Court File No.: CV-24_____-00CL

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 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

FACTUM OF THE APPLICANTS
(Application Returnable May 21, 2024)

May 21, 2024

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PART I - OVERVIEW

1. Eastern Meat Solutions Inc. ("**Eastern Meat**"), Sierra Custom Foods Inc. ("**Sierra Foods**"), Sierra Supply Chain Services Inc. ("**Sierra Services**"), Sierra Realty Corporation ("**Sierra Realty**"), RVB Holdings Inc. ("**RVB Holdings**"), Vanden Broek Holdings (2008) Inc. ("**VBH**"), Sierra Realty Calgary Corporation ("**Sierra Calgary**"), and Eastern Meat Solutions (USA) Corp. ("**EMS US**" and collectively, the "**Applicants**") bring this application for an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). All capitalized terms not expressly defined herein are defined, and have the meanings set forth, in the Affidavit of Robert Vanden Broek sworn May 21, 2024 (the "**Vanden Broek Affidavit**").

2. The Applicants are seeking, among other things, the following relief as part of the Initial Order: (i) the appointment of Deloitte Restructuring Inc. as Monitor of the Applicants (in such capacity, the "**Monitor**"); (ii) a stay of proceedings against the Applicants, the Monitor, and their respective employees, directors, advisors, officers, and representatives acting in such capacities for an initial period of ten (10) calendar days; (iii) authorization (but not the requirement) to pay certain pre-filing amounts with the consent of the Monitor to critical suppliers and other key parties with whom the Applicants transact; (iv) a restriction on the exercise of certain rights of set-off by suppliers and/or customers of the Applicants without the consent of the Monitor; and (v) the granting of an Administration Charge in the amount of $500,000, a Directors' Charge in the amount of $600,000, and an Intercompany Charge to secure any intercompany advances made during the CCAA proceeding in accordance with the Initial Order. As set out in the Vanden Broek Affidavit, certain additional relief will be sought at the Comeback Hearing.

3. The Applicants are a group of privately held companies originally founded in 1967 that are in the business of trading meat products and providing food processing and cold storage services for the food industry. This is a highly regulated industry that requires careful handling, storage, processing, and distribution of critical food supplies to ensure the highest standards of health and safety. Substantially all of the Applicants' operations are carried out in Ontario.

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

5. Notwithstanding the significant growth and success achieved by the Applicants since 1967, the Applicants are currently facing significant liquidity issues and have not achieved intended performance metrics over the past several years. The Applicants are insolvent.

6. Despite recent funding made available by Robert Vanden Broek (a director of each of the Applicants) and BMO (the Applicants' senior secured lender and the proposed DIP Lender) the Applicants continue to forecast losses over the next two years and are facing a severe liquidity crisis. It is anticipated that, in the absence of the DIP financing to be provided by BMO, the approval of which will be sought at the Comeback Hearing, the Applicants will require additional cash to fund operations.

7. After conducting an exhaustive review and considering all reasonable alternatives in the circumstances, the Applicants have determined that it is in the best interests of the

Applicants and their stakeholders to seek protection under the CCAA. The Applicants require immediate CCAA protection in order to continue operating as a going concern.

8. If the Initial Order is granted, the Applicants intend to take steps to wind down the Trading Business, market and sell the Processing Business on a going concern basis through a formal competitive process, and focus on restructuring and continuing to operate the Cold Storage Business. The Applicants intend to return to Court as soon as possible to seek approval of a sale process with respect to the Processing Business. The Applicants will continue to operate the Processing Business and the Cold Storage Business in the ordinary course in the interim. The restructuring objective is to develop a self-sustaining and profitable Cold Storage Business and to ultimately emerge from CCAA protection with a healthier capital structure, as an ongoing participant in the sector within which the Applicants currently operate. The protections 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.

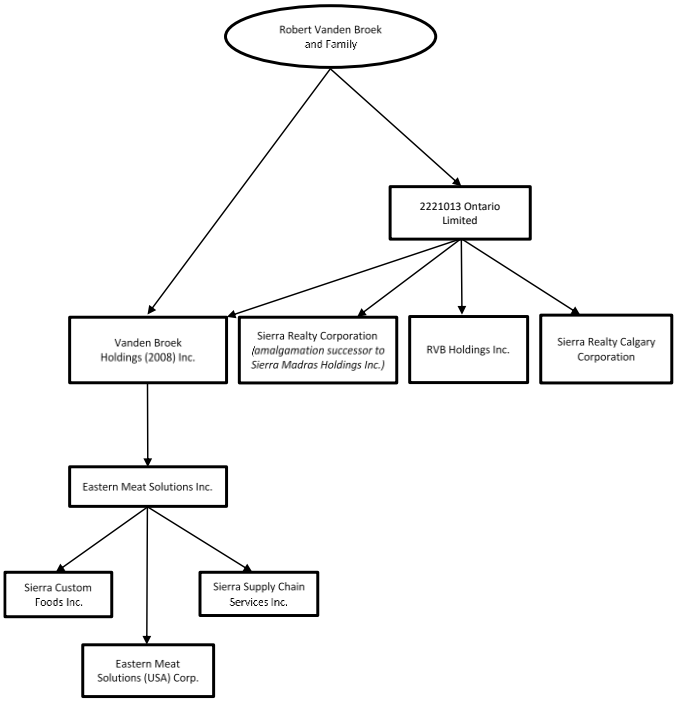
9. Each of the Applicants is a debtor company or an affiliated debtor company to which the CCAA applies. The Applicants are clearly insolvent and have liabilities in excess of $5 million. The relief sought pursuant to the proposed Initial Order largely follows the model order and is limited to that which is reasonably necessary during the initial 10-day period. The limited deviations from the model order (which are described in greater detail below) are appropriate in the circumstances.

PART II - THE FACTS

10. The facts relevant to the relief sought by the Applicants are set out in detail in the Vanden Broek Affidavit and are summarized below.

A. THE APPLICANTS

11. The Applicants are in the business of trading meat products and providing related services such as supply chain management, logistics, food processing, and cold storage. The Applicants have three distinct business lines, each of which is conducted by a separate operating entity within the corporate group: (i) the Trading Business, which is conducted by Eastern Meat; (ii) the Processing Business, which is conducted by Sierra Foods; and (iii) the Cold Storage Business, which is conducted by Sierra Services. A simplified corporate organizational chart for the Applicants is set out below:[1]



[1] Affidavit of Robert Vanden Broek sworn May 21, 2024 (the "**Vanden Broek Affidavit**") at para 13.

12. Each Applicant and its respective business are summarized below:

(a) **Eastern Meat – the Trading Business**. Eastern Meat is a privately-held corporation incorporated under the laws of Ontario. Eastern Meat is the direct parent of Sierra Services and Sierra Foods, the two other operating entities. Eastern Meat is in the Trading Business, which is a traditional trading business in which Eastern Meat acquires meat products from third-party producers or other traders and then sells the meat products on both a spot and option traded basis to a variety of distributors, wholesalers, or other traders. Eastern Meat conducts its operations from the Head Office in Mississauga, Ontario and is generally responsible for all administrative functions and costs of the Applicants. Eastern Meat currently has 43 full-time employees, one of whom is currently inactive.[2]

(b) **Sierra Foods – the Processing Business**. Sierra Foods is a privately-held corporation incorporated under the laws of Ontario. Sierra Foods is in the Food Processing Business. Substantially all of the business of Sierra Foods is carried out at a 45,000 square foot leased facility located at 275 Walker Drive, Brampton, Ontario (the "**Brampton Facility**") as well as a 25,000 square foot portion of the leased facility located at 90 Glover Road, Hamilton, Ontario (the "**Hamilton Facility**"). Sierra Foods currently has 76 full-time employees, with two currently inactive.[3]

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[2] Vanden Broek Affidavit at paras 16-20.

[3] Vanden Broek Affidavit at paras 21-23.

(c) **Sierra Services – the Cold Storage Business**. Sierra Services is a privately held corporation incorporated under the federal laws of Canada. Sierra Services is in the Cold Storage Business. Substantially all of the business of Sierra Services is carried out at a 250,000 square foot portion of the Hamilton Facility. Sierra Services currently has 78 full-time employees, one of which is currently inactive. Fifty-six (56) of the Sierra Services employees are unionized under Unifor Local 504 pursuant to the *Labour Relations Act, 1995*. A collective bargaining agreement is being negotiated but is not yet finalized or signed. It is the intention of the Applicants to continue negotiating the collective bargaining agreement in good faith and with due diligence during the post-filing period, subject to the oversight of the Monitor and the supervision of this Court. A critical component of the Cold Storage Business is the Cold Storage Agreement among Eastern Meat, Sierra Services, Confederation Freezers Inc. ("**Confederation**"), and Premium Brands Holdings Corporation. Pursuant to 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.[4]

(d) **Sierra Realty**. Sierra Realty is a privately held non-operating corporation incorporated under the laws of Ontario. It was originally intended that Sierra Realty would be the development arm of the Applicants' cold storage business. However, the Applicants' plans for further development and expansion have been paused due

[4] Vanden Broek Affidavit at paras 24-34.

to the financial challenges described herein. As such, Sierra Realty currently has no material assets or employees.[5]

(e) **RVB Holdings**. RVB Holdings is a privately-held non-operating corporation incorporated under the laws of Ontario. RVB Holdings does not have any business operations, material assets, or employees.[6]

(f) **Vanden Broek Holdings**. VBH is a privately-held non-operating corporation incorporated under the laws of Ontario. VBH does not have any 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.[7]

(g) **Sierra Calgary**. Sierra Calgary is a privately-held non-operating corporation incorporated under the laws of Alberta. Sierra Calgary does not have any material assets or employees. Sierra Calgary was originally incorporated to develop and expand the Cold Storage Business into the Calgary market. However, due to financial and marketplace challenges, the Applicants are no longer moving forward with the Calgary project. Sierra Calgary is a party to a lease agreement in respect of certain real property located in Calgary. The Applicants will seek to disclaim this lease or otherwise seek a resolution with the applicable landlord as part of the proposed restructuring.[8]

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[5] Vanden Broek Affidavit at paras 35-36.

[6] Vanden Broek Affidavit at paras 37-38.

[7] Vanden Broek Affidavit at paras 39-40.

[8] Vanden Broek Affidavit at paras 41-44.

(h) **EMS US**. EMS US is a privately held non-operating corporation incorporated under the laws of Delaware. EMS US does not carry on any business or have any meaningful assets or liabilities. EMS US functions as the conduit through which the Applicants pay their sales representatives located in the United States. The Applicants do not intend to seek recognition of the proposed Initial Order under Chapter 15 of the United States Bankruptcy Code as there would not appear to be any need for a stay of proceedings in the United States.[9]

13. While certain of the Applicants have no business operations, material assets, or liabilities, they are included as Applicants in this proceeding due to the nature of the ownership structure, their contribution to the operations of certain other Applicants, and liabilities under contracts with third parties in connection with the operations of other Applicants.

14. The Applicants are required to hold certain licenses (collectively, the "**Licenses**"), which are non-transferable under the *Safe Food for Canadians Act*, S.C. 2012, c. 24.[10] The Licenses allow the Applicants to carry out their business at the Hamilton Facility and the Brampton Facility, which are federally-inspected and licensed facilities. Each License is tied to a specific location. As part of maintaining the Licenses, the Applicants are subject to various inspections to ensure that the business and each facility are operating in accordance with the applicable regulations. Any disruption to the Licenses would materially impact the value of the Applicants' business to the detriment of all stakeholders. In addition to the Licenses, the Applicants hold transferable permits under the *Export and*

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[9] Vanden Broek Affidavit at paras 45-46.

[10] *Safe Food for Canadians Act*, S.C. 2012, c. 24.

Import Permits Act, R.S.C., 1985, c. E-19 ("**EIPA**") to import meat products from foreign jurisdictions.[11]

B. FINANCIAL SITUATION & DEBT OBLIGATIONS

15. As described above, the Applicants are currently facing severe liquidity issues and have not met management's expectations over the past several years. To help address these issues, in February 2024, Robert Vanden Broek (a director of each of the Applicants) personally invested $500,000 into the business through a holding company, using proceeds of a personal line of credit that is secured against his family's property. In addition, BMO recently made available $500,000 under the Applicants' Revolving Facility, which was previously held back from the eligible borrowing base pursuant to the BMO Credit Agreement.[12]

16. Notwithstanding this additional funding and the significant strides made by the Applicants to reduce costs, as set out in the Cash Flow Forecast, the Applicants will require additional cash to fund operations. This will be addressed by the Applicants through the requested DIP financing from BMO, approval of which will be sought at the Comeback Hearing. The Applicants continue to forecast losses over the next two years and would not be able to continue as a going concern absent immediate CCAA protection and the availability of DIP financing.[13]

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[11] *Export and Import Permits Act*, R.S.C., 1985, c. E-19; Vanden Broek Affidavit at paras 53-56.

[12] Vanden Broek Affidavit at para 57.

[13] Vanden Broek Affidavit at para 16.

17. 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.[14]

(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.[15]

(c) **BMO Senior Secured Debt**. As described above, 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

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[14] Vanden Broek Affidavit at paras 60-61.

[15] Vanden Broek Affidavit at paras 62-63.

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.[16]

(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.[17]

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[16] Vanden Broek Affidavit at paras 64-69.

[17] Vanden Broek Affidavit at para 70.

(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.[18]

(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.[19]

(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.[20]

C. URGENT NEED FOR RELIEF

18. The Applicants are facing a severe liquidity crisis and, absent DIP financing and the Court's approval of same to be sought at the Comeback Hearing, would not have sufficient

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[18] Vanden Broek Affidavit at paras 72-73.

[19] Vanden Broek Affidavit at para 74.

[20] Vanden Broek Affidavit at paras 75-76.

liquidity to fund operations throughout these proceedings. The Applicants are insolvent. The Applicants represent a family-owned business that has been operating in Ontario since 1967. 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.[21]

19. If the Initial Order is granted, the Applicants intend to take steps to wind down the Trading Business, market and sell the Processing Business on a going concern basis, and focus on restructuring and continuing to operate 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. The Applicants will continue to operate the Processing Business and the Cold Storage Business in the ordinary course in the interim. The restructuring objective is to develop a self-sustaining and profitable Cold Storage Business and to ultimately emerge from CCAA protection with a healthier capital structure, for the benefit of the sector within which the Applicants operate. The protections 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.[22]

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[21] Vanden Broek Affidavit at paras 77-79.

[22] Vanden Broek Affidavit at para 80.

PART III - THE ISSUE

20. The sole issue on this application is whether the relief sought pursuant to the proposed Initial Order should be granted.

PART IV - LAW & ANALYSIS

A. THE APPLICATION COMPLIES WITH ALL CCAA REQUIREMENTS

21. The CCAA applies to a "debtor company" or affiliated debtor companies where the total claims against the debtor company or its affiliates are greater than $5 million.[23] Each Applicant (including EMS US) carries on business or has assets in Canada and therefore constitutes a "company" for the purposes of section 2(1) of the CCAA. A "debtor company" is defined under section 2(1) of the CCAA to include a company that is "insolvent".[24] Whether a company is insolvent for the purposes of the CCAA is determined by reference to the definition of "insolvent person" under the BIA and the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, which includes a "looming liquidity crisis".[25]

22. Each Applicant is either insolvent under the applicable BIA test or is facing a looming liquidity crisis that clearly satisfies the expanded insolvency test set out by this Court in *Stelco*. The Applicants have liabilities far exceeding the $5 million threshold. Accordingly,

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[23] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 [***CCAA***], ss. 2(1) & 3(1).

[24] *Lydian International Limited (Re)*, 2019 ONSC 7473 [***Lydian***], at paras 35 & 36.

[25] *Stelco Inc., Re,* 2004 CanLII 24933 (ONSC – Commercial List) at paras 26 & 40.

each of the Applicants is a debtor company or an affiliated debtor company to which the CCAA applies.

B. RELIEF SOUGHT IS LIMITED TO WHAT IS REASONABLY NECESSARY

23. Pursuant to section 11.001 of the CCAA, the relief sought on an initial application must be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.[26]

24. In *Lydian*, Chief Justice Morawetz held that the stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[27] The initial stay period preserves the *status quo* and allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.[28]

25. The relief sought pursuant to the proposed Initial Order satisfies these requirements. 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.

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[26] *CCAA*, s. 11.001.

[27] *Lydian* at para 25.

[28] *Ibid* at paras 26-30.

C. THE STAY OF PROCEEDINGS IS REQUIRED

26. The proposed Initial Order provides for the granting of a stay of proceedings up to and including May 31, 2024.

27. Pursuant to section 11.02(1) of the CCAA, a Court may make an order staying all proceedings in respect of a debtor company for a period of ten (10) days, provided that the Court is satisfied that circumstances exist that make the order appropriate.[29] The initial stay of proceedings is required to maintain the *status quo* and avoid an immediate liquidation of the business. The initial stay should therefore be granted.

D. THE PROPOSED MONITOR SHOULD BE APPOINTED

28. As described above, the Applicants seek the appointment of Deloitte as the Monitor.

29. Upon the granting of an Initial Order, section 11.7 of the CCAA requires that a trustee be appointed to monitor the debtor company's business and financial affairs.[30] Deloitte has consented to act as monitor in this proceeding, subject to the granting of the Initial Order, and is a trustee within the meaning of subsection 2(1) of the BIA. Further, Deloitte is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA. Accordingly, Deloitte should be appointed as Monitor of the Applicants in this proceeding.

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[29] *CCAA*, s. 11.02(1).

[30] *CCAA*, s. 11.7.

E. THE ADMINISTRATION CHARGE SHOULD BE APPROVED

30. The Applicants request that this Court grant a super-priority administration charge on the Property in favour of counsel for the Applicants, the Monitor, and counsel for the Monitor in the amount of $500,000 (the "**Administration Charge**"). At the Comeback Hearing, the Applicants will seek to increase the amount of the Administration Charge to $750,000. The amount of the Administration Charge was developed in consultation with the Monitor and is proposed to rank in priority to all other charges and security interests.

31. Section 11.52 of the CCAA provides the Court with express statutory jurisdiction to grant the Administration Charge, provided notice is given to the secured creditors who are likely to be affected by it.[31] The Administration Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing*.[32] The requested amount is fair and reasonable having regard to the size and complexity of the Applicants and their respective businesses. The Applicants' operating lender and senior secured creditor BMO is on notice of the Initial Order that is sought. The Applicants will provide notice of the Initial Order (if granted) and the materials filed by the Applicants in support of the Comeback Hearing to all other secured creditors who may be impacted by the Administration Charge.

F. THE DIRECTORS' CHARGE SHOULD BE APPROVED

32. To ensure the ongoing stability of the Applicants' business during the CCAA proceeding, the Applicants will require the continued participation of their current director and officers.

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[31] *CCAA*, s. 11.52.

[32] *Canwest Publishing Inc*., 2010 ONSC 222 at para 54.

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

33. The Applicants estimate, with the assistance of the Monitor, that the obligations of the Applicants that could give rise to potential director and officer liability may amount to as much as approximately $600,000 within the initial 10-day period, and $750,000 thereafter, if such amounts remain unpaid at any given time, in the ordinary course.

34. The Applicants therefore request that this Court grant a super-priority charge in favour of the Applicants' directors and officers in the initial amount of $600,000 over the Property (the "**Directors' Charge**") to secure any indemnity obligations to the Applicants' directors and officers in respect of any liabilities they may incur during the CCAA proceeding. At the Comeback Hearing, the Applicants will seek to increase the amount of the Directors' Charge to $750,000. It is proposed that the Directors' Charge will rank subordinate to the Administration Charge and the DIP Lender's Charge (once granted) but in priority to all other charges and security interests.

35. 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.[33]

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[33] *CCAA*, s. 11.51.

36. In *Jaguar Mining Inc., Re*, Morawetz J. (as he then was) stated that, in order to grant a Directors' Charge, the Court must be satisfied of the following factors: (i) notice has been given to the secured creditors likely to be affected by the charge; (ii) the amount is appropriate; (iii) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and (iv) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.[34]

37. The Applicants submit that the foregoing factors are satisfied in the circumstances for the following reasons: (i) the Applicants' operating lender and senior secured creditor BMO is on notice of the Initial Order that is sought; (ii) the Applicants will provide notice of the Initial Order (if granted) and the materials filed by the Applicants for the Comeback Hearing to all other secured creditors who may be impacted by the Directors' Charge; (iii) the Applicants will benefit from the active and committed involvement of the current directors and officers, whose continued participation will help facilitate an effective restructuring; (iv) the directors and officers cannot be certain whether the existing insurance will be applicable or respond to any claims made against them; (v) the Directors' Charge will not secure any obligations incurred by a director as a result of the director's gross negligence or wilful misconduct; and (vi) the Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

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[34] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para 45.

G. INTERCOMPANY CHARGE

38. The Applicants provide related and end-to-end services within the sector, which creates efficiencies and scale. Certain financing, funds, and assets are routinely transferred between the members of the Applicants in the ordinary course of operations, and there is intercompany indebtedness that is recorded when that occurs. 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, the proposed Initial Order contemplates a standard intercompany charge over each applicable Applicant's property. This will secure any intercompany balances (each, an "**Intercompany Charge**") and will ensure that the stakeholders of the funding Applicant are not prejudiced by the continued, ordinary course flow of funds required to operate the business.

39. It is proposed that each Intercompany Charge will rank subordinate to the Administration Charge, the DIP Lender's Charge (once granted), the Directors' Charge, and the security interest of BMO in respect of the Applicants' indebtedness and obligations under the BMO Credit Facilities.

40. Intercompany Charges are routinely granted in CCAA proceedings and receiverships involving corporate groups to protect the stakeholders and the collateral pools of each individual entity within such corporate groups.[35] The Intercompany Charges are appropriate in the circumstances of this case, and should be approved.

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[35] Appointment Order of the Honourable Justice Hainey dated April 30, 2021, *Ontario Securities Commission v. Bridging Finance Inc. et al* (Court File No. CV-21-00661458-00CL) at paras 27-29; Initial Order of the Honourable Justice Hainey dated January 21, 2021, *In the Matter of FIGR Brands Inc. et al* (Court File No. CV-21-00655373-00CL) at para 39.

H. PRE-FILING PAYMENTS TO CRITICAL THIRD PARTIES

41. The Applicants seek approval to make payments of certain pre-filing amounts to certain critical suppliers and other third parties (in each case, subject to the approval of the Monitor), if required, in order to ensure the continued stability of the business operations. Given the nature of the Applicants' business and the devastating effect that any shut-down, however temporary, would have on the enterprise value, it is particularly important that the Applicants have the ability, with the consent of the Monitor, to make pre-filing payments in respect of any critical meat products or other goods in transit.

42. As part of operating in the cold storage, meat trading, and food processing industries, the Applicants have a significant amount of assets in transit at any given time in the ordinary course of business. In order to protect these assets for the benefit of the Applicants and their stakeholders, the proposed Initial Order provides that, with the consent of the proposed Monitor, the Applicants may pay amounts owing for goods or services in transit or otherwise supplied to the Applicants prior to the date of the Initial Order by warehouse providers, logistics or supply chain providers, transportation providers, customs brokers, freight forwarders, and amounts payable in respect of customs and duties for goods.

43. Similar relief has been granted in other CCAA proceedings, particular in the context of large retail insolvencies where such retailers similarly have a large number of goods in transit at any given time in the ordinary course of business.[36]

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[36] Initial Order of the Honourable Chief Justice Morawetz dated March 2, 2023, *In the Matter of Nordstrom Canada Retail Inc. et al* (Court File No. CV-23-00695619-00CL) at para 6(e); Initial Order of the Honourable Justice Black dated April 24, 2024, *In the Matter of Ted Baker Canada Inc. et al* (Court File No. CV-24-00718993-00CL) at para 6(e).

I. RESTRICTED SET-OFF RIGHTS

44. In order to maximize liquidity and therefore 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, or leave of the Court, no party may exercise the following set-off in respect of the Applicants: (i) pre-filing against post-filing set-off; and (ii) triangular set-off (i.e., set-off against one Applicant by one member of a corporate group in respect of amounts owing to or by another Applicant or another member of that corporate group).

45. This is of particular importance to the Applicants. Given the existence of a corporate group 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. Any attempted exercise of triangular set-off would have a negative impact on the liquidity of the business and impair the Applicants' restructuring efforts.

46. Given the immediate liquidity crisis, even with the proposed DIP financing, it is imperative that the Applicants maximize available cash. Every additional dollar will increase the likelihood of a successful restructuring.

47. Courts have restricted pre-filing against post-filing set-off in other cases, including the recent CCAA proceedings of *Ted Baker Canada Inc. et al* and *Pride Group Holdings Inc. et al*, where in each case the initial order expressly prohibited pre-filing against post-filing

set off absent the consent of the Monitor or leave of the Court.[37] This is consistent with the Supreme Court of Canada's decision in *Montréal (City) v. Deloitte Restructuring Inc*., where Chief Justice Wagner, writing for the majority, held that pre-filing against post-filing set-off is generally subject to the stay of proceedings, "although [the court] may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases".[38]

48. The same principles should apply in the context of triangular set-off. To use an illustrative example, triangular set-off occurs where A owes money to B, and A attempts to set-off that amount against the amounts that C owes to A (where, in this example, B and C are affiliates). Triangular set-off is effectively a form of piercing the corporate veil or substantive consolidation of corporate groups due to the absence of mutuality between the obligations and the counterparties involved. As such, triangular set-off is equitable relief that is only recognized in limited circumstances under section 21 of the CCAA[39] where, among other things, there are equitable grounds to allow the set-off and the set-off arises out of the same transaction or is so clearly connected to the underlying transaction such that it would be "manifestly unjust" to disallow the set-off.[40] The Applicants note that, for

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[37] Initial Order of the Honourable Justice Black dated April 24, 2024, *In the Matter of Ted Baker Canada Inc. et al* (Court File No. CV-24-00718993-00CL) at para 18; *Pride Group Holdings Inc. et al*., 2024 ONSC 2026 at paras 51 & 52.

[38] *Ibid* at para 52, citing *Montréal (City) v. Deloitte Restructuring Inc*., 2021 SCC 53 at para 4.

[39] *CCAA*, s. 21.

[40] See for example: *SemCanada Crude Company (Re)*, 2009 ABQB 252 at paras 6 & 7, citing *Holt v. Telford*, [1987] 2 S.C.R. 193 at para 34. See also: *Polywheels Inc. (Re)*, 2009 CanLII 25317 at para 27, citing *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 at para 26.

similar reasons, triangular set-off is not permitted in Chapter 11 proceedings under the United States Bankruptcy Code.[41]

49. Determining whether triangular set-off is permitted under section 21 of the CCAA is inherently a fact-specific inquiry that should be addressed on a case-by-case basis by the supervising court as an exercise of its equitable jurisdiction or with the consent of the applicable parties, rather than being unilaterally imposed by opportunistic counterparties against insolvent debtors against the backdrop of a stay of proceedings.

50. The proposed Initial Order provides that no party will be entitled to assert triangular set-off absent the consent of the Applicants and the Monitor, or with leave of the Court. This is required to prevent an "opening of the floodgates" where multiple corporate groups may otherwise seek to unilaterally assert triangular set-off against the Applicants, which would only serve to compound the liquidity crisis during the most critical early stage of the restructuring. The Applicants submit that no parties will be prejudiced by the relief sought. To the extent any issues arise in respect of triangular set-off after the granting the Initial Order, those issues can be addressed by the applicable parties or, if necessary, determined by the Court. The proposed Initial Order maintains the *status quo* and preserves the right of any party to seek an order lifting the stay of proceedings at a later date, if necessary. The relief sought strikes an appropriate balance between the liquidity constraints of the Applicants and the rights of customers and suppliers to obtain timely payment for any supply of goods and services.

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[41] In *Re Orexigen Therapeutics, Inc*., 990 F.3d 748 (3d Cir. 2021), the United States Court of Appeals for the Third Circuit affirmed the decision of Judge Shannon of the United States Bankruptcy Court (District of Delaware) that a "triangular set-off" does not satisfy the Bankruptcy Code's mutuality requirement (which albeit is distinguishable from the language of section 21 of the CCAA) and is therefore not permitted in Chapter 11 proceedings.

PART V - RELIEF REQUESTED

51. For all of the foregoing reasons, the Applicants request that this Honourable Court grant the Initial Order substantially in the form of the draft Initial Order located at Tab 3 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of May,2024.

May 21, 2024

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SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case Law / Orders
1	*Lydian International Limited (Re)*, 2019 ONSC 7473
2	*Stelco Inc., Re*, 2004 CanLII 24933
3	*Canwest Publishing Inc.*, 2010 ONSC 222
4	*Jaguar Mining Inc., Re*, 2014 ONSC 494
5	Appointment Order of the Honourable Justice Hainey dated April 30, 2021, *Ontario Securities Commission v. Bridging Finance Inc. et al* (Court File No. CV-21-00661458-00CL)
6	Initial Order of the Honourable Justice Hainey dated January 21, 2021, *In the Matter of FIGR Brands Inc. et al* (Court File No. CV-21-00655373-00CL)
7	Initial Order of the Honourable Chief Justice Morawetz dated March 2, 2023, *In the Matter of Nordstrom Canada Retail Inc. et al* (Court File No. CV-23-00695619-00CL)
8	Initial Order of the Honourable Justice Black dated April 24, 2024, *In the Matter of Ted Baker Canada Inc. et al* (Court File No. CV-24-00718993-00CL)
9	*Pride Group Holdings Inc. et al*., 2024 ONSC 2026
10	*Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53
11	*Holt v. Telford*, [1987] 2 S.C.R. 193
12	*Polywheels Inc. (Re)*, 2009 CanLII 25317
13	*Algoma Steel Inc. v. Union Gas Ltd.*, *2003 CanLII 30833*
14	*SemCanada Crude Company (Re)*, 2009 ABQB 252
15	*In Re Orexigen Therapeutics, Inc.*, 990 F.3d 748 (3d Cir. 2021)

SCHEDULE "B"
RELEVANT STATUTES

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

Section 2

Definitions
debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent.

Section 3

Application
(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Section 11

General power of court
Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 11.001

Relief reasonably necessary
An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.02

Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application
(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Section 11.2

Interim financing
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders
(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered
(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application
(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.51

Security or charge relating to director's indemnification
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance
(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52

Court may order security or charge to cover certain costs
(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act. Priority (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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.

Court File No.:CV-24-_____-00CL

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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