2023 01G 3233
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 as Amended (the "**BIA**")

IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended (the "**CCAA**"); and

AND IN THE MATTER OF an application of Big Erics Inc. ("**BEI**") and Terra Nova Old Port Foods Inc. ("**TNOPFI**") (collectively, the "**Companies**")

AFFIDAVIT

I, **NICOLE MYLES BROOK** of the City of Halifax, in the Province of Nova Scotia, **MAKE OATH AND SAY AS FOLLOWS**:

1. I am President of BEI (together with TNOPFI, the "**Applicants**"). Accordingly, I have personal knowledge of the matters set out below. Where I have relied on information from others, I state the source of such information and verily believe it to be true. Specifically, where I discuss matters relating to TNOPFI in this affidavit, I have sought and received information on such matters from Ingo Eckoldt, the General Manager of TNOPFI, as I am not involved in the business of TNOPFI on a day to day basis, although I do provide advice, support (including referrals of projects and opportunities) and generally collaborate from time to time.

2. I swear this affidavit in support of a motion by the Applicants for an Order converting the proceedings commenced by the Applicants under Part III of the BIA to proceedings under the CCAA. This affidavit supplements the affidavit of the Chief Financial Officer of the Applicants, Bill Barlett, sworn July 11, 2023 (the "**Barlett Affidavit**").

I. REQUEST TO CONVERT THE PROCEEDINGS

3. The Applicants filed Notices of Intention to Make a Proposal ("**NOIs**") under s. 50.4(1) of the BIA on July 3, 2023. Grant Thornton Ltd. ("**GTL**") was appointed as proposal trustee (the "**Proposal Trustee**"). From the outset the intention of Applicants was that the NOIs were an interim measure to obtain the immediate protection of a stay of proceedings and to provide the Applicants with the breathing room to take further steps, which included consideration of pursuing the proceedings under the CCAA.

4. The Applicants are based in Newfoundland and Labrador ("**NL**"). TNOPFI has its production, cold storage, sales and operations facility in NL, while BEI has a retail sale office, warehouse and distribution facility in NL. BEI's largest operational, project design, sales and distribution facility is located in Nova Scotia ("**NS**").

5. While the majority of TNOPFI's sales occur in NL, both Applicants conduct business throughout Atlantic Canada and beyond and are affiliated entities sharing common ownership and certain human resources. BEI's business relates to the purchase and sale of commercial and residential kitchen, food service (including restaurant), and sanitation and janitorial equipment and supplies. TNOPFI manufactures and sells beef, pork and other protein food products it processes in NL and also buys and sells finished food products from other producers (together with BEI's business, the "**Business**").

6. Given the nature of the Business, many customers of both Applicants operate in the food service, hospitality and tourism industries in Atlantic Canada and beyond (including numerous food service facilities in airports across Canada). This makes the Business correspondingly sensitive to the very material impacts of seasonality, including the substantial concentration and increase in activity in customers' premises during the spring, summer and fall, and the ebbs and flows of the food service, hospitality and tourism industries generally.

7. The summer months from June to August in particular are peak hospitality and tourism months in Atlantic Canada, with some increase in sales activity also during the shoulder seasons on either side of those summer months. Accordingly, the Business is most active during those months, taking advantage of the rise and peak in activity levels in order to maximize revenues during that period.

8. It is unfortunate that the Applicants were required to commence NOI proceedings in early July as this has disrupted the Business during the peak seasonal period. Since the filing, numerous customers and vendors/suppliers of the Business have expressed serious concern and misunderstanding and have been quite reluctant to deal with a company in “bankruptcy proceedings”. It has been my and the Business’ observation that notwithstanding our attempts to educate customers and vendors/suppliers on the going-concern nature of the NOI proceeding, the stigma of a “bankruptcy” has been persistent and harmful to the Business, especially during this peak sales season.

9. In consultation with the Applicants’ advisors and the Proposal Trustee, the Applicants have determined that it would be beneficial to continue these proceedings under the umbrella of the CCAA so as to avoid the perceived stigma of a “bankruptcy” as there is a prevailing sense and impression in the business community that companies pursuing protection under the CCAA are focused on “restructuring” and have the primary intent to improve and continue operations. This will ease the impressions and concerns of employees, customers and vendors/suppliers that the Applicants have not shuttered their doors and declared or are inevitably proceeding to bankruptcy, but rather are undertaking a restructuring process with a view to continuing as a going concern business.

10. I am advised by the Applicants’ legal counsel that the 45-day limitation in the BIA on the length of stay extension a Court may impose and the 6 month limit for proposal proceedings is not a

feature of the CCAA and that with the active involvement and oversight of the Courts and their appointed officers, the Courts routinely grant longer stay extensions under the CCAA than under the BIA. I believe the longer stay periods, direct involvement of the Court and its appointment of a Monitor, will build confidence and credibility for those dealing with the Businesses and so are of significance to the Applicants for the reasons discussed below.

II. GOALS OF THE CCAA PROCEEDING

11. The NOI proceedings were commenced as a result of the substantial and adverse changes to the Applicants' credit facilities, threat of enforcement by BMO, and the concern that enforcement steps by BMO would eliminate all jobs, terminate outstanding sales and project contracts that benefit not only the Applicants but also customers and vendors/suppliers, terminate all leases, and generally destroy any residual and going concern value in the Business.

12. The purpose of the CCAA proceedings will be to, among other things, canvass the market to determine if an investment, sale, and/or refinancing transaction on an *en bloc* or piecemeal basis might be available. Further, the CCAA stay of proceeding will provide greater flexibility and stability, increase stakeholder confidence, including to permit the Applicants to more fully explore whether there are any other available avenues to maximize realization while continuing to operate on a cash flow positive basis.

(a) Investment solicitation process conducted by the Applicants

13. One of the goals of the CCAA proceeding will be to advance the marketing process commenced by the Applicants in and around April 2023. David Howe, FCPA, FCA, CMA, FCIRP of the accounting and consulting firm Noseworthy Chapman ("**NC**") was retained by the Applicants to supervise and direct the marketing and solicitation process. NC is also an independent member of DFK International ("**DFK**"), a global tax, audit and accounting services organization, and that relationship provides access to other members beyond NL.

14. NC has conducted targeted marketing, including reaching out to possible prospects via DFK, and to date has contacted approximately 21 potentially interested parties regarding potential investment opportunities in the Business. I am advised by Mr. Howe that there is a significant level of interest, although none of the interested parties have advanced to a stage where an offer can be made. The marketing efforts have been interrupted to some degree by the NOI proceedings, and I believe that the implementation of a formal and more public sale and investment solicitation process ("**SISP**") for each Applicant with the greater stability and credibility of the CCAA proceeding, would provide confidence and certainty to the interested parties in the marketing process.

15. In their pre-filing marketing efforts, the Applicants have been focused on soliciting investment into the Business on a substantial minority equity basis. While the Applicants have not expressly pursued a majority investment or outright sale option, I believe that expanding the marketing process to include all potential transactions, including majority investment, sale, and refinancing transactions, will be of benefit and is most likely to maximize value for creditors, employees, and other stakeholders.

16. It is critical that the Business continue as a going concern during any SISP. The value in the Applicants' Business is derived largely from accounts receivable, inventory, and goodwill. The Applicant, TNOPFI, has been in business for about 50 years and the Applicant, BEI, for 78 years. Each is an established brand in Atlantic Canada and beyond. The Applicants have each established key supplier/manufacturer relationships, customer bases and sales and distribution networks. TNOPFI has valuable and difficult to obtain Federal and internationally recognized food safety, production, handling, and distribution licenses, as well as other permits and intellectual property rights.

17. Both Applicants have valuable sale contracts, including ongoing tender contracts to supply schools, hospitals, and other public and commercial customers. In the last 40 years, BEI also

developed an additional focus on and has successfully bid on numerous design build contracts for new restaurants, commercial kitchen, and other project-based build-and-install works throughout the Atlantic provinces. BEI also has a successful track record of winning bids for design-build projects in airports across Canada and into the US, as well as for the Department of National Defence, which requires the company to maintain its high level security clearance.

18. The Applicants do not own significant capital assets or any real estate that would drive value in a liquidation. In essence, the value of the Applicants is in their going concern operations, the value of which far surpasses any potential liquidation value of their respective assets.

19. The Applicants intend to continue to engage NC, in consultation with the proposed Monitor, to develop a robust SISP for each Applicant that will take into consideration and build upon the Applicants' pre-filing efforts. The Applicants intend to seek approval of the SISP at an appropriate time. The Applicants also intend to consider and explore with various parties the potential of a stalking horse bid in order to set a floor price for investment or sale and to provide comfort to vendors and customers that there is and will be a buyer or investor for each Business.

20. I believe that continuing under the BIA and any other threat to the going concern nature of the Business will be harmful to employee retention, the SISP, and has the potential of chilling the sale processes, as well as deterring investors from spending time and resources conducting due diligence on each of the Applicants. In this regard I believe that the credibility and flexibility of the CCAA in the investor and broader business community will better serve each of the Applicants' goals to maximize value in a SISP. Having to renew a stay of proceedings every 45 days, rather than in relation to milestones in the restructuring proceedings will also be disruptive to a SISP and may reduce the attractiveness of the Business to potential buyers or investors.

(b) Continued realization on the assets of TNOPFI

21. I am advised by Mr. Eckholdt, the General Manager of TNOPFI, that in parallel to the marketing efforts for that Business, he has been pursuing opportunities to realize on TNOPFI assets, particularly perishable inventory.

22. Because TNOPFI is a food manufacturing business, much of its raw material and finished inventory is perishable and much of the remainder of its assets are depreciating assets such as food manufacturing supplies and equipment. While TNOPFI is seeking interest in its business as a whole, any opportunities to realize on perishable and deteriorating assets is beneficial to TNOPFI and its creditors and stakeholders.

23. I understand from Mr. Eckholdt that such efforts will continue under the supervision of the proposed Monitor, and that proceeds of realization are reflected in the cash flows for TNOPFI as filed by the proposed Monitor.

III. CHARGES

(a) Administration Charge

24. The Applicants intend to seek certain charges, including an administration charge up to the amount of $300,000 to secure the fees and disbursements of the professionals engaged by the Applicants to advance the SISP and restructuring proceedings (the "**Administration Charge**"). The Administration Charge is described in greater detail in the Barlett Affidavit.

(b) Directors' Charge

25. I am advised by the directors of the Applicants that they wish to be indemnified by the Applicants for any liability they may incur as directors post-filing in consideration for their continued

participation in the Applicants' restructuring proceedings. I understand they wish the Applicants to indemnify them and to seek a charge in favour of the directors as security for the indemnity.

26. The Applicants are net payors of HST and source deductions, which if unpaid are obligations of the directors. BEI remits approximately $50,000 in HST a month and source deductions of approximately $100,000 a month. TNOPFI is usually in a refund position in respect of HST but pays monthly source deductions of approximately $35,000.

27. The Applicants currently maintain director and officer insurance with limited coverage (the "**D&O Policy**"), however the policy is set to expire on August 31, 2023 without a right of renewal. Accordingly, it is possible that the policy may not be renewed by the insurer given the Applicants' have commenced proceedings under the BIA and CCCA, and the directors will lose the benefit of insurance coverage.

28. Accordingly, to ensure that directors are not exposed to post-filing liability based on any limitation in the scope or term of the D&O Policy, and to encourage their continue participation during the restructuring proceedings, the Applicants seek a charge in priority to all other charges other than the Administration Charge, in the maximum amount of $250,000 (the "**Directors' Charge**").

IV. KEY EMPLOYEE RETENTION PLAN

29. The Applicants are seeking approval of a key employee retention plan ("**KERP**"), which is discussed in greater detail in the proposed Monitor' report. In respect of the employees of BEI, I believe the KERP is necessary to ensure continuity at the Business and ensure that key employees are motivated to continue their employment with BEI during these restructuring proceedings. Mr. Eckoldt has also informed me that the same considerations apply to some employees of TNOPFI who are included in the KERP.

30. The KERP is especially significant to the Applicants because much of their value is in their customer and vendor/supplier relationships, ongoing project management and overall going concern operations, which cannot continue in any meaningful sense without key employees.

V. INTERIM FINANCING

31. The Applicants have yet to conclude whether interim financing is needed. Interim financing is being considered as a means to permit the Applicants to maximize revenues and generate positive cash flow, and to preserve the goodwill value of the Business including for purposes of the SISP.

32. A key component of BEI's Business is design-build (including equipment sale/supply) project work. Certain design-build contracts are won through successful bids in request for proposal ("**RFP**") processes. In the context of RFP processes and large contracts, customers and suppliers/vendors often seek to ensure even before a contract is executed, that the counterparty is likely to have the liquidity to perform the contract, including the supply of all equipment and other components within such counterparty's scope.

33. In the case of BEI in particular, its design-build projects often require it to demonstrate financial stability and viability. The lack of a sufficient revolving facility (which BMO has capped) has adversely impacted the company's ability to demonstrate financial wherewithal and to continue to complete and win bids on what are often high value projects. The company is not in a position to maximize revenues and gross margin if it cannot successfully complete or bid on and win contracts. The likely effect is to diminish realization in any going-concern SISP transaction.

34. The Applicants intend to consult with the proposed Monitor and their advisors to further consider the need for interim financing. If, based on the commercial judgment of the Applicants' management and Board, interim financing is determined to be beneficial to the Applicants'

restructuring goals, the Applicants will return to seek approval of a debtor-in-possession ("**DIP**") facility, which terms are likely to require a corresponding DIP charge.

VI. NEXT STEPS IN THE CCAA PROCEEDING

35. If the Court finds it appropriate to continue these NOI proceedings under the CCAA and to grant the Applicants the relief sought for the purpose of advancing their restructuring proceeding, the next anticipated step is for each of the Applicants to further develop and expand the scope of the proposed SISP for each Business and return to this Court at an appropriate time to seek approval of the SISP with the support and approval of the proposed Monitor.

36. In the meantime, the Applicants will direct their efforts at the retention of employees, key vendors/suppliers, ongoing and potential high value customer projects, for the maximization of revenue over the summer months and following shoulder season.

37. The Applicants continue to act in good faith and with due diligence.

SWORN before me in the City of Halifax in the Province of Nova Scotia, Canada:	
BARRISTER, NOTARY PUBLIC NEWFOUNDLAND AND LABRADOR	**NICOLE MYLES BROOK**