

**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 U.S. Orders,
returnable August 25, 2020)**

August 21, 2020

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TO: SERVICE LIST

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Applicant

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(as of August 21, 2020)**

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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 debtors¹ (collectively, the “**Debtors**” or “**GNC**”) for an order recognizing, and giving full force and effect in Canada to, certain U.S. 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.²

¹ 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.

² Tolivar Affidavit, paras 13-14, attached as Exhibit A to the Affidavit of Michael Noel, affirmed August 18, 2020 (“**Noel 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**”).³

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**”).⁴

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.⁵

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

³ Noel Affidavit, para 5.

⁴ Noel Affidavit, para 6.

⁵ [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.⁶

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 \$250,000.⁷

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.⁸

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.

⁶ [GNC Application Endorsement](#) at para 2.

⁷ [GNC Application Endorsement](#) at paras 2, 26.

⁸ See generally [GNC Application Endorsement](#); Noel Affidavit, paras 7-8.

10. The U.S. Court entered all of the orders in relation to the Second Day Motions (the “**Second Day Orders**”).⁹ This court recognized those orders for which recognition in Canada was sought following a hearing on July 27, 2020 (the “**July Recognition Hearing**”).

11. On August 5, 2020 the U.S. Court entered an Amended Cash Management Order (as defined below). This Court previously recognized the corresponding unamended order.¹⁰

12. Following the Second Day Motions, the Debtors filed several additional motions in the U.S. Court seeking additional orders (the “**August 19 Orders**”).

13. On August 18 and 19, 2020 the U.S. Court entered the August 19 Orders.¹¹ The Debtors are seeking recognition of certain of the August 19 Orders and the Amended Cash Management Order in this Court (collectively, the “**Additional U.S. Orders**”), as described below.¹²

The Additional U.S. Orders

14. The Debtors are seeking recognition of the following U.S. Orders in this court:

- (a) amended 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

⁹ Noel Affidavit, para 9.

¹⁰ Noel Affidavit, paras. 10 and 12.

¹¹ Affidavit of Michael Noel, affirmed August 20, 2020 (“**Second Noel Affidavit**”), para 5.

¹² Noel Affidavit, para. 13

status to postpetition intercompany claims (“**Amended Cash Management Order**”);

- (b) order (a) approving the Disclosure Statement (defined below), (b) establishing the voting record date, voting deadline, and other dates, (c) approving procedures for soliciting, receiving, and tabulating votes on the Plan (defined below) and for filing objections to the Plan, (d) approving the manner and forms of notice and other related documents, (e) approving notice and procedures for the assumption of executory contracts and unexpired leases, and (f) granting related relief (“**Disclosure Statement Order**”);
- (c) order modifying the Debtors’ original bidding procedures order (“**Modified Bidding Procedures Order**”);
- (d) order approving (a) the Debtors’ entry into the stalking horse agreement and related bid protections and (ii) granting related relief (“**Stalking Horse and Bid Protections Order**”); and
- (e) omnibus order authorizing the rejection of certain unexpired leases effective as of the Petition Date, including the rejection of three leases in Canada (“**Ninth Omnibus Order to Reject Certain Unexpired Leases**”).¹³

¹³ Noel Affidavit, para. 13.

Amended Cash Management Order

15. The Second Day Orders contained a final cash management order (“**Final Cash Management Order**”), which permitted the Debtors to use their existing cash management system pursuant to the terms of that Order. This Court recognized the Final Cash Management Order following the July Recognition Hearing.¹⁴

16. An Amended Cash Management Order was entered by the U.S. Court following the July Recognition Hearing. The Amended Cash Management Order amends the terms of the Final Cash Management Order to allow the Debtors to maintain accounts with a balance of up to US\$45,000 with banks that have not executed a UDA (Uniform Depository Agreement) with the U.S. Trustee, with any excess amounts to be transferred into accounts with banks that have executed UDAs.¹⁵

17. This amendment is not intended to apply to the Debtor’s bank accounts located at Canadian banks. As such, while the Debtors are seeking recognition of the Amended Cash Management Order in Canada (in light of the remaining aspects of the order that relate to Canadian bank accounts), the revised draft recognition order filed with this Court reflects that fact and confirms that bank accounts of the Debtors at Canadian banks will not be swept in that manner.¹⁶

¹⁴ [Order of Justice Gilmore](#) dated July 27, 2020 in CV-20-00642970-00CL.

¹⁵ Amended Cash Management Order, para. 17, Exhibit B to the Noel Affidavit.

¹⁶ See the discussion of the Amended Cash Management Order in the Second Report of the Information Officer as well as the revised draft order filed by the Debtors, located at Tab 2 of the Debtors’ Supplementary Motion Record.

Disclosure Statement Order

18. Upon commencing the Chapter 11 Cases, the Debtors entered a restructuring support agreement (the “**RSA**”) to pursue, in parallel, both a standalone plan of reorganization (the “**Standalone Plan Transaction**”) and a competitive sale process for their assets (the “**Sale Transaction**”). In furtherance of these transactions, the Debtors have prepared a plan of reorganization (the “**Plan**”) which sets out, among other things, the distributions to creditors and interest holders in the event of the consummation of either the Standalone Plan Transaction or the Sale Transaction.¹⁷ In support of the Plan, the Debtors have also prepared a disclosure statement (the “**Disclosure Statement**”) which contains the pertinent information necessary for the holders of claims against the Debtors entitled to vote on the Plan to make informed decisions about whether to vote to accept or reject the Plan.¹⁸

19. The Disclosure Statement Order approves the Disclosure Statement and certain limited elements of the Plan, including the timelines and procedures for voting on the Plan and the procedures for providing notice to creditors in respect thereof.¹⁹

20. The Disclosure Statement is the product of the Debtors’ extensive review and analysis of their businesses, assets and liabilities, the circumstances leading to the Chapter 11 Cases and other significant events occurring during the Chapter 11 Cases.²⁰

¹⁷ Motion of Debtors for Disclosure Statement Order, para. 16, Exhibit D to the Noel Affidavit.

¹⁸ Motion of Debtors for Disclosure Statement Order, para. 15, Exhibit D to the Noel Affidavit.

¹⁹ Disclosure Statement Order, Exhibit C to the Second Noel Affidavit.

²⁰ Motion of Debtors for Disclosure Statement Order, para. 14, Exhibit D to the Noel Affidavit.

21. In addition, the Disclosure Statement reflects the Debtors' thorough development of the Plan, including the distributions to holders of claims against the Debtors contemplated thereunder, the effect of the Plan on such holders and the resultant distributions thereunder if the Standalone Plan Transaction is confirmed and consummated.²¹ It also discusses the proposed Sale Transaction and reflects the distribution of sale proceeds pursuant to the Plan.²²

22. The terms of the Plan itself are outlined and summarized in the Second Report of the Information Officer and are not repeated here.

23. As set out in the Disclosure Statement Order, the U.S. Court has found that the Disclosure Statement contains adequate information about the Plan and that the procedures set out in relation to the voting on the Plan are reasonable and appropriate.²³

Modified Bidding Procedures Order

24. In furtherance of the Debtors' pursuit of the Sale Transaction under the terms of the RSA, the Debtors have now signed an agreement of purchase and sale of substantially all of their assets (the "**Stalking Horse Agreement**") with Harbin Pharmaceutical Group Holding Co., Ltd. ("**Harbin**").

25. When the Second Day orders were entered, the terms and conditions of Harbin's bid had not been yet been finalized.²⁴ As such, the Debtors sought and received a bidding procedures

²¹ *Ibid.*

²² *Ibid.*

²³ Disclosure Statement Order, pp. 2-3, Exhibit C to the Second Noel Affidavit.

²⁴ Motion of Debtors for Modified Bidding Procedures Order, para. 13, Exhibit F to the Noel Affidavit.

order that reserved 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 deadline for the Debtors' selection of a stalking horse bidder set forth in this order was August 3, 2020 (the "**Stalking Horse Deadline**").²⁵ Despite the thorough and diligent efforts of the parties, the Stalking Horse Agreement was not finalized until after the Stalking Horse Deadline had passed.²⁶

26. Now that the Debtors have entered the Stalking Horse Agreement, they have sought and received, by way of the Modified Bidding Procedures Order, a short, four-day extension of the Stalking Horse Deadline from August 3, 2020 to August 7, 2020 to permit their entry into the Stalking Horse Agreement with Harbin.²⁷

Stalking Horse and Bid Protections Order

27. As described above, the Debtors have entered into the Stalking Horse Agreement with Harbin. The Stalking Horse Agreement provides for a termination fee of US\$15,200,000 and an expense reimbursement of up to US\$3,000,000 (collectively, the "**Bid Protections**"), payable to Harbin in the event that the Stalking Horse Agreement is not selected as the successful bid for the Sale Transaction.²⁸

²⁵ Motion of Debtors for Modified Bidding Procedures Order, para. 1, Exhibit F to the Noel Affidavit.

²⁶ Motion of Debtors for Modified Bidding Procedures Order, para. 13, Exhibit F to the Noel Affidavit.

²⁷ Motion of Debtors for Modified Bidding Procedures Order, para. 1, Exhibit F to the Noel Affidavit.

²⁸ Exhibit A to Notice of Filing of Amendment to Stalking Horse Agreement, para. 2, Exhibit J to the Noel Affidavit; Exhibit A to Notice of Filing of Second Amendment to Stalking Horse Agreement, para. 5, Exhibit H to the Second Noel Affidavit

28. The U.S. Court has now granted, by way of the Stalking Horse and Bid Protections Order, approval of the Debtors' entry into the Stalking Horse Agreement and its associated Bid Protections. In particular, it has held that the Bid Protections are commensurate to the real and substantial benefits conferred upon the Debtors' estates by Harbin; are reasonable and appropriate in light of the size and nature of the proposed sale contemplated, the commitments made by Harbin, and the efforts that have been and will be expended by Harbin; and are necessary to induce Harbin to continue to pursue such sale and continue to be bound by the Stalking Horse Agreement.

29. The Stalking Horse and Bid Protections Order does not approve the sale of the Debtors' assets, which will be considered at a later hearing.

Omnibus Orders to Reject Certain Unexpired Leases

30. 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.

31. 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.²⁹

²⁹ Ninth Omnibus Motion to Reject Certain Unexpired Leases, para. 7, Exhibit E to the Noel Affidavit

32. The Debtors have brought eleven omnibus lease rejection motions seeking, among other things, the rejection of the identified leases. The Ninth Lease Rejection Order will approve the lease rejections for three stores in Canada.³⁰

33. 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.³¹

PART III – THE ISSUES

34. 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.

PART IV – THE LAW

A. Part IV of the CCAA

35. 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

³⁰ Noel Affidavit, para 15.

³¹ [*GNC Application Endorsement*](#) at para 29.

intended to promote fair and efficient administration of cross-border insolvencies, which also protects the interests of debtors, creditors, and other interested persons.³²

36. 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.³³

B. The Additional U.S. Orders should be recognized by this Court

37. Section 49 of the CCAA provides that the Court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of a debtor company's property or that the order is in the interests of a creditor or creditors. Section 50 of the CCAA further provides that an order made under Part IV of the CCAA, including pursuant to section 49, may be made on any terms and conditions that the Court considers appropriate. Further, once an order recognizing a foreign proceeding is made, the Court is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.³⁴

38. GNC Holdings seeks the recognition of Additional U.S. Orders that have been obtained by the Debtors from the U.S. Court.

³² [Zochem Inc. \(Re\), 2016 ONSC 958](#) at para 15; CCAA at s. 44.

³³ CCAA at s. 61(1).

³⁴ CCAA at ss. 49, 50, 52(1) and 61(2).

39. The Additional U.S. 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 Additional U.S. Orders, including recognition of U.S. lease rejection orders, as sought here.³⁵ 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.³⁶

40. 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.³⁷

³⁵ [*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 \(Pier One proceeding\)*](#).

³⁶ 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.

³⁷ [*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.*](#)

41. 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;
- (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.³⁸

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

43. In respect of the Stalking Horse and Bid Protections Order, the approval of the termination fee and expense reimbursement of the Bid Protections is consistent with Canadian law.³⁹ Additionally, Canadian courts regularly recognize foreign orders approving such bid protections.⁴⁰

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

³⁹ See e.g. [*Clover Leaf Holdings Company, Re*](#), Endorsement of Justice Hainey 20 December 2019 (Ont Sup Ct J (Commercial List)), Court File No CV-19-631523-00CL; [*Aralez Pharmaceuticals Inc. \(Re\)*](#), Endorsement of Justice Dunphy, 10 October 2018 (Ont Sup Ct J (Commercial List)), Court File No CV-18-603054-00CL.

⁴⁰ See e.g. [*Terrestar Networks Inc., Re*](#), Endorsement of Justice Morawetz, 23 June 2011 (Ont Sup Ct J (Commercial List)), Court File No CV-10-8944-00CL.

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 Additional U.S. Orders were made in good faith and in the interest of the Debtors' creditors and stakeholders. None of the Additional U.S. Orders breach any applicable Canadian law. GNC Holdings submits that recognition of the Additional U.S. Orders is necessary to ensure that the purposes of the CCAA are satisfied and the Debtors have the best opportunity to restructure their affairs.

45. Accordingly, GNC Holdings requests that the Court recognize the Additional U.S. Orders.

PART V – RELIEF REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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

Lawyer for the Applicant

SCHEDULE A – LIST OF AUTHORITIES

- 1 Conway J - Endorsement on Application in CV-20-00642970-00CL (*Re GNC*) dated June 29, 2020
- 2 *Zochem Inc. (Re)*, 2016 ONSC 958
- 3 *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201
- 4 *Laidlaw Inc. (Re) (In Bankruptcy)*, 2003 CanLII 8003 (ON SC)
- 5 Order of Hainey J., as issued & entered on Feb. 21, 2020, re Amended and Restated Supplemental Order (*Pier One* proceeding)
- 6 *Royal Bank of Canada v. Soundair Corp.*, 4 OR (3d) 1
- 7 *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460
- 8 *Tiger Brand Knitting Co. (Re)*, 2005 CanLII 9680 (ON SC)
- 9 *Babcock & Wilcox Canada Ltd., Re*, 5 BLR (3d) 75
- 10 Order of Newbould J. dated January 25, 2017, *In the Matter of Modular Space Intermediate Holdings Inc. et al.*
- 11 *Re Xerium Technologies Inc.*, 2010 ONSC 3974
- 12 *Clover Leaf Holdings Company, Re*, Endorsement of Justice Hainey 20 December 2019 (Ont Sup Ct J (Commercial List)), Court File No CV-19-631523-00CL
- 13 *Aralez Pharmaceuticals Inc. (Re)*, Endorsement of Justice Dunphy, 10 October 2018 (Ont Sup Ct J (Commercial List)), Court File No CV-18-603054-00CL
- 14 *Terrestar Networks Inc., Re*, Endorsement of Justice Morawetz, 23 June 2011 (Ont Sup Ct J (Commercial List)), Court File No CV-10-8944-00CL.

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 U.S. Orders,
returnable August 25, 2020)**

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