

**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  
(Motion returnable September 25, 2024)**

September 23, 2024

**Thornton Grout Finnigan LLP**  
3200 – 100 Wellington Street West  
TD West Tower, Toronto-Dominion Centre  
Toronto, ON M5K 1K7

**Rebecca Kennedy** (LSO# 61146S)  
Email: [rkennedy@tgf.ca](mailto:rkennedy@tgf.ca)

**D.J. Miller** (LSO# 34393P)  
Email: [djmiller@tgf.ca](mailto:djmiller@tgf.ca)

**Adam Driedger** (LSO# 77296F)  
Email: [adriedger@tgf.ca](mailto:adriedger@tgf.ca)

**Shurabi Srikaruna** (LSO# 90908K)  
Email: [ssrikaruna@tgf.ca](mailto:ssrikaruna@tgf.ca)

Lawyers for the Applicants

## TABLE OF CONTENTS

<b>PART I - OVERVIEW .....</b>	<b>1</b>
<b>PART II - THE FACTS.....</b>	<b>3</b>
<b>PART III - THE ISSUES .....</b>	<b>7</b>
<b>PART IV - LAW &amp; ANALYSIS.....</b>	<b>8</b>
A. THE TRANSACTION SHOULD BE APPROVED .....	8
B. THE STAY EXTENSION SHOULD BE APPROVED .....	13
C. DIP AMENDMENT SHOULD BE APPROVED.....	14
D. KERP & KERP CHARGE.....	15
E. APPROVAL OF MONITOR REPORTS & FEES.....	20
F. BMO DISTRIBUTIONS .....	22
G. WEPPA.....	24
<b>PART V - RELIEF REQUESTED.....</b>	<b>25</b>
<b>SCHEDULE “A” LIST OF AUTHORITIES.....</b>	<b>26</b>
<b>SCHEDULE “B” RELEVANT STATUTES.....</b>	<b>28</b>

## PART I - OVERVIEW

1. On May 21, 2024, the Applicants sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") pursuant to the initial order (the "**Initial Order**") of the Honourable Justice Penny of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). Pursuant to the Initial Order, among other things, Deloitte Restructuring Inc. was appointed as the monitor of the Applicants (in such capacity, the "**Monitor**").<sup>1</sup>
2. At the Comeback Hearing, the Applicants sought and obtained certain additional relief pursuant to the Amended and Restated Initial Order of the Honourable Justice Penny, including a stay extension until September 30, 2024, and obtained approval of a sale and investment solicitation process (the "**SISP**") in respect of the food processing business and/or the assets of Sierra Custom Foods Inc. ("**Sierra Foods**").
3. The SISP is now complete and the Monitor and the Applicants have identified 1001000161 Ontario Limited (the "**Purchaser**") as the Successful Bidder.
4. The Applicants bring this motion seeking the following relief:
  - (a) an order (the "**Approval and Vesting Order**") approving the sale transaction (the "**Transaction**") contemplated by the asset purchase agreement between Sierra Foods and the Purchaser dated September 19, 2024 (the "**APA**") and vesting in the

---

<sup>1</sup> All capitalized terms not expressly defined herein are defined, and have the meanings set forth, in the Affidavit of Robert Vanden Broek sworn September 19, 2024 (the "**Vanden Broek Affidavit**").

Purchaser all of the right, title, and interest of Sierra Foods in and to the Purchased Assets (as defined in the APA);

- (b) an order extending the Stay Period until and including January 31, 2025;
- (c) an order authorizing the Applicants to execute the DIP Amendment (as defined and described below) to align the maturity date under the DIP Facility with the proposed extension to the Stay Period;
- (d) an order approving the proposed key employee retention plan for certain employees of the Applicants (the “**KERP**”) and granting a related KERP charge on the Property in the maximum aggregate amount of \$285,600 (“**KERP Charge**”);
- (e) an order approving the Pre-Filing Report of the Monitor dated May 21, 2024, the First Report of the Monitor dated May 30, 2024, and the Second Report, to be filed (the “**Second Report**” and collectively, the “**Monitor’s Reports**”), and the conduct and activities of the Monitor described therein;
- (f) an order approving the fees and disbursements of the Monitor and its counsel for the period from May 5, 2024 to August 31, 2024, as set out in the Second Report.
- (g) an order approving certain distributions to BMO in its capacity as DIP Lender and senior secured creditor; and
- (h) an order that, pursuant to subsection 5(1)(b)(iv) and 5(5) of the *Wage Earner Protection Program Act* (Canada), SC 2005, c 47, s 1 (“**WEPPA**”), the Applicants meet the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-222 (the “**WEPP Regulations**”) and the Applicants’ former employees are individuals to whom WEPPA applies.

5. The Applicants advised the service list of this motion by email dated September 18, 2024, and served their motion record on September 19, 2024. The Applicants are currently unaware of any adverse comment or opposition to the relief sought. The relief sought is supported by the Monitor and the DIP Lender.

## **PART II - THE FACTS**

6. The facts relevant to the relief sought are set out in detail in the Vanden Broek Affidavit and the Second Report and certain key facts are summarized below.

### **A. Background Information**

7. 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. The Applicants have three distinct business lines, each of which is carried out by a separate Applicant within the corporate group: (i) the meat trading and market services business, which is conducted by Eastern Meat (the “**Trading Business**”); (ii) the food processing business, which is conducted by Sierra Foods (the “**Processing Business**”); and (iii) the cold storage and transportation business, which is conducted by Sierra Services (the “**Cold Storage Business**”).<sup>2</sup>
8. Due to an ongoing liquidity crisis, the Applicants sought and obtained creditor protection under the CCAA on May 21, 2024. At the Comeback Hearing, the Applicants sought and obtained certain additional relief, including a stay extension until September 30, 2024, approval of certain debtor-in-possession financing (the “**DIP Facility**”) provided by BMO,

---

<sup>2</sup> Vanden Broek Affidavit at para 6.

the senior secured lender of the Applicants, and approval of the SISP in respect of the Processing Business.<sup>3</sup>

9. The objective of this proceeding was and remains to: (i) wind down the Trading Business carried out by Eastern Meat; (ii) market and sell the Processing Business carried out by Sierra Foods through the SISP; and (iii) develop a restructuring or other exit strategy in respect of the Cold Storage Business carried out by Sierra Services.<sup>4</sup> The relief sought on this motion and the steps taken by the Applicants and the Monitor to date are consistent with the foregoing objective.

**B. The SISP**

10. As described above, the SISP solely relates to the Processing Business and the assets of Sierra Foods. The following contains a summary of the marketing efforts undertaken by the Monitor and the Applicants during the SISP:

- (a) **Notice and Solicitation of Interest.** Following Court approval of the SISP, the Monitor and the Applicants carried out a broad marketing plan that included print and digital ads and reached out to 59 strategic and/or financial parties that may be potentially interested in participating in the SISP. Each such party was sent a Teaser and the template NDA.<sup>5</sup>
- (b) **Phase 1.** The Monitor and the Applicants admitted 16 potential bidders into Phase 1 of the SISP. These parties were granted access to an electronic data room. During

---

<sup>3</sup> Vanden Broek Affidavit at paras 8 and 9.

<sup>4</sup> Vanden Broek Affidavit at para 10.

<sup>5</sup> Vanden Broek Affidavit at para 15.

Phase 1, the Monitor and the Applicants: (i) responded to inquiries from potential bidders; (ii) updated the contents of the data room based on requests from potential bidders; and (iii) held conference calls with certain potential bidders regarding a potential transaction. The Phase 1 Bid Deadline was July 16, 2024. A number of potential bidders submitted non-binding letters of intent.<sup>6</sup>

- (c) **Phase 2.** The Monitor and the Applicants admitted a number of parties into Phase 2 of the SISP and continued to facilitate the due diligence process in accordance with the terms of the SISP. The Monitor and the Applicants delivered the Phase 2 Bid Process Letter to each Phase 2 Qualified Bidder, which established the procedures and deadlines for Phase 2. The Phase 2 Bid Deadline was extended by two days until August 15, 2024.<sup>7</sup>

11. The Monitor and the Applicants, in consultation with the DIP Lender, ultimately selected the Purchaser as the Successful Bidder. The Qualified Bid submitted by the Purchaser, which culminated in the APA, represents the highest and best bid submitted in the SISP and will maximize value for the stakeholders of Sierra Foods.<sup>8</sup>

### **C. The APA & Proposed Transaction**

12. Having identified the Purchaser as the Successful Bidder in the SISP, the Applicants, in consultation with the Monitor and the DIP Lender, negotiated and finalized the terms of the APA with the Purchaser and its counsel. The APA contemplates the sale of substantially

---

<sup>6</sup> Vanden Broek Affidavit at paras 13 and 15.

<sup>7</sup> Vanden Broek Affidavit at paras 17-20.

<sup>8</sup> Vanden Broek Affidavit at paras 21 and 22.

all of the assets of Sierra Foods to the Purchaser on a going concern basis and the assumption by the Purchaser of certain related liabilities (including certain liabilities related to the employees to be assumed by the Purchaser).<sup>9</sup>

13. Certain key terms of the APA are summarized below:<sup>10</sup>

- (a) **Purchase Price.** The Purchase Price is comprised of a cash payment on closing, which is subject to certain adjustments, and the assumption of certain assumed liabilities.
- (b) **Structure.** The structure of the Transaction is an asset sale transaction to be completed pursuant to an Approval and Vesting Order. The Purchaser will acquire substantially all of the assets of Sierra Foods that are used in connection with the Processing Business. The Purchaser will operate the Processing Business on a going concern basis post-closing. It is anticipated that a majority of the employees of Sierra Foods will continue their employment with the Purchaser post-closing.
- (c) **Deposit.** A deposit equal to 10% of the unadjusted cash component of the Purchase Price was provided by the Purchaser to the Monitor on August 28, 2024.
- (d) **Outside Date for Closing.** The Outside Date for Closing is October 18, 2024.
- (e) **Conditions to Closing.** In addition to obtaining Court approval, certain key conditions include: (i) Purchaser shall have obtained all Government Authorizations necessary to operate the Processing Business; (ii) certain key

---

<sup>9</sup> Vanden Broek Affidavit at para 23.

<sup>10</sup> Vanden Broek Affidavit at para 24.



employees shall have accepted the Purchaser's offer of employment; (iii) Purchaser shall have obtained an assignment of lease in respect of the leased premises located in Brampton, Ontario; and (iv) Purchaser shall have obtained all consents required for the assignment of the Contracts Requiring Consent.

14. The APA is the product of the extensive efforts of the Monitor and the Applicants to solicit interest in Sierra Foods. The Monitor and the Applicants are of the view that the Transaction contemplated by the APA will maximize value for Sierra Foods' stakeholders.<sup>11</sup>
15. The facts relevant to the ancillary relief sought by the Applicants are included in the following sections.

### **PART III - THE ISSUES**

16. The issues on this motion are whether the Court should:
  - (a) approve the Transaction contemplated by the APA and grant the AVO;
  - (b) extend the Stay Period until January 31, 2025;
  - (c) authorize the Applicants to execute the DIP Amendment;
  - (d) approve the proposed KERP and KERP Charge;
  - (e) approve Monitor's Reports and the fees and disbursements of the Monitor and its counsel as set out therein;
  - (f) approve certain distributions to BMO; and

---

<sup>11</sup> Vanden Broek Affidavit at para 25.

- (g) order that the Applicants meet the criteria prescribed by section 3.2 of the WEPP Regulations and the Applicants' former employees are individuals to whom WEPPA applies.

## **PART IV - LAW & ANALYSIS**

### **A. THE TRANSACTION SHOULD BE APPROVED**

#### ***(i) Jurisdiction & Legal Principles***

17. Pursuant to Section 36 of the CCAA, the Court has jurisdiction to approve a sale of assets outside of the ordinary course of business. Section 36(3) sets out the following factors for the Court to consider when deciding whether to grant the authorization of a sale of assets outside the ordinary course:
  - (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
  - (b) whether the monitor approved the process leading to the proposed sale or disposition;
  - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
  - (d) the extent to which the creditors were consulted;
  - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>12</sup>
18. These criteria largely overlap with those enumerated in the decision *Royal Bank of Canada v Soundair Corp.* The Court was guided by the *Soundair* factors prior to the enactment of Section 36 and continues to reference them when considering the statutory test. The *Soundair* factors are as follows: (i) whether sufficient effort has been made to get the best price and the receiver or debtor (as applicable) has not acted improvidently; (ii) whether the interests of all parties have been considered; (iii) the efficacy and integrity of the process by which offers have been obtained; and (iv) whether there has been unfairness in the working out of the process.<sup>13</sup>
19. Further, Section 36(7) of the CCAA provides that the Court must be “satisfied that the company will and can make payments that would have been required under sections 6(5)(a) and 6(6)(a) if the court had sanctioned the compromise or arrangement”. These sections require, among other things, the payment of certain amounts related to employee wages (which are current), employee source deductions (which are current), and registered pensions (which are not applicable in this case).<sup>14</sup>
20. Finally, in *Nortel Networks Corporation (Re)*, this Court held that it should consider the following four factors when deciding whether to authorize a sale under the CCAA in the

---

<sup>12</sup> CCAA, s. [36\(1\)](#) and [36\(3\)](#).

<sup>13</sup> *Royal Bank v Soundair Corp* (1991), 83 DLR (4th) 76 (Ont CA) [*Soundair*] at [para 16](#); *Canwest Global Communications Corp*, 2010 ONSC 2870 [*Canwest*] at [para 13](#).

<sup>14</sup> CCAA, s. [36\(7\)](#).

absence of a plan: (i) whether a sale transaction warranted at this time; (ii) whether the sale will benefit the whole economic community; (iii) whether the creditors have a *bona fide* reason to object to the sale; and (iv) whether there is a better viable alternative.<sup>15</sup>

**(ii) *The Transaction should be Approved***

21. The Applicants submit that the Transaction meets the criteria in Section 36(3) and satisfies the *Soundair* and *Nortel* principles for the following reasons:

- (a) **The SISP was Fair and Reasonable.** The SISP was approved by the Court and carried out by the Monitor, an independent officer of the Court, and the Applicants under the supervision of the Court. The SISP was fair and reasonable. The Applicants are unaware of any objections to the conduct of the SISP.
- (b) **The Monitor's Report.** The Monitor approved, and carried out, the SISP. The Second Report confirms that, in accordance with the Monitor's liquidation analysis, it is unlikely that a bankruptcy or liquidation would yield a better outcome than the Transaction. The Monitor supports the proposed Transaction.
- (c) **The Consideration is Fair and Reasonable.** The SISP was a robust and competitive process approved by the Court. The Transaction represents the highest and best offer as a result of the SISP. The Transaction will maximize value for all stakeholders of Sierra Foods. There is no indication that a further or longer process would result in a superior transaction.

---

<sup>15</sup> *Nortel Networks Corporation (Re)* [2009] OJ No 3169 (QL), 55 CBR (5<sup>th</sup>) 229 at [para 49](#); *Green Growth Brands Inc.*, 2020 ONSC 3565 at [para 61](#).

- (d) **Transaction Benefits Whole Economic Community.** BMO, as the DIP Lender and the senior secured creditor, is the primary economic stakeholder of Sierra Foods. BMO supports the Transaction and was consulted by the Monitor and the Applicants throughout the SISP. In addition, given that the Transaction will result in the continuation of the Processing Business under new ownership, the Transaction will preserve value for a variety of other stakeholders in the economic community, including employees, contractors, customers, and suppliers.
- (e) **No Better Viable Alternative.** The Transaction represents the highest and best offer received in the SISP. There is no higher or better alternative in the circumstances.

(iii) *APA Sealing Order should be Granted*

- 22. The Applicants seek a sealing order in respect of Confidential Exhibit “A” to the Vanden Broek Affidavit, which contains the unredacted APA. The redacted version of the APA redacted: (i) the Purchase Price and other applicable monetary amounts or percentages that reveal the economic terms of the Transaction (the “**Economic Terms**”); (ii) the identity of a counterparty to a confidential supply contract at Schedule “B” of the APA (the “**Confidential Counterparty**”); and (iii) the names and titles of the transferred employees at Schedule “F” of the APA (the “**Employee Information**”).
- 23. The applicable legal test for granting a sealing order, as set out by the Supreme Court in *Sherman Estate v. Donovan*, is that the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
  - (a) court openness poses a serious risk to an important public interest;

- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
  - (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>16</sup>
24. The Applicants respectfully submit that the request for a sealing order in respect of the Economic Terms, the Confidential Counterparty, and the Employee Information satisfies the *Sherman Estate* test.
25. The economic terms of a transaction are routinely sealed until closing on the basis that there is a broader public interest in maintaining the confidentiality of such information and maximizing value in insolvency proceedings.<sup>17</sup> In the Applicants' view, disclosure of the Economic Terms would prejudice recoveries for stakeholders in the event that the Transaction does not close because such disclosure would effectively create a ceiling on the amount that a new purchaser would be prepared to pay for the Purchase Assets.
26. The personal and commercially sensitive information of non-parties (including the identities of contractual counterparties and individual employees) is also often sealed in insolvency proceedings until further order of the Court. The Confidential Counterparty is not a party to this proceeding and disclosing the identity of the Confidential Counterparty could facilitate efforts by competitors to market goods and services to that party, which

---

<sup>16</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 at [para 38](#).

<sup>17</sup> See for example: *Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 4203 at [paras 25 – 31](#); *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2023 ONSC 2579 at [para 54](#); *American General Life Insurance Company et al. v. Victoria Avenue North Holdings Inc. et al.*, 2023 ONSC 3322 at [para 30](#); and *Danier Leather Inc. (Re)*, 2016 ONSC 1044 at [para 84](#).

could interfere with the closing of the Transaction and the conduct of the Processing Business post-closing. Similarly, the assumed employees are non-parties to this proceeding and have a reasonable expectation that their names and titles will not be disclosed to the public. There is an important public interest in protecting the information of non-party employees that justifies the granting of a sealing order.<sup>18</sup>

27. There are no reasonable alternatives to seeking a sealing order in respect of the Economic Terms, the Confidential Counterparty, and the Employee Information. The Applicants submit that any limitation on the open court principle is both minimal and justified. The sealing order in respect of the Economic Terms will be lifted on closing and no party will be prejudiced by the sealing order in respect of the Confidential Counterparty and the Employee Information, which has no bearing on stakeholder recoveries.

## **B. THE STAY EXTENSION SHOULD BE APPROVED**

28. The Applicants seek to extend the Stay Period up to and including January 31, 2025.<sup>19</sup>
29. Section 11.02(2) of the CCAA provides that the Court may extend the stay of proceedings for any period it considers necessary provided the Court is satisfied that: (i) circumstances exist to make the order appropriate; and (ii) the applicant has acted, and is acting, in good faith and with due diligence.<sup>20</sup>

---

<sup>18</sup> *Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONSC 4203 at paras [24-40](#).

<sup>19</sup> Vanden Broek Affidavit at para 41.

<sup>20</sup> CCAA, s. [11.02\(2\)](#).

30. The stay extension is necessary and appropriate in the circumstances to allow for the continued operation of the Applicants' business. It will also enable the Applicants, with the assistance of the Monitor, to close the Transaction and consider various restructuring options in respect of the Cold Storage Business and the manner in which the claims of creditors may be addressed.<sup>21</sup>
31. The Applicants have acted, and continue to act, in good faith and with due diligence during this proceeding. The Cash Flow Forecast appended to the Second Report demonstrates that, subject to the approval of the DIP Amendment, which is described below, the Applicants will have sufficient liquidity to fund their business operations during the proposed extension to the Stay Period.<sup>22</sup> The Applicants submit that no party will be materially prejudiced by the stay extension.

**C. DIP AMENDMENT SHOULD BE APPROVED**

32. The DIP Credit Agreement currently provides for a maturity date of September 30, 2024, which aligned with the original stay extension granted pursuant to the ARIIO. The Applicants require an amendment to the DIP Credit Agreement to extend the maturity date until January 31, 2025. This will align with the proposed extension to the Stay Period described above.
33. To that end, the Applicants and the DIP Lender have entered into an amending agreement dated September 20, 2024 (the "**First DIP Amending Agreement**") to extend the maturity date until January 31, 2025. No additional fees are contemplated under the First DIP

---

<sup>21</sup> Vanden Broek Affidavit at para 41.

<sup>22</sup> Vanden Broek Affidavit at para 42.



Amending Agreement. The ongoing availability of the DIP Loan is consistent with the forecast liquidity needs of the Applicants and will allow the Applicants to close the Transaction and continue their efforts to maximize value for stakeholders.<sup>23</sup>

#### **D. KERP & KERP CHARGE**

##### ***(i) Overview of KERP & KERP Charge***

34. In order to incentivize the Key Employees to remain as employees of the Applicants during this proceeding, the Applicants are seeking Court approval of:

- (a) the KERP, which provides 26 Key Employees with retention bonuses in the aggregate amount of \$285,600; and
- (b) a related KERP Charge on the Property in the maximum amount of \$285,600 as security for the obligations of the Applicants under the KERP, which will rank subordinate to the Administration Charge, the DIP Lender's Charge, the Directors' Charge, the BMO Security, and the Intercompany Charges, but in priority to all other security interests, trusts, liens, charges, and encumbrances upon the Applicants' Property.<sup>24</sup>

35. As set out in the KERP Letter delivered to each Key Employee, the key terms of the KERP are as follows: (i) each Key Employee is entitled to a single lump sum payment in a specified amount (approximately 10% of their annual salary) upon the closing of the Transaction. The aggregate of all KERP payments is \$285,600; (ii) each KERP payment is

---

<sup>23</sup> Second Report at para 51.

<sup>24</sup> Vanden Broek Affidavit at paras 38 and 39.

subject to Court approval and the successful closing of the Transaction; (iii) in order to be eligible for a KERP payment, each Key Employee must remain employed with the Applicants on the Closing Date unless terminated without cause prior to the Closing Date; (iv) the KERP payment is subject to all applicable withholding taxes and deductions; and (v) the KERP is in addition to (not in lieu of) any other payments or benefits to which the Key Employees are entitled under their applicable employment agreements.<sup>25</sup>

**(ii) *Jurisdiction & Legal Principles***

36. Courts have frequently recognized the utility and importance of KERPs in restructuring proceedings and have approved KERPs in numerous CCAA and other insolvency proceedings.<sup>26</sup>
37. The CCAA is silent with respect to the approval of KERPs and the granting of a charge to secure a KERP. As such, the approval of a KERP and a KERP charge are matters within the discretion of the Court, grounded in the Court's inherent and/or statutory jurisdiction to make any order it sees fit. The discretion of the Court to approve a KERP in the context of a restructuring will be exercised on a case-by-case basis.<sup>27</sup>
38. The following non-exhaustive list of factors set out by Justice Newbould in *Grant Forest* and Justice Morawetz (as he then was) in *Cinram* are considered by courts in determining whether to grant a KERP and a KERP Charge: (i) whether the court-appointed officer

---

<sup>25</sup> Vanden Broek Affidavit at para 33.

<sup>26</sup> See for example: *Aralez Pharmaceuticals Inc., Re*, [2018 ONSC 6980](#) [*Aralez*]; *Cinram International Inc., Re*, [2012 ONSC 3767](#) [*Cinram*]; *Grant Forest Products Inc., Re*, [\[2009\] OJ No. 3344](#) [*Grant Forest*].

<sup>27</sup> *Cinram* at [para 91](#); *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (ONSC) [*Canwest Global*] at [para 49](#).

supports the KERP and the KERP Charge (to which great weight is attributed); (ii) whether the employees to which the KERP applies would consider other employment options if the KERP were not secured by the KERP Charge; (iii) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process; (iv) the employees' history with the company and any special knowledge and skills they possess; (v) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies; (vi) whether the KERP was approved by the board of directors; (vii) whether the KERP is supported or consented to by secured creditors; and (viii) whether the payments under the KERP are payable upon completion of the restructuring process.<sup>28</sup>

39. As Justice Dunphy noted in *Aralez Pharmaceuticals*, three criteria underlie the foregoing factors: (i) arm's length safeguards; (ii) necessity; and (iii) reasonableness of design. Within these parameters, the scope of the KERP and the amounts allocated to the beneficiaries thereof are highly fact-dependent based on the needs of the company in question and the role of the employees in the business and the restructuring.<sup>29</sup>

**(iii) *The KERP & KERP Charge should be Approved***

40. The KERP and KERP Charge should be approved for the following reasons:<sup>30</sup>

---

<sup>28</sup> *Grant Forest* at [paras 8-24](#); *Cinram* at [para 91](#).

<sup>29</sup> *Aralez* at [para 30](#).

<sup>30</sup> *Vanden Broek Affidavit* at para 34.

- (a) the Applicants designed the KERP and set the quantum of the KERP Charge in consultation with the Monitor. The Monitor and the DIP Lender both approve of the proposed KERP and KERP Charge;
- (b) the Applicants compared the KERP to similar key employee retention plans approved in other proceedings and is of the view that the structure of the KERP and the quantum of the KERP Charge are reasonable and appropriate in the circumstances;
- (c) the Key Employees provide the critical operational support required to maintain Sierra Foods' licenses, which is necessary for the closing of the Transaction;
- (d) none of the Key Employees could be readily or easily replaced internally and the process to find appropriately qualified replacements for the Key Employees externally would be lengthy, difficult, costly and an impediment to the Transaction;
- (e) the Key Employees have historical knowledge of, and familiarity with, business and operations, and experience and expertise;
- (f) without the benefit of the KERP, the Key Employees may consider other employment options;
- (g) the departure of Key Employees would be costly, disruptive, and detrimental to the restructuring efforts and may jeopardize the morale of the Applicants' employees at a time that they are most in need of stability and continuity;
- (h) the KERP Payment will facilitate the continued participation of the Key Employees until the Transaction closes; and

- (i) the amounts payable under the KERP are reasonable and justified in the circumstances.

(iv) ***KERP Sealing Order***

41. The Applicants seek a sealing order in respect of Confidential Exhibit “B” to the Vanden Broek Affidavit, which contains the unredacted KERP Schedule. The KERP Schedule contains the names of each Key Employee and the proposed KERP payment to each Key Employee, which is approximately 10% of their annual salary.<sup>31</sup>
42. KERPs have been routinely sealed by courts in recognition of the important public and general commercial interest in preserving confidential and personal information regarding the compensation of non-party employees.<sup>32</sup> The aggregate amount of the KERP and the KERP Charge have been disclosed. However, the amount of each individual KERP payment and the identities of the Key Employees should remain confidential. Courts have recognized that it would be detrimental to the operations of a company to disclose the identities of the beneficiaries of a KERP and the quantum of any individual payments<sup>33</sup> and that the beneficiaries of a KERP have a reasonable expectation that their personal information will be kept confidential.<sup>34</sup>
43. The sealing order in respect of the KERP Schedule should therefore be granted.

---

<sup>31</sup> Vanden Broek Affidavit at para 35.

<sup>32</sup> See for example: *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras [25-27](#); and *PricewaterhouseCoopers Inc. v. MJardin Group, Inc.*, 2022 ONSC 3603 at paras [17-21](#).

<sup>33</sup> *Danier Leather* at [para 83](#).

<sup>34</sup> *Canwest Global* at [para 52](#).

## **E. APPROVAL OF MONITOR REPORTS & FEES**

### **(i) Fee Approval**

44. The Applicants seek Court approval of the fees and disbursements of the Monitor and its counsel for the period from May 5, 2024 to August 31, 2024.
45. The total fees and disbursements of the Monitor during this period (inclusive of HST) is \$1,254,884. The total fees and disbursements of the Monitor’s counsel (Dentons Canada LLP) during this period (inclusive of HST) is \$324,579.85.<sup>35</sup>
46. As held by Chief Justice Morawetz in *Laurentian University*, the role of the Court on a motion to pass accounts is to evaluate them based on the “overriding principle of reasonableness”. The overall value of a receiver or a monitor is the predominant consideration in assessing the reasonableness of the accounts. The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of the professional services rendered may not be instructive when viewed in isolation. The focus of the fair and reasonable assessment should be on what was accomplished, and not how much time it took.<sup>36</sup>
47. The following factors set out by the Court of Appeal in *Confectionately Yours Inc. (Re)*, and referenced in the decisions of Justice Newbould in *Nortel* and Chief Justice Morawetz in *Laurentian University*, provide guidance as to how to evaluate the quantum of fees: (i) the nature, extent, and value of the assets; (ii) the complications and difficulties

---

<sup>35</sup> Second Report at para 57.

<sup>36</sup> *Laurentian University of Sudbury*, 2022 ONSC 2927 at [para 9](#) [*Laurentian University*] citing *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#) [*Nortel*] and *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at [para 45](#).

encountered; (iii) the degree of assistance provided by the debtor; (iv) the time spent; (v) the monitor's knowledge, experience and skill; (vi) the diligence and thoroughness displayed; (vii) the responsibilities assumed; (viii) the results of the monitor's efforts; and (ix) the cost of comparable services performed in a prudent and economical manner.<sup>37</sup>

48. The Applicants submit that these factors are satisfied in this case and the nature and quantum of the fees and disbursements are consistent with the overriding principle of reasonableness. The Monitor and its counsel have been – and will continue to be – integral to this proceeding and the ability of the Applicants to maximize value for stakeholders. Further information regarding the fees and disbursements of the Monitor and its counsel is contained in the Second Report.

**(ii) *Report & Activity Approval***

49. The Applicants also seek approval of the Monitor's Reports and the activities, decisions, and conduct of the Monitor set out therein.
50. In *Target*,<sup>38</sup> the Court noted that a request to approve a Monitor's report is not unusual<sup>39</sup> and that there are good policy and practical reasons to grant the approval of a Monitor's report and activities, including: (i) allowing the Monitor to move forward with the next steps in the CCAA proceedings; (ii) allowing the Monitor to bring its activities before the Court; (iii) allowing an opportunity for the concerns of stakeholders to be addressed and

---

<sup>37</sup> *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 at [paras 42-54](#); *Laurentian University* at [para 10](#); and *Nortel* at [para 14](#).

<sup>38</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#) [*Target*].

<sup>39</sup> *Target* at [para 2](#).

any problems rectified; (iv) enabling the Court to satisfy itself that the Monitor’s activities have been conducted in a prudent and diligent manner; (v) providing protection for the Monitor not otherwise provided by the CCAA; and (vi) protecting creditors from delay that may be caused by re-litigation of steps taken to date or potential indemnity claims by the Monitor.<sup>40</sup>

51. These principles were recently reaffirmed by Chief Justice Morawetz in *Laurentian University*.<sup>41</sup>
52. The activities of the Monitor set out in the Monitor’s Reports were necessary and undertaken in good faith pursuant to the Monitor’s duties and powers as set out in the ARIO and other orders made in the CCAA Proceeding. Approval of the Monitor’s activities will assist in moving forward with the next steps in this proceeding. The Applicants respectfully submit that the principles set out in *Target* have been satisfied in this case.

#### **F. BMO DISTRIBUTIONS**

53. The Applicants seek Court approval, subject to the consent of the Monitor, to make distributions to BMO in repayment of the obligations owing under the DIP Credit Agreement and the pre-filing senior secured debt (collectively, the “**BMO Distributions**”).
54. The draft order contemplates that the BMO Distributions in respect of the DIP Credit Agreement may be made from any of the Applicants and the BMO Distributions in respect

---

<sup>40</sup> *Target* at [para 23](#).

<sup>41</sup> *Laurentian University of Sudbury*, 2022 ONSC 5850, at [para 17](#).



of the pre-filing senior secured debt may be made from any of the Applicants that are obligors thereunder (including Sierra Foods) (the “**Obligors**”).

55. The Monitor’s independent counsel has confirmed that, subject to the customary assumptions and qualifications, BMO has a valid security interest in Ontario over all of the present and after acquired personal property of Sierra Foods, which has been perfected by registration.<sup>42</sup> The security review in respect of the other Obligors is in process and distributions from such other Obligors will only be made once that review is complete.
56. Orders granting interim distributions are routinely granted by courts. In *Re AbitibiBowater Inc.*, Justice Gascon considered a number of factors in determining whether to approve interim distributions, including whether the payee’s security was valid and enforceable, whether the amounts owed to the payee exceed the distributions, and whether the distributions will leave the estate with sufficient liquidity.<sup>43</sup>
57. The Applicants submit that the proposed BMO Distributions will satisfy these factors. The BMO Distributions will be made to BMO in its capacity as DIP Lender or senior secured creditor, in each case, subject to the prior approval of the Monitor. The BMO Distributions will only be made in the event that the Applicants have sufficient liquidity. The BMO Distributions are in the best interests of the Applicants and their stakeholders and will, among other things, significantly reduce the total obligations of the Applicants and the interest payable by the Applicants on a monthly basis.<sup>44</sup>

---

<sup>42</sup> Second Report at para 48.

<sup>43</sup> *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6461 at paras [71-75](#).

<sup>44</sup> Vanden Broek Affidavit at para 48.

**G. WEPPA**

58. Finally, the Applicants seek an order that the Applicants meet the criteria prescribed by section 3.2 of the WEPP Regulations and the Applicants' former employees are individuals to whom WEPPA applies.
59. WEPPA provides that an individual is eligible to receive payment thereunder if (among other criteria) the former employer is subject to CCAA proceedings and a court determines that the former employer meets the criteria prescribed by section 3.2 of the WEPP Regulations. Section 3.2 of the WEPP Regulations provides that the court "may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations."
60. Courts have held that section 3.2 of the WEPP Regulations does not require that an employer be in the process of liquidating its business in order for any former employees to be eligible for WEPPA. The provision is permissive and courts have emphasized that the critical factor in determining whether WEPPA applies is whether employees are terminated due to an insolvency or restructuring.<sup>45</sup>
61. The Applicants have terminated certain employees and certain additional employees may be terminated as a result of this proceeding. All such employees have been or will be paid their full wages and vacation pay, but not any amounts in respect of severance or termination pay. The Applicants submit that all of the employees terminated as a result of

---

<sup>45</sup> *Gestion Inc. et al, Re*, Judgment of Collier, J dated August 27, 2024, at [paras 32-35](#).

this proceeding should have access to the benefits under WEPPA following such termination.

62. Representatives from Labour Program Employment and Social Development Canada (“ESDC”), the Government of Canada agency responsible for administering WEPPA, were served with the Applicants’ motion record and the Monitor has been in communication with such representatives during this proceeding. The Applicants are unaware of any opposition from ESDC.

### **PART V - RELIEF REQUESTED**

63. For all of the foregoing reasons, the Applicants request that this Honourable Court grant the requested relief, substantially in the form of the draft orders located at Tabs 3 and 4 of the Applicants’ motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of September, 2024.**

September 23, 2024




---

**Thornton Grout Finnigan LLP**  
 3200 – 100 Wellington Street West  
 TD West Tower, Toronto-Dominion Centre  
 Toronto, ON M5K 1K7

**Rebecca Kennedy** (LSO# 61146S)  
 Email: [rkennedy@tgf.ca](mailto:rkennedy@tgf.ca)

**D.J. Miller** (LSO# 34393P)  
 Email: [djmiller@tgf.ca](mailto:djmiller@tgf.ca)

**Adam Driedger** (LSO# 77296F)  
 Email: [adriedger@tgf.ca](mailto:adriedger@tgf.ca)

**Shurabi Srikaruna** (LSO# 90908K)  
 Email: [ssrikaruna@tgf.ca](mailto:ssrikaruna@tgf.ca)

Lawyers for the Applicants

**SCHEDULE “A”  
LIST OF AUTHORITIES**

No.	Case Law / Orders
1	<a href="#"><i>Royal Bank v Soundair Corp (1991)</i></a> , 83 DLR (4th) 76 (Ont CA)
2	<a href="#"><i>Canwest Global Communications Corp.</i></a> , 2010 ONSC 2870
3	<a href="#"><i>Nortel Networks Corp. (Re)</i></a> (2009), 55 CBR (5 <sup>th</sup> ) 229 (ONSC – Commercial List)
4	<a href="#"><i>Green Growth Brands Inc., Re</i></a> , 2020 ONSC 3565
5	<a href="#"><i>Ontario Securities Commission v Bridging Finance Inc.</i></a> , 2023 ONSC 4203
6	<a href="#"><i>U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.</i></a> , 2023 ONSC 2579
7	<a href="#"><i>American General Life Insurance Company et al. v. Victoria Avenue North Holdings Inc. et al.</i></a> , 2023 ONSC 3322
8	<a href="#"><i>Danier Leather Inc. (Re)</i></a> , 2016 ONSC 1044
9	<a href="#"><i>Ontario Securities Commission v. Bridging Finance Inc.</i></a> , 2023 ONSC 4203
10	<a href="#"><i>Aralez Pharmaceuticals Inc., Re</i></a> , 2018 ONSC 6980
11	<a href="#"><i>Cinram International Inc., Re</i></a> , 2012 ONSC 3767
12	<a href="#"><i>Grant Forest Products Inc., Re</i></a> , [2009] OJ No. 3344
13	<a href="#"><i>Canwest Global Communications Corp., Re</i></a> , 2009 CarswellOnt 6184 (ONSC)
14	<a href="#"><i>Ontario Securities Commission v. Bridging Finance Inc.</i></a> , 2021 ONSC 4347
15	<a href="#"><i>PricewaterhouseCoopers Inc. v. MJardin Group, Inc.</i></a> , 2022 ONSC 3603
16	<a href="#"><i>Laurentian University of Sudbury</i></a> , 2022 ONSC 2927
17	<a href="#"><i>Re Nortel Networks Corporation et al</i></a> , 2017 ONSC 673
18	<a href="#"><i>Bank of Nova Scotia v. Diemer</i></a> , 2014 ONCA 851
19	<a href="#"><i>Confectionately Yours Inc. (Re)</i></a> , 2002 CanLII 45059
20	<a href="#"><i>Target Canada Co. (Re)</i></a> , 2015 ONSC 7574
21	<a href="#"><i>AbitibiBowater inc. (Arrangement relatif à)</i></a> , 2009 QCCS 6461
22	<a href="#"><i>Gestion Inc. et al, Re</i></a> , Judgment of Collier, J dated August 27, 2024

**SCHEDULE “B”  
RELEVANT STATUTES**

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

**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 11.02 (2)**

**Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(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 36**

### **Restriction on disposition of business assets**

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

### **Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

### **Factors to be considered**

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
  - (b) whether the monitor approved the process leading to the proposed sale or disposition;
  - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
  - (d) the extent to which the creditors were consulted;
  - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
  - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

### **Additional factors — related persons**

- (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
  - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**Related persons**

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

**Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**Restriction — employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

**Restriction — intellectual property**

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.



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

Court File No.: CV-24-00720622-00CL

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

Proceedings commenced at Toronto, Ontario

**FACTUM OF THE APPLICANTS**

**Thornton Grout Finnigan LLP**

TD West Tower, Toronto-Dominion Centre  
100 Wellington Street West, Suite 3200  
Toronto, ON M5K 1K7

**Rebecca L. Kennedy (LSO# 61146S)**

Email: [rkennedy@tgf.ca](mailto:rkennedy@tgf.ca)

**D.J. Miller (LSO# 34393P)**

Email: [djmiller@tgf.ca](mailto:djmiller@tgf.ca)

**Adam Driedger (LSO# 77296F)**

Email: [adriedger@tgf.ca](mailto:adriedger@tgf.ca)

**Shurabi Srikaruna (LSO# 90908K)**

Email: [ssrikaruna@tgf.ca](mailto:ssrikaruna@tgf.ca)

Tel: (416) 304-1616

Fax: (416) 304-1313

Lawyers for the Applicants