

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GNC HOLDINGS, INC., GENERAL NUTRITION CENTRES COMPANY, GNC PARENT LLC, GNC CORPORATION, GENERAL NUTRITION CENTERS, INC., GENERAL NUTRITION CORPORATION, GENERAL NUTRITION INVESTMENT COMPANY, LUCKY OLDSCO CORPORATION, GNC FUNDING INC., GNC INTERNATIONAL HOLDINGS INC., GNC CHINA HOLDSCO, LLC, GNC HEADQUARTERS LLC, GUSTINE SIXTH AVENUE ASSOCIATES, LTD., GNC CANADA HOLDINGS, INC., GNC GOVERNMENT SERVICES, LLC, GNC PUERTO RICO HOLDINGS, INC. AND GNC PUERTO RICO, LLC

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

Applicant

**FACTUM OF THE APPLICANT  
(Motion for Recognition of Certain Second Day Orders,  
returnable July 27, 2020)**

July 22, 2020

**Torys LLP**

79 Wellington St. W., 30th Floor  
Box 270, TD South Tower  
Toronto, ON M5K 1N2  
Fax: 416.865.7380

Scott A. Bomhof (LSO #: 37006F)  
Tel: 416.865.7370 | sbomhof@torys.com

Adam M. Slavens (LSO #: 54433J)  
Tel: 416.865.7333 | aslavens@torys.com

Jeremy Opolsky (LSO #: 60813N)  
Tel: 416.865.8117 | jopolsky@torys.com

Leora Jackson (LSO #: 68448L)  
Tel: 416.865.7547 | ljackson@torys.com

Lawyers for the Applicant

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## **PART I – NATURE OF THE MOTION**

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

## **PART II – THE FACTS**

### **Proceedings to Date**

2. GNC is a global health and wellness brand with a diversified business. In its stores and online in certain regions, GNC sells an assortment of performance and nutritional supplements, vitamins, herbs and greens, health and beauty, food and drink, and other general merchandise, featuring innovative GNC-branded products as well as nationally recognized third-party brands, many of which are exclusive to GNC.<sup>2</sup>

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<sup>1</sup> In addition to GNC Holdings, Inc., the other Debtors are General Nutrition Centres Company, GNC Parent LLC, GNC Corporation, General Nutrition Centers, Inc., General Nutrition Corporation, General Nutrition Investment Company, Lucky Oldco Corporation, GNC Funding Inc., GNC International Holdings Inc., GNC China Holdco, LLC, GNC Headquarters LLC, Gustine Sixth Avenue Associates, Ltd., GNC Canada Holdings, Inc., GNC Government Services, LLC, GNC Puerto Rico Holdings, Inc. and GNC Puerto Rico, LLC.

<sup>2</sup> Tolivar Affidavit, paras 13-14, attached as Exhibit A to the Affidavit of Andrea Das-Wieczorek, affirmed July 22, 2020 (“**Das-Wieczorek Affidavit**”).

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

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

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

6. The Debtors sought the appointment of a foreign representative and the recognition of the Chapter 11 Cases as foreign main proceedings. They also sought recognition of certain First Day

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<sup>3</sup> Das-Wieczorek Affidavit, para 5.

<sup>4</sup> Das-Wieczorek Affidavit, para 6.

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

Orders entered by the U.S. Court, particularly an Interim DIP Order. The Interim DIP Order was necessary to provide the Debtors' access to financial liquidity required for them to continue as a going concern and to implement their restructuring plan.<sup>6</sup>

7. Finally, the Debtors sought the appointment of FTI Consulting Canada Inc. as the information officer for these proceedings and the grant of various charges, including an Administration Charge of CDN \$250,000.<sup>7</sup>

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

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

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

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

<sup>8</sup> See generally [GNC Application Endorsement](#); Das-Wieczorek Affidavit, paras 7-8.

10. On or by July 21, 2020, the U.S. Court entered all of the orders in relation to the Second Day Motions (the “**Second Day Orders**”).<sup>9</sup> One order remains to be entered and is being addressed at a hearing before the U.S. Court scheduled for July 22, 2020.

11. The Debtors are now seeking recognition of certain of the Second Day Orders in this Court.

### **The Second Day Orders**

12. The Second Day Orders the Debtors are seeking to have recognized in Canada fall into two categories: (i) final orders in respect of interim orders previously recognized by this Court and (ii) orders granted in respect of certain of the Second Day Motions.

13. The Debtors are seeking recognition in Canada for the following Second Day Orders, which are companion final orders with respect to corresponding First Day Orders previously recognized by this Court as interim orders on June 29, 2020:

- (a) Final order (a) authorizing continued use of existing cash management system, including maintenance of existing bank accounts, checks, and business forms, (b) authorizing continuation of existing deposit practices, (c) authorizing continuation of intercompany transactions, and (d) granting administrative claim status to postpetition intercompany claims (“**Final Cash Management Order**”);

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<sup>9</sup> Das-Wieczorek Affidavit, para 9.

- (b) Final order authorizing payment of certain prepetition critical vendor claims (**“Final Critical Vendors Order”**);
- (c) Final order authorizing the Debtors to (i) maintain and administer prepetition customer programs and (ii) pay prepetition obligations related thereto (**“Final Customer Programs Order”**);
- (d) Final order (i) authorizing the Debtors to (a) obtain senior secured postpetition financing, (b) grant liens and superpriority administrative expense status, (c) use cash collateral of prepetition secured parties, and (d) grant adequate protection to prepetition secured parties; (ii) schedule a final hearing pursuant to Bankruptcy Rules 4001(b) and 4001(c); and (iii) granting related relief (the **“Final DIP Order”**);
- (e) Final order establishing certain notice and hearing procedures for transfers of, or worthlessness deductions with respect to, common stock and convertible preferred stock of GNC Holdings (**“Final Equity Trading NOL Order”**);
- (f) Final order authorizing the Debtors to (a) pay prepetition insurance obligations and prepetition bonding obligations and (b) maintain their postpetition insurance coverage and bonding program (**“Final Insurance Order”**);
- (g) Final order (a) authorizing payment of prepetition lien claims and import claims and (b) confirming administrative expense priority of outstanding orders (**“Final Lien and Import Claims Order”**);

- (h) Final order (a) approving procedures for store closing sales, (b) authorizing customary bonuses to managers of closing stores, (c) authorizing assumption of the consulting agreements, and (d) granting related relief (“**Final Store Closing Order**”).
- (i) Final order authorizing payment of prepetition taxes and fees (“**Final Tax Order**”);
- (j) Final order (a) prohibiting utility companies from altering or discontinuing service on account of prepetition invoices, (b) approving deposit as adequate assurance of payment, (c) establishing procedures for resolving requests by utility companies for additional assurance of payment, and (d) authorizing payment of any prepetition service fees (“**Final Utilities Order**”); and
- (k) Final order (a) authorizing payment of certain prepetition workforce obligations, (b) authorizing continuance of workforce programs, (c) authorizing payment of withholding and payroll-related taxes, and (d) authorizing payment of prepetition claims owing to workforce program administrators (“**Final Wages Order**”).<sup>10</sup>

14. Since the interim orders were issued, the Debtors received informal comments and objections regarding these orders by various interested parties and filed revised orders in order to resolve those comments and objections.

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<sup>10</sup> Das-Wieczorek Affidavit, para 11.

15. The Debtors are also seeking recognition of the following “new” Second Day Orders, in relation to which the Debtors have not previously sought relief in Canada:

- (a) An order establishing bar dates and related procedures for filing proofs of claim (**“Bar Date Order”**);
- (b) An order approving bidding procedures related to a competitive auction process for the sale of the Debtors’ assets (**“Bidding Procedures Order”**); and
- (c) Omnibus orders authorizing the rejection of certain unexpired leases effective as of the Petition Date, including the rejection of 29 leases in Canada (**“First Omnibus Order to Reject Certain Unexpired Leases”** and **“Third Omnibus Order to Reject Certain Unexpired Leases”**).<sup>11</sup>

16. The Bidding Procedures Order has not yet been issued but is expected to be entered on July 22, 2020.<sup>12</sup>

### **Bar Date Order**

17. Under the *United States Bankruptcy Code*, any creditor or equity security holder that held claims against the Debtors prior to the Petition Date must file a proof of claim if their claim is not listed on the Debtors’ schedules of assets and liabilities. They must also file a claim if their claim is listed but is disputed, contingent or unliquidated.<sup>13</sup>

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<sup>11</sup> Das-Wieczorek Affidavit, para 12.

<sup>12</sup> Das-Wieczorek Affidavit, para. 20.

<sup>13</sup> Bar Date Motion, p. 3, Exhibit X to the Das-Wieczorek Affidavit.

18. The Debtors have brought a motion to establish deadlines for the filing of such claims in the Chapter 11 Cases (the “**Bar Dates**”), as well as to establish the procedures and requirements for filing proofs of claim and the procedures for providing notice of the Bar Dates to known and potential creditors.<sup>14</sup>

19. Establishing the Bar Dates and related procedures is essential to the Debtors’ efficient administration of their estates. It will allow the Debtors to expeditiously determine and evaluate existing liabilities as they prepare a plan of reorganization in their creditors’ best interests and will reduce uncertainty of future claims being brought by creditors.<sup>15</sup>

20. Pursuant to the proposed Bar Date Order, the Debtors are required to publish notice of the Bar Dates in *The Globe and Mail* and such other local newspapers or publications as the Debtors deem appropriate.<sup>16</sup>

### **Bidding Procedures Order**

21. Upon commencing the Chapter 11 Cases, the Debtors entered a restructuring support agreement (the “**RSA**”) to pursue both a standalone plan of reorganization (the “**Standalone Plan Transaction**”) and a competitive sale process for their assets. As part of the competitive sale process, the Debtors received a \$760 million bid from Harbin Pharmaceutical Group

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<sup>14</sup> Bar Date Motion, p. 1-2, Exhibit X to the Das-Wieczorek Affidavit.

<sup>15</sup> Bar Date Motion, p. 14, Exhibit X to the Das-Wieczorek Affidavit.

<sup>16</sup> Bar Date Motion, p. 12, Exhibit X to the Das-Wieczorek Affidavit.

Holding Co., Ltd. (“**Harbin**”); however, the terms and conditions of Harbin’s bid have not been finalized in an asset purchase agreement between the Debtors and Harbin or its designee.<sup>17</sup>

22. As such, the Debtors filed a notice of filing revised bidding procedures with the U.S. Court on July 15, 2020.<sup>18</sup> The bidding procedures (the “**Bidding Procedures**”) reserve the Debtors’ rights to return to the U.S. Court on seven days’ notice to request approval of a stalking horse bidder and bid protections. The revised Bidding Procedures include procedures by which the Debtors may select a stalking horse bidder and provide it with a breakup fee, expense reimbursement, and minimum overbid protections. The revisions also explain how the selected stalking horse bid will interact with other parties’ bids where there is a sole bidder or an auction.<sup>19</sup>

23. The Debtors also subsequently filed a revised proposed Bidding Procedures Order. Consistent with the revised Bidding Procedures, the revised order removes reference to a specific stalking horse bidder and asset purchase agreement. It enables the Debtors, in consultation with certain parties, to select a Stalking Horse Bidder or Bidders, and sets out a process for providing notice, receiving objections, and approval in relation to such a designation.<sup>20</sup>

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<sup>17</sup> Bidding Procedures Motion, p. 5-6, Exhibit Y to the Das-Wieczorek Affidavit and Notice of Filing of Revised Bidding Procedures, p. 1, Exhibit BB to the Das-Wieczorek Affidavit.

<sup>18</sup> Das-Wieczorek Affidavit, Exhibit BB.

<sup>19</sup> Notice of Filing of Revised Bidding Procedures, p. 1, 4, 11-14, Exhibit BB to the Das-Wieczorek Affidavit.

<sup>20</sup> Das Wieczorek Affidavit, Exhibit DD

24. The bidding process will maximize the value of the Debtors' estates and will promote a successful restructuring. The Bidding Procedures will allow the Debtors to solicit additional offers and conduct a controlled, fair, and open sale process that encourages participation by financially capable, well-informed bidders.<sup>21</sup>

### **Omnibus Orders to Reject Certain Unexpired Leases**

25. The Debtors are parties to several thousand real property leases in the United States, Canada, and Puerto Rico. As part of their ongoing restructuring efforts, the Debtors have identified stores whose leases they seek to reject. 29 of these stores are located in Canada.<sup>22</sup>

26. By rejecting certain leases, the Debtors avoid accruing unnecessary expenses which provide no benefits to the Debtors' estates. The Debtors and their advisors have concluded that the leases are not marketable given current market conditions and are unlikely to generate material value of the Debtors' estates.<sup>23</sup>

27. The Debtors have brought eight omnibus lease rejection motions seeking, among other things, the rejection of the identified leases. The First and Third Omnibus Motions to Reject Certain Unexpired Leases include the lease rejections for 29 of the stores in Canada.<sup>24</sup>

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<sup>21</sup> Bidding Procedures Motion, p. 24-25, Exhibit Y to the Das-Wieczorek Affidavit.

<sup>22</sup> First Omnibus Motion to Reject Certain Unexpired Leases, p. 3, Exhibit Z to the Das-Wieczorek Affidavit

<sup>23</sup> First Omnibus Motion to Reject Certain Unexpired Leases, p. 4, Exhibit Z to the Das-Wieczorek Affidavit

<sup>24</sup> Das-Wieczorek Affidavit, para 18.

28. Counsel for certain Canadian landlords has not objected to the recognition of these orders. General Nutrition Centres Company (“**GNC Canada**”) has assured the Canadian landlords’ counsel that it will give the landlords at least 30 days’ notice prior to the effective date of a lease rejection and will continue to pay rent during that time period. This understanding between the parties is reflected in Justice Conway’s endorsement from the initial recognition hearing in this matter.<sup>25</sup>

29. In response to informal comments by interested parties, the Debtors filed revised orders for the First and Third Omnibus Orders to Reject Certain Unexpired Leases. The revisions to these orders include deeming the Debtors to have abandoned any furniture, fixtures, and equipment and other personal property free and clear of all liens, claims, interests, or other encumbrances as of the Petition Date at the rejected lease locations. The Debtors are not authorized to abandon personal identifying information of any customer and must comply with state or federal privacy and/or theft prevention laws and rules in respect of personal identifying information.<sup>26</sup>

### **PART III – THE ISSUES**

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

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<sup>25</sup> [GNC Application Endorsement](#) at para 29.

<sup>26</sup> Certification of Counsel Regarding First Omnibus Order to Reject Certain Unexpired Leases, p. 2-3, Exhibit EE to the Das-Wieczorek Affidavit.

## **PART IV – THE LAW**

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

31. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions. Such orders are also intended to promote fair and efficient administration of cross-border insolvencies, which also protects the interests of debtors, creditors, and other interested persons.<sup>27</sup>

32. In the context of Part IV of the CCAA, the Court is granted the authority to apply any legal or equitable rules necessary, provided they are not inconsistent with the provisions of the CCAA.<sup>28</sup>

### **B. The Second Day Orders of the U.S. Court should be recognized by this Court**

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

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<sup>27</sup> [Zochem Inc. \(Re\)](#), [2016 ONSC 958](#) at para 15; CCAA at s. 44.

<sup>28</sup> CCAA at s. 61(1).

extent possible, with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.<sup>29</sup>

34. GNC Holdings seeks the recognition of Second Day Orders that were obtained by the Debtors from the U.S. Court.

35. The Second Day Orders are not inconsistent with any order that may be granted under the CCAA. Canadian courts have regularly exercised their jurisdiction under sections 49 and 50 of the CCAA to recognize Chapter 11 bankruptcy orders with similar effect to the Second Day Orders, including recognition of U.S. lease rejection orders, as sought here.<sup>30</sup> Under the CCAA, the Court has jurisdiction to approve a process for seeking bidders to purchase assets under a court-supervised sale process, and Canadian courts have exercised this jurisdiction on numerous occasions.<sup>31</sup>

36. The Final DIP Order, among other things, authorizes the Debtors to (i) obtain senior secured postpetition financing on a superpriority basis in the aggregate principal amount of US\$200,000,000 (the “**DIP Term Facility**”) and (ii) incur senior secured postpetition obligations on a superpriority basis in respect of a prepetition senior secured superpriority credit

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<sup>29</sup> CCAA at ss. 49, 50, 52(1) and 61(2).

<sup>30</sup> [Zochem Inc. \(Re\)](#) at paras 14, 42; [Massachusetts Elephant & Castle Group, Inc. \(Re\)](#), 2011 ONSC 4201 at paras 36, 40. Regarding lease rejection orders, see, for example, [Laidlaw Inc. \(Re\) \(In Bankruptcy\)](#), 2003 CanLII 8003 (ON SC) at para 19; [Order of Hainey J., as issued & entered on Feb. 21, 2020, re Amended and Restated Supplemental Order \(Pier One proceeding\)](#).

<sup>31</sup> See, for example, [Royal Bank of Canada v. Soundair Corp.](#), 4 OR (3d) 1 at paras 43-46, 48; [Order of Morawetz J dated June 23, 2011, In the Matter of Terrestar Networks Inc.](#); [AbitibiBowater inc. \(Arrangement relatif à\)](#), 2009 QCCS 6460 at paras 36-54; [Tiger Brand Knitting Co. \(Re\)](#), 2005 CanLII 9680 (ON SC) at paras 32-37.

facility in the aggregate principal amount of US\$275,000,000 plus any and all accrued and unpaid interest on all outstanding FILO Term Loans (the “**DIP ABL FILO Facility**”).<sup>32</sup>

37. Immediate access to incremental liquidity pursuant to the DIP financing facilities is critical to preserving the Debtors’ ability to operate. The Debtors do not have sufficient liquidity to operate their business in the ordinary course without the financing provided by the DIP financing facilities. Among other things, the Debtors need such liquidity to pay vendors and other participants in the Debtors’ supply chain, to execute on certain initiatives, and to pay fees and costs related to their restructurings.<sup>33</sup>

38. The Debtors have determined, in the exercise of their business judgment, that the terms of the DIP financing facilities are reasonable and appropriate in the circumstances.<sup>34</sup>

39. The amount actually borrowed by the Debtors under the DIP financing facilities is proposed to be secured by, among other things, Court-ordered charges on the Debtors’ property in Canada.<sup>35</sup>

40. This Court has concluded in previous proceedings that there is no impediment to granting approval of DIP financing including a full roll-up provision in foreign recognition proceedings

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<sup>32</sup> Tolivar Affidavit, para 89, Exhibit A to the Das-Wieczorek Affidavit

<sup>33</sup> Tolivar Affidavit, paras 90-91, Exhibit A to the Das-Wieczorek Affidavit

<sup>34</sup> Tolivar Affidavit, para 92, Exhibit A to the Das-Wieczorek Affidavit

<sup>35</sup> Tolivar Affidavit, para 93, Exhibit A to the Das-Wieczorek Affidavit.

under Part IV of the CCAA. In doing so, it has emphasized the importance of comity in foreign recognition proceedings.<sup>36</sup>

41. In cross-border insolvencies, Canadian and U.S. courts routinely seek to complement, coordinate and, where appropriate, accommodate the proceedings of the other court in order to enable cross-border enterprises to successfully restructure. Comity and cooperation are increasingly important in the restructuring context given the multi-jurisdictional presence of so many businesses, including GNC. Without coordination by the courts of cross-border restructuring proceedings, the result would be multiple proceedings with the likely consequence of inconsistent court orders and decisions and general uncertainty as to the direction and effect of the restructuring proceedings on creditors and stakeholders in various jurisdictions.<sup>37</sup>

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

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

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<sup>36</sup> [\*Hollander Sleep Products, LLC et al., Re\*](#) at paras 46-47; [\*Hartford Computer Hardware, Inc. \(Re\)\*](#), [2012 ONSC 964](#) at paras 10-14, 18-19; [\*Xinergy Ltd., Re\*](#), [2015 ONSC 2692](#) at paras 18, 21-23.

<sup>37</sup> [\*Babcock & Wilcox Canada Ltd., Re\*](#), [5 BLR \(3d\) 75](#) at paras 9-10; [Order of Newbould J. dated January 25, 2017, \*In the Matter of Modular Space Intermediate Holdings Inc. et al.\*](#).

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

- (g) that all affected stakeholders receive effective notice as is reasonably practicable in the circumstances.<sup>38</sup>

43. The Second Day Orders were obtained by the Debtors to facilitate their restructuring efforts in the Chapter 11 Cases by, among other things, minimizing the adverse effects of the Chapter 11 Cases on their business and preserving and maximizing the potential value of the Debtors' assets for the benefit of their creditors and other stakeholders.

44. GNC Holdings submits that consideration of the factors above favour granting the relief sought, and it is appropriate that the Court recognize and give effect to the orders of the U.S. Court. The Second Day Orders were made in good faith and in the interest of the Debtors' creditors and stakeholders. None of the Second Day Orders breach any applicable Canadian law. GNC Holdings submits that recognition of the Second Day Orders is necessary to ensure that the purposes of the CCAA are satisfied and the Debtors have the best opportunity to restructure their affairs.

45. Accordingly, GNC Holdings requests that the Court recognize the Second Day Orders.

#### **PART V – RELIEF REQUESTED**

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

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<sup>38</sup> [Babcock & Wilcox Canada Ltd., Re](#) at para 21; [Re Xerium Technologies Inc.](#), [2010 ONSC 3974](#) at paras 26-27.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in blue ink, appearing to read "Scott A. Bomhof", is written over a horizontal line.

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Scott A. Bomhof

Lawyer for the Applicant

## SCHEDULE A – LIST OF AUTHORITIES

1. Conway J - Endorsement on Application in CV-20-00642970-00CL (Re GNC) dated June 29, 2020
2. *Zochem Inc. (Re)*, 2016 ONSC 958
3. *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201
4. *Laidlaw Inc. (Re) (In Bankruptcy)*, 2003 CanLII 8003 (ON SC)
5. Order of Hainey J., as issued & entered on Feb. 21, 2020, re Amended and Restated Supplemental Order (Pier One proceeding).
6. *Royal Bank of Canada v. Soundair Corp.*, 4 OR (3d) 1
7. Order of Morawetz J dated June 23, 2011, In the Matter of Terrestar Networks Inc.
8. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460
9. *Tiger Brand Knitting Co. (Re)*, 2005 CanLII 9680 (ON SC)
10. *Hollander Sleep Products, LLC et al., Re*, 2019 ONSC 3238
11. *Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964
12. *Xinergy Ltd., Re*, 2015 ONSC 2692
13. *Babcock & Wilcox Canada Ltd., Re*, 5 BLR (3d) 75
14. Order of Newbould J. dated January 25, 2017, In the Matter of Modular Space Intermediate Holdings Inc. et al..
15. *Re Xerium Technologies Inc.*, 2010 ONSC 3974

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

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

#### PART IV – CROSS-BORDER INSOLVENCIES

##### PURPOSE

###### *Purpose*

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

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

##### INTERPRETATION

###### *Definitions*

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

[...]

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

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

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

##### RECOGNITION OF FOREIGN PROCEEDING

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

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

###### *Documents that must accompany application*

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

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

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

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

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

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

***Other evidence***

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

***Translation***

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

[...]

***Other Orders***

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

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

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

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

***Restriction***

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

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

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

***Terms and Conditions of Orders***

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

[...]

## **OBLIGATIONS**

### ***Cooperation — Court***

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

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

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

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

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

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

## **MISCELLANEOUS PROVISIONS**

[...]

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

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

### ***Public policy exception***

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

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

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

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

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE APPLICANT  
(Motion for Recognition of Certain Second Day  
Orders, returnable July 27, 2020)**

**Torys LLP**

79 Wellington St. W., 30th Floor  
Box 270, TD South Tower  
Toronto, ON M5K 1N2  
Fax: 416.865.7380

Scott A. Bomhof (LSO #: 37006F)  
Tel: 416.865.7370 | sbomhof@torys.com

Adam M. Slavens (LSO #: 54433J)  
Tel: 416.865.7333 | aslavens@torys.com

Jeremy Opolsky (LSO #: 60813N)  
Tel: 416.865.8117 | jopolsky@torys.com

Leora Jackson (LSO #: 68448L)  
Tel: 416.865.7547 | ljackson@torys.com

Lawyers for the Applicant