

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
EXTREME FITNESS, INC.**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**FACTUM OF
EXTREME FITNESS, INC.**

March 26, 2013

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Steven L. Graff (LSUC # 31871V)
Tel: 416.865.7726
Fax: 416.863.1515
Email: sgraff@airdberlis.com

Ian Aversa (LSUC # 55449N)
Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

James A. Desjardins (LSUC # 62493E)
Tel: 416.865.4641
Fax: 416.863.1515
Email: jdesjardins@airdberlis.com

Lawyers for Extreme Fitness, Inc.

SERVICE LIST

TO: **AIRD & BERLIS LLP**
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Steven L. Graff
Tel: 416-865-7726
Fax: 416-863-1515
Email: sgraff@airdberlis.com

Ian Aversa
Tel: 416-865-3082
Fax: 416-863-1515
Email: iaversa@airdberlis.com

James A. Desjardins
Tel: 416-865-4641
Fax: 416-863-1515
Email: jdesjardins@airdberlis.com

Lawyers for Extreme Fitness, Inc.

AND TO: **FTI CONSULTING CANADA INC.**
TD Waterhouse Tower
79 Wellington Street West
Toronto Dominion Centre, Suite 2010
Toronto, ON M5K 1G8

Steven Bissell
Tel: 416-649-8054
Fax: 416-649-8101
Email: steven.bissell@fticonsulting.com

Brogan Taylor
Tel: 416-649-8074
Fax: 416-649-8101
Email: brogan.taylor@fticonsulting.com

Monitor

AND TO: **GOODMANS LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Melaney J. Wagner
Tel: 416-597-4258
Fax: 416-979-1234
Email: mwagner@goodmans.ca

Caroline Descours
Tel: 416-597-6275
Fax: 416-979-1234
Email: cdescours@goodmans.ca

Lawyers for the Monitor

AND TO: **THORNTON GROUT FINNIGAN LLP**
100 Wellington Street West, Suite 3200
Toronto, ON M5K 1K7

Grant B. Moffat
Tel: 416-304-0599
Fax: 416-304-1313
Email: gmoffat@tgf.ca

Alana Shepherd
Tel: 416-304-0597
Fax: 416-304-1313
Email: ashepherd@tgf.ca

Lawyers for National Bank of Canada

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
Commerce Court West
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Steven J. Weisz
Tel: 416-863-2616
Fax: 416-863-2653
Email: steven.weisz@blakes.com

Ian Binnie
Tel: 416-863-3250
Fax: 416-863-2653
Email: ian.binnie@blakes.com

Marc Flynn

Tel: 416-863-2685
Fax: 416-863-2653
Email: marc.flynn@blakes.com

Lawyers for Golub Capital Incorporated

AND TO: **MILLER THOMSON LLP**

One London Place
255 Queens Avenue, Suite 2010
London, ON N6A 5R8

Alissa Mitchell

Tel: 519-931-3510
Fax: 519-858-8511
Email: amitchell@millertomson.com

Lawyers for GoodLife Fitness Centres Inc.

AND TO: **SISKINDS LLP**

680 Waterloo Street
London, ON N6A 3V8

Henry Berg

Tel: 519-660-7786
Fax: 519-660-7787
Email: henry.berg@siskinds.com

Lawyers for GoodLife Fitness Centres Inc.

AND TO: **ALVAREZ & MARSAL CANADA INC.**

Royal Bank Plaza South Tower
200 Bay Street, Suite 2900
Toronto, ON M5J 2J1

Alan J. Hutchens

Tel: 416-847-5159
Fax: 416-847-5201
Email: ahutchens@alvarezandmarsal.com

Greg A. Karpel

Tel: 416-847-5170
Fax: 416-847-5201
Email: gkarpel@alvarezandmarsal.com

AND TO: **BORDEN LADNER GERVAIS LLP**
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Roger Jaipargas
Tel: 416-367-6266
Fax: 416-361-7067
Email: rjaipargas@blg.com

Lawyers for 2079843 Ontario Inc., 2044922 Ontario Ltd. and 2125879 Ontario Inc.

AND TO: **BERKOW, COHEN LLP**
Barristers
141 Adelaide Street West, Suite 400
Toronto, ON M5H 3L5

Alexandra Lev-Farrell
Tel: 416-364-4900
Fax: 416-364-3865
Email: alev-farrell@berkowcohen.com

Lawyers for Bentall Kennedy (Canada) LP

AND TO: **BLANEY McMURTY LLP**
Barristers and Solicitors
1500 - 2 Queen Street East
Toronto, ON M5C 3G5

John C. Wolf
Tel: 416-593-2994
Fax: 416-596-2044
Email: jwolf@blaney.com

Bradley Phillips
Tel: 416-593-3940
Fax: 416-593-5437
Email: bphillips@blaney.com

Lawyers for First Capital (Cedarbrae) Corporation

AND TO: **DAOUST VUKOVICH LLP**
20 Queen Street West, Suite 3000
Toronto, ON M5H 3R3

Wolfgang Kaufmann
Tel: 416-597-3952
Fax: 416-597-8897
Email: wolfgang@dv-law.com

Lawyers for Adgar Investments and Development Ltd.

AND TO: **HARRISON PENZA LLP**
Barristers & Solicitors
450 Talbot Street
London, ON N6A 4K3

K. Daniel Reason
Tel: 519-679-9660
Fax: 519-667-3362
Email: dreason@harrisonpensa.com

*Lawyers for Heffner Auto Finance Corp., Heffner Auto Sales and Leasing Inc.
and Heffner Leasing Limited*

AND TO: **EXTREME FITNESS, INC.**
8281 Yonge Street
Thornhill, ON L3T 2C7

AND TO: **EXTREME FITNESS HOLDING CORP.**
c/o Falconhead Capital LLC
450 Park Avenue #3
New York, NY 10022

AND TO: **EXTREME FITNESS ULC**
c/o Golub Capital Incorporated
666 Fifth Avenue, 18th Floor
New York, NY 10103

AND TO: **ROYAL BANK OF CANADA**
180 Wellington Street West, 3rd Floor
Toronto, ON M5J 1J1

AND TO: **LIFE FITNESS INTERNATIONAL SALES, INC.**
5100 North River Road
Schiller Park, IL 60176

AND TO: **COINAMATIC COMMERCIAL LAUNDRY INC.**
301 Matheson Boulevard West
Mississauga, ON L5R 3G3

AND TO: **INDCOM LEASING INC.**
5061 Ure Street
Oldcastle, ON N0R 1L0

AND TO: **ESSEX CAPITAL LEASING CORP.**
3280 Devon Drive
Windsor, ON N8X 4L4

AND TO: **CLE LEASING ENTERPRISES LTD.**
3390 South Service Road, 2nd Level
Burlington, ON L7N 3J5

AND TO: **DSM LEASING LTD.**
1300 Bay Street, Suite 400
Toronto, ON M5R 3K8

AND TO: **ENERCARE SOLUTIONS LIMITED PARTNERSHIP**
2 East Beaver Creek Road, Building 2
Richmond Hill, ON L4B 2N3

-and-

4000 Victoria Park Avenue
North York, ON M2H 3B4

AND TO: **DELL FINANCIAL SERVICES CANADA LIMITED**
155 Gordon Baker Road, Suite 501
North York, ON M2H 3N5

AND TO: **BMW CANADA INC.**
50 Ultimate Drive
Richmond Hill, ON L4S 0C8

AND TO: **DE LAGE LANDEN FINANCIAL SERVICES CANADA INC.**
100-1235 North Service Road West
Oakville, ON L6M 2W2

AND TO: **XEROX FINANCIAL SERVICES CANADA LTD.**
c/o Xerox Canada Ltd.
33 Bloor Street East
Toronto, ON M4W 3H1

Stephanie Grace

Tel: (416) 413-2805

Fax: (416) 972-5530

Email: stephanie.grace@xerox.com

AND TO: **CIT FINANCIAL LTD.**
5035 South Service Road
Burlington, ON L7R 4C8

AND TO: **1079268 ONTARIO INC.**
4211 Yonge St., Suite 200
Toronto, ON M2P 2A9

AND TO: **MICHAEL S. SINGER**
Solicitor
23 Lesmill Road, Suite 300
Toronto, ON M3B 3P6

Lawyer for 1079268 Ontario Inc.

AND TO: **DEPARTMENT OF JUSTICE**
The Exchange Tower
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Diane Winters

Tel: (416) 973-3172
Fax: (416) 973-0810
Email: diane.winters@justice.gc.ca

Christopher Lee

Tel: (416) 954-8247
Fax: (416) 973-0810
Email: christopher.lee@justice.gc.ca

Lawyers for Canada Revenue Agency

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO AS REPRESENTED BY
THE MINISTER OF FINANCE**
(Income Tax, PST)
PO Box 620
33 King Street West, 6th Floor
Oshawa, ON L1H 8E9

Kevin J. O'Hara

Email: kevin.ohara@ontario.ca

COURTESY COPIES

Morry Offman

Email: morryoffman@msn.com

Steve DaCosta

Email: stevedacosta@rogers.blackberry.net

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**FACTUM OF
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PART I – OVERVIEW

1. Extreme Fitness, Inc. (the “**Applicant**”) seeks an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) for, among other things:

- (a) approving the Asset Purchase Agreement between the Applicant and GoodLife Fitness Centres Inc. (“**GoodLife**”) dated March 19, 2013 (the “**APA**”), and vesting the Applicant’s right, title and interest in and to the Purchased Assets (as defined in the APA) to GoodLife;
- (b) extending the Stay Period (as defined in the Initial Order of the Honourable Mr. Justice Campbell granted on February 7, 2013 in these proceedings (the “**Initial Order**”)) to and including May 10, 2013;
- (c) approving the Second Report (the “**Second Report**”) of FTI Consulting Canada Inc. (“**FTI**”), in its capacity as the Court-appointed monitor of the Applicant (in

such capacity, the “**Monitor**”) and approving the actions of the Monitor described therein;

- (d) approving the Supplemental Report to the Second Report of the Monitor dated March 26, 2013 (the “**Supplemental Report**”);
- (e) sealing the Confidential Supplement to the Second Report and Confidential Exhibit “B” to the Affidavit of Alan Hutchens sworn March 22, 2013 (the “**Hutchens Affidavit**”) until further order of this Court;
- (f) ordering the assignment of certain leases (collectively and as the same may have been amended, restated, supplemented or replaced from time to time, the “**Leases**”) to GoodLife pursuant to the APA; and
- (g) authorizing the Monitor to make interim distributions from the proceeds of the transaction contemplated in the APA (the “**Transaction**”) to:
 - (i) Golub Capital Incorporated, as agent (in such capacity, the “**DIP Agent**”) for the benefit of itself and three lenders (collectively, in such capacity, the “**DIP Lender**”), in the amounts advanced under the DIP Credit Agreement (as defined in the Initial Order), plus interest and costs;
 - (ii) the Applicant, in an amount agreed to by the Monitor as is required to satisfy:
 - (1) the Applicant’s post-filing obligations, including, without limitation, the liabilities intended to be protected by the

Administration Charge and the D&O Charge (as those terms are defined in the Initial Order); and

- (2) any monetary defaults under the Lease existing at the time of its assignment, other than monetary defaults arising by reason only of the Applicant's insolvency, the commencement of proceedings under the CCAA or the Applicant's failure to perform a non-monetary obligation;
- (iii) Golub Capital Incorporated, as agent (in such capacity, the "**Priority Agent**") for the benefit of itself and the lenders (collectively, in such capacity, the "**Priority Lenders**") under the Priority Credit Agreement (as defined in the affidavit of Alan Hutchens sworn February 7, 2013 (the "**February Affidavit**")); and
- (iv) National Bank of Canada, as agent (in such capacity, "**NBC**"), for the benefit of itself and the lenders (collectively, in such capacity, the "**NBC Lenders**") under the National Bank Credit Agreement (as defined in the February Affidavit) on account of the Applicant's outstanding indebtedness for principal, interest and costs.

PART II – FACTS

Introduction

2. The Applicant is a leading operator of fitness clubs in the greater Toronto area and surrounding region.

Affidavit of Alan Hutchens sworn March 22, 2013 (the “Hutchens Affidavit”), Motion Record of the Applicant (the “Motion Record”), Tab 3, pg. 3, para. 3

3. On February 7, 2013, the Applicant made an application under the CCAA seeking court protection from its creditors, which protection was granted pursuant to the Initial Order.

Hutchens Affidavit, Motion Record, Tab 3, pg. 3, para. 4

4. The February 7 Affidavit sets out the background of these CCAA proceedings, including the business of the Applicant and its financial difficulties, an overview of the Applicant’s major stakeholders and the proposed sale of substantially all of the Applicant’s assets, properties and undertakings to GoodLife.

Hutchens Affidavit, Motion Record, Tab 3, pg. 3, para. 5

5. On March 7, 2013, upon a motion by the Applicant, this Court granted an order, among other things: (i) extending the Stay Period to and including April 5, 2013; (ii) approving the key employee retention plan (the “KERP”) offered by the Applicant to certain employees deemed critical to complete the proposed transaction with GoodLife; and (iii) approving the First Report of the Monitor dated February 26, 2013 (the “First Report”), and the actions of the Monitor described therein.

Hutchens Affidavit, Motion Record, Tab 3, pg. 3, para. 6

6. Prior to the Initial Order, the Applicant entered into a Letter of Intent with GoodLife dated January 18, 2013 (the “LOI”) under which the Applicant agreed to sell, and GoodLife agreed to purchase, substantially all of the Applicant’s assets, properties and undertakings subject to, among other things, the execution of a binding asset purchase agreement (the “APA”) on or before March 18, 2013.

Hutchens Affidavit, Motion Record, Tab 3, pg. 3, para. 7

7. Pursuant to an Amending Agreement between the Applicant and GoodLife dated March 19, 2013, the LOI was amended to provide for the execution of the APA on or before March 19, 2013.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 8

8. Since the commencement of these proceedings, the Applicant and GoodLife have been working diligently towards satisfying the conditions set out in the LOI and negotiating the form of the APA.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 9

9. The sale transaction contemplated in the LOI must, according to its terms, close on or before March 31, 2013 or such other date as the parties thereto agree.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 10

10. The conditions set out in the LOI have been satisfied or waived by the Applicant and GoodLife, and the APA was executed by the Applicant and GoodLife, and acknowledged by the Monitor in respect of certain specified provisions of the APA, on March 19, 2013. Accordingly, the Applicant is seeking approval of the APA.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 11

Background of the Sales Process

11. On July 4, 2012, the Applicant engaged Integrity Square LLC (“ISQ”), a specialty financial advisory firm based in New York that focuses on the fitness and wellness sector, to

provide financial advisory services with respect to a sale of the Applicant or certain of its 13 fitness facilities.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 12

12. Commencing in mid-August, 2012, ISQ contacted 26 potential purchasers that either already had operations in the fitness facility sector or that ISQ believed would have interest in the Applicant. Of these 26 parties, 9 executed non-disclosure agreements and received the confidential information memorandum prepared by ISQ, which memorandum described the Applicant's business.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 13

13. Several parties subsequently accessed the confidential electronic data room established to assist with due diligence. October 10, 2012 was set as the date for potential purchasers to submit written non-binding indications of interest that were to include, among other things, information regarding purchase price, form of consideration, financing sources and due diligence requirements.

Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 14

14. The ISQ sales process generated:

- (a) two written offers to buy certain of the Applicant's fitness facilities;
- (b) one written offer to purchase all of the Applicant's fitness facilities, except the Delisle location;
- (c) one verbal offer to purchase the Applicant's suburban fitness facilities (6 of 13 clubs); and

- (d) a verbal expression of interest in respect to a partnership with the Applicant.

Hutchens Affidavit, Motion Record, Tab 3, pg. 5, para. 15

15. The Applicant and ISQ concluded that the potential realizations from the above-noted offers were insufficient and, accordingly, none of the offers were accepted. The offer submitted by GoodLife was the only offer that contemplated the purchase of substantially all of the Applicant's member and personal training contracts. As such, ISQ contacted GoodLife to inquire if its offer could be enhanced. Subsequent discussions and negotiations with GoodLife culminated in the parties entering the LOI.

Hutchens Affidavit, Motion Record, Tab 3, pg. 5, para. 16

16. Further details regarding the ISQ sale process are set out in the summary attached as Confidential Exhibit "B" to the Hutchens Affidavit.

Hutchens Affidavit, Motion Record, Tab 3, pg. 5, para. 17

17. The sale process conducted by ISQ was fair and reasonable in the circumstances and adequately canvassed the market for expressions of interest.

Hutchens Affidavit, Motion Record, Tab 3, pg. 5, para. 18

The APA

18. The transaction contemplated in the APA (the "**Transaction**") provides for the sale or assignment of substantially all of the Applicant's assets to GoodLife (except the Excluded Assets, as that term is defined in the APA), including, without limitation, contracts regarding the Applicant's Members and Persons subject to Personal Training Contracts (as those terms are

defined in the APA), personal property used in the Applicant's business and the assumption of substantially all of the equipment leases and real property leases.

Hutchens Affidavit, Motion Record, Tab 3, pg. 5 para. 19

19. As of March 22, 2013, the Applicant and GoodLife reached consensual assignment arrangements with the landlords of 8 of the Applicant's 13 fitness facilities, and efforts to achieve similar arrangements with the balance of the landlords are ongoing.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 20

20. The Transaction was negotiated at all times in good faith and with a view to the best interests of the Applicant and its stakeholders.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 21

21. The purchase price payable under the Transaction is fair and reasonable in the circumstances and represents the highest realization for the Applicant's stakeholders when compared against the offers generated in the sales process conducted by ISQ.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 22

22. The consummation of the Transaction will result in the preservation of approximately 70% of the jobs of the Applicant's employees, and will provide for continued supplier relationships and continued business activity at the locations subject to the Purchased Assets, including the Leases.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 23

23. The Monitor, Priority Lenders and the NBC Lenders support the APA and the Transaction.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 24

The Stay Period

24. Pursuant to paragraph 14 of the Initial Order, the Stay Period expires on April 5, 2013.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 25

25. The extension of the Stay Period to and including May 10, 2013 is necessary in order to provide stability to the Applicant's business while the Applicant, with the assistance of the Monitor, works diligently on completing the proposed transaction with GoodLife and the wind-up of the business affairs of the Applicant, which would maximize value for the benefit of the Applicant's stakeholders.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 26

26. The eight-week cash flow projection, reviewed with the Monitor and filed with this Court, projects that the Applicant will have sufficient funding to complete the Transaction and the wind-up of the business affairs of the Applicant. Subject to the Court granting the requested relief, after the closing of the Transaction, a portion of the net sale proceeds generated from the sale to GoodLife will be used to fund the remaining obligations that the Applicant has incurred since the date of the Initial Order, including employee wages and vacation pay.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 6-7, para. 27

27. Since the issuance of the Initial Order, the Applicant has acted, and continues to act, in good faith and with due diligence, and circumstances exist that make granting an extension of the Stay Period to and including May 10, 2013 appropriate.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 28

28. The Monitor supports the motion to extend the Stay Period and the Applicant is unaware of any creditor who opposes this relief being granted. No creditor of the Applicant is expected to suffer any material prejudice if the Stay Period is extended to and including May 10, 2013.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 29

Sealing the Confidential Supplement to the Second Report

29. The Confidential Supplement to the Second Report contains an unredacted copy of the APA. In order to protect the stakeholders of the Applicant and to minimize disruption during these CCAA proceedings, the Applicant is seeking an order sealing the Confidential Supplement to the Second Report until further order of this Court.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 30

Assignment of the Leases

30. The Leases relate to certain of the premises underlying the Applicant's fitness facility operations which are to be sold to GoodLife pursuant to the APA. The Leases form an essential component of GoodLife's ability to continue the operations acquired pursuant to the APA in the ordinary course.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 31

31. Pursuant to sections 2.07 and 4.01 of the APA, the Applicant is obligated to request the consents (collectively, the “**Consents**”) of all of the lessors under the leases which form part of the Purchased Assets (collectively, the “**Purchased Leases**”) which, by their terms, require the consent of the lessors to any assignment, prior to the Closing Date (as defined in the APA).

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 32

32. In respect of the Purchased Leases which, by their terms, require consent to assignment, the Applicant has used commercially reasonable efforts to obtain the Consents.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 33

33. As a result of those efforts, as of the date hereof, the Applicant has obtained Consents or made other arrangements satisfactory to GoodLife for the Purchased Leases in respect of the following locations wherein the Applicant operates fitness facilities, which, by their terms, require consent to assignment:

- (a) Cedarbrae;
- (b) Dundas;
- (c) Dunfield;
- (d) Interchange;
- (e) North York;
- (f) Pickering;
- (g) Richmond; and
- (h) Whitby,

all as defined in the February 7 Affidavit.

Hutchens Affidavit, Motion Record, Tab 3, pg. 8, para. 34

34. As at March 22, 2013, GoodLife was still negotiating with the landlords of each of the Bloor and Delisle locations (as defined in the February 7 Affidavit) with respect to the assignment of their respective leases with the Applicant. The result of such negotiations will be concluded and communicated to the Applicant by Monday, March 25, 2013, at which point the leases for those locations will either form part of the Purchased Leases or will be repudiated by the Applicant.

Hutchens Affidavit, Motion Record, Tab 3, pg. 8, para. 35

35. Despite its commercially reasonable efforts, as at March 22, 2013, the Applicant was unable to obtain Consents for the balance of the Purchased Leases, which constitute the Leases the Applicant is seeking this Court's approval to assign to GoodLife and which are delineated as follows:

- (a) in respect to the premises known municipally as 635 Danforth Avenue, Toronto, Ontario, the lease between the Applicant and 1079268 Ontario Inc. dated October 30, 2006, as amended by letter agreement dated October 12, 2007;
- (b) in respect to the premises known municipally as 111 Wellington Street West, Toronto, Ontario, the lease between the Applicant and 2125879 Ontario Inc. dated June 1, 2007, as amended by agreement dated June 1, 2007;
- (c) in respect to the premises known municipally as 8281 Yonge Street, Thornhill, Ontario ("**Thornhill**"), the lease between a predecessor corporation of the

Applicant and 550 Adelaide Properties Inc., a predecessor corporation of the current landlord, 2079843 Ontario Inc. as amended by agreements dated May 27, 1998, September 1, 1998 and June 2006; and

- (d) in respect to certain parking space in connection with the Thornhill location, the premises known municipally as 8275 Yonge Street, Thornhill, Ontario, the lease between the Applicant and 2044922 Ontario Ltd. dated June 2006, as amended by agreement dated September 15, 2006. 2044922 Ontario Ltd. and 2079843 Ontario Inc. are related entities.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 8-9, para. 36

36. The Applicant will continue to use commercially reasonable efforts to obtain Consents relating to the Leases until the return date of its motion.

Hutchens Affidavit, Motion Record, Tab 3, pg. 9, para. 37

37. The assignment of the Leases to GoodLife is important to the restructuring efforts of the Applicant and necessary to ensure maximum realization of value by the Applicant pursuant to the APA, which proceeds will be distributed to the Applicant's stakeholders in accordance with their entitlement thereto.

Hutchens Affidavit, Motion Record, Tab 3, pg. 9, para. 38

38. The Monitor supports the APA and of the Applicant consummating the Transaction and approves of the assignment of the Leases to GoodLife.

Hutchens Affidavit, Motion Record, Tab 3, pg. 9, para. 39

39. GoodLife has satisfied the Monitor as to its readiness and ability to perform the obligations under the Leases upon approval by this Court of their assignment, as is more fully described in the Second Report.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 40

40. GoodLife was founded in 1979 and is the largest fitness company in Canada with approximately 300 clubs and 750,000 members across Canada. GoodLife has already satisfied the financing conditions set forth in the APA, including providing a deposit in the amount of \$1,500,000, which is indicative of its financial wherewithal to consummate the Transaction and its ability to perform the obligations under the Leases upon approval by this Court of their assignment.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 41

41. GoodLife intends to carry out substantially the same business and use of the premises subject to the Leases in the same manner in which they were previously used.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 42

42. In order for the Applicant to ensure maximum realization of value under the APA, it is necessary that the Applicant obtain the relief sought herein to assign the Leases.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 43

43. The interests of the lessors under the Leases are not anticipated to be materially prejudiced.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 44

44. Provided the interim distribution to the Applicant is approved by this Court, the Applicant will be in good standing under the Leases and there will be no monetary defaults thereunder.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 45

45. The material terms of the Leases should not affect the outcome of the Applicant's motion.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 46

46. This Court's ordering the assignment of the Leases to GoodLife is essential to achieve the maximum realization of value by the Applicant pursuant to the APA, and the Transaction and is appropriate in the circumstances.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, para. 47

Interim Distributions

47. The Applicant is seeking interim distributions of the proceeds of the Transaction to each of the DIP Agent on behalf of the DIP Lenders, the Applicant, the Priority Agent on behalf of the Priority Lenders and NBC on behalf of the NBC Lenders, all of which is conditional on the Monitor's approval of same.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 48

48. As of March 22, 2013, USD\$1,000,000 has been advanced under the DIP Credit Agreement and a further USD\$300,000 is to be advanced today. The aggregate amount of

USD\$1,300,000, plus interest and costs, will be repaid in full to the DIP Lender from the proceeds of the Transaction.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 49

49. The contemplated interim distributions to the Applicant from the proceeds of the Transaction will be used to satisfy certain of the Applicant's post-filing obligations, including, without limitation, the liabilities intended to be protected by the Administration Charge and the D&O Charge, and any monetary defaults under the Leases at the time of their assignment, other than monetary defaults arising by reason only of the Applicant's insolvency, the commencement of proceedings under the CCAA or the Applicant's failure to perform a non-monetary obligation.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 50

50. The contemplated interim distributions to the Priority Agent and to NBC are on account of the Applicant's outstanding indebtedness to the Priority Lenders and the NBC Lenders for principal, interest and costs, as described in the February 7 Affidavit and as are more fully described in the supplementary report of the Monitor, which distributions are subject to the Monitor maintaining an adequate reserve for, among other things, any amounts secured by the Administration Charge and the D&O Charge.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 51

51. The interim distributions sought by the Applicant are fair and reasonable in the circumstances.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 52

52. As set out in the Supplemental Report, the security held by each of the Priority Lenders and the NBC Lenders is valid and enforceable, and the Monitor supports the interim distributions sought by the Applicant.

Supplemental Report of the Monitor dated March 26, 2013 (the "Supplemental Report"), paras. 14-22

PART III – ISSUES

53. The primary issues to be determined on this motion are whether this Court should:
- (a) approve the APA;
 - (b) extend the Stay Period;
 - (c) seal the Confidential Supplement to the Second Report and Confidential Exhibit "B" to the Hutchens Affidavit until further order of this Court;
 - (d) ordering the assignment of the Leases to GoodLife; and
 - (e) approve the interim distributions to the DIP Agent on behalf of the DIP Lenders, the Applicant, the Priority Agent on behalf of the Priority Lenders and NBC on behalf of the NBC Lenders.

PART IV – LAW AND ARGUMENT

A. *THE APPROVAL AND VESTING ORDER SHOULD BE GRANTED*

Disposition of Assets by the Applicant in CCAA Proceedings

54. Courts have long recognized that the remedial nature of the CCAA confers on them broad powers to carry out the purpose of the CCAA, which is to facilitate the restructuring of insolvent companies.

Nortel Networks Corp. (Re) (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]) [*“Nortel 2009”*], Applicant’s Book of Authorities, Tab 1 at para. 30
 CCAA, s. 11

55. In *Nortel Networks Corp. (Re)*, Justice Morawetz reviewed the jurisdiction of the Court to approve a sales process in the absence of a plan under the CCAA. In finding that CCAA Courts have such jurisdiction, Justice Morawetz focused on the continuation of the business as a going concern, holding that:

... the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose... it should not matter whether the business continues as a going concern under the debtor’s stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met. [emphasis added]

Nortel 2009, Applicant’s Book of Authorities, Tab 1 at paras. 34, 40 and 47

56. Justice Morawetz also noted that courts have repeatedly exercised such discretion in asset sales, including in *Consumers Packaging Inc. (Re)*, where the Ontario Court of Appeal held that:

[the approval of an asset sale] is consistent with previous decisions in Ontario and elsewhere that have emphasized the board remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

Consumers Packaging Inc. (Re) (2001), 27 C.B.R. (4th) 197 (Ont. C.A.),
Applicant's Book of Authorities, Tab 2 at para. 9

57. The Courts' power to approve a sale of assets prior to the formulation of a plan of compromise or arrangement was codified in section 36 of the CCAA, which sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA, s. 36(3)

58. Section 36 of the CCAA was considered in *Canwest Publishing Inc. (Re)* where Justice Pepall approved the proposed sale and held, among other things, that:

- (a) the monitor's support of the transaction spoke to the reasonableness of the process;
- (b) the creditors were sufficiently consulted as they had input or were otherwise involved at various stages in the process; and
- (c) the sale would result in a going concern outcome and earn significant recovery for secured and unsecured creditors and, therefore, the sale had a positive effect.

Canwest Publishing Inc. (Re) (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List]) ["*Canwest Publishing*"], Applicant's Book of Authorities, Tab 3 at para. 13

59. In making her decision in *Canwest Publishing*, Justice Pepall also noted that the criteria set out in subsection 36(3) of the CCAA "largely overlap" with the criteria established in *Royal Bank v. Soundair Corp.*, which was used by Courts to review the reasonableness of proposed sales in CCAA proceedings prior to the enactment of section 36 and which provides that the Courts should consider:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

Canwest Publishing, Applicant's Book of Authorities, Tab 3 at para. 13

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.), Applicant's Book of Authorities, Tab 4 at para. 16

60. In *White Birch Paper Holding Company (Re)*, Justice Mongeon approved an asset sale pursuant to section 36 of the CCAA, holding that, while recovery for unsecured creditors would be low, it was not in the best interest of any of the stakeholders for him to refuse to make the order sought.

White Birch Paper Holding Company (Re), 2010 QCCS 4915, Applicant's Book of Authorities, Tab 5 at paras. 48, 49, 51-52 and 57

The Applicant Satisfies the Criteria for Approval of the APA

61. The APA meets the criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

- (a) the Monitor and the Applicant believe the sale process conducted by ISQ was fair and reasonable in the circumstances and adequately canvassed the market for expressions of interest;
- (b) the APA and the Transaction was negotiated at all times in good faith and with a view to the best interests of the Applicant and its stakeholders;
- (c) the Transaction is in the best interests of the Applicant's stakeholders;
- (d) the Applicant's senior secured creditors, the Priority Lenders and the NBC Lenders, support the APA and the Transaction;
- (e) all creditors of the Applicant with registered personal property security interests against it have been served with notice of the Applicant's motion to approve the APA;
- (f) none of the Applicant's stakeholders oppose the APA;

- (g) the Monitor supports the Transaction contemplated in the APA;
- (h) the consideration payable under the APA is fair and reasonable in the circumstances and represents the highest and most immediate realization for the Applicant's stakeholders when compared to the offers generated through the ISQ Sales Process; and
- (i) the consummation of the Transaction will result in the preservation of approximately 70% of the jobs of the Applicant's employees, and will provide for continued supplier relationships and continued business activity at the locations subject to the Purchased Assets.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 5-6, paras. 18, 21, 22, 23, 24

Second Report, paras. 29, 51, 50, 52, 53, 58

62. The APA preserves the Applicant's business as a going concern.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, paras. 23

Second Report, para. 50

63. The Applicant negotiated the APA in consultation with the Monitor. The Monitor is supportive of the transactions contemplated by the APA and has provided the Court with a report in that regard.

Second Report, para. 58

64. Accordingly, the Applicant respectfully submits that the criteria set out in subsection 36(3) of the CCAA are satisfied.

Other Requirements of Section 36 of the CCAA

65. In addition to the factors set out in subsection 36(3), subsection 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

CCAA, s. 36(7)

Section 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a)

66. Justice Pepall considered subsection 36(7) of the CCAA in *Canwest Global Communications Corp. (Re)* where (although she held that section 36 was not applicable to the facts of that case) she was satisfied by confirmation from counsel for the debtors of compliance with section 36(7), and asked the monitor to report to the Court on the status of those payments should a compromise or arrangement be made in the future.

***Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List]) [*“Canwest Global”*], Applicant’s Book of Authorities, Tab 6 at para. 42**

67. The Applicant has been paying wages, salaries, commissions or compensation to its employees as contemplated by paragraph 6(5)(a) of the CCAA in the ordinary course. Provided this Court approves the interim distributions to the Applicant provided in the Ancillary Order, the Applicant will satisfy any payments that would have been required under paragraphs 6(5)(a).

CCAA, s. 6(5)(a)

BIA, s. 136(1)(d), s. 81.3 and s. 81.4

Hutchens Affidavit, Motion Record, Tab 3, pgs. 6, 11, paras. 27, 50

Second Report, para. 57

68. Paragraph 6(6)(a) of the CCAA is not applicable in this case as the Applicant does not sponsor any pension plans.

CCAA, s. 6(6)(a)

Affidavit of Alan Hutchens sworn February 7, 2013, Application Record dated February 7, 2013, Tab 4, pg. 14, para. 51

69. The additional factors and restrictions under subsection 36(4) and (5) of the CCAA are not applicable in this case as the Applicant and GoodLife are not related persons within the meaning of the CCAA.

Second Report, para. 56

B. THE STAY PERIOD SHOULD BE EXTENDED

70. The Applicant is seeking the extension of the Stay Period to and including May 10, 2013.

71. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company where: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCAA, s. 11.02

72. Pursuant to paragraph 14 of the Initial Order, the Stay Period expires on April 5, 2013. The extension of the Stay Period to and including May 10, 2013, is necessary in order to provide stability to the Applicant's business while the Applicant, with the assistance of the Monitor, works diligently on completing the Transaction with GoodLife and the wind-up of the business affairs of the Applicant, which would maximize value for the benefit of the Applicant's stakeholders.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, paras. 25, 26

73. In *Canwest Global Communications Corp. (Re)*, Justice Pepall granted an extension of the stay of proceedings for a group of debtors that were continuing to work with their stakeholders. Her Honour found that the extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the continuation of their businesses as a going concern. The factors which supported Her Honour's decision were: (a) the cashflow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period; (b) the monitor supported the extension; (c) there was a lack of opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

Canwest Global, Applicant's Book of Authorities, Tab 6 at para. 43

74. The cash flow projection attached as Exhibit "D" to the Hutchens Affidavit projects that, subject to the completion of the Transaction and the Court granting the requested relief, the Applicant will have sufficient funding to complete the Transaction and the wind-up of the business affairs of the Applicant during the requested Stay Period. Subject to the Court granting the requested relief, after the closing of the Transaction, a portion of the net sale proceeds generated from the sale to GoodLife will be used to fund the remaining obligations that the Applicant has incurred since the date of the Initial Order, including employee wages and vacation pay.

Hutchens Affidavit, Motion Record, Tab 3, pg. 6, para. 27

75. The Monitor supports the motion to extend the Stay Period and the Applicant is unaware of any creditor who opposes this relief being granted. The Applicant does not believe that any

creditor will suffer any material prejudice if the Stay Period is extended to and including May 10, 2013.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 29

Second Report, para. 46

76. Since the issuance of the Initial Order, the Applicant has acted, and continues to act, in good faith and has been working with due diligence.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 28

77. Accordingly, the Applicant respectfully requests that this Court grant an extension of the Stay Period to and including May 10, 2013.

C. *THE CONFIDENTIAL SUPPLEMENT TO THE SECOND REPORT AND CONFIDENTIAL EXHIBIT "B" TO THE HUTCHENS AFFIDAVIT SHOULD BE SEALED*

78. The Applicant is seeking an order sealing the Confidential Supplement to the Second Report and Confidential Exhibit "B" to the Hutchens Affidavit, which contain a copy of the unredacted APA and the ISQ Sales Process Summary, respectively.

79. Subsection 137(2) of the *Courts of Justice Act* provides this Court with the statutory jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, R.S.O. 1990, c. C-34, as amended, s. 137(2)

80. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, Applicant's Book of Authorities, Tab 7 at para. 53,

81. The Confidential Supplement to the Second Report contains an unredacted copy of the APA, the disclosure of which would cause harm to the Applicant and its stakeholders, which is an important commercial interest that should be protected.

Hutchens Affidavit, Motion Record, Tab 3, pg. 7, para. 30

82. Confidential Exhibit "B" to the Hutchens Affidavit contains an unredacted copy of the ISQ Sales Process summary, the disclosure of which will similarly cause harm to the Applicant and its stakeholders, which is an important commercial interest that should be protected.

Hutchens Affidavit, Motion Record, Tab 3, pg. 5, para. 17

83. Accordingly, the Applicant respectfully requests that this Court grant an Order sealing the Confidential Supplement to the Second Report and Confidential Exhibit "B" to the Hutchens Affidavit.

D. THE ASSIGNMENT OF THE LEASES SHOULD BE APPROVED

The Statutory Test for Contract Assignment: Section 11.3 of the CCAA

84. Section 11.3(1) was incorporated into the CCAA as part of the September 2009 amendments and provides that this Court may order the assignment of all of a debtor company's rights and obligations under a contract.¹

CCAA, s. 11.3

85. Section 11.3(3) of the CCAA provides that the factors a Court is to consider in determining whether to order the assignment of the rights and obligations under a contract are, among other things:

- (a) whether the Monitor approved of the proposed assignment;
- (b) whether the proposed assignee would be able to perform the obligations under the contract; and
- (c) whether it would be appropriate to assign the rights and obligations under the contract to the proposed assignee.

CCAA, s. 11.3(3)

86. In addition, section 11.3(4) of the CCAA provides that a Court may not order an assignment unless it is satisfied that all monetary defaults in relation to the agreement with the exception of those arising by reason of the company's insolvency, the commencement of the

¹ Section 11.3(2) of the CCAA provides that Section 11.3(1) of the CCAA does not apply to certain types of contracts. The Leases do not fall under these exceptions.

CCAA proceedings or the company's failure to perform a non-monetary obligation will be remedied on or before a day fixed by the Court.

CCAA, s. 11.3(3)

87. Finally, a copy of the order is to be sent to every party to the assigned agreement.

CCAA, s. 11.3(3)

88. Although section 11.3 of the CCAA does not require the Applicant to seek consent to assignment prior to bringing an assignment motion, nor to accept whatever consent is proposed by a counterparty, the Applicant, in conjunction with GoodLife, has attempted to obtain Consents from the landlords of the Leases through commercially reasonable means and will continue to do so up to the return date of this motion.

CCAA, s. 11.3(3)

Hutchens Affidavit, Motion Record, Tab 3, pg. 5, para. 17

89. Although there are no reported decisions providing a comprehensive analysis and application of section 11.3 by this Court, it has granted Orders assigning contracts, leases and agreements pursuant to section 11.3 of the CCAA.

Planet Organic Health Corp., Re, Approval and Vesting Order of the Honourable Mr. Justice Morawetz dated June 4, 2010, Court File No. 10-8699-00CL, Applicant's Book of Authorities, Tab 8 at para. 6

90. Similarly, in *White Birch Paper Holding Co., Re.*, the Quebec Court approved the assignment of certain contracts and leases pursuant to section 11.3 of the CCAA, but did not engage in a detailed analysis of the factors to be considered.

White Birch Paper Holding Company (Re), (2010) 72 C.B.R. (5th) 63 (Que. S. Ct.)
Applicant's Book of Authorities, Tab 9 at para. 16

White Birch Paper Holding Co., Re., Approval and Vesting Order of Honourable
Mr. Justice Mongeon dated September 28, 2010, Court File No. 500-11-038474-108,
Applicant's Book of Authorities, Tab 10 at paras. 16-18

91. In light of the lack of post-amendment jurisprudence on the application of section 11.3(3), the Applicant submits that the proper application of the 11.3(3) factors will involve a similar but more streamlined analysis to that undertaken by the Courts in the pre-amendment jurisprudence where Courts determined whether or not to exercise their inherent jurisdiction to grant an assignment. In particular, the Applicant submits that this pre-amendment jurisprudence is instructive with respect to addressing the "appropriate" factor in paragraph 11.3(3)(c) of the CCAA.

CCAA, s. 11.3(3)(c)

92. Prior to the enactment of the 2009 CCAA amendments, a Court could, in the exercise of its inherent discretion under Section 11 of the CCAA, authorize the assignment of an agreement, including where the agreement contained an anti-assignment clause and where consent of the counterparty to the agreement was required but not obtained.

Playdium Entertainment Corp., Re., (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.)
["*Playdium*"], Applicant's Book of Authorities, Tab 11

Nexient Learning Inc., Re., (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.) ["*Nexient*"],
Applicant's Book of Authorities, Tab 12

Re Hayes Forest Service Ltd. (2009), 57 C.B.R. (5th) 52 (BCSC) ["*Hayes*"],
Applicant's Book of Authorities, Tab 13 at para. 31

93. In *Playdium*, the Court considered several factors in determining whether to exercise its inherent jurisdiction to approve an assignment, including: (1) whether the debtor made a sufficient effort to obtain the best price for the agreement and did not act improvidently; (2) the

competing interests of the counterparty and the debtor company's other stakeholders; (3) the efficacy and integrity of the process by which the offers were obtained; and (4) whether there has been any unfairness in the working out of the process. The Court in *Playdium* went on to hold that the assignment must be essential to the restructuring transaction.

***Playdium*, Applicant's Book of Authorities, Tab 11 at paras. 26-28**

94. In *Nexient*, decided several years after *Playdium* and soon before the enactment of Section 11.3 of the CCAA, the Court held that the test for determining whether the Court should exercise its discretion to assign an agreement was whether the assignment was "important to the reorganization process". This test superseded the higher threshold previously suggested in *Playdium*.

***Nexient*, citing *Woodwards Ltd., Re.*, [1993] B.C.J. No. 42 (S.C.), Applicant's Book of Authorities, Tab 12 at para. 56**

***Playdium*, Applicant's Book of Authorities, Tab 11**

95. The Applicant submits that the "appropriate" factor under to be considered under paragraph 11.3(c) of the CCAA is substantially similar to the "important to the reorganization process" test in *Nexient*, but rationalized by virtue of the statutory regime created by section 11.3 of the CCAA (i.e., only certain types of agreements can be assigned, all monetary defaults must be cured, and the assignee must show it would be able to perform) such that a full application of the *Playdium* factors is not required.

The Proposed Assignment of the Leases to GoodLife Satisfies Subsection 11.3(3) of the CCAA

96. The proposed assignments of the Leases fulfill all of the requirements established by the CCAA:

- (a) the Monitor approves the proposed assignment of the Leases to GoodLife;

- (b) GoodLife has demonstrated that it possesses the financial wherewithal, the relevant business experience and the intention to perform all obligations under the Leases;
- (c) GoodLife intends to carry out substantially the same business and use of the premises subject to the Leases as that which is carried on by the Applicant;
- (d) the assignment of the Leases is important to the restructuring process, consistent with the purposes and spirit of the CCAA and, therefore, “appropriate” under paragraph 11.3(3)(c) of the CCAA;
- (e) approval of the assignment of the Leases to GoodLife is essential to achieve the maximum realization of value by the Applicant pursuant to the APA and the Transaction and is appropriate in the circumstances;
- (f) subject to the Court’s approval of the requested distributions from the proceeds of the Transaction, the Applicant will have the funds necessary to pay any outstanding amounts under the Leases, will be in good standing under the Leases and there will be no monetary defaults.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 9-10, paras. 39-42, 47

Second Report, paras. 39, 59

97. The Applicant and GoodLife have been, and continue to be, in discussions with the counterparties to the Leases in an effort to obtain Consents. Additionally, copies of the Ancillary Order sought by the Applicant have been sent to all of the counterparties to the Leases.

Accordingly, the counterparties to the Leases are and have been fully apprised of the intentions of the Applicant.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 8-9, paras. 36-37

98. The APA and the Transaction with GoodLife contemplated therein is the result of a fair and reasonable sales process that adequately canvassed the market and represents the highest realization for the Applicant's stakeholders in the circumstances. The Transaction will result in the sale of substantially all of the Applicant's assets, the continued operation of the business as a going concern, the preservation of approximately 70% of the jobs of the Applicant's employees, continued supplier relationships and continued business activity at the locations subject to the Purchased Assets, including the Leases, all of which accord with the fundamental purposes of the CCAA.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 5-6, paras. 19, 21-23

Second Report, paras. 49-51, 58-59

99. The assignment of the Leases to GoodLife is essential to achieve the maximum realization of value by the Applicant pursuant to the APA and the Transaction, is appropriate in the circumstances, and is supported by the Applicant's senior secured creditors and the Monitor.

Hutchens Affidavit, Motion Record, Tab 3, pgs. 9-10, paras. 38-39, 47

Second Report, para. 58

100. Although it is not part of the statutory test under section 11.3, there is no prejudice to the counterparties who have not provided their consent to the proposed assignments of the Leases as the proposed assignee, GoodLife, has the financial wherewithal, business experience and desire necessary to fulfill the obligations under the Leases, and will be operating substantively the same

businesses in substantially the same manner in the same locations as that which has been operated by the Applicant.

Hutchens Affidavit, Motion Record, Tab 3, pg. 10, paras. 40-42, 44

Second Report, para. 39

101. The determination of the reasonableness of withholding consent to assignment is a question of whether a reasonable person would have withheld consent in the circumstances, taking account of the commercial realities of the marketplace, the economic impact of the assignment and the financial position of the proposed assignee. In *Hayes*, the Court held that it could approve the assignment of an agreement in the context of the CCAA even where the Court determines that consent to the agreement's assignment was reasonably withheld. On balance, the Court held that the advantage to creditors of the debtor company far outweighed any disadvantage to the creditor, despite the consent of the creditor to assign the agreement being reasonably withheld.

***Hayes*, Applicant's Book of Authorities, Tab 13 at paras. 31, 51**

Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. Toronto: Carswell, 2009 (loose-leaf updated 2013), Applicant's Book of Authorities, Tab 14 at 11-162

102. Absent this Court's ordering the assignment of the Leases to GoodLife, the Applicant may ultimately be left with the locations under the Leases, but with no local management infrastructure to oversee their operation, no members, no financial ability to fulfill its ongoing obligations under the Leases, and no reasonable prospect of realizing on any assignment of the Leases. The continued operation of the Applicant's business and continued employment of most of the Applicant's employees at the locations of the Leases is not feasible unless the Leases are

assigned. The assignment of the Leases is therefore in the best interests of the Applicant's stakeholders and consistent with the purposes and spirit of the CCAA.

E. THE INTERIM DISTRIBUTIONS SHOULD BE APPROVED

103. The Applicant is seeking interim distributions to the DIP Agent on behalf of the DIP Lender, to the Priority Agent on behalf of the Priority Lenders, to NBC on behalf of the NBC Lenders and to itself to satisfy its post-filing obligations, including, without limitation, the liabilities intended to be protected by the Administration Charge and the D&O Charge and any monetary defaults under the Leases at the time of their proposed assignment, other than monetary defaults arising by reason only of the Applicant's insolvency, the commencement of proceedings under the CCAA or the Applicant's failure to perform a non-monetary obligation.

The Court's Jurisdiction

104. Section 11 of the CCAA provides that a Court may, "subject to the restrictions set out in [the CCAA] ... make any order it considers appropriate in the circumstances." The court has inherent jurisdiction to fill in the gaps of the CCAA to give effect to its objects.

Nortel 2009, Applicant's Book of Authorities, Tab 1 at para. 30

CCAA, s. 11

105. Orders granting interim distributions are routinely granted by Canadian courts. In *Re AbitibiBowater Inc.*, the Honourable Mr. Justice Gascon approved an interim distribution, noting that nothing in the CCAA prevents such relief and that "it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization."

Re AbitibiBowater Inc., 2009 QCCS 6461 [*“Abitibi”*], Applicant’s Book of Authorities, Tab 15 at paras. 70-75

Re Windsor Machine & Stamping Ltd. (2009), 55 C.B.R. (5th) 241 (Ont. S.C. [Comm. List.]), Applicant’s Book of Authorities, Tab 16

Re PCAS Patient Care Automation Services Inc., 2012 ONSC 3367, Applicant’s Book of Authorities, Tab 17

Re Northstar Aerospace, Inc., 2012 ONSC 4423, Applicant’s Book of Authorities, Tab 18

Cinram International Inc., et al. (Re), Administrative Reserve / Distribution / Transition Order of Honourable Mr. Justice Morawetz dated October 19, 2012, Court File No. CV12-9767-00CL, Applicant’s Book of Authorities, Tab 19

The Interim Distributions Should be Approved

106. In coming to his decision in *Abitibi*, Justice Gascon considered a number of factors, including:

- (a) the payee’s security was valid and enforceable;
- (b) the amounts owed to the payee exceeded the distribution; and
- (c) the distribution would result in significant interest savings.

Abitibi, Applicant’s Book of Authorities, Tab 15 at para. 75

107. All of these factors are satisfied in the case at bar:

- (a) Pursuant to the Initial Order, the DIP Lender is entitled to the benefit of the Court-ordered DIP Charge on the assets, undertakings and properties of the Applicant, which DIP Charge ranks in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise in

favour of any person and is subordinate in priority to the Administration Charge and D&O Charge.

- (b) The Monitor's counsel has reviewed the security held by each of NBC, the Priority Agent, and Golub as agent under the Golub Credit Agreement in respect of the Applicant's assets and has found the personal property security granted in favour of NBC, the Priority Agent, and Golub as agent under the Golub Credit Agreement to be valid and enforceable. The opportunity to assert a higher-ranking claim has been communicated to all creditors who have registered a personal property security interest against the Applicant.
- (c) The aggregate amount owed to the DIP Lender, the NBC Lenders and to the Priority Lenders is greater than the distributions sought by the Applicant, which are subject to the Monitor maintaining an adequate reserve for, among other things, any amounts secured by the Administration Charge and the D&O Charge and other post-filing obligations.
- (d) The Applicant is accruing interest at a rate of approximately \$5,180 per day in respect of its indebtedness to the Priority Lenders and the NBC Lenders. The proposed interim distributions will cause such accrual to dramatically reduce.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 51-52

Second Report, paras. 54-55

Supplemental Report, paras. 13-22

108. The quantum of the interim distributions sought by the Applicant are all conditional on approval by the Monitor.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 48

109. The interim distributions sought by the Applicant are fair and reasonable in the circumstances and are supported by the Monitor.

Hutchens Affidavit, Motion Record, Tab 3, pg. 11, para. 53

Supplemental Report, paras. 21-22

PART V – RELIEF REQUESTED

110. The Applicant respectfully requests that this Court grant Orders substantially in the form of the draft Orders attached as Tab 2 and 4 to the Applicant's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of March, 2013.

Aird & Berlis LLP
Aird & Berlis LLP

AIRD & BERLIS LLP

Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Steven L. Graff (LSUC # 31871V)

Tel: 416.865.7726
Fax: 416.863.1515
Email: sgraff@airdberlis.com

Ian Aversa (LSUC # 55449N)

Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

James A. Desjardins (LSUC # 62493E)

Tel: 416.865.4641
Fax: 416.863.1515
Email: jdesjardins@airdberlis.com

Lawyers for Extreme Fitness, Inc.

TAB "A"

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
2. *Consumers Packaging Inc. (Re)* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
3. *Canwest Publishing Inc. (Re)* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *White Birch Paper Holding Company (Re)*, 2010 QCCS 4915
6. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List])
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
8. *Planet Organic Health Corp., Re*, Approval and Vesting Order of the Honourable Mr. Justice Morawetz dated June 4, 2010, Court File No. 10-8699-00CL
9. *White Birch Paper Holding Company (Re)*, (2010) 72 C.B.R. (5th) 63 (Que. S. Ct.)
10. *White Birch Paper Holding Co., Re.*, Approval and Vesting Order of Honourable Mr. Justice Mongeon dated September 28, 2010, Court File No. 500-11-038474-108
11. *Playdium Entertainment Corp., Re.*, (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.)
12. *Nexient Learning Inc., Re.*, (2009), 62 C.B.R. (5th) 248
13. *Hayes Forest Services Ltd., Re.*, (2009) 57 C.B.R. (5th) 52 (BCSC)
14. Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. Toronto: Carswell, 2009 (loose-leaf updated 2013)
15. *Re AbitibiBowater Inc.*, 2009 QCCS 6461
16. *Re Windsor Machine & Stamping Ltd.* (2009), 55 C.B.R. (5th) 241 (Ont. S.C. [Comm. List.])
17. *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 3367
18. *Re Northstar Aerospace, Inc.*, 2012 ONSC 4423

19. *Cinram International Inc., et al. (Re)*, Administrative Reserve / Distribution / Transition Order of Honourable Mr. Justice Morawetz dated October 19, 2012, Court File No. CV12-9767-00CL

TAB "B"

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of \$1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

(9) The following definitions apply in this section.

“compensation” includes vacation pay but does not include termination or severance pay.

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person’s business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

(4) A security under this section ranks above every other claim, right, charge or security against the person’s current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

(7) A person who, in respect of a transaction, was not dealing at arm’s length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm’s length.

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

(9) The following definitions apply in this section.

“compensation” includes vacation pay but does not include termination or severance pay.

“person who is subject to a receivership” means a person any of whose property is in the possession or under the control of a receiver.

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the Income Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or

meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her

Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension

plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

(5) The applicant is to send a copy of the order to every party to the agreement.

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Courts of Justice Act, R.S.O. 1990, c. C-34

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF EXTREME FITNESS, INC.**

Court File No. CV-13-10000-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE APPLICANT

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Steven L. Graff (LSUC # 31871V)

Tel: 416.865.7726

Fax: 416.863.1515

Email: sgraff@airdberlis.com

Ian Aversa (LSUC # 55449N)

Tel: 416.865.3082

Fax: 416.863.1515

Email: iaversa@airdberlis.com

James A. Desjardins (LSUC # 62493E)

Tel: 416.865.4641

Fax: 416.863.1515

Email: jdesjardins@airdberlis.com

Lawyers for Extreme Fitness, Inc.