Court File No. CV-13-1000-00CL

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.

February 7, 2013

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FACTUM OF THE APPLICANT

PART I – OVERVIEW

1. Extreme Fitness, Inc. ("**Extreme**", the "**Company**" or the "**Applicant**") seeks this Court's protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). By this application, the Applicant seeks an order pursuant to the CCAA:

(a) declaring that the Applicant is a company to which the CCAA applies;

(b) staying all proceedings and remedies taken or which might be taken in respect of the Applicant or any of its property, except upon the leave of the Court being granted, or as otherwise provided;

(c) authorizing the Applicant to prepare and file with the Court a plan of compromise or arrangement with its creditors;

(d) appointing FTI Consulting Canada Inc. ("**FTI**") as monitor of the Applicant (in such capacity, the "**Monitor**");

(e) approving a debtor-in-possession financing facility (the "**DIP Facility**") with Golub Capital Incorporated, as agent for the benefit of itself and three lenders (in such capacity, the "**DIP Lender**"), in the principal amount of USD$2,000,000 and granting a priority charge (the "**DIP Charge**") over the assets, properties and undertakings of the Applicant (collectively, the "**Property**") to secure repayment of the amounts borrowed by the Applicant under the DIP Facility;

(f) authorizing an administration charge (the "**Administration Charge**") over the Property to the benefit of the Monitor, Monitor's counsel, the Applicant's counsel and Alvarez & Marsal Canada ULC ("**A&M**") in its capacity as the Applicant's financial advisor (in such capacity, the "**Advisor**") and in its capacity as the Applicant's Interim Chief Financial Officer and Interim Controller (in such capacities, the "**Interim Officers**") to secure their fees and disbursements; and

(g) authorizing a charge over the Property to the benefit of the Applicant's directors, officers and Interim Officers (the "**D&O Charge**") for obligations and liabilities they may incur as directors and officers of the Applicant after the commencement of the CCAA proceedings.

PART II – FACTS

Background to the Applicant and its Business

2. The Applicant is a privately held corporation formed by articles of amalgamation under the laws of the Province of Alberta on June 16, 2006. The Applicant is registered to carry on business in the Province of Ontario and all of its assets are located in Ontario.

Affidavit of Alan Hutchens sworn February 7, 2013 (the "Hutchens Affidavit"), Application Record of the Applicant (the "Application Record"), Tab 4, pg. 3, para. 6

3. On June 15, 2006, Falconhead Capital, LLC ("**Falconhead**"), a New York based private equity firm, purchased the Extreme business which, at the time, operated four fitness facilities in the greater Toronto area (the "**GTA**"). Falconhead is the Applicant's largest shareholder, directly or indirectly holding approximately 80% of the outstanding share capital of the Company. Through acquisitions and greenfield expansions, the Applicant currently operates 13 fitness facilities in the GTA and surrounding region with approximately 57,500 members.

Hutchens Affidavit, Application Record, Tab 4, pg. 3, paras. 7-8

4. As of February 7, 2013:

(a) the Applicant's directors are David Gubbay, Darko Pajovic and Taso Pappas (collectively, the "**Directors**"); and

(b) the Applicant's officers are Taso Pappas, President, Alan Hutchens, Interim Chief Financial Officer and Greg Karpel, Interim Controller (collectively, the "**Officers**"). Messrs. Hutchens and Karpel were appointed as Interim CFO and Interim Controller, respectively, effective May 1, 2012, pursuant to an engagement letter between the Applicant and A&M of even date.

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

5. The Applicant's former CFO and former Controller were placed on administrative leave effective April 26, 2012. The Applicant's former CEO resigned effective June 8, 2012. On the same date, Taso Pappas was appointed President of the Applicant.

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

6. DBP Maintenance ("**DBP**") is an independent contractor owned by, among others, Darko Pajovic. DBP currently provides janitorial and general maintenance services to Extreme's 13 fitness facilities.

Hutchens Affidavit, Application Record, Tab 4, pg. 4, para. 11

7. The Applicant's revenues are comprised primarily of membership and personal training fees. The Applicant operates its 13 fitness facilities from the following leased locations:

(a) 80 Bloor Street West, Toronto ("**Bloor**");

(b) 3495 Lawrence Avenue East, Scarborough ("**Cedarbrae**");

(c) 635 Danforth Avenue, Toronto ("**Danforth**");

(d) 1521 Yonge Street, Toronto ("**Delisle**");

(e) 319 Yonge Street, Toronto ("**Dundas**");

(f) 110 Eglinton Avenue East, Toronto ("**Dunfield**");

(g) 90 Interchange Way, Vaughan ("**Interchange**");

(h) 4950 Yonge Street, Toronto ("**North York**");

(i) 1755 Pickering Parkway, Pickering ("**Pickering**");

(j) 267 Richmond Street West, Toronto ("**Richmond**");

(k) 8281 Yonge Street, Thornhill ("**Thornhill**");

(l) 111 Wellington Street West, Toronto ("**Wellington**"); and

(m) 75 Consumers Drive, Whitby ("**Whitby**").

Hutchens Affidavit, Application Record, Tab 4, pg. 3-4, para. 12

8. The Applicant's registered office is 600, 12220 Stony Plain Road, Edmonton, Alberta. Its head office is located at 8281 Yonge Street, Thornhill, Ontario.

Hutchens Affidavit, Application Record, Tab 4, pg. 4, para. 13

Applicant's Current Financial Situation

9. In early April, 2012, the Applicant's former CEO became aware that the Company was experiencing liquidity difficulties and that certain discrepancies and irregularities existed in the Company's books and records. Accordingly, the Applicant took immediate steps to investigate the situation by, among other things, engaging A&M on April 9, 2012, to provide consulting services in connection with, among other things, efforts to improve the Company's financial and operating performance and to assist in evaluating difficulties with the Company's accounting, financial and operating reporting.

Hutchens Affidavit, Application Record, Tab 4, pg. 5, para. 18

10. In mid-April, 2012, in order to address the Company's liquidity needs, certain of its stakeholders, with the cooperation of National Bank of Canada (the Applicant's senior secured lender), extended the Applicant a priority credit facility, as further detailed below.

Hutchens Affidavit, Application Record, Tab 4, pg. 5, para. 19

11. The Applicant and A&M worked throughout April and May, 2012 to identify, review and assess the impact of the discrepancies and irregularities that existed in the Company's books and records. As this work progressed it became evident that the Company's financial statements for the fiscal years ending December 31, 2010 and 2011 and its monthly financial statements for January to April, 2012 required restatement. The primary financial statement items that had been misstated, included, but were not limited to:

(a) personal training revenue, accounts receivable and deferred revenue;

(b) allowance for doubtful accounts;

(c) membership revenues; and

(d) GST/HST liabilities.

Hutchens Affidavit, Application Record, Tab 4, pg. 5-6, para. 20

12. The financial statement restatement work was concluded in mid-June, 2012 which entailed, but was not limited to:

(a) restatement of the Applicant's financial statements for the fiscal years ending December 31, 2010 and December 31, 2011 and its balance sheet as at December 31, 2009;

(b) reconciliation of the Applicant's personal training records for fiscal years 2009 to 2011;

(c) recalculation and restatement of the Applicant's bad debt expense for fiscal years 2010 and 2011;

(d) filing the Applicant's amended 2010 income tax return; and

(e) restating the Applicant's GST/HST liability in conjunction with the filing of amended returns under the Canada Revenue Agency's Voluntary Disclosures Program ("**VDP**"), as further described herein.

Hutchens Affidavit, Application Record, Tab 4, pg. 6, para. 21

13. The Applicant's unaudited third-quarter financial statements for the period ended September 30, 2012 reflect a loss from operations of $7,072,813.

Hutchens Affidavit, Application Record, Tab 4, pg. 6, para. 22

14. The Applicant's liabilities total approximately $57 million, $44 million of which are secured (including capital lease obligations).

Hutchens Affidavit, Application Record, Tab 4, pg. 7, para. 23

Applicant's Secured Creditors

(a) National Bank of Canada

15. The Applicant and National Bank of Canada ("**National Bank**") are parties to a credit agreement dated May 20, 2011 (the "**National Bank Credit Agreement**"), pursuant to which National Bank agreed to provide a revolving term credit facility in the principal amount of

$3,000,000, a non-revolving term loan facility in the principal amount of $15,000,000, a non-revolving term loan facility in the principal amount of $7,000,000 and a Business MasterCard facility in the principal amount of $500,000 (collectively, the "**National Bank Facilities**").

Hutchens Affidavit, Application Record, Tab 4, pg. 7, para. 24

16. The Applicant executed and delivered a general security agreement in favour of National Bank dated May 20, 2011 (the "**National Bank GSA**"), registration in respect of which was made pursuant to the *Personal Property Security Act* (Ontario) (the "**PPSA**") on March 25, 2011, pursuant to financing statement number 20110325 0910 1862 5333 and reference file number 668533329.

Hutchens Affidavit, Application Record, Tab 4, pg. 7, para. 25

17. As further security to support the National Bank Credit Agreement, the Applicant executed and delivered a securities pledge agreement in favour of National Bank (the "**National Bank SPA**") and a fixed and floating charged debenture in the principal amount of $50,000,000 (the "**National Bank Debenture**").

Hutchens Affidavit, Application Record, Tab 4, pg. 7, para. 26

18. The Applicant was in default of certain of its obligations under the National Bank Credit Agreement and, accordingly, entered into a forbearance letter agreement with National Bank dated April 18, 2012 (as amended, the "**National Bank Forbearance Agreement**"). The National Bank Forbearance Agreement operated to forbear enforcement of National Bank's security until October 31, 2012, conditional on certain terms and conditions as set out in the National Bank Forbearance Agreement. Through a series of extensions to the National Bank Forbearance Agreement, the forbearance date was extended to January 31, 2013.

Hutchens Affidavit, Application Record, Tab 4, pg. 7-8, para. 27

19. The total indebtedness of the Applicant to National Bank outstanding as at February 7, 2013 is approximately $18,734,943, including a $300,000 letter of credit provided by National Bank as security for the Applicant's lease of the Interchange location.

Hutchens Affidavit, Application Record, Tab 4, pg. 8, para. 28

(b) Golub Capital Incorporated

20. The Applicant and Golub Capital Incorporated ("**Golub**"), as agent for the benefit of itself and the lenders described in the agreement, are parties to an amended and restated credit agreement dated May 20, 2011 (the "**Golub Credit Agreement**"), pursuant to which Golub agreed to provide a term facility to the Applicant in the principal amount of $16,500,000 (the "**Golub Facility**").

Hutchens Affidavit, Application Record, Tab 4, pg. 8, para. 29

21. The Applicant executed and delivered a general security agreement in favour of Golub (the "**Golub GSA**"), registration in respect of which was made pursuant to the PPSA on June 5, 2006, pursuant to financing statement number 20060605 1112 1862 3005 and reference file number 625817394, as amended by financing statement numbers 20110426 0803 1862 7632 and 20110513 1051 1862 9118. This registration has been postponed by operation of financing statement number 20110511 0950 1862 8866 in favour of National Bank's PPSA registration against the Applicant under financing statement number 20110325 0910 1862 5333 and reference number 668533329.

Hutchens Affidavit, Application Record, Tab 4, pg. 8, para. 30

22. The Applicant was in default of certain of its obligations under the Golub Credit Agreement and, accordingly, executed a forbearance letter agreement with Golub, as agent for the benefit of itself and the lenders described therein, dated April 18, 2012 (as amended, the "**Golub Forbearance Agreement**"). The Golub Forbearance Agreement operated to forbear enforcement of Golub's security to October 31, 2012, conditional on certain terms and conditions substantively similar to those set out in the National Bank Forbearance Agreement. Through a series of extensions to the Golub Forbearance Agreement, the forbearance date was extended to February 15, 2013.

Hutchens Affidavit, Application Record, Tab 4, pg. 8-9, para. 31

23. The total indebtedness of the Applicant to Golub under the Golub Credit Agreement outstanding as at December 31, 2012 is approximately USD$18,728,587, including amounts owing for accrued interest.

Hutchens Affidavit, Application Record, Tab 4, pg. 9, para. 32

Priority Credit Facility

24. In order to address its liquidity difficulties, the Applicant entered into a priority credit facility agreement with Golub, as agent for the benefit of itself and the lenders described therein (the "**Priority Lenders**"), dated April 18, 2012 (as amended, the "**Priority Credit Agreement**"), under which the Priority Lenders agreed to provide a credit facility in the principal amount of USD$6,000,000, to be increased up to a maximum amount of USD$8,000,000 at the discretion of the Priority Lenders. The Priority Credit Agreement was provided to the Applicant expressly to provide liquidity sufficient to satisfy certain of its payroll and other operating expenses pursuant to approved cash flow statements. As of the date of this

Affidavit, the Applicant has drawn the aggregate of USD$8,000,000 under the Priority Credit Agreement.

Hutchens Affidavit, Application Record, Tab 4, pg. 9, para. 33

25. The Applicant executed and delivered, as an acknowledgment party, an intercreditor agreement between Golub, in its joint capacities as agent for itself and on behalf of each of the senior creditors and junior creditors (as defined therein) dated April 18, 2012 (the "**Golub Intercreditor**"), under which the Applicant's obligations to Golub and the junior creditors under the Golub Credit Agreement were subordinated in favour of those of Golub and the senior creditors under the Priority Credit Agreement up to an amount equal to USD$8,000,000, plus interest and costs.

Hutchens Affidavit, Application Record, Tab 4, pg. 9, para. 34

26. The Applicant executed and delivered, as an acknowledgment party, an intercreditor agreement between Golub, as agent for and on behalf of the senior creditors (as defined therein), and National Bank, as agent for and on behalf of the junior creditors (as defined therein), dated April 18, 2012 (the "**National Bank / Golub Intercreditor**"), under which the Applicant's obligations to National Bank and the junior creditors under the National Bank Credit Agreement were subordinated in favour of those of Golub and the senior creditors under the Priority Credit Agreement up to an amount equal to USD$8,000,000, plus interest and costs.

Hutchens Affidavit, Application Record, Tab 4, pg. 9-10, para. 35

27. Other than the creditors described above and RBC (as defined and described below), there are no other creditors with general security over the Applicant's assets.

Hutchens Affidavit, Application Record, Tab 4, pg.10, para. 36

(c) Other Secured Creditors

28. Each of CIT Financial Ltd., Life Fitness International Sales, Inc., Heffner Leasing Limited, Heffner Auto Sales and Leasing Inc., Heffner Auto Finance Corp., Coinamatic Commercial Laundry Inc., Indcom Leasing Inc., Essex Capital Leasing Corp., CLE Leasing Enterprises Ltd., DSM Leasing Ltd., Enercare Solutions Limited Partnership, Dell Financial Services Canada Limited, BMW Canada Inc. and De Lage Laden Financial Services Canada Inc. have made PPSA security registrations against the Applicant in respect to specific leased equipment and motor vehicles, as applicable.

Hutchens Affidavit, Application Record, Tab 4, pg.10, para. 37

(d) Cash Management System / Payment Processors: National Bank of Canada, Royal Bank of Canada and Chase Paymentech Solutions

29. The Applicant maintains the following bank accounts:

(a) two accounts with its primary operating bank, National Bank, being one Canadian dollar account and one U.S. dollar account (together, the "**National Bank Accounts**"); and

(b) 14 accounts with Royal Bank of Canada ("**RBC**"), being one account for each of the Applicant's 13 fitness facilities and one master account (collectively, the "**RBC Bank Accounts**").

Hutchens Affidavit, Application Record, Tab 4, pg. 10, para. 39

30. The Canadian dollar National Bank account (the "**CAD National Bank Account**") is the Applicant's primary operating account where Visa and Master Card credit card payments and

Interac direct deposit payments made in favour of the Applicant are deposited. Approximately 76.5% of the Company's aggregate cash receipts are deposited into the CAD National Bank Account, including cash and cheque payments received directly at the Applicant's 13 fitness facilities and delivered to the Company's head office for deposit. The Company utilizes the cash in the CAD National Bank Account to fund its payroll and to pay all of its landlord, supplier and other Canadian dollar obligations. The U.S. dollar National Bank account (the "**USD National Bank Account**") is used periodically to pay the Applicant's U.S. dollar obligations. Funds are electronically transferred by management of the Applicant from the CAD National Bank Account to the USD National Bank Account on an as-needed basis.

Hutchens Affidavit, Application Record, Tab 4, pg. 11, para. 40

31. The RBC Bank Accounts are the Applicant's secondary operating accounts where pre-authorized debits ("**PADs**") and American Express credit card payments made in favour of the Applicant are deposited. Approximately 23.5% of the Company's aggregate cash receipts are deposited into the RBC Bank Accounts. The funds held in the RBC Bank Accounts are periodically aggregated into the RBC master account and subsequently transferred at the request of management of the Applicant from the RBC master account to the CAD National Bank Account on an as-needed basis. The Applicant does not make any other disbursements to any other parties from the RBC Bank Accounts.

Hutchens Affidavit, Application Record, Tab 4, pg. 11, para. 41

32. As security for its services and the obligations of the Applicant under its agreement with RBC, the Company is required to maintain a minimum aggregate cash balance in its RBC accounts of $500,000. RBC has a PPSA registration against the Applicant by way of financing

statement number 20080709 1945 1531 7923 and reference file number 646777251 over inventory, equipment, accounts, other and motor-vehicle.

Hutchens Affidavit, Application Record, Tab 4, pg. 11, para. 42

33. The Applicant also has an existing agreement with Chase Paymentech Solutions, for itself and on behalf of The Bank of Nova Scotia and First Data Loan Company, Canada (collectively, "**Paymentech**"), dated February 2, 2011 (the "**Paymentech Agreement**"), pursuant to which Paymentech provides processing services for Visa and Master Card credit card payments and Interac direct deposit payments made in favour of the Applicant. Paymentech currently processes approximately 70% of all cash receipts of the Company. As security for its services and the obligations of the Applicant under the Paymentech Agreement, the Applicant has provided to Paymentech a cash deposit in an amount of $900,000.

Hutchens Affidavit, Application Record, Tab 4, pg. 11-12, para. 43

(e) Landlords

34. The Applicant has existing lease agreements with the following landlords:

(a) Krugarand Corporation, in respect to the Bloor location;

(b) First Capital (Cedarbrae) Corporation, in respect to the Cedarbrae location;

(c) 1079268 Ontario Inc., in respect to the Danforth location;

(d) 1521 Yonge Street Limited, in respect to the Delisle location;

(e) 10 Dundas Street Ltd., in respect to the Dundas location;

(f) 110 Eglinton Avenue East Inc., in respect to the Dunfield location;

(g) 2748355 Canada Inc., in respect to the Interchange location;

(h) Redbourne Madison Property Inc. and Redbourne Madison LP Inc., in respect to the North York location;

(i) Pickering Brock Centre Inc., in respect to the Pickering location;

(j) Festival Hall Developments Inc., in respect to the Richmond location;

(k) 2079843 Ontario Inc. and 2044922 Ontario Ltd., in respect to the Thornhill location and corresponding parking lot lease;

(l) 2125879 Ontario Inc., in respect to the Wellington location; and

(m) Whitby Entertainment Holdings Inc., in respect to the Whitby location.

Hutchens Affidavit, Application Record, Tab 4, pg. 12, para. 44

(f) Government of Canada/Canada Revenue Agency

35. On April 23, 2012, the Applicant's legal counsel wrote to the CRA to initiate a voluntary disclosure under CRA's VDP relating to under reported GST/HST collections and overstated input tax credits for fiscal years 2009, 2010 and 2011. In a letter dated May 10, 2012, CRA assigned a VDP case number to Extreme and confirmed that the effective date of the voluntary disclosure was April 23, 2012.

Hutchens Affidavit, Application Record, Tab 4, pg. 13, para. 45

36. On July 20, 2012, the Applicant's legal counsel wrote to CRA to submit amended monthly GST/HST returns prepared by the Company for fiscal years 2009, 2010 and 2011. The amended returns show an aggregate GST/HST liability for those years of approximately $3.4 million, subject to assessment by CRA. In addition, while the Company did not file amended

returns for January and February, 2012, the combined liability of approximately $624,000 for those months has not been paid to CRA.

Hutchens Affidavit, Application Record, Tab 4, pg. 13, para. 46

37. The Applicant received Notices of Re-Assessment (the "**NORAs**") from CRA dated January 11, 2013, which delineated the Applicant's HST obligations flowing from the amended tax returns filed under the VDP. The aggregate HST liability owing pursuant to the NORAs is $4,548,819, including the above-noted liabilities for January and February, 2012 and interest and penalties of $369,845.

Hutchens Affidavit, Application Record, Tab 4, pg. 13, para. 47

(g) Employees

38. The Applicant presently employs approximately 160 full-time employees, 700 part-time employees, and 30 independent contractors in Ontario. The 30 independent contractors provide services related to group fitness classes at each of the Applicant's 13 fitness facilities. The Applicant's employees are not unionized and do not have a collective bargaining agent. Wages and benefits total approximately $1,700,000 per month.

Hutchens Affidavit, Application Record, Tab 4, pg. 13, para. 48

39. As at February 7, 2013, all source deductions related to the Applicant's employees were current, including, without limitation, income tax withholdings, employee health tax, worker's compensation, Canada Pension Plan and employment insurance.

Hutchens Affidavit, Application Record, Tab 4, pg. 14, para. 50

40. The Applicant has no pension plans.

Hutchens Affidavit, Application Record, Tab 4, pg. 14, para. 51

41. Based on the Applicant's current cash position, its pro-forma cash flows and its access to the balance available to it under the DIP Facility (as defined herein), it has sufficient cash to continue to pay wages to its remaining employees, contractors and its other obligations arising post-filing until the completion of the proposed sale transaction or restructuring.

Hutchens Affidavit, Application Record, Tab 4, pg. 13, para. 49

(h) Trade Creditors

42. As at February 5, 2013, the Applicant's other unsecured liabilities, including trade debt, totalled approximately $850,000, which amount does not include outstanding February rent payments of approximately $890,000. Since the Applicant's business does not require significant consumable supplies or services, its trade creditor debt is generally small and is usually satisfied in the ordinary course of business.

Hutchens Affidavit, Application Record, Tab 4, pg. 14, para. 52

Prior Marketing and Sale Process

43. 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 Extreme or certain of its 13 fitness facilities.

Hutchens Affidavit, Application Record, Tab 4, pg. 14, para. 53

44. Commencing in mid-August, 2012, ISQ contacted numerous potential purchasers that either already had operations in the fitness facility sector or that ISQ believed would have

interest in Extreme. Of these parties, several executed non-disclosure agreements and received the confidential information memorandum prepared by ISQ, which memorandum described Extreme's business.

Hutchens Affidavit, Application Record, Tab 4, pg. 14, para. 54

45. 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, Application Record, Tab 4, pg. 14, para. 55

46. The Applicant and ISQ concluded that the potential realizations from the offers generated by the solicitation process described above were insufficient and, accordingly, no offers were accepted.

Hutchens Affidavit, Application Record, Tab 4, pg. 14-15, para. 56

Sale Under CCAA Protection

47. Based on the information set out above and attached to the Hutchens Affidavit, the Applicant is insolvent as the aggregate of its property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due and who, without the aid of further funding, would not be able to satisfy its liabilities as they become due

Hutchens Affidavit, Application Record, Tab 4, pg. 15, paras. 57-58

48. In order for the Applicant to ensure the best possible recovery for its stakeholders, including, without limitation, its creditors, employees, customers and landlords, the Applicant has determined that a sale of its business is required.

Hutchens Affidavit, Application Record, Tab 4, pg. 15, para. 59

Letter of Intent with GoodLife Fitness Centres Inc.

49. On January 18, 2013, the Applicant entered into a letter of intent (the "**LOI**") with GoodLife Fitness Centres Inc. ("**GoodLife**"). The LOI contemplates the sale of substantially all of the Applicant's assets for an aggregate amount greater than any one or more of the other offers proffered under the ISQ sales process and maximizes value for all stakeholders.

Hutchens Affidavit, Application Record, Tab 4, pg. 15, para. 60

50. The sale transaction contemplated in the LOI must, according to its terms, close on or before March 1, 2013 or such other date as the parties thereto agree to. Certain conditions precedent must be satisfied prior to the conclusion of the sale, including, but not limited to:

(a) GoodLife concluding its due diligence with respect to the Applicant on or before March 4, 2013;

(b) the execution of a binding asset purchase agreement in respect of substantially all of the Applicant's assets (the "**APA**") by no later than March 18, 2013; and

(c) approval of the APA by the Court.

Hutchens Affidavit, Application Record, Tab 4, pg. 15-16, para. 61

51. Pursuant to the LOI, until the earlier of: (i) the date on which the APA is executed; and (ii) the date on which GoodLife terminates negotiations under the LOI, the Applicant, the Applicant's shareholders, National Bank and Golub are precluded from directly or indirectly soliciting or engaging in discussions or negotiations with any third party seeking to purchase the Applicant's assets.

Hutchens Affidavit, Application Record, Tab 4, pg. 16, para. 62

52. The parties to the LOI are diligently working towards satisfying the conditions set out in the LOI and, to the extent that such conditions are satisfied, will enter into an APA, return to Court to seek approval of the APA and ultimately distribute the realizations from said transaction to the Applicant's creditors entitled thereto in accordance with their priority assuming the transaction closes.

Hutchens Affidavit, Application Record, Tab 4, pg. 16, para. 63

PART III – ISSUES

53. The primary issues to be determined on this application are whether this Court should:

(a) grant protection to the Applicant under the CCAA;

(b) approve the DIP Facility and grant the DIP Charge;

(c) grant the Administration Charge;

(d) grant the D&O Charge; and

(e) seal the confidential appendices to the Hutchens Affidavit.

PART IV – LAW AND ARGUMENT

A. THE APPLICANT SHOULD BE GRANTED PROTECTION UNDER THE CCAA

The Applicant is a "Debtor Company" to which the CCAA Applies

54. The CCAA applies to a "debtor company" where the total of claims against the debtor exceeds $5,000,000.

CCAA, s. 3(1)

55. The CCAA defines "company" as, *inter alia*, a company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, including an income trust. Pursuant to section 2 of the CCAA, a "debtor company" is defined in the CCAA as, *inter alia*, a company that is insolvent.

CCAA, s. 2(1), "debtor company", "company"

56. The Applicant is a privately held corporation formed by articles of amalgamation under the laws of the Province of Alberta on June 16, 2006. The Applicant is therefore a "company" within the definition of the CCAA.

Hutchens Affidavit, Application Record, Tab 4, pg. 3, para. 6

57. The CCAA does not define "insolvent", but the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "**BIA**") is commonly referenced in establishing that an applicant is a debtor company in the context of the CCAA. The definition of "insolvent person" in the BIA is as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

Stelco Inc. (Re) (2004), 48 C.B.R. (4th) 299 at paras. 21-22 (Ont. S.C.J. [Comm. List]), Applicant's Book of Authorities, Tab 1 ["_Stelco_"]

BIA, s. 2, "insolvent person"

58. In *Stelco*, Justice Farley applied an expanded definition of "insolvent" in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying (a) the BIA's definition of "insolvent person" to include a financially troubled corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

Stelco at paras. 25-26, Applicant's Book of Authorities, Tab 1

59. The Applicant is insolvent as the aggregate of its property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due and who, without the aid of further funding, would not be able to satisfy its liabilities as they become due.

Hutchens Affidavit, Application Record, Tab 4, pg. 15, para. 57-58

60. Accordingly, the Applicant respectfully submits that, in these particular circumstances, it should be considered a debtor company with total claims against it in excess of $5,000,000 who qualifies for protection under the CCAA.

The Requested Stay of Proceedings is Appropriate in the Circumstances

61. Section 11.02 of the CCAA provides that the Court may, on an initial application, for a period of not more than thirty days, impose a stay of proceedings in respect of the Applicant if the Applicant satisfies the Court that circumstances exist which make the order appropriate.

> ***CCAA*, s. 11.02**

62. In *Lehndorff General Partner Ltd. (Re)*, Justice Farley described the CCAA as a statute intended to "facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy" and, as such, is "remedial legislation entitled to a liberal interpretation". Justice Farley stated, *inter alia*:

> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.
>
> ***Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 at para. 6 (Ont. Gen. Div. [Comm. List]) Applicant's Book of Authorities, Tab 2 ["*Lehndorff*"]**

63. Justice Farley also expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. Specifically, Justice Farley stated:

> The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.
>
> ... It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.
>
> ***Lehndorff* at para. 7, Applicant's Book of Authorities, Tab 2**

64. More recently, in *Nortel Networks Corp. (Re)*, Justice Morawetz also held that the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives.

> ***Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 at para. 47 (Ont. S.C.J. [Comm. List]), Applicant's Book of Authorities, Tab 3 ["*Nortel*"]**

65. The power to grant a stay of proceedings should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and to enable continuance of the company seeking CCAA protection.

> ***Lehndorff* at para. 10, Applicant's Book of Authorities, Tab 2**

66. The Applicant requires a stay of proceedings in order to allow it to maintain operations while giving it the necessary time to consult with its stakeholders regarding the future of its business operations and pursue the opportunity of a going concern sale with respect to the assets or a restructuring of the Applicant's business.

67. Accordingly, the Applicant respectfully submits that it is appropriate in the circumstances to grant the requested stay of proceedings under the CCAA.

B. THE DIP FACILITY SHOULD BE APPROVED AND THE DIP CHARGE SHOULD BE GRANTED

68. The Applicant is seeking approval of the DIP Facility in the initial maximum principal amount of USD$2,000,000 to be secured by the DIP Charge.

69. Section 11.2 of the CCAA provides this Court with the statutory jurisdiction to grant the DIP Charge. It provides:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make

> an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2 (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> ***CCAA*, s. 11.2**

70. This Court has stressed the importance of meeting the criteria set out in subsection 11.2(1) of the CCAA, being:

(a) the DIP Charge does not purport to prime any secured party who has not received notice of this application;

(b) the amount to be advanced under the DIP facility is appropriate and required, having regard to the debtor's cash-flow statement;

(c) the charge does not secure an obligation that existed before the Order was made.

> ***Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at paras. 32-34 (Ont. S.C.J. [Comm. List]) ("*Canwest Global*"), Applicant's Book of Authorities, Tab 4**

71. The amount of the DIP Facility is supported by the Applicant's cash flow projections. The financing will be used to fund the Applicant's operations for the initial 9 week period, the anticipated period to complete a sale transaction.

> **Hutchens Affidavit, Application Record, Tab 4, pg. 15, para. 69**

72. The DIP Charge does not secure obligations to the DIP lender that existed before the Order (should it be granted).

73. Subsection 11.2(4) of the CCAA sets out a number of factors to be considered by the Court in determining if it is appropriate to grant a DIP Charge. It states:

> 11.2(4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> ***CCAA*, s. 11.2(4)**

74. In the present case, the following, when considered in relation to the above noted factors, support the granting of the DIP Charge:

(a) *Period during which the Applicant is expected to be subject to the CCAA.* The Applicant is optimistic that CCAA protection will enable it to negotiate a going concern sale of all or substantially all of its assets relatively quickly. However, given the early stages of this proceeding, the Applicant is not able to estimate with certainty the length of time it will require protection under the CCAA.

(b) *The DIP Facility would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicant.* Absent the funding

provided for by the DIP facility, the Applicant has no liquidity and will not be able to continue to meet its payroll obligations or have the opportunity to work with its stakeholders and the Monitor to develop a plan to restructure the business or effect a going concern sale.

(c) *Material prejudice to any creditor as a result of the security or charge.* The DIP Charge does not purport to prime any secured party who has not received notice of this application.

(d) *The Monitor.* The proposed Monitor supports the granting of the DIP Charge.

Hutchens Affidavit, Application Record, Tab 4, pg. 18, paras. 71-72

C. THE ADMINISTRATION CHARGE SHOULD BE GRANTED

75. The Applicant is seeking an Administration Charge in the amount of $500,000 as security for the fees and disbursements incurred in connection with services rendered to the Applicant both before and after the commencement of the CCAA proceedings by the Applicant's legal counsel, the Monitor, the Monitor's counsel and A&M.

76. Section 11.52 of the CCAA provides this Court with the statutory jurisdiction to grant the Administration Charge. It provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52 (2) This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

***CCAA*, s. 11.52**

77. In *Canwest Publishing Inc. (Re)*, Justice Pepall held that, in addition to the considerations provided for in section 11.52 of the CCAA, the following factors should also be considered:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

***Canwest Publishing Inc.* (Re) (2010), 63 C.B.R. (5th) 115 at para. 54 (Ont. S.C.J. [Comm. List]), Applicant's Book of Authorities Book, Tab 5**

78. In the present case, the following factors support the granting of the Administration Charge:

(a) the beneficiaries of the Administration Charge will provide essential legal and financial advice to the Applicant throughout the CCAA proceedings;

(b) the roles of the Applicant's legal counsel, the Monitor, the Monitor's legal counsel and A&M are distinct and there is no anticipated unwarranted duplication;

(c) the Administration Charge does not purport to prime any secured party who has not received notice of this application; and

(d) the proposed Monitor supports the granting of the Administration Charge.

Hutchens Affidavit, Application Record, Tab 4, pg. 19, para. 77

79. Accordingly, the Applicant respectfully submits that this is an appropriate case in which to grant the Administration Charge. Each of the proposed beneficiaries will play a critical role in the Applicant's restructuring and it is unlikely that the above noted advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

D. THE D&O CHARGE SHOULD BE GRANTED

80. The Applicant is seeking a D&O Charge in the amount of $2,880,000 in order to protect the Directors, Officers and Interim Officers from certain potential liabilities.

81. The Directors, Officers and Interim Officers have indicated that their respective ongoing involvement is conditional upon the granting of an order under the CCAA which grants a charge on the Applicant's property in the maximum amount of $2,880,000, approximately equal to 4 weeks wages plus accrued vacation pay plus 2 months of estimated HST obligations, as security for the Applicant's indemnification for possible liabilities which may be incurred by such

Directors, Officers and Interim Officers, which would rank second in priority behind the Administration Charge but ahead of the DIP Charge.

Hutchens Affidavit, Application Record, Tab 4, pg. 20, para. 79

82. The D&O Charge is required in order to provide a level of protection to the Directors, Officers and Interim Officers with respect to the possible liabilities imposed on individuals in their capacity as directors and officers of the Applicant. The D&O Charge is fair and reasonable and advances the integral need of the Applicant to have fully functional, experienced and qualified advisors, board of directors and officers.

Hutchens Affidavit, Application Record, Tab 4, pg. 21, para. 83

83. Section 11.51 of the CCAA provides this Court with the statutory jurisdiction to grant the D&O Charge. It states:

> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be acted by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51 (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51 (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51 (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

***CCAA*, s. 11.51**

84. In *Canwest Global Communications Corp. (Re)*, Justice Pepall applied section 11.51 at the debtor company's request for a directors' and officers' charge, noting that the Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings. In approving the request, Justice Pepall stated:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approve the request.

***Canwest Global* at para. 48, Applicant's Book of Authorities, Tab 4**

85. The D&O Charge conforms with the requirements of subsection 11.51 of the CCAA in that: (i) it does not apply to obligations and liabilities that were incurred prior to the commencement of the proceedings; (ii) it only applies to obligations and liabilities not covered by the Applicant's current D&O insurance policy; and (iii) it does not apply to any obligation or liability incurred as a result of the applicable Director, Officer or Interim Officer's gross negligence or wilful misconduct.

86. The proposed Monitor supports the granting of the D&O Charge, including the amount thereof.

87. The D&O Charge does not purport to prime any secured party who has not received notice of this application.

88. For these reasons, the Applicant respectfully submits that the D&O Charge is reasonable in the circumstances, conforms with the requirements of section 11.51 of the CCAA and should be granted.

E. THE CONFIDENTIAL EXHIBITS TO THE HUTCHENS AFFIDAVIT SHOULD BE SEALED

89. The Applicant is seeking an order sealing Confidential Exhibit "C", which contains the Applicant's financial statements; Confidential Exhibit "O", which contains a financial summary of the ISQ sales process; and Confidential Exhibit "P", which contains the GoodLife LOI (collectively, the "**Confidential Exhibits**").

90. 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)**

91. 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 at para. 53, Applicant's Book of Authorities, Tab 6**

92. The Confidential Exhibits contain unredacted, sensitive financial and business information, the disclosure of which will cause harm to the Applicant and its stakeholders, all of which is an important commercial interest that should be protected.

93. Accordingly, the Applicant respectfully requests that this Court grant an Order sealing the Confidential Exhibits.

PART V – RELIEF REQUESTED

94. The Applicant respectfully requests that this Court grant an Order substantially in the form of the draft Initial Order attached as Tab 2 to the Applicant's Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of February, 2013.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List])

2. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List])

3. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])

4. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm. List])

5. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List])

6. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (SCC)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

2. In this Act,

...

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

2. (1) In this Act,

...

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

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.

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor

company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Courts of Justice Act, RSO 1990, c C.43

137 (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.

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-13-1000-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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