

**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 PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC.  
AND KIT FINANCE INC

Applicants

**FACTUM IN SUPPORT OF 11.3 CCAA ASSIGNMENT MOTION**

May 26, 2011

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## I. OVERVIEW

1. The Prizm Entities<sup>1</sup> are attempting to close a going concern sale (the "**Soul Sale Transaction**") of more than 200 of their restaurants in Ontario, British Columbia and Quebec to Soul Restaurants Canada Inc. (the "**Purchaser**"). The Prizm Entities' entry into the Soul Agreement was the result of an extensive and fair marketing and bidding process, followed by intensive negotiations with an arm's length purchaser. The Purchase Price reflects the highest and best price possible for the Purchased Assets under the circumstances and will result in the preservation of approximately 3,100 jobs, continued supplier relationships and continued business activity at the locations being sold in numerous communities.

2. In connection with the Soul Sale Transaction, the Prizm Entities are seeking the assignment to the Purchaser under Section 11.3 of the CCAA of seventy-two (72) leases (the "**Outstanding Leases**"), for which the Prizm Entities have not been able to obtain satisfactory consents to assignment.

3. The statutory test for this Court to order the assignment of the Outstanding Leases is met. The Monitor approves of the proposed assignment. The Purchaser has demonstrated that it has the financial wherewithal, relevant business experience, and intention to meet its obligations under the Outstanding Leases. Moreover, the proposed assignment of the Outstanding Leases is important to the restructuring process, consistent with the purposes and spirit of the CCAA, and therefore, "appropriate". Finally, the Prizm Entities are in good standing under the Outstanding Leases and there are no monetary defaults.

4. Although it is not a requirement of the statutory test to assign the Outstanding Leases, there is no countervailing prejudice to the landlords who have not provided their consent to the proposed assignment. Following the assignment, an experienced operator who will be able to fulfill the lease obligations will be operating substantially the same business from the same locations under identical lease terms.

5. However, absent the assignment of the Outstanding Leases, the Prizm Entities may ultimately be obligated to refund that part of the Purchase Price allocated to the Purchased

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<sup>1</sup> Capitalized terms used herein but not otherwise defined herein shall have the meanings ascribed to such terms in the Affidavit of Deborah Papernick, sworn May 24, 2011, filed in support of the Assignment Motion (the "**Assignment Affidavit**").

Outlets for which assignment has not been obtained to a maximum potential purchase price reduction of \$12.9 million. Absent the assignment, the Priszm Entities may ultimately be left with restaurants but with no local management infrastructure to oversee their operation and no franchise agreement for those locations. The assignment of the Outstanding Leases is therefore a critical and important aspect of the Priszm Entities' restructuring efforts and fair, reasonable, and appropriate in the circumstances.

## II. FACTS

6. On March 31, 2011 this Court issued its Initial Order extending protection under the CCAA to the Priszm Entities.

Assignment Affidavit at para. 4.

7. The Priszm Entities commenced these CCAA proceedings to, among other things, seek this Court's approval of the Soul Sale Transaction.

Assignment Affidavit at para. 7.

8. The Soul Sale Transaction contemplated under the Soul Agreement was the result of an extensive and fair marketing and bidding process, intensive negotiations with an arm's length party, and, in the Priszm Entities' sound business judgment, results in the highest and best available price for the Purchased Assets (which includes the Outstanding Leases).

Assignment Affidavit at paras. 35 & 41.

9. Pursuant to the Soul Agreement, the Vendor is obligated to use its commercially reasonable efforts to obtain the consents of all of the Landlord Consents for all of the 204 Purchased Outlets. The Soul Agreement further provides that an application to this Court for an order for the assignment of the Outstanding Leases shall constitute commercially reasonable efforts on the part of the Vendor.

Assignment Affidavit at paras. 19 & 20.

10. The Vendor is able to assign 94 Leases, or approximately 46.1% of the Leases without requiring consent to assignment.

Assignment Affidavit at para. 22.

11. The Prizm Entities have attempted to obtain the Landlord Consents through commercially reasonable means, including by sending letters requesting the Landlord Consents. The Prizm Entities have also provided certain legal and financial information with respect to the Purchaser to landlords upon receiving requests for same.

Assignment Affidavit at para. 23.

12. As of the date hereof, the Vendor has obtained Landlord Consents or made other arrangements satisfactory to the Purchaser for 38 Leases, or approximately 18.6% of the Leases. Despite the exercise of its commercially reasonable efforts, however, the Vendor has been unable to obtain satisfactory Landlord Consents relating to 72, or approximately 35.3% of the Leases.

Assignment Affidavit at para. 24

13. SREIT is the landlord of 31 of the Outstanding Leases. SREIT has implicitly confirmed that the Purchaser is a fit and proper assignee of the SREIT Leases; however, SREIT and the Prizm Entities have been unable to agree as to the terms of an assignment agreement. The Prizm Entities seek assignment of the SREIT Leases to, among other reasons, avoid any suggestion that the Soul Sale Transaction creates additional liabilities for the Prizm Entities that may affect the distribution of the proceeds of the Soul Sale Transaction.

Assignment Affidavit at paras. 25, 27 & 28.

14. To the extent that less than 95% (194) of the Leases are not assigned within six months of Closing, the Lease is terminated or the Purchaser is evicted prior to an assignment of the Lease becoming effective, the Purchase Price will be reduced by the amount of the Purchase Price allocated to the non-assigned Purchased Outlets and refunded to the Purchaser.

Assignment Affidavit at para. 21.

15. Based on the provisions of the Soul Agreement, the Monitor calculates that the maximum potential Purchase Price reduction in respect of failure to assign Leases is \$12.9 million.

Second Report of the Monitor, at para. 26.

16. If the Prizm Entities are required to refund part of the Purchase Price to the Purchaser pursuant to Section 8(8) of the Soul Agreement, it will not receive the franchise agreement in return.

Assignment Affidavit at para. 43.

17. Assuming the Soul Transaction is approved and closes, the majority of stores in Ontario and British Columbia will be sold and the employees responsible for the operation of such stores, including the area and regional managers will be transferred to Soul. In the event that some or all of the Outstanding Leases are not ultimately assigned, the Prizm Entities would be left with the stores but with no local management infrastructure to oversee their operation. The continued operation of stores with Outstanding Leases is unlikely to be feasible in the event that the Outstanding Leases are not ultimately assigned.

Second Report of the Monitor, at para. 67.

18. The Monitor is supportive of the Soul Sale Transaction and approves the assignment of the Outstanding Leases.

Assignment Affidavit at para. 37.

Second Report of the Monitor, at para. 69.

19. The Prizm Entities are in good standing under the Outstanding Leases and there are no monetary defaults.

Assignment Affidavit at para. 45.

20. The Purchaser has more than thirty (30) years experience operating fast food restaurants in the United Kingdom, with more than twenty-six (26) of those years involving the ownership and operation of KFC restaurants in the United Kingdom;

Affidavit of Aly Janmohamed, sworn May 20, 2011 at para. 6.

21. The Purchaser has demonstrated that it would be able to perform its obligations under the Outstanding Leases and intends to do so; and

Affidavit of Aly Janmohamed, sworn May 20, 2011, at paras. 7-12.

22. Following the assignment, the Purchaser will continue to operate the same business in substantially the same manner from the same locations under identical lease terms.

Affidavit of Aly Janmohamed, sworn May 20, 2011, at para. 10.

23. The assignment of the Outstanding Leases is important to the ongoing ability of the Purchaser to continue ongoing business operations from the outlets being sold to the Purchaser and is critical to the Prizm Entities' value realization and, thus, its restructuring efforts.

Assignment Affidavit at paras. 33 & 42.

### III. LAW & ARGUMENT

#### (A) The Statutory Test for Contract Assignment: Section 11.3 of the CCAA

24. Section 11.3(1) was incorporated into the CCAA as part of the September 2009 amendments and provides that this Court may authorize the assignment of all of an entity's rights and obligations under a contract.<sup>2</sup>

CCAA, s. 11.3, Schedule "A".

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<sup>2</sup> 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 Outstanding Leases do not fall under these exceptions.

25. Section 11.3(3) of the CCAA provides that the factors a Court is to consider in determining whether to approve the assignment of 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), Schedule "A".

26. 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 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), Schedule "A".

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

CCAA, s. 11.3(3), Schedule "A".

28. Section 11.3 of the CCAA does not require an applicant to seek consent to assignment prior to bringing an assignment motion, nor to accept whatever consent is proposed by a counterparty, although the Prizm Entities have attempted to obtain the Landlord Consents through commercially reasonable means.

CCAA, s. 11.3(3), Schedule "A".

29. Although there are no reported decisions discussing the application of Section 11.3 by this Court, it has previously granted an Order 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, at para. 6.

30. 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 Co., Re* 72 C.B.R. (5th) 63 at para. 16 [*"White Birch"*].

*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, at paras. 16-18.

31. In light of the lack of post-amendment jurisprudence on the application of Section 11.3(3), the Prizm Entities submit 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 Prizm Entities submit that this pre-amendment jurisprudence is instructive with respect to addressing the "appropriate" factor in Section 11.3(3)(c) of the CCAA.

32. 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 a contract, including where the contract contained an anti-assignment clause and where consent of the counterparty to the contract was required but not obtained (even where such consent was reasonably withheld).

*Playdium Entertainment Corp., Re.*, (2001), 31 C.B.R. (4<sup>th</sup>) 302 (Ont. S.C.J.). [*"Playdium"*]

*Nexient Learning Inc., Re.*, (2009), 62 C.B.R. (5<sup>th</sup>) 248. [*"Nexient"*]



*Re Hayes Forest Service Ltd.* (2009), 57 CBR (5<sup>th</sup>) 57 CBR 52 (BCSC).

33. In *Playdium*, the Court considered a number of factors in determining whether to exercise its inherent jurisdiction to approve an assignment: (1) whether the debtor made a sufficient effort to obtain the best price for the contract and did not act improvidently; (2) the competing interests of the counterparty and the debtor'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 Entertainment Corp., Re.*, (2001), 31 CBR (4<sup>th</sup>) 302 (Ont. SCJ).

34. 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 a contract was whether the assignment was "important to the reorganization process." This test superseded the higher threshold previously suggested in *Playdium*.

*Nexient Learning Inc., Re.*, (2009), 62 C.B.R. (5<sup>th</sup>) 248 at para. 56 citing *Woodwards Ltd., Re.*, [1993] B.C.J. No. 42 (S.C.).

*Playdium Entertainment Corp., Re.*, (2001), 31 C.B.R. (4<sup>th</sup>) 302 (Ont. S.C.J.).

35. The Prizm Entities submit that the "appropriate" factor under Section 11.3 is substantially similar to the "important to the reorganization process" test in *Nexient*, but streamlined such that a full application of the *Playdium* factors is not required, such factors essentially being superseded by the statutory regime created by Section 11.3 of the CCAA. (*i.e.*, only certain types of contracts can be assigned, all monetary defaults must be cured, and the Purchaser must show it would be able to perform).

**(B) The Proposed Assignment of the Outstanding Leases to the Purchaser Satisfies the Factors in Section 11.3(3) of the CCAA**

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

- (a) the Monitor appointed pursuant to the Initial Order approves the proposed assignment of the Outstanding Leases to the Purchaser;

Second Report of the Monitor, para. 69.

- (b) the Purchaser has demonstrated that it possesses the financial wherewithal, the relevant business experience and the intention to perform all obligations under the Outstanding Leases;

Assignment Affidavit at paras. 34-37.

Affidavit of Aly Janmohamed, sworn May 20, 2011 at paras. 6-12.

- (c) the assignment of the Outstanding Leases is important to the restructuring process, consistent with the purposes and spirit of the CCAA, and therefore, “appropriate” under Section 11.3(3)(c) of the CCAA; and

Assignment Affidavit at paras. 33 and 42.

- (d) the Prizm Entities are in good standing under the Outstanding Leases and there are no monetary defaults.

Assignment Affidavit at para. 45.

37. Finally, a copy of the order requested has been sent to all of the Landlords with outstanding Leases.

38. The Soul Sale Transaction is the result of a fair and even-handed sales process conducted by the Prizm Entities. The consummation of the Soul Sale Transaction will result in the sale of more than 200 of the Prizm Entities’ restaurants on a going concern basis and the preservation of approximately 3,100 jobs, continued supplier relationships and continued business activity at the locations subject to the Leases in numerous communities, all of which accord with the fundamental purposes of the CCAA.

39. Following the completion of the Soul Sale Transaction, an experienced operator who will be able to fulfill the lease obligations will be operating the same businesses in substantially the same manner in the same locations under identical lease terms. Accordingly, although it is not

part of the statutory test under Section 11.3, there is no prejudice to the landlords who have not provided their consent to the proposed assignment.

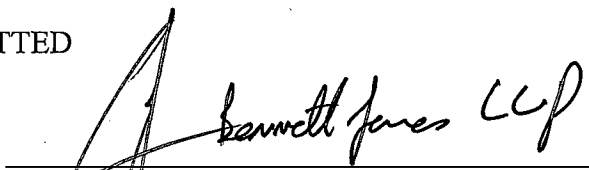
40. However, absent this Court's approval of the assignment of the Outstanding Leases to the Purchaser, the Prizm Entities will risk losing substantial value under the Soul Agreement. The Prizm Entities may ultimately be obligated refund that part of the Purchase Price allocated to the Purchased Outlets for which assignment has not been obtained to a maximum potential purchase price reduction of \$12.9 million. Without the assignment, the Prizm Entities may ultimately be left with the locations, but with no local management infrastructure to oversee their operation and no franchise agreement for those restaurants. The continued operation of restaurants with Outstanding Leases is unlikely to be feasible in the event that the Outstanding Leases are not ultimately assigned. The assignment of the Outstanding Leases is therefore a critical and important aspect of the Prizm Entities' restructuring efforts and consistent with the purposes and spirit of the CCAA.

**IV. ORDER REQUESTED**

41. The Prizm Entities respectfully request that this Court grant an order authorizing the assignment of any and all of the Prizm Entities' rights and obligations under the Outstanding Leases to the Purchaser.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 26, 2011



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## Schedule "A"

### Statutory Provisions Relied Upon

#### *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-1.*

##### General power of court

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

##### Assignment of agreements

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.

##### Exceptions

(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.

##### Factors to be considered

(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.

Restriction

(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.

Copy of Order

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

**Schedule "B"**

**Authorities Relied Upon**

**Caselaw:**

*Hayes Forest Services Ltd., Re.*, (2009) 57 C.B.R. (5<sup>th</sup>) 52 (BCSC).

*Nexient Learning Inc., Re.*, (2009), 62 C.B.R. (5<sup>th</sup>) 248.

*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.

*Playdium Entertainment Corp., Re.*, (2001), 31 CBR (4<sup>th</sup>) 302 (Ont. S.C.J.).

*White Birch Paper Holding Co., Re.*, (2010) 72 C.B.R. (5<sup>th</sup>) 63.

*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.

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INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC., AND KIT  
FINANCE INC, APPLICANTS

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**FACTUM**

**(11.3 CCAA Assignment Motion Returnable  
May 30, 2011)**

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