CITATION: Eastern Meat Solutions Inc.(Re) 2024 ONSC 2905
COURT FILE NO.: CV-24-00720622-00CL
DATE: 2023-05-22

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: 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 EASTERN MEAT SOLUTIONS INC., SIERRA CUSTOM FOODS INC., SIERRA SUPPLY CHAIN SERVICES INC., SIERRA REALTY CORPORATION, RVB HOLDINGS INC., VANDEN BROEK HOLDINGS (2008) INC., SIERRA REALTY CALGARY CORPORATION AND EASTERN MEAT SOLUTIONS (USA) CORP., Applicants

BEFORE: Penny J.

COUNSEL: *Rebeca Kennedy, D.J. Miller* and *Adam Driedger* for the Applicants
Michael Schafler and *Valerie Cross* for the Proposed Monitor
Alex Macfarlane for the Bank of Montreal

HEARD: May 21, 2024

REASONS FOR DECISION ON APPLICATION FOR AN INITIAL ORDER

Overview

[1] On May 21, 2024 I granted an initial order under the CCAA in this matter with reasons to follow. These are the reasons.

[2] The Applicants have brought an application for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The Applicants seek:

- an order that the CCAA applies to the debtor companies;
- an order appointing Deloitte Restructuring as Monitor;
- a stay of all proceedings against the Applicants and their directors, officers and employees until May 31, 2024;
- an order granting the following priority charges (collectively, the "Charges") over the Property (as defined in the Initial Order), listed in descending order of priority:

a. a charge as security for the respective fees and disbursements of the proposed Monitor, its counsel, and counsel to the Applicants, in the maximum amount of $500,000 (the "Administration Charge");

b. a charge in favour of the directors and officers of the Applicants in the maximum amount of $600,000 (the "Directors' Charge"); and

c. an Intercompany Charge to secure any intercompany advances made during the CCAA proceeding in accordance with the Initial Order.

- an order authorizing but not requiring the Applicants to pay certain pre-filing amounts with the consent of the Monitor to critical suppliers and other key parties with whom the Applicants transact; and

- an order restricting the exercise of certain rights of set-off by suppliers and/or customers of the Applicants without the consent of the Monitor.

[3] The Applicants are currently negotiating the terms of a debtor-in-possession loan facility and, once that is finalized, intend to seek approval of the proposed DIP financing at the Applicants' come back hearing, to be scheduled by the court and heard no later than May 31, 2024.

Background

[4] The Applicants have three distinct business lines, each of which is carried out by a separate entity within the corporate group: (i) a meat trading and market services business, which is conducted by Eastern Meat (the "Trading Business"); (ii) a food processing business, which is conducted by Sierra Foods (the "Processing Business"); and (iii) a cold storage and transportation business, which is conducted by Sierra Services (the "Cold Storage Business"). These industries are highly regulated by the Canadian Food Inspection Agency ("CFIA"), requiring careful handling, storage, processing, and distribution of critical food supplies to ensure the highest standards of health and safety.

[5] Sierra Realty Corporation ("Sierra Realty") was originally intended to be the development arm of the Applicants' Cold Storage Business and is a party to certain of the real property leases that some of the Applicants use to carry out operations. Sierra Realty Calgary Corporation ("Sierra Calgary") is the tenant on a facility lease in Calgary that was entered into with a view to expanding the cold storage business. For reasons discussed in the supporting affidavit filed with this application, this expansion will no longer be pursued by the Applicants.

[6] RVB Holdings Inc. ("RVB Holdings") does not have any business operations, material assets, or employees.

[7] Vanden Broek Holdings (2008) Inc. ("VBH") has no assets or employees or business operations. VBH functions as the holding company that owns 100% of the shares of Eastern Meat and therefore indirectly owns (through Eastern Meat) 100% of the shares of each of Sierra Foods and Sierra Services.

[8] Eastern Meat Solutions (USA) Corp. ("EMS US") does not carry on any business or have any meaningful assets or liabilities. EMS US functions as the entity through which the Applicants pay their sales representatives located in the United States.

[9] The Applicants offer related services within the sector, with integrated accounts, management, and operations. While certain of the Applicants have no business operations, material assets, or liabilities, they are included as Applicants in this proceeding due to the ownership structure, their contribution to the operations of certain other Applicants, and contracts that they have with third parties for operations of related Applicant entities.

[10] A critical component of the Cold Storage Business is a Cold Storage Management Agreement dated as of December 17, 2021 (the "Cold Storage Agreement") among Eastern Meat, Sierra Services, Confederation Freezers Inc. ("Confederation"), and Premium Brands Holdings Corporation ("Premium Brands"). Under the Cold Storage Agreement, Sierra Services engaged Confederation to manage all aspects of the Cold Storage Business at the Hamilton Facility, including warehousing and storage services, food storage services, freight transportation services, and supply chain management services. Although Confederation manages the cold storage business and the employees, all employees remain employed with Sierra Services and are not employees of Confederation.

[11] On a consolidated basis, the Applicants had revenues of approximately $281 million for the fiscal year of 2023 and currently have approximately $65.1 million in outstanding debt. The Applicants have 177 employees on a full-time basis (of which 173 are located in Ontario and four are located across the United States).

Circumstances Giving Rise to This Application

[12] The Applicants are currently facing a significant liquidity crisis due, in part, to: (i) difficulties in onboarding and managing growth capacity at two facilities that the Applicants operate from; (ii) increasing capital costs, which have had the effect of eroding margins (which are already slim in the industry); (iii) inflationary pressures (including as it relates to administrative and labour costs); and (iv) escalating supply costs due to global supply chain and related issues.

[13] The Applicants have defaulted on certain debt service covenants under the credit agreement with their senior secured lender, Bank of Montreal ("BMO"). Prior to the Comeback Hearing, no additional amounts will be available to the Applicants under the terms of the BMO credit facilities beyond the existing limits, subject to availability.

[14] The Applicants have already undertaken significant efficiency and cost-cutting measures to address its challenges, including salary reductions, employee terminations, and a strategic review of all operating and administrative costs with the assistance of a financial advisor. However, these efforts proved insufficient. Now, the current liquidity crisis does not permit the Applicants to continue on that path. The Applicants require additional cash to fund operations and payroll in the near future. Furthermore, as of May 13, 2024 the Applicants have approximately $19.6 million in unsecured debt, primarily comprised of trade payables related to the operation of the Applicants' business. The Applicants are not

in a position to repay these liabilities. Accordingly, the Applicants require immediate CCAA protection to ensure that the value of the business is preserved while the Applicants have an opportunity to restructure.

[15] The board of directors of the Applicants have explored all options to maintain the financial health and viability of the business. After conducting an exhaustive review and considering all reasonable alternatives in consultation with legal and financial advisors, the board has determined that it is in the best interests of the Applicants and their stakeholders to pursue a restructuring under the CCAA.

Application of the CCAA

[16] Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The Applicant's chief place of business is Ontario.

[17] The CCAA applies to a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds $5 million. The Applicants, as companies incorporated by or under an Act of Parliament or of the legislature of a province meet the CCAA definition of "company" and are therefore eligible to make this application under the CCAA. Total claims exceed $5 million.

[18] The following provides an overview of the Applicants' material assets and liabilities:

(a) Total Assets. As at September 30, 2023, the total assets of the Applicants, based on the 2023 unaudited consolidated financial statements, were approximately $68.2 million. The assets are primarily comprised of inventory and accounts receivable. The Applicants do not own any real property.

(b) Total Liabilities. As at September 30, 2023, the total liabilities of the Applicants, based on the 2023 unaudited consolidated financial statements, were approximately $65.1 million. The liabilities are primarily comprised of the senior secured debt owing to BMO and accounts payable. Although the book value of the Applicants' assets based on the unaudited 2023 financial statements exceeds the book value of their liabilities, in a forced liquidation the realizable value of the Applicants' assets may not be sufficient to satisfy the senior secured indebtedness to BMO and the claims of all other creditors. In addition, due to the immediate liquidity crisis, the Applicants are insolvent and are unable to pay their liabilities in the ordinary course absent the relief sought pursuant to the Initial Order.

(c) BMO Senior Secured Debt. As noted, BMO is the senior secured operating lender of the Applicants and the proposed DIP Lender (although approval of DIP financing will be deferred until the Comeback Hearing). Pursuant to the BMO Credit Agreement among Eastern Meat (as borrower), BMO (as lender), and each of Sierra Foods and Sierra Services as guarantors, BMO made available to Eastern Meat the BMO Credit Facilities, including the Revolving Facility referred to above. The total outstanding amount under the BMO Credit Facilities as at May 21, 2024 is $8,037,369.58 and USD$1,448,812.06. Sierra Services and Sierra Foods have each guaranteed the obligations of Eastern Meat under the BMO Credit Facilities, and each of Eastern Meat and Sierra Services agreed to guarantee

the indebtedness and obligations of Sierra Foods to BMO. Each of Eastern Meat, Sierra Foods, and Sierra Services granted BMO, among other things, security over all of its present and after-acquired personal property pursuant to a separate general security agreement. The Applicants are in discussions with BMO regarding its role as the DIP lender in this proceeding and the terms of the proposed DIP financing. BMO has been supportive of management's efforts to address the current liquidity issues, and has indicated that it will support the Applicants in commencing this proceeding and provide DIP financing to allow the intended restructuring steps to be implemented.

(d) Secured Equipment Lessors. The Applicants, primarily in relation to the Food Processing Business and Cold Storage Business, are also borrowers under certain leasing facilities with several different equipment lessors and/or lenders in respect of various vehicles and other equipment used to operate the business (collectively, the "Lease Facilities"). The aggregate amount outstanding under the Lease Facilities, as at May 13, 2024, is approximately $4,025,668.

(e)Real Property Leases. As described above, the Applicants do not own any real property and exclusively operate out of the leased premises located at the Head Office in Mississauga, Ontario, the Hamilton Facility, and the Brampton Facility. In total, the Applicants currently pay approximately $803,220.78 per month on account of the foregoing leases, inclusive of all applicable taxes, maintenance fees, and insurance.

(f) Unsecured Debt. In addition to the liabilities set out above, as at May 13, 2024, the Applicants have approximately $19.6 million in unsecured debt, which is primarily comprised of trade payables related to the operation of the Applicants' business.

(g) HST Liability. With the exception of Sierra Realty, the Applicants are current on all priority payables owing to CRA. Sierra Realty was recently assessed with an HST tax liability in the amount of $182,630.37 in connection with the sale of an intangible right of $1,404,849 that occurred in January 2022. Sierra Realty will, with the assistance of the Monitor and counsel, determine what steps may be appropriate in connection with this CRA liability.

[19] The Applicants are insolvent. This is clear from, among other things, the Proposed Monitor's Cash Flow Statement: the Applicants are unable to meet their obligations generally as they become due without the additional financing to be provided by the proposed DIP Facility.

Appointment of Deloitte

[20] Deloitte began working with the Applicants prior to the commencement of this proceeding and has become familiar with the Applicants' operations, business lines and current challenges.

[21] Deloitte is a licensed trustee within the meaning of s. 2 of the Bankruptcy and Insolvency Act and is not subject to any of the restrictions on who may be appointed as Monitor set out in section 11.7(2) of the CCAA. Deloitte has extensive experience in matters of this nature, including insolvency proceedings involving meat processing, cold storage and

related aspects of the industry. Deloitte is well qualified to provide assistance to the Applicants and to act as Monitor in supervising this matter; it has consented to do so.

The Stay

[22] Section 11.02(1) permits the court to grant an initial stay of up to 10 days on an application for an initial order, provided the stay is appropriate and the applicants have acted with due diligence and in good faith. Under s. 11.001, other relief granted under s. 11 of the CCAA at the same time as an initial order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."

[23] The Applicants, in consultation with the Monitor, have limited the relief sought on this initial application to that which is reasonably necessary to "keep the lights on" for the continued operation of the Applicants' business during the initial stay period. The Applicants intend to return to Court to seek additional relief at the Comeback Hearing.

[24] The Monitor's report indicates that the Applicants will have sufficient cash to fund operations for the initial stay period.

[25] If a stay of proceedings is granted, the Applicants intend to take steps to: (i) wind down the Trading Business, (ii) market and sell the Processing Business on a going concern basis, and (iii) focus on restructuring and continuing the Cold Storage Business. The Applicants intend to return to Court as soon as possible to seek approval of a sale process for the Processing Business and, in the interim pending any sale, will continue to operate the Processing Business and the Cold Storage Business in the ordinary course. The restructuring objective is to develop a self-sustaining and profitable Cold Storage Business and to emerge from CCAA protection with a healthier capital structure. The protections available under the CCAA will provide the Applicants with the flexibility and breathing room required to carry out this objective under the supervision of the Court and with the assistance of the Monitor.

[26] I am satisfied that the stay is appropriate; the Applicants have acted with due diligence and in good faith.

The Administration Charge

[27] Section 11.52 of the CCAA gives the court jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts. In determining whether to approve an administration charge, the Court must consider: (a) the size and complexity of the businesses under CCAA protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.

[28] The Applicants seek a first-ranking Administration Charge on the Property in favour of the Monitor, its counsel, and counsel to the Applicants up to the maximum amount of $500,000 during the Initial Stay Period, which the Applicants will seek to increase to a total amount

of $750,000 at the Comeback Hearing. The Administration Charge is necessary to ensure the active involvement of critical parties to these CCAA proceedings. It is unlikely that these advisors would participate in the CCAA proceedings without the administration charge. The quantum of the proposed administration charge in the Initial Order is limited to what is "reasonably necessary" for the initial stay period, given the demands on the advisors leading up to the filing together with likely further demands prior to the comeback hearing. It is supported by the Monitor.

[29] The Administration Charge is approved.

Directors' Charge

[30] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the Directors' Charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it. The notice requirement is met in the circumstances.

[31] A successful restructuring of the Applicants will require the continued active engagement of its directors and officers. These individuals are highly knowledgeable about the Applicants' various businesses and are essential to the viability of the Applicants' restructuring steps, its continuing business and the preservation of enterprise value.

[32] The Applicants estimate, with the assistance of the Monitor, that obligations of the Applicants that could give rise to potential director and officer liability may mount to as much as approximately $600,000 within the initial 10-day period, and $750,000 thereafter, if such amounts remain unpaid.

[33] The Applicants' current and former directors and officers are among the potential beneficiaries under a separate liability insurance policy in the amount of up to $1 million pursuant to an insurance policy with Zurich Insurance Company Ltd. that expires on February 28, 2025.

[34] The proposed Directors' Charge is necessary to ensure the continued active participation of the Applicants' officers and directors. Their involvement will facilitate a smoother and more cost-effective CCAA proceedings, benefiting the Applicants and their stakeholders. The Monitor supports granting this request.

[35] The Directors' Charge is approved.

Intercompany Funding Charge

[36] The Applicants provide related and end-to-end services within the sector which creates certain efficiencies and scale. In the ordinary course of business, funds are transferred between and among certain of the Applicants, creating an intercompany indebtedness that is recorded.

[37] In order to ensure that no creditor is prejudiced based on the flow of funds in respect of any intercompany funding after the date of the Initial Order, a standard intercompany

charge over each applicable Applicant's property is sought. This will secure any intercompany balances and ensure that stakeholders of the funding Applicant are not prejudiced by the continued, ordinary course flow of funds.

[38] The Applicants and the Monitor will record all intercompany funding and therefore the amount of each intercompany charge granted by and to each Applicant. At the relevant time, the Applicants and the Monitor will determine the net amount secured by each intercompany charge for the period after the date of the Initial Order.

[39] The proposed Intercompany Charge will rank subordinate to the Administration Charge and the Directors' Charge and subordinate to the proposed DIP Charge if granted.

[40] I am satisfied that this charge is appropriate and consistent with the purposes of the Initial Order. The Intercompany Charge is approved.

Permitting Payments & Set-Off

[41] The court has jurisdiction to make any orders that it thinks appropriate under s. 11 of the CCAA. Payment to critical suppliers, including provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor, is necessary to achieve the purposes for which the initial order is being granted.

[42] The proposed Initial Order contemplates that the Applicants will be permitted (but not required) to make the following payments (including certain pre-filing amounts) to ensure that the businesses may continue in the ordinary course post-filing:

(a) all outstanding and future wages, salaries, employee benefits, vacation pay, and employee expenses payable on or after the date of the Initial Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants (as defined in the propose Initial Order) retained or employed by the Applicants in respect of these proceedings at their standard rates and charges;

(c) any payments required by the Applicants to maintain any of the licenses under the *Safe Food for Canadians Act*;

(d) subject to the approval of the Monitor, amounts owing for goods or services supplied to the Applicants prior to the date of the proposed Initial Order if, in the opinion of the Applicants, such payments are necessary or desirable to avoid disruption to the business of the Applicants;

(e) all expenses and capital expenditures reasonably necessary for the preservation of the Applicants' property or the business, including, without limitation, payments on account of insurance (including D&O Insurance), maintenance, and security services; and

(f) payment for goods or services actually supplied to the Applicants following the date of the proposed Initial Order or payments to obtain the release of goods or delivery of services contracted for prior to the date of the proposed Initial Order.

[43] In order to maximize liquidity and the ability of the Applicants to achieve a successful restructuring, the Initial Order further provides that, without the consent of the Applicants and the Monitor, no party may exercise the following set-off rights:

(a) pre-filing against post-filing set-off; and

(b) triangular set-off (i.e., set-off against the Applicants by one member of a corporate group in respect of amounts owing to or by another member of that corporate group).

[44] This is of particular importance to the Applicants. Given the inter-related and synergistic nature of the Applicants' business lines, there are multiple corporate groups that are both suppliers to, and customers of, the Applicants. Different entities among those corporate groups may seek to exercise triangular set-off rights in respect of net balances owing for goods and services supplied during the pre-filing period, including among various Applicants. The amounts potentially involved are material. Any attempted exercise of triangular set-off would have a negative impact on the liquidity of the business and impair the Applicants' restructuring efforts.

[45] The requested order concerning permitted payments and set-off is approved.

Future DIP Financing

[46] The Applicants are in the process of negotiating a debtor-in-possession financing facility (the "DIP Facility") with their existing lender, BMO. The Applicants and the Monitor will report to the Court on the terms of the DIP Facility, and the priority charge in respect thereof, once finalized, for the Comeback Hearing. The Applicants, with the assistance of the Monitor, have sized the proposed DIP Facility to address the Applicants' liquidity needs. The DIP Facility shall be supported by the cash flow forecast prepared by the Applicants and reviewed by the Monitor.

Conclusion

[47] The application for the Initial Order is granted. Order to issue in the form signed by me this day.

[48] Friday May 31, 2024 at 10:00 AM is scheduled for the came back hearing, for one hour.

Penny J.

Date: May 22, 2024