IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, a New York corporation, Plaintiff, v. PAYLESS SHOESOURCE, INC., a Missouri corporation; and COLLECTIVE BRANDS, INC. f/k/a Payless ShoeSource, Inc., a Delaware corporation, Defendants.	)	Case No. 08-CV-2337 KHV/JPO

COMPLAINT

American Guarantee & Liability Insurance Company ("American Guarantee"), pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57, hereby states and alleges as follows for its Complaint against Defendants Payless ShoeSource, Inc. and Collective Brands, Inc. f/k/a Payless ShoeSource, Inc. (collectively "Payless").

I. PARTIES, JURISDICTION, AND VENUE

1. American Guarantee is an insurance company organized under the laws of the State of New York. At all relevant times, American Guarantee was authorized to do business in the State of Kansas.

2. Defendant Payless ShoeSource, Inc. is a Missouri corporation with its principal place of business in the State of Kansas.

3. Defendant Collective Brands, Inc. f/k/a Payless ShoeSource, Inc. is a Delaware corporation with its principal place of business in the State of Kansas.

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because complete diversity of citizenship exists between American Guarantee and Defendants and the amount in controversy exceeds $75,000.

5. In addition, Payless has asserted that damages included in a verdict rendered against it and in favor of adidas, as alleged *infra,* require American Guarantee to indemnify it under certain policies of insurance, which American Guarantee denies. Therefore, a justiciable controversy exists between the parties so that the Court has jurisdiction under 28 U.S.C. § 2201 *et seq.*

6. Venue is proper in the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims for relief asserted herein occurred in the State of Kansas and Defendants have sufficient contacts with the State of Kansas such that they are subject to personal jurisdiction in this judicial district.

II. GENERAL ALLEGATIONS

A. The Underlying Lawsuit

7. In 1994 nonparties adidas AG and adidas America, Inc. (collectively "adidas") filed a lawsuit against Payless in the United States District Court for the Eastern District of New York, alleging that Payless' sale of shoes with three parallel stripes and shoes with four parallel double serrated-edged stripes willfully infringed on adidas' trademark rights with respect to adidas' registered "Three Stripe Design."

8. Pursuant to the settlement agreement executed by Payless and adidas in December 1994, Payless agreed not to sell (1) shoes with three parallel stripes and (2) shoes with two or four parallel double serrated-edged stripes.

9. Following the 1994 settlement, Payless sold shoes with two and four parallel straight-edged stripes.

10. Adidas filed the Underlying Lawsuit in the United States District Court for the District of Oregon in November 2001, claiming that Payless violated the parties' 1994 settlement by selling infringing shoes.

11. Adidas filed a Third Amended Complaint on August 21, 2006, alleging that 268 Payless shoe "lots" infringed adidas' trademark and trade dress rights and constituted unfair deceptive trade practices.

12. Specifically, adidas alleged that Payless imports, markets, and sells goods in interstate commerce that bear a confusingly similar imitation of adidas' Three-Stripe Mark and Superstar Trade Dress.

13. Adidas asserted claims against Payless for (1) federal trademark infringement of the Three-Stripe Mark, (2) federal unfair competition as to the Three-Stripe Mark and Superstar Trade Dress, (3) federal dilution as to the Three-Stripe Mark and Superstar Trade Dress, (4) state trademark dilution and injury to business reputation in violation of various states' laws as to the Three-Stripe Mark and Superstar Trade Dress, (5) common law infringement and unfair competition as to the Three-Stripe Mark and Superstar Trade Dress, and (6) unfair and deceptive trade practices as to the Three-Stripe Mark and Superstar Trade Dress.

14. On February 22, 2008, the district court granted Payless' motion for summary judgment on adidas' state law Superstar Trade Dress dilution claims; trial on adidas' remaining claims began on April 8, 2008.

15. The jury returned its verdict in the Underlying Lawsuit on May 5, 2008, finding in favor of adidas on all its claims.

16. The jury was instructed that the term "use" of a trademark or trade dress included selling, offering for sale or distributing.

17. The jury was further instructed that the only trade dress claims were for the Superstar trade dress.

18. The jury was further instructed, in determining whether deliberate copying could support an inference of secondary meaning, an element of trade dress infringement, that the deliberate copying "must be an intentional attempt to capitalize" on adidas' reputation or good will.

19. The jury was further instructed that the claims for unfair and deceptive trade practices were "very similar" to claims for trade dress or trademark infringement.

20. The jury was further instructed that, in order to find for adidas on the claims for unfair and deceptive trade practices, it must find that Payless "knowingly engaged in a deceptive trade practice." The jury found in favor of adidas on its claims for unfair and deceptive trade practices.

21. The jury was further instructed that willful infringement referred to "a deliberate intent to cause customer confusion" and that it could find that Payless acted willfully "if Payless used the design features intentionally, knowing it was an infringement." The jury found for adidas on all of the claims for unfair and deceptive trade practices.

22. The jury was instructed that, on any claim of trade dress or trademark infringement in which it found that Payless acted "willfully," it could award to adidas Payless' profits as damages. The jury did award Payless' profits to adidas in its verdict.

23. The jury was further instructed that, in order to award damages to adidas on the dilution claims, it had to find "that Payless willfully intended" to trade on adidas' reputation or to cause dilution. The jury found in favor of adidas on its dilution claims with respect to both trademark and trade dress.

24. The jury was instructed to make a determination on each of 268 lots if it found for adidas. The jury determined that 267 of the 268 lots infringed on adidas' rights.

25. The jury verdict included actual damages of $30,610,179 for a hypothetical royalty on the trademark and/or trade dress claims, disgorgement of Payless' profits in the amount of $137,003,578 on its finding that Payless' actions were willful, and additional punitive damages in the amount of $137,003,578, for a total award of $304,617,335.

B. The American Guarantee Policies

26. American Guarantee issued seven Following Form Excess Liability Policies to Payless ShoeSource, Inc. from April 1, 1999 to February 1, 2007:

a. Policy Number EUO 2254858 02, effective April 1, 1999 to April 1, 2000 ("1999 American Guarantee Policy");

b. Policy Number AEC 2254858 03, effective April 1, 2000 to April 1, 2001 ("2000 American Guarantee Policy");

c. Policy Number AEC 9302722 00, effective February 1, 2002 to February 1, 2003 ("2002 American Guarantee Policy");

d. Policy Number AEC 9302722 01, effective February 1, 2003 to February 1, 2004 ("2003 American Guarantee Policy");

e. Policy Number AEC 9302722 02, effective February 1, 2004 to February 1, 2005 ("2004 American Guarantee Policy");

f. Policy Number AEC 9302722 03, effective February 1, 2005 to February 1, 2006 ("2005 American Guarantee Policy"); and

g. Policy Number AEC 9302722 04, effective February 1, 2006 to February 1, 2007 ("2006 American Guarantee Policy").

27. American Guarantee did not issue a Following Form Excess Policy to Payless ShoeSource, Inc. for the policy period April 1, 2001 to February 1, 2002.

1. 1999 American Guarantee Policy

28. The 1999 American Guarantee Policy provides excess coverage on a following form basis, subject to a $50,000,000 each occurrence/offense limit, over Federal Insurance Company's controlling underlying policy ("1999 Federal Policy"), number 7976-79-70 KCO. The 1999 American Guarantee Policy only applies above underlying insurance in the amount of $100,000,000.

29. The 1999 Federal Policy, in turn, provides excess coverage for Allianz Insurance Company's policy ("1999 Allianz Policy"), number CGL 1027809, with a $1,500,000 per occurrence limit, $4,000,000 general aggregate limit, and a $500,000 each occurrence self insured retention ("SIR").

30. The 1999 Federal Policy provides (1) excess liability coverage under Coverage A consistent with the terms and conditions of the 1999 Allianz Policy and (2) umbrella coverage under Coverage B when Coverage A does not apply.

a. Excess Coverage Under Coverage A (Controlled by 1999 Allianz Policy)

31. The 1999 Allianz Policy and, therefore, Coverage A under the 1999 Federal Policy and the 1999 American Guarantee Policy provide coverage for "advertising injury" subject to the following relevant terms:

1. Insuring Agreement

    a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "advertising injury" to which this insurance applies. . . .

    b. This insurance applies to:

. . . .

(2) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

32. "Advertising injury" is defined, in relevant part, under the 1999 Allianz Policy and, therefore, under Coverage A under the 1999 Federal Policy and the 1999 American Guarantee Policy as:

> "Advertising injury" means injury arising out of one or more of the following offenses:
>
> . . . .
>
> c. Misappropriation of advertising ideas or style of doing business; or
> d. Infringement of copyright, title or slogan.

33. The 1999 Allianz Policy and, therefore, Coverage A under the 1999 Federal Policy and the 1999 American Guarantee Policy exclude coverage for advertising injury "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period."

b. Umbrella Coverage Under Coverage B (Controlled by 1999 Federal Policy)

34. The 1999 Federal Policy and, therefore, the 1999 American Guarantee Policy provide umbrella liability insurance under Coverage B for "advertising injury," when Coverage A controlled by the terms of the 1999 Allianz Policy does not apply, subject to the following relevant terms:

> COVERAGE B – UMBRELLA LIABILITY INSURANCE
>
> **Insuring Agreements**
>
> Under Coverage B, we will pay on behalf of the **insured**, damages the **insured** becomes legally obligated to pay by reason of liability imposed by law or assumed under an **insured contract** because of . . . **advertising injury** covered by this insurance which takes place during the Policy Period of this policy and is caused by an **occurrence**. We will pay such damages in excess of the Retained

> Limit Aggregate specified in Item 4 d. of the Declarations or the amount payable by **other insurance**, whichever is greater.

35. "Advertising injury" and "advertising" are defined, in relevant part, under Coverage B of the 1999 Federal Policy and, therefore, the 1999 American Guarantee Policy as:

> **Advertising injury** means injury, other than **bodily injury** or **personal injury**, arising solely out of one or more of the following offenses committed in the course of **advertising** your goods, products or services:
>
> . . . .
>
> 3. infringement of copyrighted titles, slogans or other **advertising** materials.
>
> **Advertising** means any paid: advertisement, publicity article, broadcast or telecast.

36. The umbrella coverage under Coverage B of the 1999 Federal Policy and, therefore, the 1999 American Guarantee Policy exclude coverage for advertising injury arising out of the "[o]ral or written publication of materials whose first publication took place before the beginning of the policy period."

2. 2000 American Guarantee Policy

37. The 2000 American Guarantee Policy provides excess coverage on a following form basis, subject to a $50,000,000 each occurrence limit, with respect to Federal's controlling underlying policy ("2000 Federal Policy"), number 7976-79-70 KCO. The 2000 American Guarantee Policy only applies above underlying insurance in the amount of $100,000,000.

38. The 2000 Federal Policy, like the 1999 Federal Policy, provides excess coverage for a policy issued by Allianz ("2000 Allianz Policy").

39. Upon information and belief, the 2000 Federal Policy and the 2000 Allianz Policy provide coverage identical in relevant part with the terms of the 1999 Federal Policy and the 1999 Allianz Policy, respectively.

3. 2002 American Guarantee Policy

40. The 2002 American Guarantee Policy provides excess coverage on a following form basis, subject to a $50,000,000 each occurrence limit, with respect to St. Paul Fire & Marine Insurance Company's controlling underlying policy ("2002 St. Paul Policy"), number QK06800083. The 2002 American Guarantee Policy only applies above underlying insurance in the amount of $100,000,000.

41. The 2002 St. Paul Policy provides excess coverage for ACE American Insurance Company policy ("2002 ACE Policy"), number XSLG20311332, with a personal and advertising injury limit of $1,500,000, general aggregate limit of $4,000,000, and retained limit of $500,000.

42. The 2002 St. Paul Policy provides (1) excess liability coverage on a following form basis under Coverage A with respect to the 2002 ACE Policy and (2) umbrella liability coverage under Coverage B when Coverage A does not apply.

a. Excess Coverage Under Coverage A (Controlled by 2002 ACE Policy)

43. The 2002 ACE Policy and, therefore, Coverage A of the 2002 St. Paul Policy and the 2002 American Guarantee Policy provide coverage for provides coverage for "advertising injury" subject to the following relevant terms:

1. Insuring Agreement

    a. We will pay the insured for the "ultimate net loss" in excess of the "retained limit" shown in the Declarations that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under DEFENSE, INVESTIGATION, SETTLEMENT, LEGAL EXPENSES AND INTEREST ON JUDGMENTS. . . .

    b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

44. "Personal and advertising injury" is defined, in relevant part, under the 2002 ACE Policy and, therefore, under Coverage A of the 2002 St. Paul Policy and the 2002 American Guarantee Policy as:

> "Personal and advertising injury" means injury, including consequential "bodily injury", (except mental anguish, mental injury, shock, or humiliation), arising out of one of more of the following offenses:
>
> . . . .
>
> f. The use of another's advertising idea in your "advertisement"; or
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

45. "Advertisement" is defined under the 2002 ACE Policy and, therefore, under Coverage A of the 2002 St. Paul Policy and the 2002 American Guarantee Policy as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purposes of attracting customers or supporters."

46. "Ultimate net loss" is defined under the 2002 ACE Policy and, therefore, under Coverage A of the 2002 St. Paul Policy and the 2002 American Guarantee Policy as:

> "Ultimate net loss" means the total amount which the insured is legally obligated to pay as damages due to an "occurrence" or offense arising out of covered claims or "suits" either by an adjudication or a settlement to which we agree in writing and includes interest that accrues after entry of the judgment and deductions for recoveries and salvages which have been or will be paid. "Ultimate net loss" does not include any of the expenses incurred by the insured or us in connection with defending the claim or "suit".

47. The 2002 ACE Policy and, therefore, Coverage A of the 2002 St. Paul Policy and the 2002 American Guarantee Policy exclude coverage for personal and advertising injury "[a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy period."

48. The 2002 ACE Policy and, therefore, Coverage A of the 2002 St. Paul Policy and the 2002 American Guarantee Policy also exclude coverage for personal and advertising injury

"[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'."

b. Umbrella Coverage Under Coverage B (Controlled by 2002 St. Paul Policy)

49. The 2002 St. Paul Policy and, therefore, the 2002 American Guarantee Policy provide umbrella liability insurance under Coverage B for "advertising injury" subject to the following relevant terms:

> **Advertising injury liability**. We will pay amounts any "protected person" is legally required to pay as damages for covered "advertising injury" that is caused by an "advertising injury offense" committed while this agreement is in effect.

50. "Advertising injury," "advertising injury offense," and "advertisement" are defined, in relevant part, under Coverage B of the 2002 St. Paul Policy and, therefore, the 2002 American Guarantee Policy as:

> "Advertising injury" means injury, other than "bodily injury" or "personal injury", that is caused by an "advertising injury offense".
>
> "Advertising injury offense" means any of the following offenses in your "advertisement":
>
> . . . .
>
> - Unauthorized use of any advertising idea, trade dress, or slogan of others.
> - Infringing upon any copyright of others.
>
> "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about "your products", "your work", or "your completed work" for the purpose of attracting customers or supporters.

51. The umbrella coverage under Coverage B of the 2002 St. Paul Policy and, therefore, the 2002 American Guarantee Policy exclude coverage for advertising injury "[a]rising out of written or spoken material which was first made known before this agreement went into effect."

52. The umbrella coverage under Coverage B of the 2002 St. Paul Policy and, therefore, the 2002 American Guarantee Policy also exclude coverage for advertising injury for "any 'offense' committed by or for the 'protected person' that the 'protected person' knew would violate the rights of another and cause . . . 'advertising injury.'"

4. 2003 American Guarantee Policy

53. The 2003 American Guarantee Policy provides excess coverage on a following form basis, subject to a $50,000,000 each occurrence limit, with respect to St. Paul's controlling underlying policy ("2003 St. Paul Policy"), number QK06800342. The 2003 American Guarantee Policy only applies above underlying insurance in the amount of $125,000,000.

54. The 2003 St. Paul Policy provides (1) excess liability coverage on a following form basis under Coverage A with respect to ACE policy ("2003 ACE Policy"), number XSLG20312427 and (2) umbrella liability coverage under Coverage B when Coverage A does not apply.

55. Upon information and belief, the 2003 St. Paul Policy and the 2003 ACE Policy have the same relevant terms as the 2002 St. Paul Policy and the 2002 ACE Policy, except for the addition of an intellectual property exclusion in the 2003 St. Paul Policy, applicable to Coverage A and Coverage B.

56. The intellectual property exclusion precludes coverage for "any actual or alleged infringement" of copyright, patent, trade dress, trade name, trade secret, trademark, or other intellectual property rights or laws.

5. 2004 American Guarantee Policy

57. The 2004 American Guarantee Policy provides excess coverage on a following form basis, subject to a $50,000,000 each occurrence limit, with respect to St. Paul's controlling

underlying policy ("2004 St. Paul Policy"), number QK06800622. The 2004 American Guarantee Policy only applies above underlying insurance in the amount of $125,000,000.

58. The 2004 St. Paul Policy provides (1) excess liability coverage on a following form basis under Coverage A with respect to the Discover Property & Casualty Insurance Company's policy ("2004 Discover Policy"), number D002Q00102 and (2) umbrella liability coverage under Coverage B when Coverage A does not apply.

a. Excess Coverage Under Coverage A
(Controlled by 2004 Discover Policy)

59. The 2004 Discover Policy and, therefore, Coverage A of the 2004 St. Paul Policy and the 2004 American Guarantee Policy provide coverage for "personal and advertising injury" subject to the following relevant terms:

1. Insuring Agreement

   a. We will pay "ultimate net loss" in excess of the "self-insured retention" because of "personal and advertising injury" to which this insurance applies.

   b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period.

60. "Advertisement" and "personal and advertising injury" are defined, in relevant part, under the 2004 Discover Policy and, therefore, under Coverage A of the 2004 St. Paul Policy and the 2004 American Guarantee Policy as:

> "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.
>
> "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one of more of the following offenses:
>
> . . . .

6. The use of another's advertising idea in your "advertisement"; or
7. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

61. The 2004 Discover Policy and, therefore, Coverage A of the 2004 St. Paul Policy and the 2004 American Guarantee Policy exclude coverage for personal and advertising injury "[a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy period."

62. The 2004 Discover Policy and, therefore, Coverage A of the 2004 St. Paul Policy and the 2004 American Guarantee Policy also exclude coverage for personal and advertising injury "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"

63. Coverage A under the 2004 Discover Policy is also subject to the intellectual property exclusion in the 2004 St. Paul Policy, which excludes coverage for "injury or damage that results from any actual or alleged infringements or violation of any" copyright, patent, trade name, trade secrets, trademarks, or other intellectual property rights or laws.

b. Umbrella Coverage Under Coverage B (Controlled by 2004 St. Paul Policy)

64. Upon information and belief, the 2004 St. Paul Policy and, therefore, the 2004 American Guarantee Policy provide umbrella liability insurance under Coverage B identical in relevant part with the 2003 St. Paul Policy except for modified language in the intellectual property exclusion.

65. The intellectual property exclusion in the 2004 St. Paul Policy and, therefore, the 2004 American Guarantee Policy precludes coverage for "injury or damage that results from any actual or alleged infringements or violation of any" copyright, patent, trade name, trade secrets, trademarks, or other intellectual property rights or laws.

6. 2005 American Guarantee Policy

66. The 2005 American Guarantee Policy provides excess coverage on a following form basis, subject to a $25,000,000 each occurrence limit, with respect to St. Paul's controlling underlying policy ("2005 St. Paul Policy"), number QK6800965. The 2005 American Guarantee Policy only applies above underlying insurance in the amount of $125,000,000.

67. The 2005 St. Paul Policy provide coverage for all sums in excess of the "Retained Limit" subject to the following relevant terms:

> A. We will pay on behalf of:
>
> 1. the **Insured** all sums in excess of the **Retained Limit** that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law
>
> . . . .
>
> because of:
>
> . . . .
>
> 2. . . . **Advertising Injury** that is caused by an **Occurrence** committed during the Policy Period;
>
> . . . .
>
> There is no coverage under this policy for . . . **Advertising Injury** unless a **Retained Limit** applies.
>
> B. Retained Limit means the greater of the following:
>
> 1. the total of the applicable limits of all **Scheduled Underlying Insurance**, and the applicable limits of any **Other Insurance**, for . . . **Advertising Injury** covered by **such Scheduled Underlying Insurance** or **Other Insurance**;
>
> 2. the total of the applicable limits of all **Scheduled Retained Limits** for . . . **Advertising Injury** covered by such **Scheduled Retained Limits**; or
>
> 3. if applicable, the amount stated in the Declaration as a **Self Insured Retention** because of any . . . **Advertising Injury** not covered by either any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, and caused by any one **Occurrence**.

68. "Advertising injury," "advertising idea," and "advertisement" are defined, in relevant part, under the 2005 St. Paul Policy and, therefore, the 2005 American Guarantee Policy as:

> **Advertising Injury** means injury, other than **Bodily Injury** or **Personal Injury**, arising out of your business and caused by one or more of the following offenses:
>
> . . . .
>
> 3. unauthorized use in your **Advertisement** of another's **Advertising Idea**; or
> 4. infringement in your **Advertisement** of another's copyright, trade dress, or **Slogan**.
>
> **Advertising idea** means a manner or style of **Advertisement** that others use and intend to attract attention in their **Advertisement**. However, information used to identify or record customers or supporters, such as a list of customers or supporters, shall not be considered to be an **Advertising Idea**.
>
> **Advertisement** means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.
>
> For purposes of this definition:
>
> 1. notices that are published include material placed on the Internet or similar electronic means of communication;
> 2. only that part of your website that is about your goods, products or services for the purpose of attracting customers or supporters is considered an **Advertisement**; and
> 3. the placing of advertising, borders or frames for you by others, or links for or to others, on or in your website is not considered an **Advertisement**.

69. The 2005 St. Paul Policy and, therefore, the 2005 American Guarantee Policy exclude coverage for advertising injury "arising out of any: 1. oral, written or electronic publication of material whose first publication; 2. unauthorized use in your **Advertisement** of another's **Advertising Idea** if that unauthorized use first; or 3. infringement in your **Advertisement** of another's copyright, trade dress or **Slogan** if that infringement first; took place before the beginning of the **Policy Period**."

70. The 2005 St. Paul Policy and, therefore, the 2005 American Guarantee Policy exclude coverage for advertising injury "caused by or committed at the direction of the **Insured**, or by an offense committed at the direction of the **Insured**, with knowledge that the rights of another would be violated and that . . . **Advertising Injury** would result."

71. The 2005 St. Paul Policy and, therefore, the 2005 American Guarantee Policy also exclude coverage for advertising injury "arising out of the actual or alleged infringement or violation of any" copyright, patent, trade name, trade secret, trademark, or other intellectual property rights or laws. This exclusion does not apply to advertising injury that results from "the unauthorized use in your **Advertisement** of another's **Advertising Idea**" or "infringement in your **Advertisement** of another's copyright, trade dress or trademarked **Slogan**."

7. 2006 American Guarantee Policy

72. The 2006 American Guarantee Policy provides excess coverage on a following form basis, subject to a $25,000,000 each occurrence limit, with respect to St. Paul's controlling underlying policy ("2006 St. Paul Policy"), number QK08000070. The 2006 American Guarantee Policy only applies above underlying insurance in the amount of $125,000,000.

73. Upon information and belief, the 2006 St. Paul Policy and, therefore, the 2006 American Guarantee Policy provides coverage identical in relevant part to the 2005 St. Paul Policy and the 2005 American Guarantee Policy, respectively.

III. CLAIMS FOR RELIEF

A. First Claim for Relief
(For a Declaration That the Jury's Verdict in Favor of adidas in the Underlying Lawsuit Is Not for Damages for "Advertising Injury" or "Personal and Advertising Injury" as those Terms are Defined under the American Guarantee Policies)

74. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

75. Each American Guarantee Policy includes, through the controlling underlying policies, a definition of "advertising injury" or "personal or advertising injury" as set forth above.

76. The jury's verdict in favor of adidas in the Underlying Lawsuit is not for damages for "advertising injury" or "personal and advertising injury" under any of the American Guarantee Excess Policies as defined in the relevant policy provisions.

B. Second Claim for Relief

(For a Declaration That the Jury's Verdict in Favor of adidas in the Underlying Lawsuit is Not for Damages Caused by Advertising, and thus is not for Advertising Injury or Personal and Advertising Injury)

77. American Guarantee incorporates and realleges paragraphs 1 through 73 as if set forth herein.

78. Each American Guarantee Policy includes, through the controlling underlying policies, the requirement that the damages must be caused by an "offense committed in the course of [Payless'] advertising," arising "solely" out of an offense "committed in the course of [Payless'] advertising," or an offense "in an advertisement," as set forth above.

79. None of the damages awarded by the jury are damages caused by advertising, Advertising Injury or Personal and Advertising Injury; thus the awarded damages do not have the necessary causal connection to be covered under the policies.

C. Third Claim for Relief

(For a Declaration That the Jury's Verdict in Favor of adidas in the Underlying Lawsuit is Excluded under the 2002, 2003, 2004, 2005, and 2006 American Guarantee Policies, in Whole or in Part, by the Knowing Violation Exclusion)

80. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

81. Coverage under all of the American Guarantee Policies beginning in 2002 is precluded for "advertising injury" or "personal and advertising injury" caused by or at the direction of Payless with the knowledge that the offense or act would violate the rights of another and inflict "advertising injury" or "personal and advertising injury," as set forth above.

82. The jury's verdict in favor of adidas in the Underlying Lawsuit was for infringing conduct that was done by or at the direction of Payless with knowledge that the conduct would violate the rights of adidas and inflict "advertising injury" or "personal and advertising injury."

83. The jury's specific findings in favor of adidas on its claims for dilution of both trademark and trade dress and on its claims for unfair and deceptive trade practices, as well as its finding that Payless acted willfully and its award of Payless' profits to adidas, and its award of punitive damages to adidas, all establish that the jury found Payless' conduct to be knowing and intentional within the meaning of these exclusions.

D. Fourth Claim for Relief
(For a Declaration That the Jury's Verdict in Favor of adidas in the Underlying Lawsuit Are Excluded From Coverage Under in the 2003, 2004, 2005, and 2006 American Guarantee Policies by the Intellectual Property Exclusion)

84. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

85. Coverage A and Coverage B of the 2003 and 2004 American Guarantee Policies and coverage under the 2005 and 2006 American Guarantee Policies is precluded for "advertising injury" or "personal and advertising injury" that results from any actual or alleged infringement of trade dress, trademark, or other intellectual property rights or laws.

86. The jury's findings and verdict in favor of adidas in the Underlying Lawsuit was for infringement of adidas's trade dress and trademark rights and are therefore excluded under the Policies.

E. Fifth Claim for Relief
(For a Declaration That the American Guarantee Policies Do Not Provide Coverage, in Whole or in Part, for the Jury's Verdict in Favor of adidas in the Underlying Lawsuit Under the Known-Loss Doctrine)

87. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

88. The jury's findings and verdict in favor of adidas in the Underlying Lawsuit arises out of and relates to infringing conduct by Payless that began, at the latest, in 1994 when adidas sued Payless for infringement and reached a settlement of that litigation, and Payless was producing two-stripe and four-stripe shoes.

89. The jury's verdicts in favor of adidas in the Underlying Lawsuit are not covered under the American Guarantee Policies under the known-loss doctrine.

F. Sixth Claim for Relief
(For a Declaration That the Award of Punitive Damages in the Underlying Lawsuit Is Uninsurable as Against Public Policy, and Does Not Constitute Damages Under the American Guarantee Policies)

90. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

91. The jury's verdict in favor of adidas included an award of punitive damages.

92. Punitive damages are not insurable under Kansas law as a matter of public policy.

93. Furthermore, punitive damages are not damages because of advertising injury, or personal and advertising injury.

94. Accordingly, the jury's award of punitive damages is uninsurable not covered under the Policies.

G. Seventh Claim for Relief
(For a Declaration That the Jury's Verdict Award of Actual Damages in favor of adidas was for Estimated Royalties and not for Damages Sustained as a Result of Payless' Advertising)

95. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

96. The evidence of actual damages submitted to the jury in the Underlying Lawsuit was evidence of estimated royalties, and not damages in any way calculated or based upon Payless' advertising. Therefore, the verdict does not represent damages caused by advertising and is not covered under the American Guarantee Policies.

H. Eighth Claim for Relief
(For a Declaration that the Jury's Award of Payless' Profits to adidas was not for Damages Sustained as a Result of Payless' Advertising or an Offense and are Uninsurable Due to Payless' Intentional Conduct under Kansas Law)

97. American Guarantee incorporates and realleges paragraphs 1 through 73 as if set forth fully herein.

98. The jury awarded adidas disgorgement of Payless' profits due to its willful actions.

99. Disgorged profits are not damages caused by advertising injury or personal and advertising injury.

I. Ninth Claim for Relief
(For a Declaration that Any Award of adidas' Attorney's Fees is not for Damages Sustained as a Result of Payless' Advertising)

100. American Guarantee incorporates and realleges paragraphs 1 through 73 as if set forth fully herein.

101. Upon information and belief, adidas seeks an award of its attorney's fees in the Underlying Lawsuit.

102. Attorney's fees are not damages caused by advertising injury or personal and advertising injury and are not covered under the American Guarantee Policies.

J. Tenth Claim for Relief
(For a Declaration That the American Guarantee Policies Are Not Triggered by the Verdict in the Underlying Lawsuit)

103. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

104. Upon information and belief, Payless asked that the jury make a separate determination as to 268 lots.

105. The jury's verdict in favor of adidas in the Underlying Lawsuit involved 267 infringing shoe lots sold by Payless over the course of several years. Those lots included shoes under nine, or possibly more, different designs. The verdict in favor of adidas in the Underlying Lawsuit also involved claims of both trademark and trade dress infringement, as well as claims for unfair and deceptive trade practices.

106. The American Guarantee Policies, and their underlying policies, only provide coverage for "advertising injury" or "personal and advertising injury" caused by an offense committed during the relevant policy period.

107. Even if the jury's verdict in favor of adidas in the Underlying Lawsuit fell within the insuring provisions for "advertising injury" or "personal and advertising injury" and was not excluded by any relevant policy provisions under the American Guarantee Policies or barred from coverage by the known-loss doctrine or public policy, the award of damages, when properly allocated among the policy periods, does not trigger any American Guarantee Policy.

K. Eleventh Claim for Relief
(For a Declaration That the Jury's Findings and Verdict in Favor of adidas in the Underlying Lawsuit Are Excluded From Coverage in the American Guarantee Policies, in Whole or in Part, Due to the Applicability of the First Publication Exclusion)

108. American Guarantee incorporates and realleges paragraphs 1 through 73 as if fully set forth herein.

109. Pleading hypothetically and in the alternative, if Payless' infringement of adidas trademark and trade dress, and its unfair and deceptive trade practices, are all determined to constitute a single offense or multiple offenses which could trigger American Guarantee's coverage, which American Guarantee denies, then that offense, or those offenses, began prior to April 1, 1999.

110. All the American Guarantee Policies exclude coverage for "advertising injury" or "personal and advertising injury" arising out of the publication of material whose first publication took place before the beginning of the respective policy period.

111. The jury's verdict in favor of adidas in the Underlying Lawsuit includes infringing conduct by Payless whose first publication, if there was any publication at all, took place before the beginning of the respective American Guarantee policy periods.

112. Even if, pleading in the alternative, the damages awarded to adidas were determined to be caused by an advertising injury with the necessary causal connection to Payless' advertising, those damages are excluded from coverage by the prior-publication exclusions.

WHEREFORE, American Guarantee prays the Court enter a judgment declaring that American Guarantee has no duty to indemnify Payless under the Policies for the Judgment entered against Payless in the Underlying Lawsuit, and that the Court award American Guarantee its costs incurred herein and such other and further relief as the Court deems just and proper.

DESIGNATED PLACE OF TRIAL

Plaintiff designates Kansas City, Kansas as the place of trial for this matter.

Dated this 24th day of July, 2008.

Respectfully submitted,

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