

**Form 3-49**  
(Subrule 3-49)

**COURT FILE NUMBER**                      **Q.B. No. \_\_\_\_\_ of 2021**

**COURT OF QUEEN'S BENCH FOR SASKATCHEWAN**

**JUDICIAL CENTRE**                      **SASKATOON**

**APPLICANT**                              **BTA REAL ESTATE GROUP INC.**

**RESPONDENT**                            **SM FITNESS INC.**

**ORIGINATING APPLICATION**

**NOTICE TO THE RESPONDENTS**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court. To do so, you must be in Court when the application is heard as shown below:

Where:     Court of Queen's Bench for Saskatchewan  
              520 Spadina Crescent East  
              Saskatoon, SK S7K 3G7

Date:        February 5, 2021

Time:        10:00 a.m.

Due to the health risks posed by the COVID-19 pandemic, all chambers applications will be heard by telephone unless the presiding judge has decided otherwise. To confirm the telephone number where you can be reached on the date of the application, you must immediately contact the office of the local registrar at (306) 933-5135 and provide your telephone number. You must remain available by telephone at that number on that date until your matter is heard.

*Go to the end of this document to see what you can do and when you must do it.*

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**APPLICATION FOR DECLARATION OF SECURITY INTEREST IN COLLATERAL**

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## PARTICULARS OF APPLICATION

### The Applicant Seeks the Following Remedy or Order:

1. The Applicant, BTA Real Estate Group Inc. ("**BTA**"), seeks an Order, substantially in the form of the draft order filed herewith, pursuant to sections 63 and 66 of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 (the "**PPSA**"), section 11 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 (the "**QBA**"), and Rule 1-5 of *The Queen's Bench Rules*:
  - a. authorizing the within application to be heard concurrent with the application in the Receivership Proceedings (as defined below herein), returnable on February 5, 2021;
  - b. declaring that certain intangible property, being the Disputed Memberships (as that term is defined in the Second Report of the Receiver filed in Q.B. No. 1195 of 2020), is collateral subject to the security of BTA;
  - c. declaring that the Disputed Funds (as that term is defined in the Second Report of the Receiver filed in Q.B. No. 1195 of 2020) are collateral subject to the security interest of BTA;
  - d. providing for mandatory injunctive relief requiring the Respondent, SM Fitness Inc. ("**SMI**"), to forthwith instruct and authorize the third-party contract administrator to release the Disputed Memberships and the Disputed Funds to BTA; and
  - e. awarding BTA costs against SMI.

### The Applicant's Grounds for Making This Application Are:

2. Section 2(1) (w) of the *PPSA* broadly defines "intangible property." Section 2(1)(ff) of the *PPSA* expressly includes intangible property in the definition of "personal property."
3. Section 66(1)(a) of the *PPSA* provides the Court with expansive authority to determine, summarily, questions concerning entitlement to, or ownership of, collateral.

4. Additionally, Section 11 of the *QBA* provides the Court with the broad, general authority to issue binding declarations of right.
5. Rule 1-5 of the *QBR* empowers this Court with the broad authority to grant orders respecting its own procedure.

**The Applicant's Summary of The Material Facts is as Follows:**

6. Family Fitness Inc. ("**FFI**") operates three gym and fitness centre locations in the City of Regina. SMI operates a single gym and fitness centre location. SMI and FFI have common shareholders and a common director, Said Kaiss, who was, prior to the Receivership proceedings in Q.B. No. 1195 of 2020, the directing mind of FFI and remains the directing mind of SMI.
7. BTA is landlord and senior secured creditor to FFI. FFI granted to BTA a general security interest in all of its present and after-acquired property, together with all proceeds derived therefrom, pursuant to a general security agreement dated September 26, 2013 (the "**GSA**"). BTA perfected its security interest in FFI's present and after-acquired property by way of registering a financing statement in the Saskatchewan Personal Property Registry on October 7, 2013. BTA's security interest attached to the whole of FFI's present and after-acquired property.
8. FFI failed to perform its obligation to pay BTA rent pursuant to a commercial leasing agreement, and ultimately entered into a Forbearance Agreement with BTA.
9. FFI expressly covenanted to refrain from selling, leasing or otherwise disposing of any of the collateral secured by the GSA without first securing BTA's express written consent.
10. In or about the month of January 2018, FFI took an assignment of certain membership contracts (the "**Membership Contracts**") between gym members and third-party corporations—namely, Club Fitness Inc., Shapelys Toning and Diet Centre Ltd., and KTB Lifestyles Ltd. (collectively, the "**Assignors**"). In early 2018, the Assignors closed fitness centres operating in Regina. The Assignors' members, being the parties to the Membership Contracts, gained the right to use the FFI fitness centres upon the closure of

the Assignors' fitness centres. The dues paid pursuant to the Membership Contracts were thereafter receipted by FFI regularly until approximately April of 2020.

11. In April of 2020, FFI defaulted on certain monthly payment obligations owing to BTA, as modified by a June 2019 Forbearance Agreement.
12. On or about May 12, 2020, FFI and SMI entered into a written contract wherein FFI agreed to assign the Membership Contracts to SMI, which assigned contracts are referred to as the Disputed Memberships in the Second Report of the Receiver.
13. Contrary to the express terms of the GSA, FFI refrained from notifying BTA of such assignment of the Disputed Memberships, let alone securing the written consent of BTA for such disposition.
14. None of the dues paid by members pursuant to the Disputed Memberships have been realized by FFI subsequent to the assignment thereof by FFI to SMI. Dues identified by the Receiver to be associated with the Disputed Memberships subsequent to such assignment stand at approximately \$245,000.00 as of the date hereof, and are referred to as the Disputed Funds in the Second Report of the Receiver.
15. In September of 2020, BTA served on FFI a notice of default and demand for payment of amounts owing by FFI to BTA.
16. On October 13, 2020, this Court appointed Alvarez & Marsal Canada Inc. (the "**Receiver**") as receiver and manager of the business assets of FFI pursuant to the Order of the Honourable Justice B. Scherman in the matter of Q.B. No. 1195 of 2020 (the "**Receivership Proceedings**").
17. BTA first acquired knowledge of the transaction concerning the Disputed Memberships and the Disputed Funds on approximately January 15, 2021, upon being informed by the Receiver after Mr. Kaiss attempted to obtain the Disputed Funds directly from the third-party payment processing provider.
18. SMI has informed BTA that it takes the position that it is entitled to retain the Disputed Memberships and the Disputed Funds. SMI takes this position notwithstanding BTA's

perfected security interest in all of FFI's collateral pursuant to the GSA and the existence of the Receivership Order.

19. Since learning of the transaction, BTA has perfected its security by registration against SMI in regard to the Disputed Memberships and the Disputed Funds.

20. As of late January 2021, the Assignors have discharged their registered security interest in the Membership Contracts in the Saskatchewan Personal Property Registry.

**Material and Evidence to be Relied on:**

21. Take notice that in support of this Application the following material will be read:

- a. the within Notice of Application;
- b. the Affidavit Natasha Halvorson dated February 2, 2021;
- c. all pleadings and proceedings in the Receivership proceedings in Q.B. No. 1195 of 2020;
- d. Brief of Law (to be filed);
- e. draft Order; and
- f. such further and other material that this Honourable Court may allow.

**APPLICABLE RULES**

22. *The Queen's Bench Rules* Rules 1-5, 3-49, and 11-1.


**APPLICABLE ACTS & REGULATIONS**

23. *The Personal Property Security Act, 1993*, SS 1993, c P-6.2, at s 66; *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, at s 11.

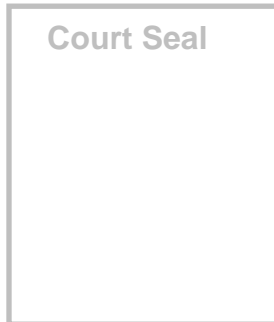
DATED at Saskatoon, Saskatchewan this 2<sup>nd</sup> day of February,  
2021.

**W Law LLP**

**Per:**

  
\_\_\_\_\_  
Michael Russell and Kevin Hoy,  
Counsel to BTA Real Estate  
Group Inc.

THIS NOTICE is issued at the above-noted judicial centre on the \_\_\_\_ day of February, 2021.



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Local Registrar

### **NOTICE**

You are named as a respondent because you have made or are expected to make an adverse claim with respect to this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form.

The rules require that a party moving or opposing an originating application must serve any brief of written argument on each of the other parties and file it at least 3 days before the date scheduled for hearing the originating application.

If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must serve a copy of the affidavit and other evidence on the originating applicant at least 10 days before the originating application is to be heard or considered.

### **CONTACT INFORMATION AND ADDRESS FOR SERVICE**

|                                   |   |
|-----------------------------------|---|
| Name of firm:                     | <b>W Law LLP</b>  |
| Name of lawyer in charge of file: | Michael J. Russell / Kevin N. Hoy   |
| Address of legal firm:            | Suite 300, 110 – 21 <sup>st</sup> Street East<br>Saskatoon, SK S7K 0B6                                      |
| Telephone number:                 | (306) 244-2242  |
| Fax number:                       | (306) 652-0332  |
| E-mail address:                   | <a href="mailto:mrussell@wlaw.com">mrussell@wlaw.com</a> / <a href="mailto:khoy@wlaw.com">khoy@wlaw.com</a> |