

**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.**

May 2, 2013

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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.**

**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) 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 July 12, 2013; and
  - (b) approving the Third Report (the “**Third 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.

## PART II – FACTS

### *Introduction*

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

**Affidavit of Alan Hutchens sworn May 1, 2013 (the “Hutchens Affidavit”),  
Motion Record of the Applicant (the “Motion Record”), Tab 3, pg. 2, 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. 2, para. 4**

4. The affidavit of Alan Hutchens sworn February 7, 2013 (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 Fitness Centres Inc. (“**GoodLife**”).

**Hutchens Affidavit, Motion Record, Tab 3, pg. 2, 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. 2, para. 6**

6. On March 27, 2013, upon a motion by the Applicant, this Court granted orders, among other things: (i) extending the Stay Period to and including May 10, 2013; (ii) approving the Asset Purchase Agreement between the Applicant and 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) in GoodLife; (iii) approving the assignment of a certain lease (the “**Danforth Lease**”) to GoodLife pursuant to the APA; (iv) authorizing the Monitor to make interim distributions from the proceeds of the APA to Golub Capital Incorporated, as agent, on behalf of the DIP Lender (as defined in the Initial Order), the Applicant, Golub Capital Incorporated, as agent, on behalf of the lenders under the Priority Credit Agreement (as defined in the February 7 Affidavit) and National Bank of Canada, as agent, on behalf of the lenders under the National Bank Credit Agreement (as defined in the February 7 Affidavit); and (v) approving the Second Report of the Monitor dated March 22, 2013 (the “**Second Report**”) and the Supplemental Report to the Second Report of the Monitor dated March 26, 2013 (the “**Supplemental Report**”), and approving the actions of the Monitor described therein.

**Hutchens Affidavit, Motion Record, Tab 3, pgs. 2-3, para. 7**

7. The transactions contemplated in the APA (the “**Transaction**”) provided 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 substantially all of the equipment leases and real property leases.

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

8. The Transaction closed at 11:59 p.m. on March 31, 2013 and the Effective Time (as defined in the APA) was 12:01 a.m. on April 1, 2013.

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

9. The consummation of the Transaction resulted in the preservation of approximately 70% of the jobs of the Applicant's employees, and provided for continued supplier relationships and continued business activity at all the locations from which the Applicant operated.

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

10. Pursuant to the Endorsement of the Honourable Justice Morawetz dated March 27, 2013, CDN\$430,000 from the proceeds from the Transaction was required to be held by the Monitor pending a hearing to determine, among other things, the amount owing by the Applicant with respect to the Danforth Lease.

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

11. The aforementioned hearing is scheduled to be held on May 28, 2013.

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

***The Stay Period***

12. Pursuant to paragraph 14 of the Initial Order, the Stay Period expires on May 10, 2013.

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

13. The extension of the Stay Period to and including July 12, 2013 is necessary while the Applicant, with the assistance of the Monitor, works diligently on resolving the dispute with respect to the Danforth Lease and winding-up the business affairs of the Applicant.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 15**

14. The eleven-week cash flow projection, reviewed with the Monitor and filed with this Court, projects that the Applicant will have sufficient funding during the extended Stay Period.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 16**

15. 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 July 12, 2013 appropriate.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 17**

16. 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 July 12, 2013.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 18**

### **PART III – ISSUES**

17. The primary issue to be determined on this motion is whether this Court should extend the Stay Period.

**PART IV – LAW AND ARGUMENT****A. THE STAY PERIOD SHOULD BE EXTENDED**

18. The Applicant is seeking the extension of the Stay Period to and including July 12, 2013.

19. 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*

20. Pursuant to paragraph 14 of the Initial Order, the Stay Period expires on May 10, 2013. The extension of the Stay Period to and including July 12, 2013 is necessary while the Applicant, with the assistance of the Monitor, works diligently on resolving the dispute with respect to the Danforth Lease and winding-up the business affairs of the Applicant.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 15**

21. 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. 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 1 at para. 43***

22. The cash flow projection attached as Exhibit “B” to the affidavit of Alan Hutchens sworn May 1, 2013 projects that the Applicant will have sufficient funding to resolve the dispute with respect to the Danforth Lease and wind-up the business affairs of the Applicant during the requested Stay Period.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 16**

23. 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 July 12, 2013.

**Hutchens Affidavit, Motion Record, Tab 3, pg. 4, para. 18**

**Third Report, para. 36**

24. 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. 4, para. 17**

**Third Report, para. 34**

25. Accordingly, the Applicant respectfully requests that this Court grant an extension of the Stay Period to and including July 12, 2013.

**PART V – RELIEF REQUESTED**

26. The Applicant respectfully requests that this Court grant an Order substantially in the form of the draft Order attached as Tab 2 to the Applicant’s Motion Record.



ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of May, 2013.

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**TAB "A"**

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List

**TAB "B"**

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

**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.

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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**  
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Proceeding commenced at Toronto

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