

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

S U P E R I O R C O U R T
(Class Actions Division)

N^o: 500-06-001074-208

ENRICO GIOIOSA

Petitioner

v.

NAUTILUS PLUS INC.

Defendant

**APPLICATION FOR PERMISSION TO DISCONTINUE THE
PUTATIVE CLASS ACTION AGAINST DEFENDANT
(ss. 206, 213 & 585 C.C.P.)**

TO THE HONOURABLE GARY D.D. MORRISON, J.S.C., JUDGE SEIZED OF PETITIONER'S APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFF, YOUR PETITIONER STATES AS FOLLOWS:

A. INTRODUCTION:

1. On June 1st, 2020, Petitioner filed an *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* against Defendant (the "**Authorization Application**"), the whole as appears from the present Court Record.
2. The Authorization Application alleged, *inter alia*, that Defendant, during the period when its Gym Services were interrupted due to Government decrees issued during the COVID-19 pandemic, imposed a unilateral change to its contracts with its members, depriving them of their rights to cancel their service contracts, unilaterally extended the term of the contracts, continued to debit their accounts while not providing services and extended the term of the contracts in contravention of the *Consumer Protection Act*, CQLR, c. P-40.1 (the "**CPA**"), the whole as appears from the present Court Record.
3. Shortly thereafter, the Honourable Gary D.D. Morrison, J.S.C. was charged with hearing of the matters concerning the Authorization Application.

4. On September 30th, 2020, Defendant through its counsel, served and filed an *Application for Authorization to Examine the Petitioner* pursuant to section 574 of the *Civil Code of Procedure*, CQLR, c. C-25.01 (the "**CCP**"), (the "**Examination Application**"), which was contested by Petitioner, the whole as appears from the present Court Record.
5. On November 27th, 2020, the Examination Application was heard virtually before the Hon. Morrison J., and on December 9th, 2020, Judgment was rendered by the Hon. Morrison J. dismissing the Examination Application, the whole as appears from the present Court Record.
6. On May 25th, 2021, the Authorization Application was heard before the Hon. Morrison J., argument plans were submitted by both parties' counsels and His Lordship took the matter "under advisement" for purposes of rendering judgment thereafter.
7. On June 11th, 2021, whilst the matter in respect of the Authorization Application was still under advisement, Defendant filed a Notice of Intention to file a Proposal ("**NOI**") under the relevant provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "**BIA**") and the Trustee thereunder, Raymond Chabot Inc. (the "**Trustee**") served counsel for Petitioner with a Notice to Stay the Application for Authorization pursuant to section 69 of the *BIA* (the "**Notice to Suspend**"), (the "**BIA Stay**"), the whole as evidenced from copies of the NOI and the Notice to Suspend, communicated herewith as **Exhibit AD-1 (en liasse)**.
8. On July 7th, 2021, your Petitioner filed an *Application to Lift the Stay of Proceedings* (the "**Lift Application**") in the NOI proceedings file, bearing Court Record number 505-11-016890-217 (the "**Insolvency File**"), to lift the BIA Stay and to allow for the continuation of the Authorization Application, which was presentable before the Registrar of Bankruptcy on July 15th, 2021, the whole as evidenced from a copy of the Lift Application, communicated herewith as **Exhibit AD-2**.
9. Upon being informed that the Defendant intended to contest the Lift Application, the hearing of same was scheduled to be heard before a Judge of this Honourable Court, sitting in the Commercial Division, in and for the District of Longueuil, on August 12th, 2021.
10. On July 9th, 2021 Defendant filed a Proposal under the relevant provisions of the *BIA* (the "**Initial Proposal**"), and the initial meeting of creditors to consider same was scheduled for July 29th, 2021, the whole as evidenced from a copy the Initial Proposal, communicated herewith as **Exhibit AD-3**.

11. On July 19th, 2021, the Trustee under the NOI, submitted its report on the state of affairs of the Defendant pursuant to sections 50(10) and 50(5) of the *BIA* (the "**Proposal Report**"), the whole as evidenced from a copy the Proposal Report, communicated herewith as **Exhibit AD-4**.
12. As appears from the Proposal Report, Exhibit AD-4:
 - a. Defendant operates 33 gym training centers and employs some 700 persons in respect of same, and moreover, that as a result of confinement measures imposed by the Government of Quebec in respect of the COVID-19 pandemic causing the closing of Defendant's gyms, Defendant suffered a major loss of business in respect of its operations between 2020 and 2021;
 - b. Although the Defendant implemented a rationalization plan in respect of expenses, as a result of Defendant continuing to face ongoing litigation from various parties, including landlords in respect of rent obligations and with its loss of business, it was not able to meet its obligations, resulting in its filing of the NOI;
 - c. The Bank of Montreal (the "**BMO**") is the Defendant's first ranking hypothecary creditor holding first-ranking moveable hypothecary security on all of Defendant's assets and is owed approximately 28 Million Dollars, and the Caisse de Dépôt et Placement du Québec (the "**CDPQ**") is the Defendant's second-ranking hypothecary creditor, holding hypothecary security on all of the Defendant's assets and is owed approximately 8 Million Dollars; and
 - d. Prior to filing the NOI, the Defendant, with the consent of the BMO, attempted to solicit new investors or purchasers for the assets of Defendant, during the period from October 2020 to April 2021, and which process was supervised by Raymond Chabot Grant Thornton LLP, the whole without success and resulting in Defendant solely being capable of filing the Proposal it filed following its NOI, failing acceptance of which Defendant will become bankrupt pursuant to the deemed dispositions of the *BIA*.

B. THE INITIAL PROPOSAL AND THE AMENDED PROPOSAL:

13. As appears from the Initial Proposal, Exhibit AD-3, same provided for, *inter alia*, a "basket" amount of \$900,000.00 to be used to pay, on a *pro rata* basis, ordinary unsecured creditors, and the preferred part of landlord claims under section 136(1)(f) and (g) of the *BIA*, as ordinary claims, the value attributed to secured debt on all assets of Defendant in respect of the debt due to creditors BMO and CDPQ was reduced to \$3,500,000.00 and both renounced to any part of the

dividend payable to ordinary creditors in respect of the non-secured part of their debt (i.e. an amount of approximately \$32,901,000.00).

14. A summary of the anticipated dividend to ordinary creditors is found at page 5 of the Proposal Report, Exhibit AD-4, and as indicated therein, did not take into account possible claims of proposed class members in the pending Authorization Application.
15. Following the filing of the Initial Proposal, Exhibit AD-3, discussions ensued between counsel for Defendant, counsel for BMO and your undersigned counsel, and it became evident that acceptance of a proposal was the only way that Defendant would survive, and failing same, Defendant would become bankrupt, all gyms would be closed, 700 jobs would be lost and all members of the Defendant's gyms would lose access to their gyms.
16. Moreover, such discussions further clarified that if the Defendant was going to survive post-Proposal, that its efforts be concentrated on re-building its business and not be distracted with significant litigation.
17. As appears from the Proposal Report (page 10), Exhibit AD-4, the Trustee's recommendation was to the effect that the Initial Proposal be accepted, as same would result in ordinary unsecured creditors receiving more than in a bankruptcy, and same would also permit Defendant to continue to honour its membership obligations vis-à-vis its 37,500 members throughout Quebec.
18. Following negotiations between counsels aforesaid, an Amended Proposal was negotiated and filed by the Defendant (the "**Amended Proposal**"), and thereafter submitted to its creditors for approval, the whole as evidenced from a copy of the Amended Proposal, communicated herewith as **Exhibit AD-5**.
19. The Amended Proposal, Exhibit AD-5, provides, *inter alia*, for the following matters in order to restructure Defendant's affairs and to ensure continued operations of the gyms and use of the membership:
 - a. Defendant would continue to honour the membership of its members and memberships would be extended by the number of months, on a month-to-month basis, where funds had been debited from a given member's account whilst no services were rendered;
 - b. The implementation of the Amended Proposal, Exhibit AD-5, is conditional to, *inter alia*, a Discontinuance being filed in the present Court Record, which is to be approved by this Honourable Court;

- c. Petitioner would file a Discontinuance of the Authorization Application without costs, subject to this Honourable Court's acceptance of same, and the Amended Proposal, if accepted by the statutory majority of creditors and approval by the Superior Court in the Insolvency File, would operate as a release of all claims, including potential claims of the putative class; and
 - d. An amount of \$41,621.40 for fees, \$2,145.80 for disbursements, and \$6,232.80 for taxes (i.e. being the total of \$50,000.00) would be paid from the Amended Proposal Amount for judicial and extra judicial fees of counsel to Petitioner, representing an amount of \$0.008 on amounts to be paid to ordinary creditors.
20. On or around July 29th, 2021, in addition to the foregoing, Defendant, through its counsel, confirmed to counsel for Petitioner that notwithstanding its Amended Proposal that would release all claims, it would nevertheless continue to honour its Closure Policy; namely, in respect of members who resided in areas where gyms had been closed or where training services were no longer in place, such members retained the right to either use another of Defendant's gyms and/or trainers or obtain a full reimbursement of their membership fees, including any Boomerang credits accumulated therein (the "Closure Policy"), the whole as evidenced from a copy of Defendant's letter, dated July 29th, 2021, detailing its Closure Policy, communicated herewith as **Exhibit AD-6**.
 21. On July 30th, 2021, the Amended Proposal, Exhibit AD-5, was approved by the statutory majority of creditors by the vote of 82 of 84 creditors voting in favour, holding claims in excess of 98.2% of all ordinary unsecured claims, the whole as evidenced from a copy of the Minutes of the Meeting of Creditors, communicated herewith as **Exhibit AD-7**.
 22. The Superior Court in the Insolvency File, approved and ratified the Amended Proposal by Judgment dated August 12th, 2021, the whole as evidenced from copies of the Report of Trustee and Judgment, communicated herewith as **Exhibit AD-8 (en liasse)**.
 23. It is to be noted that while the parties herein sought to proceed with the Lift Application with the intent to enable His Lordship to render judgment upon the conclusions of the present Application, the Superior Court in the Insolvency File also denied Petitioner's Lift Application on August 12th, 2021, holding that same was now moot given the ratification of the Amended Proposal, the whole as appears from the Judgment rendered therein, communicated herewith as **Exhibit AD-9**.

C. CONCLUSIONS:

24. Accordingly, it is in the interest of all parties that your Petitioner be permitted to file a Discontinuance in the present Court Record, in accordance with the draft Discontinuance communicated herewith as **Exhibit AD-10** (the "**Discontinuance**"), or without same, the putative members face the risk of Defendant's Bankruptcy, leaving them as ordinary unsecured creditors in a bankruptcy with no assets for ordinary unsecured creditors, all assets of Defendant being subject to the security of the BMO and the CDPQ.
25. The Discontinuance does not cause undue prejudice to the putative class members; rather, it enables them to continue to receive the benefit of their membership and provides for full reimbursements in respect of closed gyms and training services that are cancelled, and same does not, for the reasons herein provided, constitute an attack on the integrity of the justice system.
26. Furthermore, should this Honourable Court grant the present Application, Petitioner hereby agrees and undertakes to file a public notice of discontinuance by filing the Discontinuance in the Class Action Registry.
27. The present Application is well-founded in fact and in law.

WHEREFORE, PETITIONER PRAYS THAT BY JUDGMENT TO BE RENDERED HEREIN, THIS HONOURABLE COURT:

28. **GRANT** the present *Application for Permission to Discontinue the Putative Class Action against Defendant* ;
29. **AUTHORIZE** Petitioner to Discontinue its *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*, without costs;
30. **PRAY ACT** to Petitioner's undertaking to publish the Discontinuance, Exhibit AD-10, on the Class Action Registry;
31. **ORDER** Petitioner to file the Discontinuance, Exhibit AD-10, into the present Court Record within ten (10) days following Judgment to intervene herein;
32. **THE WHOLE** without legal costs.

Westmount, September 8th, 2021.

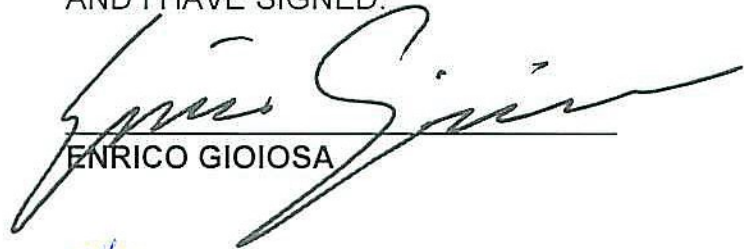

STEIN & STEIN INC.
Attorneys for Petitioner

AFFIDAVIT OF ENRICO GIOIOSA


I, **ENRICO GIOIOSA**, domiciled and residing at 12383, Jules-Helbronner Street, in the City of Montreal, District of Montreal, Province of Quebec, H1C 0E7, solemnly declare **THAT:**

1. I am the Petitioner herein;
2. All the facts stated in the foregoing *Application for Permission to Discontinue the Putative Class Action against Defendant* are true and correct.

AND I HAVE SIGNED:


ENRICO GIOIOSA

SOLEMNLy AFFIRMED before me this 8th day of September, 2021, by Enrico Gioiosa, whose oath was taken and received in the City of Westmount, Province of Quebec, the whole by technological means and in accordance with the memorandum of the Quebec Ministry of Justice dated March 20th, 2020.


Commissioner of Oaths for all the Judicial
Districts of the Province of Quebec



LIST OF EXHIBITS

- EXHIBIT AD-1:** Notice of Intention to file a Proposal and Notice to Stay the Application for Authorization pursuant to section 69 of the *B/A*, filed June 11, 2021, (*en liasse*);
- EXHIBIT AD-2:** Lift Application, filed on July 7th, 2021, in the Insolvency File;
- EXHIBIT AD-3:** Proposal under the *B/A* filed by Defendant on July 9th, 2021;
- EXHIBIT AD-4:** Proposal Report of the Trustee submitted on July 19th, 2021;
- EXHIBIT AD-5:** Amended Proposal, filed by Defendant on July 29th, 2021;
- EXHIBIT AD-6:** Defendant's letter, dated July 29th, 2021, detailing its Closure Policy;
- EXHIBIT AD-7:** Minutes of the meeting of creditors of July 30th, 2021, approving the Amended Proposal by the statutory majority of creditors;
- EXHIBIT AD-8:** Report of Trustee, and the August 12th, 2021 Judgment approving and ratifying the Amended Proposal (*en liasse*);
- EXHIBIT AD-9:** Judgment of the Superior Court in the Insolvency File denying the Lift Application, dated August 12th, 2021; and
- EXHIBIT AD-10:** Draft Discontinuance.

Westmount, September 8th, 2021.


STEIN & STEIN INC.
Attorneys for Petitioner

