liaison étroite », fait appel à un « rapport de dépendance ou des similitudes » entre des éléments. La possibilité de faire l'objet d'une preuve commune et le risque de jugements contradictoires si les différentes dettes ou affaires sont traitées isolément constituent de forts indices de connexité.

[90] En *Common law*, la notion d'*equitable set-off* requiert également que les deux dettes en cause soient connexes. »

[Emphasis added, references omitted]

[219] Under Quebec Law, to be able to operate legal compensation, it requires two debts that must be certain, liquid and exigible. Each creditor must be the debtor of the other one.

[220] In the present instance, each time that Paysafe makes a refund to a customer of the Company at the latter's instructions as per their contractual arrangements, the Payment Processor has a claim against the Company for the amount of the refund that it paid on its behalf. This claim of Paysafe is a debt of the Company that is certain, liquid and exigible.

[221] The funds held by Paysafe in BTR Paysafe Account are equally a debt of Paysafe to BTR. The amount to the credit in the said account is due to the Company and constitutes a debt of Paysafe that is equally certain, liquid and exigible when there are sufficient funds in the account.

[222] In the absence of the present insolvency situation, the legal compensation could be operated freely as it has been done between the parties since 2009.

[223] The Initial Order has changed somewhat the situation when it comes to Pre-filing liabilities that are provable claims against the Company and Post-filing accrued claims that cannot be used to offset a Pre-filing provable claim.

[224] However, the insolvency proceedings did not prevent the Company and its Post-filing suppliers from operating compensation between Post-filing accrued claims linked to the Post-filing orders' sale proceeds and Post-filing liabilities resulting from Post-filing services rendered to the Company.

[225] That is precisely why the Company, the Monitor and even the Interim Lender are not objecting to the Post-filing compensation being operated by the Payment Processors with the refunds of Post-filing orders.

[226] The present compensation issue stems from the fact that although the services requested by the Company that Paysafe refunds on its behalf certain customers were requested and rendered after the Initial Order, such Post-filing services cannot be legally paid for by the Company or compensated with its Post-filing accrued assets.

Consequently, even though the services were rendered after the Initial Order, the debt due by BTR to Paysafe regarding such Post-filing services would have been created on the date of the initial purchase order and as such, is not susceptible of being compensated with the Post-filing funds in the BTR Paysafe Account.

[227] The Court understands from the representations made by the Monitor's lawyer that, at all relevant times, Paysafe had an eventual provable claim in excess of \$4 million as at March 24<sup>th</sup>, 2016, the date of the Initial Order. This is explained by the fact that if the Company had filed for bankruptcy on that date and had failed to fulfill all of its open Pre-filing orders purchased with credit cards payments processed by Paysafe, the latter would have been "exposed" to have such an eventual unsecured provable claim in BTR's bankruptcy. Such an eventual provable claim, even if it is presently totally unquantified, would nevertheless constitute a provable claim of Paysafe in a bankruptcy or under a Plan of Arrangement under the CCAA.

[228] Based on the foregoing concept, any refund executed by Paysafe of a Pre-filing order should be treated as a portion of Paysafe's eventual provable claim according to the Monitor, and such an eventual provable claim being obviously a Pre-filing provable claim, could not have been legally compensated by Paysafe with the Post-filing funds in BTR Paysafe Account.

[229] Therefore, from the Monitor's standpoint, all refunds made by BTR to its customers in connection with Pre-filing orders must be considered as somewhat linked to the Pre-filing orders placed by those customers who received the refunds in question.

[230] In other words, it sounds as if by paying the refunds in question, the Company "saved" Paysafe from the trouble of having to deal with chargebacks had it filed for bankruptcy without fulfilling these orders.

[231] The Monitor feels that since Paysafe would have ultimately been liable to refund those same customers had the Company failed to fulfil its contractual obligations and deliver to them the purchased goods and had it also failed to refund the purchase price for lack of available funds, once those refunds were effected by Paysafe regardless that they were done voluntarily by BTR, such refunds should be automatically treated as unsecured provable claims of Paysafe that could not be compensated with corresponding debits from the BTR Paysafe Account.

[232] The Court therefore understands that the eventual liability of the Payment Processors must somehow be linked to the potential chargebacks that could be initiated by BTR's customers.

[233] It is true that in the case of chargebacks, Paysafe would become a creditor of BTR with an unsecured provable claim for as much. Given that Paysafe would ultimately have to bear the costs of the chargebacks as BTR would not have the funds to pay the same, it would only be logical that the refunds made by the Company, even



on a voluntary basis, should trigger the same type of obligations for Paysafe towards BTR.

[234] Otherwise, Paysafe would, to all intents and purposes, unduly benefit from this decision of the Company to voluntarily refund its customers by avoiding the chargebacks. That would be unfair and unjust for the Company!!!

[235] This reasoning may explain the new attitude of the Interim Lender to demand that the Company unilaterally cancels the Pre-filing open orders and let the Payment Processors deal with the chargebacks...

[236] Again with all due respect, the Court does not share this somewhat imaginative view.

[237] In fact, the Monitor's position suggests that by some fiction of the law, when Paysafe executed its contractual obligations towards the Company and complied after the Initial Order with its instructions to refund on its behalf the customers' credit cards with the amount of their Pre-filing purchases, the refunds would have suddenly and instantly created an provable claim of Paysafe against BTR for each of those refunds. Consequently, those provable claims could only be compensated via the proposed \$310,000 basket proposal.

[238] On March 24<sup>th</sup>, 2016, had the Company filed for bankruptcy instead, it would have been the thousands of customers with unfulfilled open orders that would have definitely have had unsecured provable claims against BTR, not Paysafe. That is why that before Justice Castonguay the Company could not state that Paysafe was a creditor with a provable claim.

[239] Upon their credit card account being credited in full by the Company with an amount equal to the purchase price that it received initially, the latter's obligations towards that customer became extinguished. These obligations did not pass on somehow to Paysafe by some fiction of the law.

[240] At all relevant time, Paysafe may have had a potential exposure should the Company cease its operations and fail to fulfill the open orders and refund its customers, but the Court does not see it as the evidence of an eventual provable claim that came into play with each voluntary refund granted by the Company, to the extent proposed by the Monitor's lawyer.

[241] In the present context, a potential exposure does not tantamount automatically to an eventual or an existing provable claim as such.

[242] A chargeback depends upon the consumer triggering the process with its own credit card issuer. There is no evidence or guarantee that upon the bankruptcy of the Company, all of the customers with the Pre-filing orders would initiate this process without exception.

[243] Based on the evidence, other than fees agreed upon contractually between Paysafe and the Company and chargebacks, the Court has not been presented with any other facts that would support the argument that upon executing the Company's instructions to refund certain Pre-filing orders' customers, Paysafe was suddenly transformed into an unsecured creditor of BTR for the same amount of the refund.

[244] The Court finds that under the present scenario, the Company voluntarily chose to cancel Pre-filing open orders by crediting the customers' credit card accounts with an amount equal to the prices paid at the time of their purchases. In so doing, the Company sought the assistance of Paysafe, as a payment service provider, to execute and process its refund instructions.

[245] As far as the Court is concerned, upon the customers' credit card accounts being credited with the amounts of their refunds, it constituted a payment from BTR that extinguished its obligations toward those customers. As an intermediary acting on behalf of the Company, Paysafe was never subrogated in the provable claims of those customers as again, those payments were made by the Company, thus extinguishing those debts.

[246] It is somewhat similar to the situation that would have prevailed had the Company chosen to refund a customer with a cheque drawn on its bank instead of a credit card credit through the services offered by Paysafe.

[247] The Court does not believe that the Monitor would have successfully argued that the bank, having honoured the Company's cheque covering a Pre-filing debt, could not have used the funds in the Company's bank account as they were Post-filing accrued assets.

[248] In so doing, Paysafe has always acted as an intermediary, a payment processing service provider; nothing more.

[249] In closing on that subject, the Court can only see a potential exposure for Paysafe in this matter via the chargebacks that could possibly be applied against any of the purchase transactions processed by Paysafe for the benefit of the Company.

[250] A major distinction needs to be made here.

[251] There is a difference between a voluntary refund initiated by the Company and a chargeback that is initiated by credit card issuers at the request of their client, a cardholder who is also a consumer ("**Chargeback**" or "**Chargebacks**").

[252] The *Consumer Protection Act*<sup>50</sup> deals with Chargebacks in the context of consumers' transactions made via the Internet. Such transactions are called "*Distance*

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<sup>50</sup> CQLR c. P-40.1.

*contracts*" and these legal provisions apply to the commercial transactions conducted in the Province of Quebec by the Company with Quebec consumers.

[253] The relevant provisions of the *Consumer Protection Act* are the following:

"54.1. A distance contract is a contract entered into without the merchant and the consumer being in one another's presence and preceded by an offer by the merchant to enter into such a contract.

A merchant is deemed to have made an offer to enter into a distance contract if the merchant's proposal comprises all the essential elements of the intended contract, regardless of whether there is an indication of the merchant's willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary.

54.2. A distance contract is deemed to be entered into at the address of the consumer.

54.3. No hant who makes an offer to enter into or enters into a distance contract may collect or offer to collect a partial or full payment from the consumer before performing the merchant's principal obligation, unless the consumer may request a chargeback of the payment under this Act or a regulation.

54.4. Before a distance contract is entered into, the merchant must disclose the following information to the consumer:

(a) the merchant's name and any other name under which the merchant carries on business;

(b) the merchant's address;

(c) the merchant's telephone number and, if available, the merchant's fax number and technological address;

(d) a detailed description of goods or services that are to be the object of the contract, including characteristics and technical specifications;

(e) an itemized list of the prices of the goods or services that are to be the object of the contract, including associated costs charged to the consumer and any additional charges payable under an Act;

(f) a description of any possible additional charges payable to a third party, such as customs duties and brokerage fees, whose amounts cannot reasonably be determined;

(g) the total amount to be paid by the consumer under the contract and, if applicable, the amount of instalments, the rate applicable to the use of an incidental good or service and the terms of payment;

(h) the currency in which amounts owing under the contract are payable if not Canadian dollars;

(i) the date on which, or the time within which, the merchant's principal obligation must be performed;

(j) if applicable, the mode of delivery, the name of the carrier and the place of delivery;

(k) the applicable cancellation, rescission, return, exchange and refund conditions, if any; and

(l) any other applicable restrictions or conditions.

The merchant must present the information prominently and in a comprehensible manner and bring it expressly to the consumer's attention; in the case of a written offer, the merchant must present the information in a manner that ensures that the consumer is able to easily retain it and print it.

54.5. Before a distance contract is entered into, the merchant must provide the consumer with an express opportunity to accept or decline the proposal and to correct any errors.

54.6. A distance contract must be evidenced in writing and indicate:

(a) the consumer's name and address;

(b) the date the contract is entered into; and

(c) the information described in section 54.4, as disclosed before the contract was entered into.

54.7. The merchant must send a copy of the contract to the consumer within 15 days after the contract is entered into, in a manner that ensures that the consumer may easily retain it and print it.

54.8. The consumer may cancel the contract within seven days after receiving a copy if

(a) the merchant did not disclose to the consumer the information described in section 54.4 before the contract was entered into, or did not disclose it in accordance with that section;

(b) the merchant did not provide the consumer with an express opportunity, before the contract was entered into, to accept or decline the proposal or to correct any errors;

(c) the contract does not meet the requirements of section 54.6; or

(d) the merchant did not send a copy of the contract in a manner that ensures that the consumer may easily retain it and print it.

However, the cancellation period begins as of the merchant's performance of the principal obligation if the consumer, at that time, observes that the merchant has not disclosed all the information described in section 54.4.

If the merchant does not send a copy of the contract to the consumer within the time provided for in section 54.7, the consumer has 30 days, as of the date the contract is entered into, in which to cancel the contract.

**54.9. In addition to the cases provided for in section 54.8, a distance contract may be cancelled by the consumer at any time before performance of the merchant's principal obligation if**

(a) the merchant's principal obligation is not performed within 30 days after the date specified in the contract or the later date agreed on in writing by the consumer and the merchant, or within 30 days after the contract is entered into in the case of a contract that does not specify a date or time limit for the merchant's principal obligation to be performed; or

(b) the contract is for transportation, lodging or restaurant services, or for tickets to an event, and the merchant does not provide the consumer, by the date specified in the contract or the later date agreed on in writing by the consumer and the merchant, with documents enabling the consumer to receive the services or attend the event.

54.10. The merchant's principal obligation is presumed to have been performed if the merchant attempted to perform it on the date specified in the contract, on a later date agreed on in writing by the consumer and the merchant, or on the date specified in a notice sent to the consumer within a reasonable time, but was prevented from doing so by the actions or negligence of the consumer.

54.11. The consumer's right to cancel the contract is exercised by sending a notice to that effect to the merchant.

54.12. The contract is cancelled by operation of law as of the sending of the cancellation notice.

The cancellation of the contract entails the cancellation of any accessory contract and of any warranty or security given to guarantee the amount payable under the contract.

A contract of credit entered into between the consumer and another merchant under or in relation to a distance contract forms a whole with that contract and, as such, is also cancelled by operation of law if it results from an offer, representation or other action by the merchant who is party to the distance contract.



54.13. Within 15 days following the cancellation of the contract, the merchant must refund all sums paid by the consumer under the contract and any accessory contract, including sums paid to a third person.

Within 15 days following the cancellation of the contract or following delivery if it postdates cancellation, the consumer must restore the goods that were the object of the contract to the merchant in the same state in which they were received.

The merchant shall assume the reasonable costs of restitution.

54.14. If the merchant defaults on the obligation to make a refund under section 54.13 and the consumer has paid by credit card, the consumer may, within 60 days following the default, request the card issuer to chargeback all amounts paid under the contract and any accessory contract, and to cancel all charges made to the consumer's account in relation to those contracts.

54.15. A chargeback request must be in writing and contain the following information:

- (a) the credit cardholder's name;
- (b) the credit card number and expiry date;
- (c) the merchant's name;
- (d) the date the contract was entered into;
- (e) the amount charged to the credit card account and the sums to be refunded by the merchant;
- (f) a description of the goods or services that are the object of the contract and for which chargeback is requested;
- (g) the reason for cancelling the contract; and
- (h) the date of cancellation and the means used to send the cancellation notice.

54.16. A credit card issuer that receives a chargeback request must

- (a) acknowledge receipt within 30 days;
- (b) make the chargeback and cancel all credit card charges in connection with the distance contract and any accessory contract within 90 days or two complete periods, as defined in section 67, following receipt of the request, whichever comes first.

[Emphasis added]

[254] Although the Court realizes that the Company does not limit its operations to the Province of Quebec, no evidence was adduced with respect to the rules of compensation applicable to the other jurisdictions where the Company conducts online commercial transactions with consumers outside Quebec. For the purposes hereof, the Court shall therefore take for granted that the applicable rules outside of this Province are the same.

[255] Based on the foregoing, the Court retains that the Chargeback process essentially belongs to the consumer who is the only one that can initiate it under the *Consumer Protection Act*, provided that the consumer meets the applicable prerequisites.

[256] Therefore, unless a Chargeback has been validly initiated by a credit card issuer at the request of the cardholder, a consumer, Paysafe has no reason and no right to debit the BTR Paysafe Account for any open order that has not yet been fulfilled by the Company. In other words, Paysafe has no claim against the Company until it is called upon via a credit card issuer to process a Chargeback against BTR's account.

[257] Based on the contract produced (**A-7**), Paysafe is contractually entitled to debit the "Merchant" (the Company) for the amount of a Chargeback as defined in the said contract (**A-7**, Article 3.04).

[258] In the Court's opinion, processing Chargebacks triggered by credit cards issuers at the request of consumers creates a different legal environment with respect to Paysafe who under such circumstances will have a contractual claim against BTR if the latter does not refund the amount of the Chargebacks.

[259] As there is no evidence that any of the amounts presently claimed by the Company and the Monitor from Paysafe, are actually Chargebacks requested by consumers who placed Pre-filing orders with BTR, there is no need to address this particular subject further.

[260] As previously mentioned, there is a fundamental difference between a voluntary refund made by the Company to a credit cardholder and a Chargeback initiated by the said cardholder.

[261] There is no direct exposure, potential or otherwise, for the Payment Processors under the first scenario unless they execute the instructions of the Company without making sure that the necessary funds are available to cover the requested refunds.

[262] In the case of refunds made voluntarily by the Company to its customers, the Payment Processors who processed those refunds in the performance of their contractual obligations towards the Company do not incur, as a result thereof, any financial liabilities, unless they make a mistake of course or that they agreed in so doing to extend a form of credit to BTR, which is definitely not the case here.

[263] The second scenario relating to Chargebacks offers a certain exposure to the Payment Processors. However, the Court is not faced with such a situation in the case at hand.

[264] In summary, the lawyers for Paysafe were absolutely right to characterize each refund processed via Paysafe as a voluntary refund made by the Company, following a voluntary decision made by the latter, regardless of the applicable rules of compensation under the CCAA and regardless of the Pre-filing or the Post-filing status of those cancelled orders. Those decisions were made with one objective in mind, maintaining the Company as a going concern by preserving its client base and keeping the latter satisfied despite the turbulence of the last months.

[265] This being said, the decision made by BTR to refund voluntarily a Pre-filing order's customer does not automatically mean that, insofar as Paysafe is concerned, the two transactions initiated, on the one hand by a consumer who purchased a product and, on the other hand, by BTR who chose to respond favourably that a cancellation request made by the same customer, constitutes a single transaction retroacting to the date of the original purchase.

[266] The decision made by BTR to accept a cancellation request from one of its customers and grant a refund was a business decision that in no way was binding on Paysafe and that converted the latter into a creditor of the Company with a corresponding unsecured provable claim.

[267] In the execution of the payment processing services that it agreed to continue to extend to the Company, Paysafe was certainly in a position to validly debit from the BTR Paysafe Account the amount of the voluntary refunds made at the specific request of the Company and therefore to compensate these amounts with funds in the said BTR Paysafe Account.

[268] This compensation practice is valid, legal and does not contravene to the terms and conditions of the Initial Order.

[269] As far as the Court is concerned, between Paysafe and the Company, the latter's instructions to proceed to a refund a credit card account of a Pre-filing customer and the subsequent debit made by Paysafe from BTR Paysafe Account constituted two Post-filing transactions susceptible of compensation.

[270] Once BTR decided to voluntarily accept a customer's request for the cancellation of his or her Pre-filing open order and agreed to refund such an order with its Post-filing funds, it could hardly turn around and oppose, after the fact, its "Unauthorized Compensation" argument to Paysafe who simply followed the Company's instructions to refund the customer's credit car account. Clearly, by giving such instructions to Paysafe after the Initial Order, it implied necessarily that Paysafe was to execute these

instructions and proceed to the refund by using BTR's funds that were in the BTR Paysafe Account.

[271] Again, the foregoing scenario is totally different from the one whereby BTR, being in default to deliver the purchased products and in default as well to refund the purchase price to a consumer who has requested the same, was faced with a Chargeback initiated by the credit card issuer at the request of the same consumer and processed through Paysafe who has a contractual right to claim the said Chargeback from the Company.

[272] In conclusion, the Amended application for directions pertaining to the unauthorized compensation of cancelled Pre-filing orders by Paysafe is denied as being totally ill-founded in fact and in law.

[273] Therefore, Paysafe does not have to refund to the Company any of the amounts presently claimed in connection with the alleged "Unauthorized Compensation" and can continue to act as it has always done since the Initial Order with respect to any voluntary refunds made by the Company with a corresponding credit to consumers' credit card accounts provided that BTR has sufficient funds available to cover in full any such refunds.

**- Ruling on the Motion to extend the Stay Period and on the Claims and Vesting Order Application**

[274] The Court must now deal with the remaining the Motion to extend the Stay of Proceedings and the Claims and Vesting Order Application seeking with the followings conclusions:

a) an order establishing a process for the treatment of claims against the Company and setting out the procedure for the calling and holding of a meeting of creditors to consider, and if deemed acceptable, approve the CCAA Plan (the "C&M Procedure Order");

b) an approval and vesting order in connection with the sale of all or substantially all of the assets of the Company to Optifer or one of its affiliates (the "Approval and Vesting Order"), the whole upon the terms and conditions set forth in the APA<sup>51</sup> (as defined hereinafter); and

c) an order approving an increase of the existing DIP Facility (as defined in the Initial Order) from \$1,150,000 to \$3,150,000 in order to provide the Company with sufficient liquidity while the Company completes the various steps leading to the above mentioned restructuring transactions (the "DIP Increase Order").

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<sup>51</sup> The Asset Purchase Agreement for the sale of BTR's assets to Optifer.

[275] Before addressing the Motion to extend the Stay of Proceedings, the Court shall discuss the Second Motion.

[276] With all due respect, now that the Court has reached a decision with respect to the Third Motion concerning the alleged "Unauthorized Compensation", it can only realize that this particular judgment will have a direct impact on the other two Motions.

[277] Clearly, the Court's ruling on the alleged "Unauthorized Compensation" does not alleviate in any manner the concerns of the Interim Lender, who on the last day of the hearing, insisted that the Payment Processors refund the \$1,944,243 before it would agree to inject further funds into the Company. Given the decision on that issue, the refund by the Payment Processors will not happen.

[278] In light of the foregoing and given the fact that:

- The various financial documents submitted by the Monitor in support of the two remaining Motions no longer reflect and do not address the present situation;
- The terms and conditions with respect of the Interim Financing have changed significantly and the position and the future involvement of the Interim Lender is presently unknown; and
- The position of the proposed purchaser, Optifer, in light of the latest developments, is unknown;

the Court is not in a position to grant, at this time and under the present circumstances, the Claims and Vesting Order Application as submitted.

[279] This Application is therefore denied as submitted.

[280] With respect to the Motion to extend the Stay Period, the Court will not grant the same for the period requested, namely until June 15<sup>th</sup>, 2016 for the following reasons.

[281] The events and surprises that have unfolded since April 22<sup>nd</sup>, 2016 and in particular during the three-day hearing have been a cause for great concern to the Court.

[282] As previously indicated, in the context of the Motion to extend in particular, it is of the utmost importance that the Company, being already under the protection of the CCAA, satisfies the Court, *inter alia*, that it has acted, and is acting, in good faith and with due diligence<sup>52</sup>.

[283] The approach of the Company with respect to the issue of the "Unauthorized Compensation" that was only raised for the first time some 4 to 5 weeks after the Initial

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<sup>52</sup> Section 11.02 (3)(b) of the CCAA.



Order and, suddenly exposed to an ill-founded claim of \$1,944.243, the Payment Processors who had been declared Critical Suppliers at the specific request of BTR, does not depict the conduct of a debtor acting in good faith and with due diligence.

[284] The imbroglio stemming from Farrant's testimony regarding the sudden disclosure of unilaterally cancellations with store credits being granted instead of full refunds is not reassuring either, in the eyes of the Court.

[285] The Court is also concerned that, at the very least, the Interim Lender gives all the indications that it is "*running the show*" instead of the Company. Moreover, its various change of heart concerning its prerequisites to increase its financial support to the Company raise serious questions in the mind of the Court as to its good faith in this matter.

[286] For more than four weeks, the Court has been represented, with the support of the Monitor, that albeit somewhat difficult, the Company was able to continue its operations as a going-concern with the initial injection of \$1,150,000 and that it was able to do so until June 15<sup>th</sup>, 2016 with the injection of an additional \$2 million by the Interim Lender who had agreed to do so, the whole while maintaining the *status quo* with respect to the Payment Processors with respect to the treatment of the multiple refunds granted voluntarily by the Company. At all relevant times, the Court was represented that during this restructuring period, the Company was continuing to fulfill Pre-filing and Post-filing orders indiscriminately, subject however to the availability of the goods to ship.

[287] On Friday April 22<sup>nd</sup>, 2016, under its sudden discovery of an alleged "material change" justifying its decision to withhold its additional funding of \$2 million much needed by the Company, the Interim Lender triggered a massive disruption of the *status quo* with respect to the treatment of the various voluntary refunds processed by the Payment Processors at the request of the Company.

[288] The evidence leads the Court to conclude that the Third Motion seeking the immediate cessation of the so-called "Unauthorized Compensation" and ultimately force the refund of \$1,944,243 by the Payment Processors was in all likelihood prompted, if not guided, by the Interim Lender.

[289] Finally, dissatisfied, in all appearances, with Paysafe's contestation of the Third Motion, the Interim Lender announced to the Court on April 28<sup>th</sup>, 2016, the last day of the hearing, that it would no longer extend the agreed upon additional \$2 million unless not only the Payment Processors refund \$1,944,243 to the Company but as well that BTR should now cease immediately to fulfill any Pre-filing open orders and unilaterally cancel the same forthwith.

[290] This is definitively not an environment where the good faith prevails as it should normally in restructuring procedures.

[291] Presently, the Stay Period ends today as per the Court's order rendered on April 28<sup>th</sup>, last.

[292] Given the present circumstances and in particular, the short delay during which the parties can react and/or follow-up on the present judgment, the Court shall extend the Stay of Proceedings of the Initial Order, on an exceptional basis, until Friday May 13<sup>th</sup>, 2016.

[293] The Court trusts that should another Motion to extend the Stay of Proceedings be presented by the Company, that the latter will be guided by the spirit and the provisions of Section 11.02 of the CCAA and that financial information and documentation that will be submitted to the Court's appreciation shall be complete and reliable.

**FOR THOSE REASONS, THE COURT:**

[294] **DISMISSES** the Amended application for directions pertaining to the unauthorized compensation of cancelled pre-filing orders by the Mis-en-cause credit cards settling institutions, with costs against the Petitioner, 7098961 Canada Inc. (formerly known as Beyond the Rack Enterprises Inc.) in favour of Paysafe Merchant Services Inc. and Paysafe Merchant Services Corp.;

[295] **DISMISSES** the Application for the issuance of (I) a claims and meeting procedure order (II) an order approving an asset purchase agreement and (III) an order approving an increase of the DIP Facility, without costs;

[296] **GRANTS** in part the Motion for the issuance of an order extending the stay of proceedings, without costs;


[297] **EXTENDS** the Stay Period as defined in the Initial Order of March 24<sup>th</sup>, 2016 as well as all the terms and conditions of the said Initial Order to May 13<sup>th</sup>, 2016;

[298] **ORDERS** that Appendix C, Appendix D and Appendix E to the First Report of the Monitor dated April 19<sup>th</sup>, 2016 and Appendix A and Appendix B to the Second Report of the Monitor dated April 22<sup>nd</sup>, 2016 together with Exhibits A-1, A-2, A-3, A-4, A-5 and A-6 be kept confidential and under seal with the Court until, as the case may be, further order of this Court or written agreement from the Debtor and the Monitor and **DECLARES** that all creditors of the Debtor shall be entitled to obtain disclosure of the said Appendices and Exhibits upon written request and provided they have signed a confidentiality agreement in standard form, provided that this requirement shall not apply to secured creditors;

[299] For greater certainty, **DECLARES** that pursuant to the terms and conditions of the Initial Order dated March 24<sup>th</sup>, 2016, and without modifying, amending, limiting or restricting in any manner whatsoever the terms and conditions of the said Initial Order which shall remain in full force and effect during the above mentioned Stay Period, the

Critical Suppliers namely, Paysafe Merchant Services Inc., Paysafe Merchant Services Corp., PayPal CA Limited, PayPal, Inc., Amex Bank of Canada and American Express Travel Related Service Company, Inc., are **ALLOWED** and **AUTHORIZED** to continue effecting compensation between any claim that they may have against 7098961 Canada Inc. (formerly known as Beyond the Rack Enterprises Inc.) (the "**Company**") relating to cancelled credit card sales made by the Company before the date of the Initial Order, and any claims accrued to the Company after the Initial Order, including remittances to the Company of credit card payments relating to credit card sales made by the Company after the date of the Initial Order, the whole until further order of this Court;

[300] **ORDERS** the provisional execution of this Order, notwithstanding any appeal and without the necessity of furnishing any security.



MICHEL A. PINSONNAULT, J.S.C.

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Dates of hearing: April 25, 27 and 28, 2016