

**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 GNC HOLDINGS, INC., GENERAL NUTRITION CENTRES COMPANY, GNC PARENT LLC, GNC CORPORATION, GENERAL NUTRITION CENTERS, INC., GENERAL NUTRITION CORPORATION, GENERAL NUTRITION INVESTMENT COMPANY, LUCKY OLDSCO CORPORATION, GNC FUNDING INC., GNC INTERNATIONAL HOLDINGS INC., GNC CHINA HOLDSCO, LLC, GNC HEADQUARTERS LLC, GUSTINE SIXTH AVENUE ASSOCIATES, LTD., GNC CANADA HOLDINGS, INC., GNC GOVERNMENT SERVICES, LLC, GNC PUERTO RICO HOLDINGS, INC. AND GNC PUERTO RICO, LLC

APPLICATION OF GNC HOLDINGS, INC., UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Applicant

**FACTUM OF THE APPLICANT  
(Motion for Recognition of Confirmation Order and Additional U.S. Orders  
and Granting Related Relief, returnable October 16, 2020)**

October 14, 2020

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**TO: SERVICE LIST**

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## PART I – NATURE OF THE MOTION

1. This factum is filed in support of a motion by Vitamin OldCo Holdings, Inc. (formerly known as “GNC Holdings, Inc.”) (“**Vitamin Holdings**”) as the foreign representative (in such capacity, the “**Foreign Representative**”) of itself and the other debtors<sup>1</sup> (collectively, the “**Debtors**” or “**GNC**”) for an order recognizing, and giving full force and effect in Canada to, the Confirmation Order and the Additional U.S. Orders (each as defined below) granted by the United States Bankruptcy Court for the District of Delaware (the “**U.S. Court**”) pursuant to section 49 of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The Applicant also seeks other ancillary relief.

## PART II – THE FACTS

### Proceedings to Date

2. GNC is a global health and wellness brand with a diversified business. In its stores and online in certain regions, GNC sells an assortment of performance and nutritional supplements, vitamins, herbs and greens, health and beauty, food and drink, and other general merchandise,

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<sup>1</sup> In addition to Vitamin OldCo Holdings, Inc., the other Debtors are Vitamin OldCo Centres Company, Vitamin OldCo Parent LLC, Vitamin OldCo Corporation, Vitamin OldCo Centers, Inc., Vitamin OldCo, Inc., Vitamin OldCo Investment Company, Vitamin OldCo Lucky Corporation, Vitamin OldCo Funding, Inc., Vitamin OldCo International Holdings, Inc., Vitamin OldCo Headquarters LLC, Vitamin Holdco Associates, Ltd., Vitamin OldCo Canada Holdings, Inc., Vitamin OldCo Government Services, LLC, Vitamin OldCo Puerto Rico Holdings, Inc., and Vitamin OldCo Puerto Rico, LLC.

featuring innovative GNC-branded products as well as nationally recognized third-party brands, many of which are exclusive to GNC.<sup>2</sup>

3. On June 23, 2020 (the “**Petition Date**”), the Debtors filed voluntary petitions for relief (the “**Petitions**”) commencing cases before the U.S. Court under Chapter 11 of Title 11 of the *United States Bankruptcy Code* (the “**Chapter 11 Cases**”).<sup>3</sup>

4. The Debtors also filed several first day motions with the U.S. Court (collectively, the “**First Day Motions**”). The U.S. Court heard the First Day Motions on June 25, 2020, following which it entered various interim and/or final orders in respect of the First Day Motions (collectively, the “**First Day Orders**”).<sup>4</sup>

5. On June 24, 2020, the Debtors filed an application with this Court for recognition of the Chapter 11 Cases as foreign main proceedings pursuant to Part IV of the CCAA. Part IV of the CCAA establishes a process for addressing the administration of cross-border and multi-national insolvencies in a coordinated and cooperative manner with foreign courts. It requires the Court to make an order recognizing a foreign insolvency proceeding if (i) the application for recognition of a foreign proceeding relates to a “foreign proceeding” within the meaning of the

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<sup>2</sup> Tolivar Affidavit, paras 13-14, Exhibit A to the Affidavit of Michael Noel, affirmed October 13, 2020 (“**Second Noel Affidavit**”).

<sup>3</sup> Second Noel Affidavit, para 5.

<sup>4</sup> Second Noel Affidavit, para 6.

CCAA and (ii) the applicant is a “foreign representative” within the meaning of the CCAA in respect of that foreign proceeding.<sup>5</sup>

6. The Debtors sought the appointment of a foreign representative and the recognition of the Chapter 11 Cases as foreign main proceedings. They also sought recognition of certain First Day Orders entered by the U.S. Court, particularly an Interim DIP Order. The Interim DIP Order was necessary to provide the Debtors’ access to financial liquidity required for them to continue as a going concern and to implement their restructuring plan.<sup>6</sup>

7. Finally, the Debtors sought the appointment of FTI Consulting Canada Inc. as the information officer (in such capacity, the “**Information Officer**”) for these proceedings and the grant of various charges, including an Administration Charge of CDN \$250,000.<sup>7</sup>

8. On June 29, 2020, this Court found that the Debtors’ centres of main interest are all in the United States and that the proceedings in the U.S. Court are foreign main proceedings as defined in section 45 of the CCAA. It issued an initial recognition order recognizing GNC Holdings, Inc. (now “Vitamin OldCo Holdings, Inc.”) as the foreign representative of the Debtors in respect of the Chapter 11 Cases. At the same time, this Court granted a supplemental order that, among other things, recognized and gave full force and effect to certain First Day Orders granted by the U.S. Court.<sup>8</sup>

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<sup>5</sup> [Conway J - Endorsement on Application in CV-20-00642970-00CL \(Re GNC\) dated June 29, 2020](#) at paras 2, 12 [GNC Application Endorsement].

<sup>6</sup> [GNC Application Endorsement](#) at para 2.

<sup>7</sup> [GNC Application Endorsement](#) at paras 2, 26.

<sup>8</sup> See generally [GNC Application Endorsement](#).

9. Following the initial hearing of the Debtors' Chapter 11 Cases, the Debtors filed several additional motions (the "**Second Day Motions**") in the U.S. Court.<sup>9</sup> The Debtors received informal comments as well as objections in relation to the proposed orders attached to the motions but were able to resolve nearly all of these comments and objections prior to the scheduled hearing of the Second Day Motions.

10. The U.S. Court entered all of the orders in relation to the Second Day Motions (the "**Second Day Orders**"). This Court recognized those orders for which recognition in Canada was sought following a hearing on July 27, 2020 (the "**July Recognition Hearing**").<sup>10</sup>

11. The Debtors filed several additional motions in the U.S. Court seeking additional orders (the "**August 19 Orders**"). The U.S. Court entered all of the August 19 Orders. The U.S. Court also entered an amended cash management order. This Court recognized those orders for which recognition in Canada was sought following a hearing on August 25, 2020 (the "**August Recognition Hearing**"), including an Order (a) approving the disclosure statement, (b) establishing the voting record date, voting deadline, and other dates, (c) approving procedures for soliciting, receiving, and tabulating votes on the plan and for filing objections to the plan, (d) approving the manner and forms of notice and other related documents, and (e) granting related relief ("**Disclosure Statement Order**").<sup>11</sup>

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<sup>9</sup> Second Noel Affidavit, para 9.

<sup>10</sup> Second Noel Affidavit, para 9.

<sup>11</sup> Second Noel Affidavit, para 10.

12. The Debtors later filed several further additional motions in the U.S. Court, including a motion for the entry of an order, *inter alia*, approving the sale of substantially all of the Debtors' assets free and clear of all claims, liens, liabilities, rights, interests and encumbrances (the "**U.S. Sale Order**"). The U.S. Court entered the U.S. Sale Order, and this Court recognized the U.S. Sale Order following a hearing on September 22, 2020 (the "**Sale Order Hearing**").<sup>12</sup>

13. Following the Sale Order Hearing, the Debtors filed further motions in the U.S. court regarding the entry of orders authorizing the debtors to assume and assign certain unexpired leases (the "**Further September Orders**"). The U.S. Court entered, and this Court recognized, the Further September Orders on September 30, 2020.<sup>13</sup>

#### **The Additional U.S. Orders**

14. On October 14, 2020, the U.S. Court heard further motions of the Debtors, including a motion for the entry of the Findings of Fact, Conclusions of Law, and Order Confirming Sixth Amended Joint Chapter 11 Plan of Reorganization of GNC Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code (the "**Confirmation Order**"). The U.S. Court entered the Confirmation Order on October 14, 2020.<sup>14</sup>

15. In addition to recognition of the Confirmation Order, the Debtors are seeking recognition of the following U.S. Orders in this court (collectively, the "**Additional U.S. Orders**"):

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<sup>12</sup> Second Noel Affidavit, para 11.

<sup>13</sup> Second Noel Affidavit, para 12.

<sup>14</sup> Confirmation Order, Exhibit "A" to the Affidavit of Michael Noel, affirmed October 14, 2020, para 7 ("**Third Noel Affidavit**").



- (a) Corrected Thirty-First (31<sup>st</sup>) Omnibus Order Authorizing the Debtors to Assume and Assign Certain Unexpired Leases (“**Corrected 31<sup>st</sup> Assumption Order**”);
- (b) Thirty-Fourth (34<sup>th</sup>) Omnibus Order Authorizing the Debtors to Assume and Assign Certain Executory Contracts (“**34<sup>th</sup> Assumption Order**”);
- (c) Thirty-Fifth (35<sup>th</sup>) Omnibus Order Authorizing the Debtors to Assume and Assign Certain Executory Contracts (“**35<sup>th</sup> Assumption Order**”)
- (d) Thirty-Sixth (36<sup>th</sup>) Omnibus Order (a) Authorizing Rejection of Certain Unexpired Leases Effective as of September 29, 2020 and (b) Granting Related Relief (“**36<sup>th</sup> Rejection Order**”);
- (e) Thirty-Seventh (37<sup>th</sup>) Omnibus Order (a) Authorizing Rejection of Certain Unexpired Leases Effective as of September 29, 2020 and (b) Granting Related Relief (“**37<sup>th</sup> Rejection Order**”);
- (f) Thirty-Eighth (38<sup>th</sup>) Omnibus Order (a) Authorizing Rejection of Certain Unexpired Leases Effective as of September 29, 2020 and (b) Granting Related Relief (“**38<sup>th</sup> Rejection Order**”);
- (g) Order (a) Dismissing Case of GNC China Holdco, LLC and (b) Amending Debtors’ Case Caption (the “**Case Caption Order**”);
- (h) Order, Pursuant to Section 365(d)(4) of the Bankruptcy Code, Extending the Deadline by Which the Debtors Must Assume or Reject Remaining Unexpired Leases of Nonresidential Real Property (“**365 Order**”);

- (i) Order Sustaining Debtors' First Omnibus Objection to Proofs of Claim Solely for Purposes of Voting on the Third Amended Joint Plan of Reorganization for GNC Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code (the "**1<sup>st</sup> Claim Objection Order**");
- (j) Order Approving (a) Global Settlement, (b) Stalking Horse Agreement Amendment, and (c) Plan Support Agreement ("**Global Settlement Order**"); and
- (k) Order (i) Extending the Deadline by Which the Debtors May Remove Certain Actions and (ii) Granting Related Relief ("**Litigation Removal Extension Order**").

### **Confirmation Order**

16. Upon commencing the Chapter 11 Cases, the Debtors entered a restructuring support agreement (the "**RSA**") to pursue, in parallel, both a standalone plan of reorganization (the "**Standalone Plan Transaction**") and a competitive sale process for their assets (the "**Sale Transaction**").<sup>15</sup>

17. In furtherance of the Debtors' pursuit of the Sale Transaction under the terms of the RSA, the Debtors signed an agreement of purchase and sale of substantially all of their assets (the "**Sale Agreement**") with Harbin Pharmaceutical Group Holding Co., Ltd. ("**Harbin**"). The U.S. Court entered the U.S. Sale Order which approved the Sale Agreement, which order was recognized by this Court after the Sale Order Hearing. The Closing (as defined in the Sale

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<sup>15</sup> Confirmation Brief, para 7, Exhibit "C" to the Affidavit of Michael Noel, affirmed October 9, 2020 ("**First Noel Affidavit**").

Agreement) of the transaction contemplated by the Sale Agreement occurred on October 7, 2020.<sup>16</sup>

18. With the Sale Agreement now consummated, the Debtors have filed a Seventh Joint Chapter 11 Plan of Reorganization of GNC Holdings, Inc. and its Debtor affiliates under Chapter 11 of the Bankruptcy Code, dated October 13, 2020 (the “**Plan**”).<sup>17</sup> The Plan provides for: (i) the winddown of the Debtors; (ii) the distribution of the proceeds from the Sale Agreement and settlement of claims of creditors; and (iii) the grant of certain releases, exculpations and injunctions.<sup>18</sup>

19. The Debtors obtained overwhelming support of the Plan from their voting creditors. 100% of voting Holders in Class 3 and 87.84% of voting Holders in Class 4 (as such terms are defined in the Plan) voted to accept the Plan. With these votes in hand, the Debtors sought and obtained confirmation of the Plan from the U.S. Court.<sup>19</sup>

20. Pursuant to the Confirmation Order, the U.S. Court is being asked to make the following findings of fact, among others, with respect to the Plan:

- (a) the Plan complies with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code, which include findings regarding: (a) the

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<sup>16</sup> Second Noel Affidavit, para 13.

<sup>17</sup> Third Noel Affidavit, para 7.

<sup>18</sup> Confirmation Brief, para 2, Exhibit “C” to the First Noel Affidavit.

<sup>19</sup> Confirmation Brief, para 3, Exhibit “C” to the First Noel Affidavit.

good-faith compromise and settlement of Claims, Interests, and controversies relating thereto; (b) sources of consideration for distributions under the Plan; (c) treatment of Equity Interests in subsidiary Debtors; (d) cancellation of notes, instruments and Equity Interests; (e) payment of certain fees and expenses; (f) authority to undertake corporate actions necessary to effectuate the Plan (g) rejection, assumption, or assumption and assignment of executory contracts and unexpired leases; (h) authority of the Plan Administrator; and (i) the wind-down and dissolution of the Debtors;<sup>20</sup>

- (b) the provisions of the Plan constitute a good-faith compromise and settlement of all Claims, Interests, and controversies relating to any Allowed Claim or Interest or any distribution to be made on account thereof or otherwise resolved under the Plan and that such compromise and settlement is fair, equitable, and reasonable and in the best interests of the Debtors and their Estates;<sup>21</sup>
- (c) the releases set forth in Article IX.B of the Plan constitute an essential and critical provision of the Plan and formed an integral part of the agreement among all parties in interest embodied in the Plan;<sup>22</sup>
- (d) the Debtors have complied with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(2) of the Bankruptcy Code, including sections

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<sup>20</sup> Revised Proposed Confirmation Order, paras 18-19, Exhibit “B” to the First Noel Affidavit.

<sup>21</sup> Revised Proposed Confirmation Order, para 25, Exhibit “B” to the First Noel Affidavit.

<sup>22</sup> Revised Proposed Confirmation Order, para 28, Exhibit “B” to the First Noel Affidavit.

1122, 1123, 1124, 1125, 1126, and 1128 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018;<sup>23</sup>

- (e) the Debtors proposed the Plan (including the Plan Supplement and all other documents necessary to effectuate the Plan) in good faith and not by any means forbidden by law;<sup>24</sup>
- (f) The Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code and is in the best interests of Holders of Claims and Interests;<sup>25</sup> and
- (g) the Plan satisfies section 1129(a)(11) of the Bankruptcy Code and the Plan is feasible and the Reorganized Debtors will have sufficient funds available to meet their obligations under the Plan.<sup>26</sup>

21. In support of these findings, the Debtors have submitted a Declaration of Robert A. Delgenio dated October 13, 2020 (the “**Del Genio Declaration**”) and a Declaration of Gregory Berube dated October 13, 2020 (the “**Berube Declaration**”). The Del Genio Declaration concludes that: (i) all of the requirements for confirmation of the Plan pursuant to the Bankruptcy Code have been satisfied; and (ii) the release, injunction, exculpation and settlement provisions of the Plan are integral to the Plan and are consistent with the Bankruptcy Code.<sup>27</sup>

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<sup>23</sup> Revised Proposed Confirmation Order, para 40, Exhibit “B” to the First Noel Affidavit.

<sup>24</sup> Revised Proposed Confirmation Order, para 41, Exhibit “B” to the First Noel Affidavit.

<sup>25</sup> Revised Proposed Confirmation Order, para 46, Exhibit “B” to the First Noel Affidavit.

<sup>26</sup> Revised Proposed Confirmation Order, para 50, Exhibit “B” to the First Noel Affidavit.

<sup>27</sup> Del Genio Declaration, paras 11-18 and 57-59, Exhibit “J” to the Third Noel Affidavit.

The Berube Declaration concludes that confirmation of the Plan is in the best interests of the Debtors, their Estates and their respective creditors and parties-in-interest.<sup>28</sup>

22. The Plan provides for a greater recovery for the Debtors' creditors than they would receive in a liquidation. In the liquidation analysis prepared as part of the Disclosure Statement, it was projected that the recovery for creditors in the event of a liquidation would be between US\$444 million and US\$512 million, net of liquidation expenses. Pursuant to the Plan, creditors will receive a distribution of approximately US \$550 million in cash proceeds, plus Second Lien Loans (as defined in the Plan) will be distributed to Holders of Class 3 Claims and Class 4 Notes (as defined in the Plan) will be distributed to Holders of Class 4 Claims.<sup>29</sup>

#### **Corrected 31<sup>st</sup> Assumption Order**

23. Contained within the Further September Orders recognized by this court on September 30, 2020 was a Thirty-First (31<sup>st</sup>) Omnibus Order Authorizing the Debtors to Assume and Assign Certain Unexpired Leases. The Corrected 31<sup>st</sup> Assumption Order is a corrected version of this order. No changes have been made to the body of the order itself, but solely with respect to the information regarding certain landlord counterparties listed at Schedule 1 of the order.<sup>30</sup>

#### **34<sup>th</sup> Assumption Order and 35<sup>th</sup> Assumption Order**

24. The Debtors are parties to numerous executory contracts in connection with their ongoing business operations. In connection with the sale transaction under the Sale Agreement, the

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<sup>28</sup> Berube Declaration, para 20, Exhibit "I" to the Third Noel Affidavit.

<sup>29</sup> Del Genio Declaration, para 37, Exhibit "J" to the Third Noel Affidavit.

<sup>30</sup> Corrected 31<sup>st</sup> Assumption Order, p 1, Exhibit "M" to the Second Noel Affidavit.

Debtors and Harbin have identified certain contracts the Debtors wish to assume and assign to Harbin as part of the sale.<sup>31</sup>

25. The 34<sup>th</sup> Assumption Order and the 35<sup>th</sup> Assumption Order authorize the Debtors to assume and assign the contracts identified therein to Harbin's designated assignee.<sup>32</sup>

**36<sup>th</sup> Rejection Order, 37<sup>th</sup> Rejection Order and 38<sup>th</sup> Rejection Order**

26. The Debtors are parties to several thousand real property leases in the United States, Canada, and Puerto Rico. As part of their ongoing restructuring efforts, the Debtors have identified stores whose leases they seek to reject.

27. By rejecting certain leases, the Debtors avoid accruing unnecessary expenses which provide no benefits to the Debtors' estates. The Debtors and their advisors have concluded that the leases are not marketable given current market conditions and are unlikely to generate material value of the Debtors' estates.<sup>33</sup>

28. The 36<sup>th</sup> Rejection Order, the 37<sup>th</sup> Rejection Order and the 38<sup>th</sup> Rejection Order authorize and approve the lease rejections for twelve, thirteen and five stores in Canada, respectively.<sup>34</sup>

29. Counsel for certain Canadian landlords has not objected to the recognition of these orders. General Nutrition Centres Company ("**GNC Canada**") has assured the Canadian

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<sup>31</sup> 34<sup>th</sup> Assumption Motion, paras 7 and 10, Exhibit "I" to Second Noel Affidavit.

<sup>32</sup> 34<sup>th</sup> Assumption Order, para 2, Exhibit "K" to Second Noel Affidavit.

<sup>33</sup> 36<sup>th</sup> Rejection Motion, para 7, Exhibit "N" to Second Noel Affidavit.

<sup>34</sup> Second Noel Affidavit, para 28.

landlords' counsel that it will give the landlords at least 30 days' notice prior to the effective date of a lease rejection and will continue to pay rent during that time period. This understanding between the parties is reflected in Justice Conway's endorsement from the initial recognition hearing in this matter.<sup>35</sup>

### Case Caption Order

30. Following the closing of the Sale Agreement, the Debtors were required to change their names to the following to remove all references to "GNC":<sup>36</sup>

| Old Name                              | New Name                                   |
|---------------------------------------|--|
| GNC Holdings, Inc.                    | Vitamin OldCo Holdings, Inc.               |
| GNC Parent LLC                        | Vitamin OldCo Parent LLC                   |
| GNC Corporation                       | Vitamin OldCo Corporation                  |
| General Nutrition Centers, Inc.       | Vitamin OldCo Centers, Inc.                |
| General Nutrition Corporation         | Vitamin OldCo, Inc.                        |
| General Nutrition Investment Company  | Vitamin OldCo Investment Company           |
| Lucky Oldco Corporation               | Vitamin OldCo Lucky Corporation            |
| GNC Funding, Inc.                     | Vitamin OldCo Funding, Inc.                |
| GNC International Holdings, Inc.      | Vitamin OldCo International Holdings, Inc. |
| GNC China Holdco, LLC                 | GNC China Holdco, LLC (no change)          |
| GNC Headquarters LLC                  | Vitamin OldCo Headquarters LLC             |
| Gustine Sixth Avenue Associates, Ltd. | Vitamin OldCo Associates, Ltd.             |
| GNC Canada Holdings, Inc.             | Vitamin OldCo Canada Holdings, Inc.        |
| General Nutrition Centres Company     | Vitamin OldCo Centres Company              |
| GNC Government Services, LLC          | Vitamin OldCo Government Services, LLC     |
| GNC Puerto Rico Holdings, Inc.        | Vitamin OldCo Puerto Rico Holdings, Inc.   |
| GNC Puerto Rico, LLC                  | Vitamin OldCo Puerto Rico, LLC             |

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<sup>35</sup> [GNC Application Endorsement](#) at para 29.

<sup>36</sup> Motion of Debtors for Entry of Case Caption Order, para 10, Exhibit "Q" to Second Noel Affidavit.



31. As a result of these name changes, the Debtors obtained the Case Caption Order from the U.S. Court to amend the case caption of the Chapter 11 Cases to reflect the Debtors' new names. The Debtors also seek approval from this court to amend the style of cause in the within proceedings to the following:

**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 VITAMIN OLDSCO HOLDINGS, INC.,  
VITAMIN OLDSCO CENTRES COMPANY, VITAMIN  
OLDSCO PARENT LLC, VITAMIN OLDSCO  
CORPORATION, VITAMIN OLDSCO CENTERS, INC.,  
VITAMIN OLDSCO, INC., VITAMIN OLDSCO INVESTMENT  
COMPANY, VITAMIN OLDSCO LUCKY CORPORATION,  
VITAMIN OLDSCO FUNDING, INC., VITAMIN OLDSCO  
INTERNATIONAL HOLDINGS, INC., VITAMIN OLDSCO  
HEADQUARTERS LLC, VITAMIN HOLDSCO  
ASSOCIATES, LTD., VITAMIN OLDSCO CANADA  
HOLDINGS, INC., VITAMIN OLDSCO GOVERNMENT  
SERVICES, LLC, VITAMIN OLDSCO PUERTO RICO  
HOLDINGS, INC., AND VITAMIN OLDSCO PUERTO RICO,  
LLC**

### **365 Order**

32. Pursuant to section 365(d)(4) of the Bankruptcy Code, the Debtors have an initial 120-day period following the Petition Date to assume or reject certain unexpired leases of nonresidential real property (the "**Lease Deadline**"). Pursuant to the section 365(d)(4)(B) of the Bankruptcy Code, the Debtors may request that the U.S. Bankruptcy Court extend this deadline by 90 days for cause.<sup>37</sup>

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<sup>37</sup> Motion for the Entry of the 365 Order, para 1, Exhibit "S" to Second Noel Affidavit.

33. The 365 Order extends the Lease Deadline by 90 days pursuant to this section 365(d)(4)(B) though and including the earlier of: (i) January 19, 2021 and (ii) the date of entry of an order confirming a plan.<sup>38</sup>

### **1<sup>st</sup> Claim Objection Order**

34. For the purposes of voting on the Plan, the Debtors sought to temporarily allow certain claims, listed in Schedule 1 to the 1<sup>st</sup> Claim Objection Order (the “**Claims**”), in the amount of \$1.00 as General Unsecured Claims (as defined in the Plan). The claimants to the Claims (the “**Claimants**”) are plaintiffs that have asserted litigation claims against the Debtors.<sup>39</sup>

35. The Claims were previously stayed pursuant to the Bankruptcy Code and were unliquidated. Accordingly, the Debtors proposed to count the Claimants’ ballots towards satisfying the numerosity requirement of the Bankruptcy Code, and the 1<sup>st</sup> Claim Objection Order provides authorizes the Claimants to vote on the Plan on account of their Claims in the amount of \$1.00.<sup>40</sup>

### **Global Settlement Order**

36. The Debtors and all of their major creditor constituencies entered into a global settlement (the “**Settlement**”) to resolve various disputes regarding, among other things, the Plan, the Sale Agreement and the validity and extent of certain claims of the Tranche B-2 Term Lenders and

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<sup>38</sup> 365 Order, para 2, Exhibit “V” to Second Noel Affidavit.

<sup>39</sup> Motion for the Entry of the 1<sup>st</sup> Claim Objection Order, p 1, Exhibit “R” to Second Noel Affidavit.

<sup>40</sup> Motion for the Entry of the 1<sup>st</sup> Claim Objection Order, p 15, Exhibit “R” to Second Noel Affidavit.

ABL FILO Term Lenders (as defined in the Plan).<sup>41</sup> The Global Settlement Order approves, *inter alia*, the Settlement.

### **Litigation Removal Extension Order**

37. Pursuant to the Bankruptcy Code and the rules thereunder, the Debtors may remove certain claims or causes of action by filing a notice of removal with the Bankruptcy Court within the deadlines enumerated therein (the “**Removal Deadline**”).<sup>42</sup> The Bankruptcy Court is authorized to extend the Removal Deadline for cause.<sup>43</sup>

38. The Litigation Removal Extension Order extends the Removal Deadline by 120 days though and including January 19, 2021.<sup>44</sup>

### **PART III – THE ISSUES**

39. The issue to be determined in this motion is whether the Court should grant the Order sought by Vitamin Holdings pursuant to section 49 of the CCAA.

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<sup>41</sup> Motion for the Entry of the Global Settlement Order, para 1, Exhibit “T” to Second Noel Affidavit.

<sup>42</sup> Motion for the Entry of the Litigation Removal Extension Order, paras 9 to 11, Exhibit “U” to Second Noel Affidavit.

<sup>43</sup> Motion for the Entry of the Litigation Removal Extension Order, para 12, Exhibit “U” to Second Noel Affidavit.

<sup>44</sup> Litigation Removal Extension Order, para 3, Exhibit “X” to Second Noel Affidavit.

## **PART IV – THE LAW**

### **A. Part IV of the CCAA**

40. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions. Such orders are also intended to promote fair and efficient administration of cross-border insolvencies, which also protects the interests of debtors, creditors, and other interested persons.<sup>45</sup>

41. In the context of Part IV of the CCAA, the Court is granted the authority to apply any legal or equitable rules necessary, provided they are not inconsistent with the provisions of the CCAA.<sup>46</sup>

### **B. The Confirmation Order and Additional U.S. Orders should be recognized by this Court**

42. Section 49 of the CCAA provides that the Court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of a debtor company's property or that the order is in the interests of a creditor or creditors. Section 50 of the CCAA further provides that an order made under Part IV of the CCAA, including pursuant to section 49, may be made on any terms and conditions that the Court considers appropriate. Further, once an order recognizing a foreign proceeding is made, the Court is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court, so long as the

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<sup>45</sup> [Zochem Inc. \(Re\)](#), [2016 ONSC 958](#) at para 15; CCAA at s. 44.

<sup>46</sup> CCAA at s. 61(1).

requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.<sup>47</sup>

43. Vitamin Holdings seeks the recognition of the Confirmation Order and Additional U.S. Orders that have been obtained by the Debtors from the U.S. Court.

44. Neither the Confirmation Order nor the Additional U.S. Orders are inconsistent with any order that may be granted under the CCAA. Canadian courts have regularly exercised their jurisdiction under sections 49 and 50 of the CCAA to recognize Chapter 11 bankruptcy orders with similar effect to the Additional U.S. Orders, including recognition of U.S. lease rejection orders, as sought here.<sup>48</sup>

45. Under the CCAA, the Court has jurisdiction to approve a joint plan of reorganization, and Canadian courts have exercised this jurisdiction on numerous occasions; this jurisdiction includes the Court's recognition of U.S. orders approving such sales, as is a frequent occurrence in the Canadian courts.<sup>49</sup>

46. In *Xerium*, Justice Campbell examined the jurisdiction of a Court to recognize a U.S. Plan Confirmation Order under Part IV of the CCAA. In reviewing the Court's jurisdiction,

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<sup>47</sup> CCAA at ss. 49, 50, 52(1) and 61(2).

<sup>48</sup> [Zochem Inc. \(Re\)](#) at paras 14, 42; [Massachusetts Elephant & Castle Group, Inc. \(Re\)](#), 2011 ONSC 4201 at paras 36, 40. Regarding lease rejection orders, see, for example, [Laidlaw Inc. \(Re\) \(In Bankruptcy\)](#), 2003 CanLII 8003 (ON SC) at para 19; [Order of Hainey J., as issued & entered on Feb. 21, 2020, re Amended and Restated Supplemental Order \(Pier One proceeding\)](#).

<sup>49</sup> See, e.g., [TerreStar Networks Inc., Re](#), Order of Morawetz J 27 February, 2012 (Ont Sup Ct J (Commercial List)), Court File No CV-10-8944-00CL; [Xerium Technologies Inc., Re](#), 2010 ONSC 3974 (“**Xerium**”); [Chemtura Canada Co., Re](#), 2010 CarswellOnt 19302.

Justice Campbell noted that the recognition of a Plan Confirmation Order is consistent with the purposes of Part IV as set out in section 44 of the CCAA and that principles governing confirmation of a US Plan under the Bankruptcy Code are similar to the principles underlying the CCAA, which dictate in favour of recognition of the Plan in Canada.<sup>50</sup>

47. In cross-border insolvencies, Canadian and U.S. courts routinely seek to complement, coordinate and, where appropriate, accommodate the proceedings of the other court in order to enable cross-border enterprises to successfully restructure. Comity and cooperation are increasingly important in the restructuring context given the multi-jurisdictional presence of so many businesses, including GNC. Without coordination by the courts of cross-border restructuring proceedings, the result would be multiple proceedings with the likely consequence of inconsistent court orders and decisions and general uncertainty as to the direction and effect of the restructuring proceedings on creditors and stakeholders in various jurisdictions.<sup>51</sup>

48. When a Canadian court considers whether it should recognize a foreign order, including an order made in a Chapter 11 proceeding, the following considerations should be taken into account:

- (a) the principles of comity and the need to encourage cooperation between courts of various jurisdictions;

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<sup>50</sup> Xerium at paras 23-24 and 28-29.

<sup>51</sup> [\*Babcock & Wilcox Canada Ltd., Re\*](#), 5 BLR (3d) 75 at paras 9-10; Order of Newbould J. dated January 25, 2017, *In the Matter of Modular Space Intermediate Holdings Inc. et al.*.

- (b) the need to accord respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;
- (c) whether stakeholders will be treated equitably, and in particular whether recognition will ensure that, to the extent reasonably possible, stakeholders are treated equally, regardless of the jurisdiction to which they reside;
- (d) the importance of promoting plans that allow the enterprises to reorganize globally, especially where there is an established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take “charge” of the principal administration of the enterprise’s reorganization, where this approach will facilitate a potential reorganization and which will respect the claims of stakeholders in all jurisdictions and does not detract from the net benefits that may be available from alternative approaches;
- (e) that the appropriate level of court involvement depends to a significant degree upon the court’s nexus to the enterprise;
- (f) that where one jurisdiction is to have an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign principal jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and

- (g) that all affected stakeholders receive effective notice as is reasonably practicable in the circumstances.<sup>52</sup>

49. The Additional U.S. Orders have been obtained by the Debtors to facilitate their restructuring efforts in the Chapter 11 Cases by, among other things, minimizing the adverse effects of the Chapter 11 Cases on their business and preserving and maximizing the potential value of the Debtors' assets for the benefit of their creditors and other stakeholders.

50. Vitamin Holdings submits that consideration of the factors above favour granting the relief sought, and it is appropriate that the Court recognize and give effect to the orders of the U.S. Court. The Additional U.S. Orders were made in good faith and in the interest of the Debtors' creditors and stakeholders. The Additional U.S. Orders do not breach any applicable Canadian law. Vitamin Holdings submits that recognition of the Additional U.S. Orders is necessary to ensure that the purposes of the CCAA are satisfied and the Debtors have the best opportunity to restructure their affairs.

51. Accordingly, Vitamin Holdings requests that the Court recognize the Additional U.S. Orders.

#### **PART V – RELIEF REQUESTED**

52. The Applicant requests that this Court grant the requested recognition order.

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<sup>52</sup> [\*Babcock & Wilcox Canada Ltd., Re\*](#) at para 21; [\*Re Xerium Technologies Inc., 2010 ONSC 3974\*](#) at paras 26-27.



ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Scott A. Bomhof / Adam Slavens / Jeremy Opolsky /  
Leora Jackson

Lawyer for the Applicant

## SCHEDULE A – LIST OF AUTHORITIES

- 1 Conway J - Endorsement on Application in CV-20-00642970-00CL (*Re GNC*) dated June 29, 2020
- 2 *Zochem Inc. (Re)*, 2016 ONSC 958
- 3 *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201
- 4 *Laidlaw Inc. (Re) (In Bankruptcy)*, 2003 CanLII 8003 (ON SC)
- 5 Order of Hainey J., as issued & entered on Feb. 21, 2020, re Amended and Restated Supplemental Order (*Pier One* proceeding)
- 6 *Royal Bank of Canada v. Soundair Corp.*, 4 OR (3d) 1
- 7 *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460
- 8 *Tiger Brand Knitting Co. (Re)*, 2005 CanLII 9680 (ON SC)
- 9 *Babcock & Wilcox Canada Ltd., Re*, 5 BLR (3d) 75
- 10 Order of Newbould J. dated January 25, 2017, *In the Matter of Modular Space Intermediate Holdings Inc. et al.*
- 11 *Re Xerium Technologies Inc.*, 2010 ONSC 3974
- 12 *TerreStar Networks Inc., Re*, Order of Morawetz J 27 February, 2012 (Ont Sup Ct J (Commercial List)), Court File No CV-10-8944-00CL
- 13 *Xerium Technologies Inc., Re*, 2010 ONSC 3974
- 14 *Chemtura Canada Co., Re*, 2010 CarswellOnt 19302
- 15 *Digital Domain Media Group Inc., Re*, 2012 BCSC 1567

## SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY-LAWS

### *Companies' Creditors Arrangement Act, RSC 1985, C. C-36*

#### PART IV – CROSS-BORDER INSOLVENCIES

##### PURPOSE

###### *Purpose*

**44** The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

##### INTERPRETATION

###### *Definitions*

**45** (1) The following definitions apply in this Part.

[...]

*foreign main proceeding* means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (*principale*)

###### *Centre of Debtor Company's Main Interests*

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

##### RECOGNITION OF FOREIGN PROCEEDING

###### *Application for recognition of a foreign proceeding*

**46** (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

***Documents that must accompany application***

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

***Documents may be considered as proof***

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

***Other evidence***

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

***Translation***

(5) The court may require a translation of any document accompanying the application.

[...]

***Other Orders***

**49** (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

### ***Restriction***

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

### ***Application of this and Other Acts***

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

### ***Terms and Conditions of Orders***

**50** An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

[...]

## **OBLIGATIONS**

### ***Cooperation — Court***

**52** (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

### ***Cooperation — Other Authorities in Canada***

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

### ***Forms of Cooperation***

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a) the appointment of a person to act at the direction of the court;
- (b) the communication of information by any means considered appropriate by the court;
- (c) the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e) the coordination of concurrent proceedings regarding the same debtor company.

## MISCELLANEOUS PROVISIONS

[...]

### *Court not prevented from applying certain rules*

**61** (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

### *Public policy exception*

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

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

Court File No.  
CV-20-00642970-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GNC HOLDINGS, INC. et al.

APPLICATION OF GNC HOLDINGS, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE APPLICANT  
(Motion for Recognition of Confirmation Order  
and Additional U.S. Orders and Granting  
Related Relief, returnable October 16, 2020)**

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