

**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 GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND
GOLF TOWN GP II INC.

**SUBMISSIONS OF GOLF TOWN LIMITED (FORMERLY 9918167 CANADA INC.)
(Motion for Assignment Order)**

October 26, 2016

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PART I - BACKGROUND

1. Capitalized term not otherwise defined herein have the meaning ascribed to them in the Affidavit of David Roussy sworn October 24, 2016 (the "**Roussy Affidavit**").
2. On the September 30, 2016, this Court issued the Approval and Vesting Order approving the sale of substantially of the assets and business (the "**Golf Town Business**") of Golf Town Canada Inc. and Golf Town Operating Limited (collectively, the "**Vendors**"). The Golf Town Business is being sold to Golf Town Limited (formerly 9918167 Canada Inc.) (the "**Purchaser**"), an entity owned by Fairfax Financial Holdings Limited and certain investment funds managed by CI Investments Inc, pursuant to the Purchase Agreement dated as of September 14, 2016 between the Vendors and the Purchaser.
3. The Purchase Agreement provided that, *inter alia* (i) the Purchaser would designate certain contracts as Assumed Contracts; (ii) the Vendors shall use commercially reasonable efforts to obtain consents and/or an assignment order to effect the assignment of the Assumed Contracts; (iii) the Purchaser shall assume all obligations and liabilities in respect of the Assumed Contracts due or accruing due after October 31, 2016; and (iv) all Cure Costs in respect of the Assumed Contracts will be satisfied with the closing of the Golf Town Transaction.

4. Since approval of the Golf Town Transaction by this Court on September 30, 2016 and prior to the Vendors serving these motion materials, the Vendors and Purchaser has engaged in discussions with landlords to obtain consent to the assignment of the leases (the “**Assumed Leases**”) of the locations where the Purchaser will continue to operate the Golf Town Business. While discussions are ongoing, in light of deadlines imposed by the Purchase Agreement and milestones in the Vendors’ DIP financing, it was necessary to schedule this motion seeking assignment of various leases (the “**Assigned Leases**” and each an “**Assigned Lease**”).

5. In connection with the Purchase Agreement, the Applicants have brought this Motion seeking the proposed Assignment Order attached at Tab 2 (the “**Assignment Order**”) of the Applicants’ Motion Record, in order to effect the assignment of the Assigned Leases.

6. The Purchaser has worked with the Applicants, the Monitor and various landlords under the Assigned Leases (the “**Landlords**”) in order to develop a form of Assignment Order acceptable to all parties. The Purchaser has made substantial concessions from the initial draft of the Assignment Order in an attempt to avoid contestation of the Assignment Order. If the Landlords wish to contest certain portions of the draft Assignment Order (specifically, paragraph 7 of the Assignment Order), this has the effect of potentially revisiting other paragraphs previously discussed. For example, paragraph 4 of the initial draft Assignment Order, which reflects the terms of the Purchase Agreement, and which the Landlords sought to have amended is outlined below.

4. THIS COURT ORDERS that upon delivery of the Monitor’s Certificate, the Purchaser shall be entitled to all of the rights and benefits and subject to all of the obligations and restrictions as tenant pursuant to the terms of the Assigned Leases and registrations thereof ~~for the period commencing from and after the delivery of such Monitor’s Certificate~~ and may enter into and upon and hold and enjoy each such premises contemplated by the Assigned Leases and, if applicable, any renewals thereof, for its own use and benefit, all in accordance with the terms of the Assigned Leases, without any interruption from the Vendors, any landlord under an Assigned Lease or any other person claiming through or under the Vendors or a landlord under the Assigned Leases.

7. The Purchaser has limited these submissions to the one paragraph in the Assignment Order, paragraph 7, which the Purchaser understands is the subject of certain Landlords' formal objection.

8. The original version of paragraph 7 of the Assignment Order is set out below, with the blacklined portions indicating amendments sought to the Assignment Order at the request of certain Landlords:

7. **THIS COURT ORDERS** that each counterparty to an Assigned Lease (a "**Landlord**") is prohibited from ~~exercising any right or remedy by reason of any defaults thereunder arising from the assignment of the~~ terminating an Assigned Lease, as against the Purchaser by reason of the insolvency of the Vendors, the commencement of these CCAA proceedings or proceedings in respect of affiliates of the Vendors pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 ("**Chapter 11**"), or ~~any failure by the Vendors to perform~~ having breached a non-monetary obligation ~~under~~ unless such non-monetary breach arises or continues after the Assigned Lease. is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the Assigned Lease. For ~~greater~~ certainty clarification purposes, no Landlord shall rely on a notice of default sent to the ~~Vendors~~ Vendor to terminate an Assigned Lease ~~following its assignment to as against the Purchaser pursuant to the terms of this Order.~~

PART II - ISSUES

9. The only issue addressed by these submissions is whether paragraph 7 of the Assignment Order is appropriate.

PART III - SUBMISSIONS

Paragraph 7 - Curing Insolvency Defaults

10. Paragraph 7 of the Assignment Order prohibits the Landlords from exercising "any right or remedy" under an Assigned Lease by reason of a default arising because of the insolvency of the Vendors, the assignment of the Assigned Lease, or non-monetary defaults of the Vendors that do not continue after the assignment of the Assigned Lease. The provision effectively cures defaults arising because of the insolvency of the Vendors,

ensuring that the Purchaser is to continue operating the Golf Town Business as a going concern with the same benefits under the Assigned Leases enjoyed by the Vendors, but for their insolvency.

11. Section 34(1) of the CCAA provide that no person may “terminate or amend, or claim an accelerated payment or forfeiture of the term” because of debtor’s insolvency. Section 34(2) adds that for leases, a lessor cannot “terminate or amend” the lease for non-payment of pre-filing rent. Section 34(5) specifically provides that “an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.” The provisions make clear that *ipso facto* clauses are unenforceable beyond just the right terminate the contract in its entirety. All clauses that purport to forfeit or otherwise deprive a debtor of certain rights upon insolvency are unenforceable.

12. Section 11.3 of the CCAA authorizes the Court to make an order assigning the rights and obligations of a debtor company under an agreement to any person who is specified by the Court and who agrees to the assignment. Section 11.3(4) of the CCAA requires that monetary defaults must be satisfied, striking a balance between the interests the debtor and of counterparties to assigned contracts.

13. In *Doman Industries Ltd. (Re)*¹, the British Columbia Supreme Court set out that the law is clear - defaults by reason of the debtor’s insolvency may be cured in order to permit the debtor or debtor’s business to continue operating after emerging from CCAA protection:

The law is clear that the court has the jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.²

¹ 2003 BCSC 376 [*Doman*].

² *Ibid* at para. 15.

14. In *Doman*, Justice Tysoe noted with approval the comments of Justice Spence of the Ontario Superior Court of Justice in *Playdium Entertainment Corp.(Re)*³ when he stated that:

In interpreting s. 11(4), including the “such terms” clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

15. *Doman* and *Playdium* address the law of assignments under the CCAA pre-2009 amendments, however, the Courts have confirmed that the law has not changed and the 2009 amendments only codified existing practice.⁴

16. It has become common practice for Courts to grant orders extending the non-enforceability of *ipso facto* clauses beyond CCAA proceedings in order to allow the business to continue operating as a going-concern. In connection with going concern sales, Courts have consistently issued orders with the same or similar language as that in the initial draft of the Assignment Order, preventing the exercise of “rights or remedies” under assigned contracts by reason of the debtor’s insolvency.⁵ An example of a similar assignment order recently approved by this Court in *FirstOnSite G.P. II Inc.* is attached to these submissions at Tab A. Courts also regularly grant similar relief upon sanctioning a plan of arrangement or compromise.⁶ Preventing counterparties from exercising rights or remedies based on a

³ (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. (Comm. List)) [*Playdium*] at para 32.

⁴ See *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at paras. 56 – 58.

⁵ See *White Birch Paper Holding Co., (Re)*, Approval and Vesting Order dated September 28, 2010 at para. 18; *Sterling Shoes Inc., (Re)*, Order Approving Assignment of Contracts dated April 30, 2012 at para. 6; *Primus Telecommunications Canada, Inc. (Re)*, Assignment Order dated March 2, 2016 at para. 7; *FirstOnSite G.P. II Inc. (Re)*, Assignment Order at para. 7; *Northstar Aerospace Inc. (Re)*, Approval and Vesting Order dated July 24, 2012 at para. 6; *Aeropostale Canada Corp. (Re)*, Arden Sale Approval and Assignment Order dated June 9, 2016 at para. 7; *Sherson Group Inc. (Re)*, Order (Re Assignment of Agreements) dated August 20, 2015.

⁶ See *Pacific Exploration & Production Corporation (Re)*, Plan Sanction Order dated August 23, 2016 at

debtor's insolvency is fundamental to allowing the debtor's business to continue operating upon emergence from CCAA protection or following the sale of the business within CCAA protection.

17. The purpose of section 11.3 of the CCAA has been recognized as allowing a debtor to maximize the value of its assets by permitting the assignment of its contracts to third parties for value.⁷ Attempts by the Landlords to limit the assignment or preserve potential claims, which essentially arose as a result of the Vendors' actions or insolvency, for future argument against the innocent Purchaser runs contrary to that purpose. Such an interpretation would severely restrict a debtor's ability to maximize the value of its contracts as third parties will not be interested in receiving the assignment of contract where benefits may disappear because of either the debtor's insolvency or the assignment to the contract.

18. The Purchaser, with the assistance of the Vendors, have attempted to strike a fair balance with the Landlords in accordance with section 11.3 by paying Cure Costs under the Assigned Leases, assuming obligations under the Assigned Leases accruing after October 31, 2016 and allowing for the exercise of rights or remedies under the Assigned Leases if a non-monetary default occurs or continues after the assignment. Following the completion of the assignment, the Landlords will continue to receive the primary bargain they negotiated for under the Assigned Leases. The Landlords should not be permitted to extract more value from the Assigned Leases by relying the insolvency of the Vendors or assignment of the Assigned Leases. Such a result in contrary to well-established CCAA practice and the purpose behind sections 11.3 and 34 of the CCAA.

para. 15; *Jaguar Mining Inc. (Re)*, Order (Plan Sanction) dated February 6, 2014 at para. 13; *Sino-Forest Corporation (Re)*, Plan Sanction Order dated December 10, 2012 at para. 29.

⁷ *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 798 at para. 48 and see Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause analysis: <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00865.html?#p8>.

PART IV - ORDER REQUESTED

19. For the foregoing reasons, the Purchaser requests this Court dismiss the objections raised by the Landlords and grant the Assignment Order in the form sought by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2016.

/s/ Stikeman Elliott LLP

Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Doman Industries Ltd. (Re)*, 2003 BCSC 376.
2. *Playdium Entertainment Corp. (Re)* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. (Comm. List)).
3. *Veris Gold Corp. (Re)*, 2015 BCSC 1204.
4. *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 798.

SCHEDULE "B"
RELEVANT STATUTES

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

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.

Copy of order

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

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

...

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

TAB A

1. **THIS COURT ORDERS** that any capitalized term used but not defined herein shall have the meaning ascribed to such term in the Sale Agreement.

SERVICE

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

ASSIGNMENT OF AGREEMENTS

3. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate (the "**Monitor's Certificate**") referred to in the Order of Justice Newbould dated May 9, 2016, (the "**Approval and Vesting Order**"), all of the rights and obligations of the Vendor under the agreements set out in Schedule "A" hereto that are Purchased Assets on Closing (as such terms are defined in the Sale Agreement) (collectively, the "**Assigned Contracts**") shall be assigned to the Purchaser pursuant to section 2.2 of the Sale Agreement and pursuant to section 11.3 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**").

4. **THIS COURT ORDERS** that, with respect to the Assigned Contracts that are real property leases (collectively, the "**Real Property Leases**"), upon delivery of the Monitor's Certificate, the Purchaser shall be entitled to all of the rights and benefits and subject to all of the obligations as tenant pursuant to the terms of the Real Property Leases for the period commencing from and after the delivery of such Monitor's Certificate and may enter into and upon and hold and have quiet enjoyment of such premises contemplated by the Real Property Leases and, if applicable, any renewals thereof, for its own use and benefit, all in accordance with the terms of the Real Property Leases, without any interruption from the Vendor, the landlords under the Real Property Leases or any person whomsoever claiming through or under any of the Vendor or the landlords under the Real Property Leases.

5. **THIS COURT ORDERS** that the assignment to the Purchaser of the rights and obligations of the Vendor under the Assigned Contracts to the Purchaser, or such related party as the Purchaser may designate (provided however, that such designated related party agrees to be bound by the terms of such Assigned Contract and the Purchaser is not released from any

obligation or liability thereunder), pursuant to the CCAA and this Order is valid and binding upon all of the counterparties to the Assigned Contracts notwithstanding any restriction or prohibition contained in any such Assigned Contracts relating to the assignment thereof, including any provision requiring the consent of any party to the assignment.

6. **THIS COURT ORDERS** that the Vendor's right, title and interest in the Assigned Contracts shall vest absolutely in the Purchaser free and clear of all Encumbrances other than the Permitted Encumbrances (as such terms are defined in the Approval and Vesting Order) in accordance with the provisions of the Approval and Vesting Order.

7. **THIS COURT ORDERS** that each counterparty to the Assigned Contracts is prohibited from exercising any right or remedy under the Assigned Contracts by reason of any defaults thereunder arising from the assignment of the Assigned Contracts, the insolvency of the Vendor, the commencement of these CCAA proceedings, or any failure of the Vendor to perform a non-monetary obligation under the Assigned Contracts.

8. **THIS COURT ORDERS** that the Cure Costs of the contracts listed in Schedule "A" hereto shall be in amounts set out in Schedule "A" hereto and that upon Closing, the Purchaser shall pay the Cure Costs as set out therein with respect to each applicable Assigned Contract, in full and final satisfaction of any Cure Costs owing to the counterparty to the applicable Assigned Contract, by no later than the day that is five (5) business days from the date that the Purchaser receives wire remittance instructions or other payment instructions from such counterparty.

9. **THIS COURT DIRECTS** the Vendor to send a copy of this Order to all of the counterparties to the contracts listed in Schedule "A" and, furthermore, to provide notice to any such counterparty that is listed in Schedule "A" as of the date of this Order and is subsequently added as an Excluded Contract (as the term is defined in the Sale Agreement) and removed from Schedule "A" prior to closing of the Sale Transaction.

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Vendor, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are

hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

A handwritten signature in black ink, appearing to be "D. J. ...", is written above a horizontal line.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 18 2016

PER / PAR: A handwritten signature in black ink, appearing to be "M", is written next to the text "PER / PAR:".

Schedule "A" - Assigned Contracts

	Name of Agreement	Counterparty	Date of Agreement	Cure Costs
1.	Industrial Lease Agreement	Altra Investments Inc.	Dec 13, 2011	\$0
2.	Agreement of Lease	Artis WPG Industrial Ltd.	Aug. 27, 2015	\$0
3.	MSDS Management Service Agreement	Canadian Centre for Occupational Health and Safety	Jan. 20, 2015	\$0
4.	Lease Contract	Fibernetics Corporation	Dec. 15, 2013	\$575.17
5.	Services Agreement	Meloche Monnex Inc.	Nov. 1, 2014	\$0
6.	Marketing Agreement for Services	Best Western International, Inc.	Sep. 25, 2015	\$0
7.	Agreement to Provide Products and/or Services	Greater Edmonton Foundation	Initially: Oct. 1, 2014 Renewed: Oct. 1, 2015	\$0
8.	Service Contractor Agreement	Jones Lang LaSalle Real Estate Services, Inc. for the benefit of Canada Post Corporation	Apr. 1, 2015	\$0
9.	Service Contractor Agreement	Jones Lang LaSalle Real Estate Services, Inc. for the benefit of HSBC Canada	June 26, 2014	\$0
10.	Professional Services Agreement	Staples Canada Inc.	Dec. 1, 2013	\$0
11.	Order for LMI Services	LogMeIn, Inc.	Oct. 1, 2015	\$0
12.	Preferred Contractor Service Agreement	Co-operators General Insurance Company/COSECO Insurance Co.	Jan. 21, 2015/ Jan. 28, 2015	\$0
13.	ROINS Master Services Agreement	ROINS Financial Services Limited	Jan 21, 2015	\$0

	Name of Agreement	Counterparty	Date of Agreement	Cure Costs
14.	Professional Services Agreement	Zurich Insurance Company Ltd.	July 1, 2013	\$0
15.	Lease Contracts, identified as #2639305, #2639305, #2652264, #2704856, #2649890, #2650460, #2669140	National Leasing Group Inc.	Several	\$0
16.	Product License Summary	Xactware Solutions, Inc.	May 1, 2012	\$13,332.78
17.	Customer Agreement #ECB 207931, 229239, 233177, 237305	TELUS Corporation	Dec. 14, 2009; June 13, 2011; Oct. 21, 2011; Mar. 9, 2012	\$8,515.79
18.	Rental Agreement	Big Steel Box	Undated	\$8,395.89

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 FIRSTONSITE G.P. INC.

Court File No: CV-16-11358-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

ASSIGNMENT ORDER

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IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GOLF TOWN
CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND GOLF TOWN GP II INC.

Court File No. CV-16-11527-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
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Proceedings commenced at Toronto

**SUBMISSIONS OF GOLF TOWN LIMITED
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