

Hon. Karen A. Overstreet  
Chapter: 11  
Location: Seattle  
Hearing Date: March 15, 2013  
Hearing Time: 9:30 AM  
Response Date: March 13, 2013

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re:

West Seattle Fitness,

Debtor.

NO. 12-18818

MOTION FOR ORDER (1) APPROVING  
SALE OF ASSETS FREE AND CLEAR OF  
LIENS PURSUANT TO SECTION 363; AND  
(2) AUTHORIZING THE ASSUMPTION  
AND ASSIGNMENT, AND REJECTION, OF  
CERTAIN EXECUTORY CONTRACTS  
PURSUANT TO SECTION 365

Richard A. Hooper (the “**Trustee**”), the duly appointed Chapter 11 Trustee in the bankruptcy of West Seattle Fitness, LLC (the “**Debtor**”) has signed an agreement with West Seattle Fitness Club, LLC (“**Buyer**”) to sell substantially all of its assets to Buyer. Buyer intends to continue to operate the fitness club located at 2629 SW Andover Street, Seattle, WA 98126 (the “**Club**”) and assume the majority of the Debtor’s membership contracts.

Accordingly, the Trustee moves the Court for an order (the “**Sale Order**”):

(i) authorizing and approving the Asset Purchase Agreement (the “**Agreement**”) substantially in the form attached to the Declaration of Richard A. Hooper (the “**Hooper Declaration**”);

MOTION FOR ORDER (1) APPROVING SALE OF ASSETS FREE AND CLEAR OF LIENS PURSUANT TO SECTION 363; AND (2) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT, AND REJECTION, OF CERTAIN EXECUTORY CONTRACTS PURSUANT TO SECTION 365 - 1

CAIRNCROSS & HEMPELMANN,  
ATTORNEYS AT LAW  
524 Second Avenue, Suite 500  
Seattle, Washington 98104-2323  
office 206 587 0700 fax 206 587 2308

1 (ii) authorizing the sale of the “Transferred Assets” described in the Agreement to  
2 Buyer, free and clear of all liens, claims, interests, charges and encumbrances, subject to the  
3 terms of the Agreement and the Sale Order;

4 (iii) authorizing Trustee to consummate all transactions related to the above;

5 (iv) authorizing the assumption and assignment of certain executory contracts (the  
6 “**Assumed Contracts**”), which will be transferred to the Buyer; and

7  
8 (v) authorizing the rejection of certain executory contracts (the “**Rejected**  
9 **Contracts**”) as of the date of the closing of the sale to Buyer (the “**Sale**”).

10 The Trustee also requests that the Court find that (i) notice of this Motion was  
11 appropriate and was properly served in accordance with applicable Bankruptcy Code provisions,  
12 the Bankruptcy Rules, and orders of this Court; (ii) the proposed Sale of the Transferred Assets  
13 is in the best interests of the Debtor and its estate and creditors; (iii) the Sale of the Transferred  
14 Assets is being proposed and, if approved will be consummated as provided in Bankruptcy Code  
15 Section 363; and (iv) the Buyer is not an insider or an affiliate of the Debtor.

16 This Motion is based upon the files and records herein and upon the accompanying  
17 Hooper Declaration.

## 18 I. THE PROPOSED SALE

### 19 A. Background and Marketing

20 On August 27, 2012, Debtor West Seattle Fitness LLC filed a voluntary petition under  
21 Chapter 11 of the Bankruptcy Code, commencing this bankruptcy case. On January 14, 2013,  
22 the Court entered an order appointing the Trustee as the Chapter 11 trustee.

23 Since his appointment, the Trustee has attempted to investigate the financial affairs of the  
24 Debtor, stabilize Club operations, and market the assets of the Debtor for sale. In large part  
25 because of the uncertainty of these proceedings, Club membership has dropped sharply in recent  
26 months, greatly restraining the Club’s operational cash flow. Further, the Club’s balance sheet

MOTION FOR ORDER (1) APPROVING SALE OF ASSETS FREE  
AND CLEAR OF LIENS PURSUANT TO SECTION 363; AND (2)  
AUTHORIZING THE ASSUMPTION AND ASSIGNMENT, AND  
REJECTION, OF CERTAIN EXECUTORY CONTRACTS PURSUANT  
TO SECTION 365 - 2

CAIRNCROSS & HEMPELMANN,  
ATTORNEYS AT LAW  
524 Second Avenue, Suite 500  
Seattle, Washington 98104-2323  
office 206 587 0700 fax 206 587 2308

1 has been hampered by the Debtor's long standing practice of selling long-term membership as  
2 significant discounts. A practice which the Trustee ceased in the interim period of his  
3 appointment. It was often the case that the Debtor would offer members reduced monthly rates in  
4 return for prepaying 6 or 12 months at a time. The Debtor would further discount these pre-paid  
5 memberships by offering an additional 6 or more months free of dues as an additional incentive  
6 for prepaying the already reduced rate. As sales of these prepaid membership slowed, the  
7 Debtor's ability to meet its ongoing obligations suffered greatly. It appears from the Debtor's  
8 financials that it relied heavily on these prepayment to meet operational and other needs, without  
9 regard to the future liability it was accruing and reduction in future cash flow it was creating. The  
10 Debtor operated a similar prepayment program with respect to personal training sessions, which  
11 had similarly adverse consequences. Hooper Declaration at ¶¶3-4.

12 The Trustee continues to investigate the financial affairs of the Debtor and believes there  
13 may have been a number of preferences paid and fraudulent transfers made during the course of  
14 the Debtor's operation of the Club, both pre and post-petition. However, because of the fragility  
15 of the Club's cash flow and operations, the Trustee has focused his energy on the sale of the  
16 Club to an operator capable of servicing the members. Hooper Declaration at ¶5.

17 Within days of his appointment, the Trustee provided tours of the Club and financial  
18 information to a number of prospective purchasers, including representatives of local, regional,  
19 and national health clubs. Because the Debtor leased the Club real property, the Trustee was  
20 limited in his ability to market the Club based on upon the landlord's willingness to enter into a  
21 lease with a prospective buyer operator, as none of the potential purchasers were willing to  
22 purchase the equipment and assume the memberships without a lease for the facility. Hooper  
23 Declaration at ¶6.

24 The Trustee examined the possibilities of shutting down the Club and selling the  
25 equipment and membership data separately, but does not believe that such a piecemeal  
26 liquidation would yield the highest return to creditors or the estate. Doing so could possibly

1 increase the number of unsecured creditors and claims, as a shutdown would leave all of the  
2 prepaid members without a club to honor their membership contracts. Hooper Declaration at ¶7.

3 The Trustee believes he has done an adequate job generating interest in the Club and the  
4 Transferred Assets under the circumstances. The Trustee has reviewed the offers of parties  
5 expressing an interest in the Club and the Transferred Assets, and believes that the offer set forth  
6 herein by Buyer represents a fair and reasonable offer for the Transferred Assets. Hooper  
7 Declaration at ¶8.

8 **B. Acceptance of the West Seattle Athletic Club, LLC Offer**

9 On March 1, 2013, after substantial discussions and negotiations, the Buyer and the  
10 Trustee entered into the Agreement. Hooper Declaration at ¶9 and Ex. A attached thereto. The  
11 Buyer proposes to purchase the Transferred Assets for a purchase price of \$75,000 pursuant to  
12 the terms of the Agreement. Title to the Transferred Assets shall be conveyed without warranty  
13 as to title after the Trustee obtains an order from this Court approving the sale free and clear of  
14 all liens. As part of the Agreement, the Buyer will assume all of the month-to-month  
15 memberships in good standing as of the entry of the Sale Order, as well as all post-petition  
16 prepaid Club memberships listed on Schedule 1.1(b) (the “**Assigned Contracts**”). The Buyer  
17 will not be assuming the pre-petition long term member contracts and the Trustee will be  
18 rejecting these contracts (the “**Rejected Contracts**”). Hooper Declaration at ¶¶9-11.

19 **C. Potential Security Interests In and To the Transferred Assets.**

20 With respect to potential security interests in and to the Transferred Assets, the Trustee  
21 continues to investigate these matters. The summary below represents the Trustee’s research to  
22 date regarding potential security interests in the Transferred Assets. Some or all of these may not  
23 be valid for a variety of reasons, including but not limited to satisfaction of the underlying debt  
24 and fraudulent transfer.

25 ///

26 ///

Secured Party	Filing Date	Lapse Date	Collateral Summary
Fifth Third Bank	12/19/2008	12/19/2013	LEASE # 0171370001-60 LF/Lemond RevMaster EXC Bike and other equipment
GRE 509 Olive	11/02/2009	11/02/2014	Various - Accounts, Contracts, Equipment, Inventory, Leases, Membership Agreements, Names, Revenue, Security Deposits, Sales Proceeds, etc.
HP Properties/AllStar LLC	04/16/2012	04/16/2017	Various personal property

Accordingly, the Trustee would propose to hold the funds from the proposed sale of the Transferred Assets until such time as these liens and encumbrances can be analyzed further and further instruction or order from the Court obtained. Nevertheless, the Trustee expects that the sale proceeds will likely be exhausted after the payment of administrative expenses, including chapter 11 trustee fees, U.S. Trustee fees, and professional fees, and that no funds will remain for unsecured creditors. Hooper Declaration at ¶¶12-13.

**D. The Assigned Contracts**

The Assigned Contracts the Buyer wishes to assume consist of the “Month-to-Month Contracts” and the “Post-Petition Member Contracts,” as those terms are defined in the Agreement. Generally, the “Month-to-Month Contracts” are the current month-to-month member contracts at the Club with no long term obligation on the part of the Debtor to provide Club services and no advance prepayment of dues by the members. The “Post-Petition Member Contracts” are the long-term, prepaid member contracts the Buyer has indicated it is willing to assume and honor per their respective terms. These Post-Petition Member Contracts are specifically identified at Schedule 1.1(b) of the Agreement. Accordingly, the Trustee proposes to assume the Assigned Contracts and assign them to the Buyer per the terms of the Agreement and the Sale Order. The Trustee does not believe there are any defaults under the Assigned Contracts requiring any form of cure prior to assumption and assignment.

**E. The Rejected Contracts**

The Buyer does not wish to assume the obligations under the remaining long-term, prepaid member contracts of the Debtor (the “**Rejected Contracts**”). The parties to these

1 Rejected Contracts are identified on Exhibit B to the Hooper Declaration and represent over  
2 2100 Club members.

## 3 II. ISSUES

4 Whether the Court should permit the Trustee to sell the Transferred Assets free and clear  
5 of liens and encumbrances pursuant to Bankruptcy Code §363?

6 Whether the Court should permit the Trustee, pursuant to Bankruptcy Code §365, to: (1)  
7 assume and assign the Assigned Contracts, and (2) reject the Rejected Contracts ?

## 8 III. EVIDENCE RELIED UPON

9 This Motion relies upon the files and records of this case, and the Hooper Declaration,  
10 filed herewith.

## 11 IV. LEGAL AUTHORITY AND ARGUMENT

### 12 A. The Proposed Sale of the Transferred Assets

13 Bankruptcy Code § 363(b)(1) provides that “the trustee, after notice and a hearing, may  
14 use, sell or lease, other than in the ordinary course of business, property of the estate.” The  
15 Trustee believes the proposed sale of the Transferred Assets to Buyer will generate the highest  
16 and best return to the estate and its creditors for the foreseeable future. The Club simply does not  
17 generate sufficient revenues to fund its ongoing expenses and operations, and the remaining  
18 assets of the Debtor (i.e. possible preference and fraudulent transfer actions) are not near being  
19 monetized in order to offset any shortfalls. Further, these proceedings continue to adversely  
20 impact cash flow and membership sales, as the Club is both losing existing members and  
21 struggling to attract new members under the circumstances. The Buyer has had an opportunity to  
22 inspect the Transferred Assets and is willing to acquire them on an “as-is” basis as set forth in  
23 the Agreement. The Trustee believes the proposed sale to Buyer maximizes the value of the  
24 Transferred Assets and prevents further the need for further operational and administrative  
25 expenditures which the Club cannot support. If not approved, the Trustee’s only viable  
26

1 alternative will be to shut down the Club, cease all further operations, liquidate the personal  
2 property onsite, and/or move to convert this case to a Chapter 7 proceeding.

3 **B. The Proposed Assumption/Assignment of the Assigned Contracts Should Be**  
4 **Authorized.**

5 The Court should authorize the Trustee to assume the Assigned Contracts on behalf of the  
6 Debtor and assign them to Buyer, as provided in the Agreement. Subject to Court approval and  
7 other conditions, including cure of any defaults, a trustee may assume a debtor's executory  
8 contracts or unexpired leases. *See* 11 U.S.C. § 365(a), (b). In evaluating a trustee's decision to  
9 assume contracts or leases, courts apply the business judgment rule. *See Durkin v. Bendor*  
10 *Corp.*, 204 F.3d 1276, 1282 (9th Cir. 2000). The court should presume that, in seeking to  
11 assume a contract, a trustee is acting prudently, on an informed basis, in good faith, and in the  
12 honest belief that the assumption is in the best interests of the bankruptcy estate. *See Agarwal v.*  
13 *Pomona Valley Medical Group, Inc.*, 476 F.3d 665 (9th Cir. 2007). A court should approve the  
14 assumption of a contract or lease under § 365(a) unless it finds that the trustee's conclusion that  
15 assumption would be advantageous is so manifestly unreasonable that it could not be based on  
16 sound business judgment, but only on bad faith, or whim, or caprice. *See id.* A trustee may  
17 assign an assumed executory contract or unexpired lease to a third party, provided the proposed  
18 assignee can provide adequate assurance of future performance under the contract or lease. 11.  
19 U.S.C. § 365(f)(2); *In re Fleming Companies, Inc.*, 499 F.3d 300 (3d Cir. 2007).

20 The Trustee's choice to assume the Assigned Contracts is supported by the business  
21 judgment rule as the assumption and assignment of the Assigned Contracts will allow the Trustee  
22 to complete the sale of the Transferred Assets, the proceeds of which will benefit the estate.

23 **C. The Proposed Rejection of the Rejected Contracts Should Be Authorized.**

24 The Court should authorize the Trustee to reject the Rejected Contracts on behalf of the  
25 Debtor. Section 365(a) of the Bankruptcy Code provides that a debtor in possession "subject to  
26 the court's approval, may . . . reject any executory contract or unexpired lease of the debtor." 11

1 U.S.C. § 365(a). The Trustee believes that rejection of the Rejected Contracts is in furtherance of  
2 his efforts to preserve and maximize estate value and in the best interests of the estate and its  
3 creditors. The Rejected Contracts are not necessary for the reorganization process, as there will  
4 be no reorganization and the Buyer does not wish to assume them as part of its acquisition of the  
5 Transferred Assets. Accordingly, the decision to reject the Rejected Contracts is a proper  
6 exercise of the Trustee's business judgment, and rejection thereof should be approved pursuant  
7 to Section 365(a) of the Bankruptcy Code.

8 **D. No Stay of Sale Order.**

9 A court may decline to stay an order approving a sale of property. Fed. R. Bank. P.  
10 6004(h). In light of the aforementioned factors compelling the expedited sale of the Transferred  
11 Assets, cause exists for entry of an order eliminating the stay period of Rule.

12 **V. CONCLUSION**

13 For the foregoing reasons, the Trustee respectfully requests that the Court (i) authorize  
14 and approve the Agreement; (ii) authorize the sale of the Transferred Assets described in the  
15 Agreement to Buyer, free and clear of all liens, claims, interests, charges and encumbrances,  
16 subject to the terms of the Agreement and the Sale Order; (iii) authorize Trustee to consummate  
17 all transactions related to the above; (iv) authorize the assumption and assignment of the  
18 Assumed Contracts, and authorize the rejection of the Rejected Contracts as of the date of the  
19 closing of the Sale.

20 DATED this 5<sup>th</sup> day of March, 2013.

21 CAIRNCROSS & HEMPELMANN, P.S.

22 /s/ Yousef Arefi-Afshar

23 John R. Rizzardi WSBA No. 9388

24 Yousef Arefi-Afshar WSBA No. 40754

25 Attorneys for Chapter 11 Trustee Richard A.

26 Hooper

MOTION FOR ORDER (1) APPROVING SALE OF ASSETS FREE  
AND CLEAR OF LIENS PURSUANT TO SECTION 363; AND (2)  
AUTHORIZING THE ASSUMPTION AND ASSIGNMENT, AND  
REJECTION, OF CERTAIN EXECUTORY CONTRACTS PURSUANT  
TO SECTION 365 - 8

CAIRNCROSS & HEMPELMANN,  
ATTORNEYS AT LAW  
524 Second Avenue, Suite 500  
Seattle, Washington 98104-2323  
office 206 587 0700 fax 206 587 2308