

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MERIDIAN CREDIT UNION LIMITED

Applicant

and

VANDERMEER GREENHOUSES LTD.

Respondent

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1995 c. B-3, as amended, section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and Rule 14.05(3)(g) of the *Rules of Civil Procedure*

**THIRD REPORT OF ZEIFMAN PARTNERS INC., IN ITS
CAPACITY AS COURT-APPOINTED RECEIVER**

April 17, 2015

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**THIRD REPORT OF ZEIFMAN PARTNERS INC., IN ITS
CAPACITY AS COURT-APPOINTED RECEIVER**

1. Pursuant to the Order of the Honourable Mr. Justice Spence of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated February 21, 2014 (the "**Initial Order**", a copy of which is attached hereto as **Exhibit "A"**), on the application of Meridian Credit Union Limited ("**Meridian**"), Zeifman Partners Inc. ("**Zeifman**") was appointed as Receiver (in such capacity, the "**Receiver**") of the Respondent, Vandermeer Greenhouses Ltd. ("**Vandermeer**").

2. Vandermeer is a cut flower chrysanthemum grower located in Niagara-on-the-Lake, Ontario. Vandermeer's primary production area is a ground crop with a plant capacity of over 5.9 million stems. The property is 16.5 acres and includes a 275,000 square foot greenhouse (the "**Greenhouse**") and two residences. Vandermeer also owns and operates an anaerobic digestion facility (the "**Anaerobic Digester**") capable of producing over 8,000 kwh of electricity a day.

3. Prior to the Initial Order, Zeifman had been acting as a receiver privately-appointed by Meridian. The private appointment commenced on July 19, 2011.

PURPOSE OF REPORT

4. The Receiver has filed this Third Report in response to a Motion brought by James Dell, Sophie Dell, Ron Quevillon, Charlene Quevillon, George Lepp, Erica Lepp, Richard Zirger, Judy Zirger, Dan Lavallo, Dino Lavallo, Mary Lavallo, Joan Bourk and Larry Bourk (collectively, the "**Zirger Group**") for an Order lifting the stay of proceedings under the Initial Order, to allow the Zirger Group to proceed with an application against Zeifman Partners Inc. before the Ontario Superior Court of Justice in Toronto in Court File No. CV-15-523653 commenced February 24, 2015 (the "**Zirger Application**").

BACKGROUND

5. The Zirger Application is the latest in a succession of proceedings in respect of Vandermeer commenced by Richard Zirger and Judy Zirger (together, the "**Zirgers**"), who reside on an adjacent property.

6. On May 15, 2012, the Zirgers commenced an application (the "**NFPPB Application**") to the Normal Farm Practices Protection Board (the "**NFPPB**"). The NFPPB Application dealt with substantially the same issues that are now complained of by the Zirger Group in the Zirger Application, and involved many of the individuals included in the Zirger Group. A copy of the NFPPB Application is attached hereto as **Exhibit "B"**.

7. The Zirgers voluntarily withdrew the NFPPB Application more than two years ago, on December 7, 2012. A copy of a letter from the NFPPB dated December 21, 2012 confirming the withdrawal is attached hereto as **Exhibit "C"**.

8. Pursuant to a Statement of Claim dated December 19, 2013 (the "**Zirger Claim**"), the Zirgers commenced an action against Vandermeer, Meridian and various other parties. The Zirger Claim dealt with substantially the same issues that are now complained of by the Zirger Group in the Zirger Application. A copy of the Zirger Claim is attached hereto as **Exhibit "D"**.

9. On October 23, 2014, the Receiver was provided with a copy of a Notice of Discontinuance dated October 23, 2014 in respect of the Zirger Claim. A copy of the Notice of Discontinuance is attached hereto as **Exhibit "E"**.

10. On July 22, 2014, Ms. Cassandra Kirewskie of Marshall Kirewskie, legal counsel to the Zirger Group (and to the Zirgers in connection with the NFPPB Application and Zirger Claim), contacted the Receiver's counsel to advise that an application for leave to commence a proceeding before the NFPPB was being brought on behalf of the Zirgers and a number of other individuals, and to request advice regarding available hearing dates for same.

11. The Receiver's counsel provided a list of acceptable dates in August and September for the hearing. However, the Zirger Group did not proceed at that time. In fact, on at least six (6) different occasions since July 2014, the Zirger Group has requested that the Receiver provide available dates for the hearing. On each such occasion the Receiver confirmed its availability for the hearing, yet the Zirger Group failed to proceed. A full chronology in this regard (including the relevant correspondence) is set out in the Receiver's Second Report dated March 30, 2015 (the "**Second Report**", a copy of which is attached hereto (without exhibits) as **Exhibit "F"**).

12. Also attached as **Exhibit "G"** hereto for ease of reference is a copy of the First Report of the Receiver dated November 17, 2014, (without exhibits).

THE LIFT STAY MOTION

13. In January of 2015, the Zirger Group delivered to the Receiver a set of draft affidavits, without exhibits, prepared in support of the Zirger Application, and again requested that the Receiver consent to the matter proceeding. The Receiver declined to provide its consent.

14. By letter delivered March 6, 2015, the Zirger Group confirmed that its motion to lift the stay would proceed on Thursday April 2, 2015. As of Thursday March 26, 2015, the Zirger Group had not served its motion materials (or otherwise contacted the Receiver since March 6, 2015). Accordingly, the Receiver sent a letter to the Zirger Group's counsel, advising that the Zirger Group was in breach of the Ontario *Rules of Civil Procedure* regarding service deadlines, and requesting confirmation that the motion would not be proceeding on Thursday April 2, 2015.

15. At approximately 3:45 pm on Friday March 27, 2015, the Receiver's counsel received a full banker's box containing the Zirger Group's materials, including a nine volume application record (the "**Application Record**") filed in connection with the Application, as well as a Supplementary Affidavit, Factum and Book of Authorities.

16. The Notice of Application included in the Application Record (the "**Notice of Application**", a copy of which is attached hereto as **Exhibit "H"**)) was issued by the Ontario Superior Court of Justice on February 24, 2015 and is returnable April 2, 2015. The Notice of Application indicates that the Zirger Group is seeking a broad range of orders that go far beyond a request for leave to proceed, and includes grounds of relief under the *Farming and Food Production Protection Act* (Ontario), the *Environmental Protection Act* (Ontario), the *Planning Act* (Ontario), the *Greenbelt Act* (Ontario), the *Nutrient Management Act* (Ontario) and the *Green Energy Act* (Ontario).

17. The Receiver did not consent to the issuance of the Notice of Application or the commencement of the Application, and is not aware of any Order issued by this Honourable Court granting the Zirger Group the authority to proceed in this manner. Until the late afternoon of March 27, 2015, the Receiver was not aware that the Application had been commenced. The Receiver had consented only to a dates for the hearing of a motion for an order lifting the stay, and had been awaiting a properly constituted motion, and service of proper motion materials.

URGENT ATTENDANCE

18. The Receiver anticipated being served with a motion record in respect of (and confined to) a properly-constituted motion to lift the stay of proceedings so that the Zirger Group could proceed with the Zirger Application.

19. However, no such Motion Record was received. Instead, an Application Record was delivered to the offices of the Receiver's counsel late in the afternoon on Friday March 27, 2015 and was, on its face, returnable Thursday April 2, 2015.

20. The Receiver's counsel immediately wrote to the Zirger Group regarding the inappropriateness of the Zirger Party's conduct in breaching the stay of proceedings, its late delivery of its voluminous materials and its failure to bring the matter before the Commercial List. The Receiver advised that it was arranging an urgent attendance before the Commercial List at a 9:30 chambers attendance on Tuesday March 31, 2015.

21. In the interim, out of an abundance of caution the Receiver had to commence its review of a significant amount of material in a very brief period of time, expending further estate resources. However, due to the late service and large volume of materials, the Receiver's counsel had no ability to properly review and consider the Application Record and other materials,

conduct any cross-examinations of the Zirger Group's affiants, or prepare and file any meaningful written responding materials prior to the April 2, 2015 hearing date.

22. On March 31, 2015, counsel to the Receiver, Meridian and the Zirger Group attended in chambers before the Honourable Mr. Justice McEwen, who declined to make an Order and instead referred the matter to the Judge hearing the Zirger Group's motion.

23. Following the attendance before the Honourable Mr. Justice McEwen, by letter dated April 1, 2015, the Receiver's counsel requested that the Zirger Group consent to an adjournment of its Motion returnable April 2, 2015. A copy of the letter dated April 1, 2015 is attached hereto as **Exhibit "I"**.

24. The Zirger Party did not consent to the requested adjournment. Accordingly, on April 2, 2015, the parties attended before the Honourable Mr. Justice Morawetz, who adjourned the Motion and directed the Zirger Group to bring a Motion to lift the stay in the Commercial List. A copy of the Endorsement of the Honourable Mr. Justice Morawetz dated April 2, 2015 is attached hereto as **Exhibit "J"**.

NO MERIT TO ZIRGER APPLICATION

25. As described above, the Notice of Application indicates that the Zirger Group is seeking a broad range of relief under a number of environment and farming-related statutes. Based on the Receiver's review of the Zirger Application Record and included Affidavits, the Receiver is of the view that there is no merit to the Zirger Group's claims, and that the Zirger Application is frivolous and vexatious.

26. Firstly, the Affidavits filed in support of the Zirger Application are rife with hearsay, expert-type scientific testimony from unqualified individuals, bald allegations without substantiation, baseless speculation, mischaracterizations and other serious deficiencies. In addition, a number of the complaints made by the Moving Parties relate to incidents that pre-date the Receiver's involvement in Vandermeer and which are likely barred by the *Limitations Act* (Ontario). For example:

- (a) At paragraphs 24 and 25 to the Affidavit of Judi Zirger sworn January 7, 2015 (the "**Judi Zirger Affidavit**"), the affiant makes allegations and complaints regarding incidents in 2011, which would be barred under the *Limitations Act* (Ontario). The affiant had every opportunity to proceed before the NFPPB in respect of her complaints and in fact, was specifically advised to do so at the time, yet she did not proceed;
- (b) At paragraph 96 to the Affidavit of Richard Zirger sworn January 7, 2015 (the "**Richard Zirger Affidavit**"), the affiant states his belief that Vandermeer is "...still inputting chicken waste and that it may also have returned to using DAF as a feedstock." This allegation is unequivocally false;
- (c) At paragraph 96 to the Richard Zirger Affidavit, the affiant baldly speculates that "non-agricultural source materials" are being used in the digester, and then purports to give scientific evidence (based on unspecified "readings on the internet") regarding the impact of using non-agricultural source materials. In fact, almost two-thirds of the materials used in the digester are agricultural source materials, and in any event all inputs are organic in nature and the digester is

operated within the parameters authorized pursuant to the Certificate of Approval issued by the MOE. The non-agricultural source materials used in the digester are comprised of non-purchased grocery store fruits and vegetables, and baked goods;

- (d) At paragraph 187 to the Richard Zirger Affidavit, the affiant states that Vandermeer operates "...around the clock, 24/7/365." This is simply incorrect;
- (e) At paragraph 227 to the Richard Zirger Affidavit, the affiant baldly speculates that Vandermeer's water catch basin is directed connected to the municipal "Sloma Drain". In fact, Vandermeer's water system for the digester is a closed loop system that is not connected in any way to the Sloma Drain. The Zirger Group is aware that the municipality has investigated this allegation and determined it has no merit whatsoever;
- (f) At paragraph 15 to the Supplemental Affidavit of Richard Zirger sworn April 14, 2015, the affiant purports to give scientific evidence regarding an insect referred to as "spotted wing drosophila". There is no evidence that this type of insect is present at Vandermeer. The affiant has no relevant expert credentials; and
- (g) At paragraph 3 to the Judi Zirger Affidavit, the affiant claims that she believes that Vandermeer is the cause of certain disturbances including odours. The affiant neglects to mention that her residence is in the midst of active farms including a chicken farm less than a kilometre away.

27. Secondly, the complaints that form the basis of the Zirger Application are not new, and over the past few years have been repeatedly communicated by members of the Zirger Group to

the Ontario Ministry of the Environment and Climate Change (the "**MOE**"), which administers several pieces of legislation relied upon by the Zirger Group and has primary responsibility for environment-related matters in Ontario.

28. Despite more than 40 complaints made to the MOE by members of the Zirger Group regarding the issues that form the basis of the Zirger Application, the MOE has declined to prosecute or issue any orders in response, and the Receiver is not aware of any MOE investigation regarding such complaints.

29. Thirdly, the Zirger Group makes serious unsubstantiated and inflammatory allegations against the integrity and independence of the NFPPB, apparently based upon the fact that the NFPPB was not prepared to concede to the Zirger Group's demand that Vandermeer cease operations. In short, it appears that the Zirger Group is now asking the Court to usurp the roles of the MOE and NFPPB because the Zirger Group does not like their responses to the the Zirger Group's complaints.

30. Fourth, the Zirger Group takes the position that Vandermeer is not operating as a farm, but bases its position on speculation and incorrect facts. For example, at paragraph 106 to the Affidavit of Judi Zirger sworn January 7, 2015, the affiant claims that she believes that Vandermeer's income is "...solely or predominantly from the sale of energy...". In fact, the majority of Vandermeer's income greenhouse operations and the sale of chrysanthemums. The digester is an integral part of the greenhouse operations, insofar as it contributes to the economic viability of the greenhouse operations by reducing heating costs and subsidizing operations.

31. Fifth, the Zirger Group claims that the Receiver has deliberately ignored the concerns of its members. This is simply incorrect. For example, the Receiver has undertaken the following:

- (a) Enhanced security and oversight at the facility, including inspecting the perimeter of the property four times per day for damage, suspicious activity, odours, noises or other causes for concern;
- (b) Implemented improvements to the digester, the effect of which was to reduce the opportunity for odour emissions and noise;
- (c) Paved driveway to enhance access for trucks and avoid disturbances to neighbours;
- (d) Insulated generator to alleviate noise concerns from neighbours;
- (e) Repaired generator exhaust muffler;
- (f) Installed biofilter to reduce odour emissions from digestate processing;
- (g) Ceased storing DAF; and
- (h) Minimized pet food storage, and began storing same in the warehouse.

32. However, these steps have not been satisfactory to the Zirger Group. The Zirger Group initially withdrew from participating in the Working Group because, as noted in a letter from the Zirger Group's counsel to the NFPPB dated May 15, 2012 (a copy of which is attached hereto as **Exhibit "K"**), the Working Group lacked "...the power to order that the digester cease operating." The complete termination of the digester operations remains the Zirger Group's ultimate objective.

NO URGENCY

33. Finally, the Zirger Group's claim that there is any urgency to their complaints is belied by the inexplicable delays and previously-abandoned proceedings that its members have commenced over the past 3 years or more.

34. If the Zirger Application is permitted to proceed, it would have a significantly adverse impact on the administration of the receivership, insofar as it will result in substantial delay, distraction and additional cost.

COSTS THROWN AWAY

35. Since July 2014, the Receiver's counsel has attempted to accommodate the Zirger Group's expressed desire to proceed with a motion for leave. Upon receipt of each request by the Zirger Group for dates available for the Zirger Group's motion, the Receiver's counsel responded promptly and provided a number of options. Once confirmed, the Receiver and its counsel reserved the date in their respective calendars. In some instances the Zirger Group did not even notify the Receiver that it would not be proceeding; it simply didn't serve materials and took no further steps. In other instances, the Zirger Group notified the Receiver shortly before the hearing date that it would not be proceeding as previously scheduled, and requested that the Receiver provide new dates. Accordingly, all related costs were wasted.

36. As determined by the Honourable Mr. Justice Morawetz at the April 2, 2015 attendance, the proper venue for a motion to lift the stay of proceedings was before the Commercial List, within the receivership proceeding, on proper notice to all parties on the service list. The Zirger Group initially proceeded in the wrong court and refused to serve its materials on any party other than the Receiver, despite the repeated requests in this regard from Meridian's counsel.

37. As a direct result of the Zirger Group's pattern of repeatedly requesting dates and then failing to proceed, and other conduct in this proceeding, the Zirger Group has continuously and cavalierly wasted estate resources. In particular, the circumstances surrounding commencement of the Application and delivery of the Application Record, in flagrant breach of the Initial Order, are such that the Receiver is of the view that it would be fair and appropriate for this Honourable Court to hold the Zirger Group responsible for the resulting costs incurred by the Receiver.

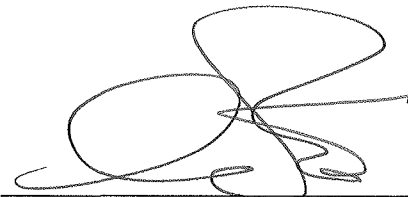
CONCLUSION

38. The Receiver has attempted to work with members of the community and other stakeholders to address concerns regarding Vandermeer's operations. The Receiver has operated Vandermeer within the parameters of the Certificate of Approval and, as described above, has taken steps to continuously improve the operations and facility.

39. However, such actions have done little, if anything, to appease the members of the Zirger Group, and it has become abundantly clear to the Receiver that the Zirger Group will only be satisfied if the digester ceases operating. The termination of the digester operations would have a very detrimental effect on the economic viability of the business.

40. For all of the above reasons, the Receiver respectfully requests that this Honourable Court issue an Order dismissing the Zirger Group's Motion for an Order lifting the stay of proceedings.

April 17, 2015

A handwritten signature in black ink, consisting of a large, stylized 'Z' followed by a series of loops and a horizontal line extending to the right.

ZEIFMAN PARTNERS INC., in its capacity
as the Court-appointed receiver of Vandermeer
Greenhouses Ltd. and not in its personal or
corporate capacity

MERIDIAN CREDIT UNION LIMITED
Applicant

-and-

Court File No. CV-14-10443-00CL
VANDERMEER GREENHOUSES LTD.
Respondent

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PROCEEDING COMMENCED AT
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May 15, 2012

By Regular Mail & Fax to: (519) 826-3259

Normal Farm Practices Protection Board
Ministry of Agriculture, Food and Rural Affairs
1 Stone Road West
Guelph, Ontario
N1G 4Y2

Dear Board Members:

RE: Vandermeer Nurseries' Anaerobic Digester
2021 Four Mile Creek Road Niagara on the Lake L0S 1J0
Certificate of Approval #9512-7QNNZJ (October 30, 2009)

We represent Judy and Richard Zirger. The Zirgers live at 59 Hunter Road, RR #3, Niagara on the Lake, next to Vandermeer Nurseries. Together with other residents, the Zirgers have been experiencing unusual vibrations, noises, odours and other disturbances.

The Zirgers believe that the source of all these and other disturbances is Vandermeer Nurseries' anaerobic digester. For some time, they and other residents have been working with Vandermeer Nurseries and officials from the Province of Ontario (both the Ministries of Environment and Agriculture), the Town of Niagara on the Lake and the Region of Niagara to eliminate these disturbances.

The Town of Niagara on the Lake has established a working group to deal with complaints emanating from the anaerobic digester. The Vandermeer Working Group is comprised of the following members:

- Don Hilborn, OMAFRA
- Randy van Berkel, Vandermeer Greenhouse
- Hugh Fraser, OMAFRA
- Paul Cline, MOE
- George Lepp, Farm Representative
- Lola Emberson, Town of NOTL
- Richard Zirger, neighbour

88 Dunn Street, Suite 201, Oakville, ON L6J 3C7
Tel: (905) 842-5070 Fax: (905) 842-4123 E-mail: mklaw@bellnet.ca

- Charlene Quevillon, neighbour
- Dan LaValle, neighbour
- Ron Planche, EA to Kim Craitor, MPP
- Stephen Bedford, Town of NOTL
- Sandra Philip, Region of Niagara, Public Health

From time to time other individuals representing other stakeholders join the Group. The Working Group meets regularly to document and address odour and noise complaints.

While some steps have been taken to reduce odours and noise from the site, the Zirgers continue to experience disturbances that cannot be resolved through the process in place. In the Zirgers' view, these disturbances are not only interfering with the enjoyment and use of their property, but also pose health and safety risks.

The Working Group's mandate is to ameliorate the sounds and odours coming from the digester. It cannot decide whether operating a waste disposal site is a normal farm practice. Nor can it determine whether the conversion of off-site generated organic waste at the Vandermeer site to commercial energy is a normal farm practice. More importantly, the Group lacks the power to order that the digester cease operating.

Neighbours have been encouraged to bring an application for a Hearing before this Board at Working Group meetings. Accordingly, please find enclosed both a Hearing Application on the prescribed form and a Notice of Application for a Hearing before the Board following the *Ontario Rules of Civil Procedure*.

Given that there have been very significant efforts made by both parties and also by third parties to address and resolve the Zirgers' complaints and that those efforts have been unsuccessful, the Applicants respectfully ask the Board to use its discretion to waive its pre-hearing mediation requirement. For the reasons set out herein and in our Notice of Application, we respectfully ask that the Board accept our application for a Hearing. Kindly confirm your acceptance of our application and advise as to when this matter will be heard.

Thank you.

Sincerely,



Paul Marshall

/nk

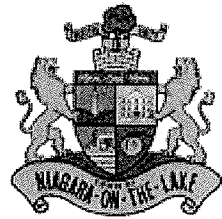
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Meeting Notes

Working Committee – Vandermeer Anaerobic Digesters

Date: September 8, 2011, 1:30 to 3:30 PM

Location: Town of NOTL – Comm. Rm 3



Attendance

Don Hilborn	OMAFRA,
Randy VanBerkel	Vandermeer Greenhouse
Hugh Fraser	OMAFRA
Paul Cline	MOE
Dan LaValle	Farm Representative
Lola Emberson	Town of NOTL
Richard and Judi Zirger	Neighbour Representative
Charlene and Ron Quevillon	Neighbour Representative
Will Walker	Town of NOTL
Peter Jekel	Region Public Health
Kim Groombridge	MOE

Discussion

Minutes from last meeting

- No comments or changes; received as written

Update on Carbon/Nitrogen Ratio and Ammonia Levels

- It was an extremely hot, humid, dry summer
- Lab test results showed a significant decrease in nitrogen levels in solid digestate over the last year (see attached chart)
- Hugh stated there has been continual reduction in nitrogen levels and Randy stated last C:N = 36:1 (Previous readings January 2010 C:N = 16:1, September 2010 C:N = 19:1, December 2010 C:N = 32:1)
- In spring, Randy introduced high carbon coffee husks feed stock which have helped increase the C:N ratio of the solid digestate
- Mrs Zirger stated that the odours had improved from a year ago; however, there still are odours present

Actions

- ✓ OMAFRA to continue to work with Randy to search for input materials to increase C:N ratio of solid digestate and reduce ammonia levels
- ✓ Continuing to reduce the protein level in the input material
- ✓ OMAFRA will continue to lab test the solid digestate

Update on Enclosure and Biofilter

- Randy reconstructed the enclosure over the separator pad, after it was damaged due to a wind storm in the spring. The biofilter is to be installed next week, weather dependant.

- The Biofilter was based on a design at the nearby Port Weller Wastewater Treatment plant, also used for odour control. Assistance in the design is being provided by Sheridan College (Mississauga, ON)
- Hugh and Don explained how the biofilter will work and feel that once installed will further reduce odours; Dan asked if testing has been done on humidity off of the biofilter and impact on microclimate.
- Hugh explained that the biofilter is kept damp because the system is a biological one and the 'bugs' that work in the pile need a slightly moist (not wet) substrate and that in his opinion it would not change the microclimate in the peach orchards.

Actions

- ✓ Don will search for negative impacts or humidity issues with regard to the biofilter prior to its installation
- ✓ OMAFRA will follow up after installation and test to see if biofilter is constructed properly and effectively removing odour.

Update on Off-loading

- Charlene stated there is banging every morning at 7:30 am; Randy explained that is when the digester is fed
- Randy stated deliveries are currently scheduled and occurring between 7am-3pm
- Problem trying to schedule grape pumice deliveries as the material must be picked up when called during grape harvest (October-November)
- From September until end of harvest last year had 148 loads, approximately 25% were late night),
- Randy spoke with Vincor to try to change pick up times but they won't change their timing and they have no storage capacity.

Actions

- ✓ During the grape harvest, Randy will try not to dump last load in the evening, leaving the off-loading (dumping) until the next morning
- ✓ Need to discuss further management of loading and off-loading

Update on Noise/Vibration

- Noise assessment has been rescheduled until October to coincide with biogas generator maintenance.

Actions

- ✓ Randy and Paul to notify Charlene of actual date for generator shut off to ensure Charlene will be available

Update On Air Monitoring

- Paul updated the Committee supplying a copy of the final version of the Air Monitoring report completed on April 21, 2010
- Paul explained that the TAGA unit was out in August 2011 collecting data and completing more extensive testing including VOC's .
- There were three concurrent ministry tests; the first dealing with health concerns, second dealing with potential ethylene impacts on the peach orchards, and the third dealing with peach toxicology and trying to establish any links to the Vandermeer's operation.

- Results of the testing will hopefully be available this fall.

Actions

- ✓ Once the test results are received by the MOE, Paul will notify Lola to schedule the next meeting

Other Discussion

- Charlene mentioned that she has experienced sinus pain since August 24th and asked Randy what has changed. Randy stated that nothing has changed operationally since last spring.
- Charlene stated neighbours have raised concerns about increased truck traffic noise on Four Mile Creek late at night.
- There were questions with respect to vermin coming from the site. Randy stated that he has killed (poisoned) some rats on-site but not an extreme number. Dan stated that he has strict regulations on dealing with vermin and that Randy should be operating under the same regulations. Hugh mentioned that they may be different because of the food growing operation
- Mr. Zirger stated he is frustrated as he thinks nothing is being done and is representing neighbours and doesn't know what to tell them.
- Biodigester Practices
There was discussion on whether there should be changes to Provincial standards and the guidelines with respect to location, impacts, minimum distances and minimum acreages.

- Hugh provided overview of Normal Farm Practice Board. Committee members were again advised that at any time they could choose to file an application with the Normal Farm Practice Board. However, it was noted that it is more conducive to continue with open dialogue between everyone as positive changes have been made on site as a result of the Working Committee.

Positive Changes of Working Committee

- Reduction of odour levels
- DAF eliminated on-site
- C:N levels have improved, reduction in ammonia levels
- Air monitoring has been completed twice
- Vibration monitoring has been completed
- Environmental data collection (health, crops, toxicology)
- Randy informed the Committee members that Vandemeer is in receivership; that it is business as usual for the time being;

It was agreed that the next meeting will take place once the results from the air testing have been received.

tab A

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

)

FRIDAY, THE 21ST

JUSTICE SPENCE

)

DAY OF FEBRUARY, 2014

)

MERIDIAN CREDIT UNION LIMITED

Applicant

-and-

VANDERMEER GREENHOUSES LTD.

Respondent

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, as amended, section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and Rule 14.05(3)(g) of the *Rules of Civil Procedure*

ORDER

THIS APPLICATION for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing Zeifman Partners Inc. as receiver (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Vandermeer Greenhouses Ltd. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavits of Bernie Huber sworn January 31, 2014 and February 19, 2014 and the Exhibits thereto and on hearing the submissions of counsel for the Applicant and the Lawyers for Richard Zirger and Judi Zirger, no one ^{any other person on the service list} appearing for ~~[NAME]~~ although duly served as appears from the affidavit of service of Jaime Henderson sworn February 11, 2014 and February 20, 2014 and on reading the consent of Zeifman Partners Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, Zeifman Partners Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby

conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$50,000.00, provided that the aggregate consideration for all such transactions does not exceed \$100,000.00; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or

affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including

without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

20. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$250,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

23. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

GENERAL

24. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

26. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

27. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

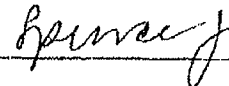
28. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

29. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT A TORONTO
IN / BOOK NO.:
LE / DANS LE REGISTRE NO.:

FEB 21 2014

ND



SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that Zeifman Partners Inc., the receiver (the "Receiver") of the assets, undertakings and properties Vandermeer Greenhouses Ltd. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the _____ of MONTH, 20YR (the "Order") made in an action having Court file number _____-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of MONTH, 20YR.

ZEIFMAN PARTNERS INC., solely in its
capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

MERIDIAN CREDIT UNION LIMITED

Plaintiff

-and

Court File No. CV-14-10443-00CL
VANDERMEER GREENHOUSES LTD.

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT
TORONTO

ORDER

FLETT BECCARIO
Barristers & Solicitors
190 Division Street
P.O. Box 340
Welland, Ontario
L3B 5P9

Tel: 905-732-4481
Fax: 905-732-2020

Lawyers for the plaintiff

J. ROSS MACFARLANE
LSUC# 36417N

tab B

NORMAL FARM PRACTICES PROTECTION BOARD

IN THE MATTER OF a hearing under the *Farming and Food Production and Protection Act*, 1998, S.O. 1998, Ch.1;

AND IN THE MATTER OF an application for a determination as to whether operating a waste disposal site and converting off-site generated organic waste to commercial energy at Vandermeer Nurseries in the Town of Niagara on the Lake is a normal farm practice;

BETWEEN:

RICHARD ZIRGER AND JUDY ZIRGER

Applicants

and

VANDERMEER GREENHOUSES LTD.

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following pages.

THIS APPLICATION will come on for a hearing before the Normal Farm Practices Protection Board (the "Board") at a date and time to be determined by the Board.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you should forthwith prepare a notice of appearance in a form similar to Form 38A prescribed by the Ontario Rules of Civil Procedure, serve it on the applicants' lawyer or, where the applicant does not

have a lawyer, serve it on the applicant, and file it, with proof of service, with the Board and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE BOARD OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it with proof of service, with the Board, as soon as possible, but not later than 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, A DECISION MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

APPLICATION

1. The Applicants make an application for:
 - a) an Order pursuant to Rule 5 of the Normal Farm Practices and Protection Board Rules of Procedure (the "Rules") dispensing with the Farm Practices Conflict Resolution Process;
 - b) a determination pursuant to s. 5 of the *Farming and Food Production and Protection Act*, S.O. 1998, Ch.1, as to whether the disturbances coming from Vandermeer Nurseries at 2021 Four Mile Creek Road, Niagara on the Lake ("Vandermeer Nurseries"), result from a normal farm practice;
 - c) an Order that Vandermeer Nurseries cease operating its anaerobic digester;
 - d) an Order for costs, including HST; and,
 - e) such other and further relief as this Board deems just.
2. The grounds for this application are that:
 - a) the Applicants are directly affected by the disturbances coming from Vandermeer Nurseries;
 - b) the parties have made numerous and on-going attempts to resolve their conflict but been unsuccessful;
 - c) the Town of Niagara on the Lake, Niagara Region, and the Ministries of the Environment and Agriculture have each provided assistance to the parties but have been unable to resolve their conflict;
 - d) that none of the Respondent's attempts to mitigate the odour, noise, vibration and emissions from the digester have been successful;
 - e) the location of an anaerobic digester within close proximity of the property line on a small farm property within a protected greenbelt in a residential and fruit farming community poses an environmental, health and safety risk;
 - f) waste disposal and commercial energy generation are not normal farm practices;
 - g) the Applicants' quiet enjoyment and use of their fruit farm has been destroyed by the loud noises, putrid smells and noxious fumes emanating from the Respondent's digester;
 - h) the Respondent's digester has created a health and safety hazard by inviting unusual numbers of rats, seagulls, insects and flies to the area;
 - i) the Board has the power to declare that waste disposal and the conversion off-site generated organic waste to commercial energy are not normal farm practices;
 - j) the Board has the power to order the Respondent to stop operating its anaerobic digester as it is causing a disturbance.

3. To facilitate the hearing of this application, the Applicants hereby request an Order compelling the Respondent to disclose all of the following documents and records:
- a) copies of all records and supporting documentation submitted by Randy Van Berkel in application for a Certificate of Approval to operate a Waste Disposal Site at 2021 Four Mile Creek Road;
 - b) copies of all government approvals for the anaerobic digester, including design specifications, minimum distance separation calculations and any consideration that was given to the location of the digester;
 - c) copies of any records considering the potential for the digester posing environmental, health and safety risks;
 - d) copies of all records describing the Respondent's attempts to mitigate the odour, noise, vibration and emissions from the digester, including any consultations that were made with third parties for same;
 - e) copies of all documents showing the receipt of off farm waste and all documents describing its content;
 - f) copies of all signage at the site;
 - g) copies of all documents related to the release of untreated biogas at the site, including each instance when the flare was in operation, its duration and why it was utilized;
 - h) copies of all odour, noise and other nuisance complaints and particulars of any responses, actions or measures taken or recommended to reduce or eliminate same;
 - i) copies of any and all records confirming the enrolment and completion of the Biogas Systems Operators' course by personnel employed by the Respondent and any other training for employment at the site;
 - j) copies of all records pertaining to health and safety precautions at the site, including emergency preparedness measures and procedures and staff training at the site;
 - k) copies of the results of any and all analyses concerning emissions, metal concentrations, noise, vibrations and odour emanating from the site and also the nutrient content of the digestate;
 - l) copies of any and all information and records concerning the quantities of digestate transferred off-site and particulars concerning its final destination and use;
 - m) copies of all the Respondent's annual reports concerning the operation of the digester;
 - n) copies of any and all charges under environmental legislation relating to the operation of the digester; and,
 - o) copies of all applications for government funding of the digester project, including any and all responses and approvals thereto.

4. In respect of the hearing of this application, the applicants will make a motion on a date to be set by the Board for:
 - a) an Order pursuant to Rule 53 and section 62 of the *Farming and Food Production and Protection Act*, 1998, S.O. 1998, Ch.1, for a site visit to the applicants' property at 59 Hunter Road, RR #3, Niagara on the Lake, Ontario;
 - b) an Order pursuant to Rule 53 and section 62 of the *Farming and Food Production and Protection Act*, 1998, S.O. 1998, Ch.1, for the inspection of the Vandermeer Nurseries' site, including its anaerobic digester;
 - c) the exchange of witness statements; and,
 - d) such other and further relief as this Board deems just.
5. The following documentary evidence will be used at the hearing of the application:
 - a) Affidavit of Richard Zirger;
 - b) Affidavit Judy Zirger;
 - c) Affidavit of Charlene Quevillon;
 - d) Affidavit of Dan LaValle;
 - e) Affidavit of George Lepp;
 - f) And such further and other evidence as we may advise and this Honourable Board permits.
6. In addition, the following persons will be available to give oral evidence as the Board deems necessary:
 - a) Richard Zirger;
 - b) Judy Zirger;
 - c) Charlene Quevillon;
 - d) Dan LaValle;
 - e) And such further and other witnesses as we may advise and this Honourable Board may permit.

DATE: May 15, 2012

MARSHALL KIREWSKIE
BARRISTERS & SOLICITORS
201 – 88 Dunn Street
Oakville, Ontario
L6J 3C7

Paul Marshall
LSUC# 33983T
(905) 842-5070 ext. 223
Fax: (905) 842-4123

Cassandra Kirewskie
LSUC # 36765H
Tel: (905) 842-5070 ext. 224
Fax: (905) 842-4123

Solicitors for the Applicants

TO: Vandermeer Nurseries
2021 Four Mile Creek Road
Niagara on the Lake, Ontario

Normal Farm Practices
Protection Board

HEARING
APPLICATION



Ontario

Application Date 2012-04-30
(yyyy/mm/dd)

NOTE: Before an application for a hearing can be considered by the Normal Farm Practices Protection Board, the matter must have gone through the Farm Practices Conflict Resolution Process established by the Ontario Ministry of Agriculture and Food and Rural Affairs (OMAFRA).
(For further information on the conflict resolution process, please contact the OMAFRA Agricultural Information Contact Centre at 1-877-424-1300).

Have the issues involved in this application been considered in OMAFRA's Normal Farm Practices Conflict Resolution Process?

Yes ☐ No ☒ Agricultural Engineer / Environmental Specialist

merous and on-going attempts to resolve the issues have been

The personal information on this form is collected under the authority of The Farming & Food Production Protection Act. It will be used only by the board to hear the applicant's case. If you have any questions about this collection contact: Secretary, Normal Farm Practices Protection Board, Ministry of Agriculture, Food & Rural Affairs, 1 Stone Rd. W., Guelph, ON N1G 4Y2, 519-826-3549

*Unsuccessful
Please see attached letter.*

Personal Information - Complete the following information:

(Please print or type all information)

Name of Applicant (if there are more than one applicants, add separate sheet with their information and signatures)			
Richard + Judy Zirger c/o. Marshall Kirewskie			
Mailing Address			
Cassandra Kirewskie - 88 Donn St #201			
City	County	Postal Code	
Oakville	Ontario	L6J 3C7	
Telephone Number	Fax Number	Email Address	
905 842-5070	905 842-4123	ckirewskie@bellnet.ca	
Applicant's signature: <i>[Signature]</i> for: Richard + Judy Zirger			

Name of person or municipality against whom the complaint is directed		
Randy van Berkel / Vandermeer Nurseries		
Address of farm or municipality		
2021 Four Mile Creek Road		
City	County	Postal Code
Niagara on the Lake		L0S 1S0
Telephone Number	Fax Number	
905 468-2827	905 468-1519	

Normal Farm Practices
Protection BoardHEARING
APPLICATION

Page 2

Nuisance Complaint (under Section 5 of the Farming & Food Production Protection Act) Complete this section only if you are directly affected by a disturbance from an agricultural operation.

Nature of the Complaint (please check all that apply):

☒ Noise ☒ Odour ☒ Dust ☐ Light ☒ Vibration ☒ Smoke ☒ Fumes

Date(s) of the Disturbance (yyyy/mm/dd):

on-going from installation of the anaerobic digester

Describe how the disturbance has affected you (If this space is insufficient, attach additional pages)

Please see attached letter.

Please attach any additional information pertaining to the complaint.

By-law Complaint (under Section 8 of the Farming and Food Production Protection Act)

Complete this section only if your farming practice is directly affected by a municipal by-law.

Information about the by-law in question:

By-law Number _____ Date the by-law was passed (yyyy/mm/dd) _____

Municipality that passed the by-law _____

Address of the Municipal Office _____

City _____

Postal Code _____

Telephone Number _____

Fax Number _____

() _____

() _____

Describe how the by-law is affecting your farming practices (If this space is insufficient, attach additional pages)

Please attach a copy of the by-law in question and any additional information pertaining to the complaint.

Please forward the signed application and attachments to:

Normal Farm Practices Protection Board
Ministry of Agriculture, Food and Rural Affairs
1 Stone Road West Guelph, ON N1G 4Y2
Phone: (519) 826-3549, Fax: (519) 826-3259
Email: finbar.desir@ontario.ca

tab C

JAN 02 2013

Ministry of Agriculture,
Food and Rural Affairs

Ministère de l'Agriculture,
de l'Alimentation et des
Affaires rurales

3rd Floor
1 Stone Road West
Guelph, Ontario N1G 4Y2
Tel: (519) 826-3549
Fax: (519) 826-3259

3^e étage
1 Stone Road West
Guelph (Ontario) N1G 4Y2
Tél.: (519) 826-3549
Télééc.: (519) 826-3259



Normal Farm Practices Protection Board

December 21, 2012

BY EMAIL and COURIER

Mr. J. Ross Macfarlane
Flett Beccario
Barristers & Solicitors
190 Division Street
P. O. Box 340
Welland, Ontario L3B 5P9

Dear Mr. Macfarlane:

**Re: Zirger v. Vandermeer Nurseries
Normal Farm Practices Protection Board No. 2012-02**

I acknowledge receipt of your letter of December 13, 2012, requesting dismissal of the application for hearing in the case above. The case has been withdrawn by the applicants by letter dated December 7, 2012.

A copy of the letter of withdrawal is attached.

Yours truly,

Finbar Desir, P.Eng.; Secretary
Normal Farm Practices Protection Board

c: Kirk W. Walstedt, Chair
Anthony Little, Vice-Chair

attachment



Marshall Kirewskie

Barristers & Solicitors

Paul David Marshall
B.A., B.Ed., LL.B.
E-mail: p.marshall@bellnet.ca

Cassandra Kirewskie
M.A., LL.B.
E-mail: ckirewskie@bellnet.ca

Nick Kirewskie
OFFICE MANAGER
E-mail: mklaw@bellnet.ca

December 7, 2012

By Regular Mail & Fax to: (519) 826-3259

Normal Farm Practices Protection Board
OMAFRA
1 Stone Road West
Guelph, Ontario
N1G 4Y2

Dear Board:

RE: Vandermeer Nurseries' Anaerobic Digester
2021 Four Mile Creek Road Niagara on the Lake L0S 1J0
Certificate of Approval #9512-7QNNZJ (October 30, 2009)

We are writing to withdraw our application. We are concerned that the Board is not impartial.

The reasons for our concerns are as follows:

A. The Minister of Agriculture ("OMAFRA") has an interest in the outcome of these proceedings.

The Board cannot hear this application fairly as OMAFRA was involved in the project that gives rise to it and has an interest in these proceedings.

OMAFRA supports anaerobic digestion and sets some of the regulatory standards for digesters in Ontario. OMAFRA participated in the decision making process that led the digester's construction and may also have funded the project as we understand that the Vandermeers received government grants to build their digester.

OMAFRA has been working with the Respondent to respond to public complaints about the stench and other disturbances coming from the Vandermeer property and to attempt to ameliorate these. One of OMAFRA's engineers is a witness for the Respondent.

Despite making a request for information in May of 2012, OMAFRA has still not released any documents concerning its involvement in the project.

Given its institutional relationship with OMAFRA, the Board may also have an interest in the outcome of these proceedings.

B. The Board lacks structural independence

The Board's structure, physical location and letterhead create a reasonable apprehension of bias.

OMAFRA appoints the Board and provides the physical space and institutional infrastructure for the Board to operate. The Board shares its letterhead with OMAFRA. It holds out to the public that it is a part of OMAFRA and that it shares, or has an interest in upholding, OMAFRA's policies and procedures.

As the Board cannot fairly review decisions made by the entity which created, empowers, funds and appoints its members, it is not the proper forum to determine whether the activities being carried on at the Vandermeer property are normal farm practices.

C. Bias

Since OMAFRA shares its premises with the Board, it is possible that members of the Board have pre-existing relationships with some of the individuals involved in this matter, and in particular, with individuals who made decisions or developed relevant policies. The Board may have outside knowledge or involvement in the matter before it. At the very least, its shared premises raise a reasonable apprehension of bias.

At our last appearance on November 13th, we advised the Board that we are contemplating litigation against the parties that were responsible for the decision to approve of the anaerobic digester being located on the Vandermeer property. Vice Chair Little was very hostile about this suggestion and aggressively questioned counsel to explain the rationale for our lawsuit. These inappropriate comments and behaviour cast doubt on the Board's impartiality.

D. Errors of Law

We are of the view that the Board has made significant and substantial pre-hearing orders that adversely impact on the final hearing over which it presides.

We are concerned that the Board ordered the adjournment to be pre-emptory on the Applicants (but not on the Respondent) when it had been advised that the Applicants have not received any documents from OMAFRA in response to their May 2012 FOI request and I advised that I am not available on the first day of the hearing as I am in court on another matter.

Secondly, the Board erred when it decided to limit disclosure without hearing any evidence or argument on point.

There was no evidence before the Board as to the specific content of the information the Respondent sought to protect or any evidence of any real and substantial risks that the Respondent would be harmed by meeting its legal obligation to disclose all relevant documents. Such harms were purely speculative and should have been weighed against the public's *Charter* protected rights in an open and fair hearing. The Board failed to hear any argument on point. Consequently, it erred when it ruled on the Respondent's entitlement to withhold relevant documents from the Applicants.

The Board's decision gives any potential buyer of the Respondent's property and business more disclosure as to the real nature of the activities being conducted there than the Applicants who live next door and who have had to commence legal proceedings to regain the use and enjoyment of their home.

While the Respondent has refused to provide its financial statements and Vice Chair Little has stated that we do not need this kind of information to prove that the Respondent's activities are not a normal farm practice, understanding the source and amount of the Respondent's revenue is a key to determining whether it is carrying out a normal farm practice or operating a waste disposal facility and selling energy. The Board's decision, based as it is on a complete absence of an evidentiary foundation, fails to pay sufficient attention to the public importance of open court records. Open justice is the hallmark of a democratic society.

Third, the Board erred when it ordered the Applicants and their counsel to give an undertaking as a precondition to obtaining relevant, admissible and material evidence.

The consequences for failing to respect an undertaking are very grave and personal, contempt proceedings or discipline by the Law Society. The giving of an undertaking is not to be taken lightly, especially in circumstances as these where the underlying reason for the request have not been tested.

Indeed, the Applicants FOI requests are not a substitute for the disclosure we were entitled to receive from the Respondent but which are now our only means of obtaining the information we need to properly prepare our case. We made a timely request to OMAFRA to obtain these documents, there is no reason we should not have had them in advance of the hearing.

Following our appearances on November 13th, counsel for the Respondent wrote to us alleging personal knowledge of the state of our FOI Request to OMAFRA. As it turns out, he appears to have been better informed than we were.

While we made a request of OMAFRA in May 2012, we have still not received any disclosure. From correspondence dated September 7, 2012, we understood that OMAFRA could not release any documents until third party appeals had been dealt with. As we did not hear anything further, we assumed that our disclosure was being held up by a third party appeal. It offends our sense of justice that the Respondent obtained confidential information about our clients' FOI request before we did and without our knowledge or approval. That impropriety is compounded by the fact that the information he was apparently given was not communicated to

us by OMAFRA and may have been known to the Board. We only learned that the third party appeal process had run its course and that subject to payment of the appropriate fees, OMAFRA was ready to deliver documents after we wrote to OMAFRA to confirm Mr. Macfarlane's information. These improprieties are further compounded by the fact that only after a second written request did the Respondent disclose that it was the third party who had objected to the disclosure of documents.

In our view, the Board exceeded its jurisdiction and pre-judged the case when it ordered that it would supervise the questions the Applicants wished to ask of the Respondents through written interrogatories. The Board's decisions have made it impossible for us to know the case that has to be met.

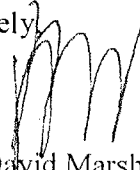
Finally, we have grave concerns about the very aggressive approach the Board has taken to scheduling. The Board had great difficulty granting an adjournment on a first request and in the absence of proper disclosure. Given the fact that the Board has taken a very restrictive view of our evidentiary entitlement and is fully aware that our only means of obtaining the evidence we require is through a process OMAFRA controls and over which we have no control and cannot predict the timing of, we find the Board's decision to Order the hearing date on a peremptory basis very unfair. The fact that I advised the Board that I am unavailable on the first day as I have a prior court appointment also strongly suggests that the Board is not committed to a fair hearing of this matter.

We have not made this decision lightly. Our clients, Richard and Judi Zirger, wake up every day to obnoxious odours, disturbing vibrations and loud noises. The trucks bringing waste to the Vandermeer property operate around the clock, 24/7, 365 days a year. Instead of enjoying quiet country living, the Zirgers are contending with rats and abnormal bird and insect populations. They cannot enjoy the outdoor environment at their family farm as the stench chases them, their friends and family indoors.

The Zirgers end each day listening to the noises created by their neighbour's waste treatment plant and watching the intermittent flare that burns excess gas, signalling a problem at the plant and highlighting the potential for a biogas explosion. Emissions from the digester have left residue on their crops, rendering them unmarketable. None of the adult Zirger children wishes to continue the family farm; their property value has undoubtedly dropped substantially.

The Zirgers have a right to have their complaints heard by impartial body. We are withdrawing our application to the Board.

Sincerely,



Paul David Marshall
/nk

tab D

Court File No.: *CV-13-495252*

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:



RICHARD ZIRGER AND JUDI ZIRGER

Plaintiffs

- and -

**VANDERMEER GREENHOUSES LTD; MERIDIAN CREDIT UNION; VINCOR (c.o.b.
as "CONSTELLATION BRANDS"); THE ONTARIO POWER AUTHORITY; HER
MAJESY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE
MINISTRY OF THE ENVIRONMENT AND THE MINISTRY OF AGRICULTURE;
THE ATTORNEY GENERAL OF ONTARIO; THE CORPORATION OF THE TOWN
OF NIAGARA ON THE LAKE; PLANET BIOGAS SOLUTIONS; and CEM
ENGINEERING**

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff(s). The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer(s) or, where the plaintiff(s) do(es) not have a lawyer, serve it on the

plaintiff(s), and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATED: *December 19, 2013* ISSUED BY: *Christine Irving*
Registrar, Superior Court of Justice
Local Registrar

TO: Vandermeer Greenhouses Ltd.
2021 Four Mile Creek Road,
Niagara on the Lake, Ontario
L0S 1J0

SUPERIOR COURT
OF JUSTICE
383 UNIVERSITY AVE.
10TH FLOOR
TORONTO, ONTARIO
M5G 1E8

COUR SUPÉRIEURE
DE JUSTICE
383 AVE. UNIVERSITY
10E ÉTAGE
TORONTO, ONTARIO
M5G 1E8

AND TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office -- Civil
McMurtry-Scott Bldg.
8th Floor, 720 Bay St
Toronto M7A 2S9

Constitutional Law Branch
4th Floor, 720 Bay Street
Toronto, Ontario
M7A 2S9

Meridian Credit Union
Niagara on the Lake, Ontario
1561 Highway 55
Virgil, Ontario

Vincor Canada
c.o.b. as "Constellation Brands"
441 Courtney Park
Mississauga, Ontario
L5T 2V3

Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto M5H 1T1

The Corporation of the Town of Niagara on the Lake
1593 Four Mile Creek Road
Virgil, Ontario
L0S 1T0

PlanET Biogas Solutions
Unit B - 227 Bunting Road
St. Catharines, Ontario
L2M 3Y2

CEM Engineering
227 Bunting Road
St. Catharines, Ontario
L2M 3Y2

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I. SUMMARY OF CLAIM

To secure a more efficient and cost-effective source of energy for their greenhouse cut flower operation, in or around February 11, 2008, Vandermeer Nurseries began a process to obtain government authorization to situate an anaerobic digester on its property.

Although anaerobic digesters are generally installed on farm properties to address odours from excess animal waste, Vandermeer's digester was specifically intended to create energy.

Vandermeer applied to the Town of Niagara on the Lake ("NOTL") for site plan approval, building permits and to change the municipal drain, known as the "Sloma Drain." In support of its application, Vandermeer stated that it would be inputting only on-farm materials into the digester.

NOTL determined that Ministry of Environment ("MOE") approval was not required for the proposed use. Despite the fact that the Vandermeer property was zoned "greenhouse" and "agricultural purposes only," on June 2, 2008, NOTL approved Vandermeer's applications without conducting any studies or requiring Vandermeer to apply for rezoning. NOTL delegated responsibility to Vandermeer to use *best efforts* to resolve any and all noise, odour and other complaints concerning the site. It did not impose any restrictions with respect to the noise, traffic, emissions or other nuisances Vandermeer could create on its property.

Although NOTL's approval contemplated that Vandermeer might alter the composition of what it puts in its digester and recognized that a different formula would require MOE approval and/or a Nutrient Management Strategy, it did not impose any additional conditions or requirements on Vandermeer in the event that the nature of its project changed or that imminent changes to Ontario's Environmental Protection Regulations

On February 23, 2009, the *Green Energy Act* ("GEA") was given first reading in the Ontario Legislature. The GEA was created to expand renewable energy generation in Ontario and is to be administered in a manner that promotes community consultation.

Vandermeer's Renewable Energy Generating Facility achieved commercial operation on April 27, 2009.

The GEA came into force on September 24, 2009. GEA's objectives were reflected in a number of legislative amendments, including amendments to the *Electricity Act*, the *Environmental Protection Act* and the *Planning Act*. Amendments to the *Electricity Act* provided for the development of a Feed-in Tariff ("*FIT Program*"), a program for the procurement of electricity from renewable sources which replaced the RESOP. Consistent with the GEA, one of the FIT program's broad policy objectives is to encourage community involvement.

Projects of any renewable technology that had a capacity of 500 kW or less and were in service by 11:59 p.m. on October 1, 2009 were eligible to transition to the FIT program. Generators who had been operating under a RESOP contract obtained a contract representing the balance of the 20-year FIT contract.

On October 30, 2009, a little over one month after the GEA became effective, MOE granted Vandermeer a Provisional Certificate of Approval for a farm based anaerobic digestion facility under s. 27(1) of the *Environmental Protection Act*. The Director's decision circumvented Ontario's environmental protection regime. Vandermeer should have sought a renewable energy approval.

Vandermeer's Certificate of Approval does not require a Nutrient Management Strategy, an environmental assessment, appropriate distance setbacks from the nearest odour receptor or compliance with Ontario's noise regulations. Ontario interprets the Certificate to permit Vandermeer to input commercial or industrial wastes such as: pet food waste; waste from Time Hortons; and, grape pomace from an American multi-national wine and spirits producer and marketer as "agricultural waste."

The Certificate does not set out a specific formula for digester inputs. Instead, Ontario consults with Vandermeer on an *ad hoc* basis to determine the input formula. While the digester's legal status as an on-farm project rests on what is inputted, the input recipe is subject to change and not open to public scrutiny. Although the operation of the digester and, in particular, the input recipe have been the subject of a Freedom of Information Request, Ontario has not provided the plaintiffs with access to this information. While they live right next door, the plaintiffs have little knowledge of the activities on the site.

While Ontario has set standards for the receipt, storage and handling of off-farm waste and out-put, it has exempted Vandermeer from them. The plaintiffs will argue that the Certificate of Approval violates their section 7 *Charter* rights to life, liberty and security of the person and, in particular their right to a healthy environment.

Despite these regulatory changes, construction continued on Vandermeer's digester. Without imposing any further conditions, NOTL granted Vandermeer a permit for a control room and the building was completed in December 2009.

On May 11, 2010, Vandermeer's contract was amended by the Advanced RESOP FIT Amendment. The Amended Contract added a new definition for "on-farm biogas facility," defining it as a Renewable Generating Facility that is regulated under Part IX.1 of Ontario Regulation 267/03 made under the *Nutrient Management Act, 2002*. Ontario exempted Vandermeer from these requirements as the digester is not regulated under either instrument.

Since the digester was installed next door to the plaintiffs' peach orchard, they began experiencing respiratory issues, anxiety and sleep disorders. On a daily basis, the plaintiffs are exposed to excessive and intolerable odours, noises, vectors and vibrations emanating from the Vandermeer property. The smell in the air on their property is often putrid.

As the digester regularly produces too much methane (which is a greenhouse gas), a visible flare often operates, giving the once quiet rural agricultural neighbourhood the appearance of an industrial site. Activities at the site create a very real risk of explosion, especially since the ground is unstable and the digester formula is always changing. In or around August of this year, NOTL investigated sink holes on the Vandermeer site. The risks, nuisances and release of pollutants emanating from the property have caused the plaintiffs to lose the use and enjoyment of their farm. Recently, on advice, the plaintiffs sadly and reluctantly ploughed under their peach orchard.

Although NOTL had set up a Working Group, with Ontario's participation and input, to address the many public complaints it receives about noises, odours, vectors and other adverse impacts of the digester, to date no one has been able to eliminate the adverse effects of the digester.

Under the terms of their security agreement with Vandermeer Greenhouses, on July 19, 2011, Meridian Credit Union appointed Zeifman Partners as Vandermeer's Receiver. Since that time, the Receiver has been operating the digester.

On May 11, 2012, the plaintiffs made a number of *Freedom of Information* requests concerning the Vandermeer site and project. While NOTL, the Region of Niagara and OMAFRA responded to their request in a timely manner, as of this date, and despite many promises to the contrary, MOE has yet to fulfill its statutory obligations by responding to the plaintiffs' request.

On May 15, 2012, the plaintiffs filed an application in the Normal Farm Practices Protection Board to determine whether the activities being carried on at the Vandermeer site are normal farm practices. Appended to the plaintiffs' application was a request for documentary disclosure from Vandermeer.

Chairman Little made an Order for a four day hearing commencing on November 13, 2012. Disclosure was to be made on a voluntary basis without any guidelines or supervision by the Board and with the Receiver determining the relevance of the documents in its possession.

From the outset, the plaintiffs raised concerns about the lack of adequate disclosure. They noted that the Receiver had not disclosed any odour complaints, any internal OMAFRA documents concerning odour, seagull and fly issues or the composition of the materials placed in the digester; farm practices at Vandermeer; classification of the digestate; emails concerning problems with peach trees located around the digester; crop damage from ammonia; or any safety manuals or particulars of any specialized training Vandermeer's employees obtained to operate the digester.

On November 6, 2012, the Board refused the plaintiffs' request for an adjournment. Six days before the scheduled hearing, the Receiver delivered its limited document brief. On November 13th, the parties attended at the Board and the plaintiffs reiterated their concerns about the lack of an even playing field. The Chair reluctantly granted the plaintiffs' adjournment request on terms and despite failing to address the disclosure issues, rescheduled the hearing for February 19, 2013.

On December 7, 2012, the plaintiffs withdrew their application citing the Board's lack of impartiality, lack of structural independence, bias and errors in handling the disclosure issues.

On December 13th, the Receiver wrote to the Board accusing the plaintiffs of abusing the Board's process and reiterating its request to have the application summarily dismissed "because the applicants were so obviously not prepared to proceed, and had abused the process of the tribunal." In closing its letter, the Receiver stated: "Unless the application

is dismissed, these applicants will be allowed to continue to bring the administration of justice through this tribunal into disrepute."

Recently, Vandermeer notified the plaintiffs of its intention to make changes to its site and operations. These changes will only increase the level of disturbances coming from the property as has every repair that has been conducted on the digester to date. Ontario has not responded to the plaintiffs' repeated requests to learn more about these changes and to make submissions in respect of them. Ontario does not have a process to ensure their voices, or the voices of the neighbours who cannot afford to participate in these proceedings and who Ontario has banned from participating in the community meetings that were set up to deal with the nuisances coming from the site, are heard.

II. THE PLAINTIFFS' CLAIM:

1. The Plaintiffs seek a declaration pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43, that the activities on the defendant Vandermeer's property are not a normal farm practice within the meaning of the *Farming and Food Production Protection Act*, 1998, S.O. 1998, c.1;
2. The Plaintiffs seek a declaration under section 24(1) of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, cII, that the *Farming and Food Production Protection Act*, 1998, S.O. 1998, c.1 infringes section 7 of the *Charter of Rights and Freedoms* in that it deprives the plaintiffs of their right to life, liberty and security of the person in a manner that is contrary to the principles of fundamental justice;
3. The Plaintiffs seek a declaration under section 24(1) of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, cII, that NOTL By-law No. 4224-08 violates the plaintiffs' section 7 *Charter* right to live in a healthy environment as implicit in the plaintiffs' right to life, liberty and security of the person in a manner that is contrary to the principles of fundamental justice;
4. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Ontario Power Authority infringed the plaintiffs' right to a healthy environment under section 7 of the *Charter* in a manner that is contrary to the principles of fundamental justice when it granted Vandermeer Nurseries a RESOP contract and later a FII contract without appropriate regulatory approvals;
5. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Minister of Environment's failure to apply the *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, in a manner that ensured the cumulative effects were considered and minimized

when MOE made the decision to grant a Certificate of Approval violated the plaintiffs' rights under section 7 of the *Charter*;

6. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Minister of Environment's application of s. 27(1) of the *Environmental Protection Act* is contrary to section 7 of the *Charter* in so far as it allowed Vandermeer to avoid the Renewable Energy Approval process as set out in the *Environmental Protection Act*, R.S.O. 1990, c. E.19 and the *Green Energy Act*, 2009 S.O. 2009, c. 12, Sched. A;
7. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Minister of Environment's application of O. Reg. 347 made under the *Environmental Protection Act* is contrary to section 7 of the *Charter*;
8. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Minister of Environment's application of O. Reg. 267 of the *Nutrient Management Act* is contrary to section 7 of the *Charter*;
9. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Minister of Environment's decision to grant Vandermeer Nurseries a Certificate of Approval to operate a Waste Disposal Site on their Niagara on the Lake property created a public health hazard and violated the plaintiffs' section 7 *Charter* right to live in a healthy environment as implicit in the plaintiffs' right to life, liberty and security of the person in a manner that is contrary to the principles of fundamental justice;
10. The Plaintiffs seek a declaration under section 24(1) of the *Charter* that the Minister of Environment's failure to require Vandermeer to obtain a renewable energy approval retroactively violated the plaintiffs' section 7 *Charter* right to live in a healthy environment as implicit in the plaintiffs' right to life, liberty and security of the person in a manner that is contrary to the principles of fundamental justice;
11. An Order under section 24(1) of the *Charter* setting aside the Minister of Environment's decision granting Vandermeer a Certificate of Approval;
12. The Plaintiffs claim against the defendant Vandermeer Greenhouses Ltd. ("Vandermeer"):
 - a) general damages in the amount of \$5,000,000.00;
 - b) special damages in an amount to be determined at, or before, the trial of this action;
 - c) aggravated damages in the amount of \$1,000,000.00;
 - d) punitive damages in the amount of \$1,000,000.00;
 - e) an interlocutory and permanent injunction restraining Vandermeer from operating its anaerobic digester pursuant to the common law and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43;
 - f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
 - g) their costs of this action, including Harmonized Sales Tax; and,

h) such further and other relief as to this Honourable Court seems just.

13. The Plaintiffs claim against the defendant Meridian Credit Union ("Meridian"):

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$1,000,000.00;
- d) punitive damages in the amount of \$1,000,000.00;
- e) an interlocutory and permanent injunction restraining Meridian from operating Vandermeer's anaerobic digester pursuant to the common law and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43;
- f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- g) their costs of this action, including Harmonized Sales Tax; and,
- h) such further and other relief as to this Honourable Court seems just.

14. The Plaintiffs claim against the defendant Vincor ("Vincor"):

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$1,000,000.00;
- d) punitive damages in the amount of \$1,000,000.00;
- e) damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*;
- f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- g) their costs of this action, including Harmonized Sales Tax; and,
- h) such further and other relief as to this Honourable Court seems just.

15. The Plaintiffs claim against the defendant The Ontario Power Authority ("OPA"):

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$1,000,000.00;
- d) punitive damages in the amount of \$1,000,000.00;
- e) damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*;
- f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- g) their costs of this action, including Harmonized Sales Tax; and,
- h) such further and other relief as to this Honourable Court seems just.

16. The Plaintiffs claim against the defendant The Corporation of the Town of Niagara on the Lake ("NOTL"):

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$1,000,000.00;
- d) punitive damages in the amount of \$1,000,000.00;
- e) damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*;
- f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- g) their costs of this action, including Harmonized Sales Tax; and,
- h) such further and other relief as to this Honourable Court seems just.

17. The Plaintiffs claim against the defendant Her Majesty the Queen in Right of Ontario ("Ontario"):

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$1,000,000.00;
- d) punitive damages in the amount of \$1,000,000.00;
- e) damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*;
- f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- g) their costs of this action, including Harmonized Sales Tax; and,
- h) such further and other relief as to this Honourable Court seems just.

18. The Plaintiffs claim against PlanET Biogas Solutions:

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$100,000.00;
- d) punitive damages in the amount of \$100,000.00;
- e) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- f) their costs of this action, including Harmonized Sales Tax; and,
- g) such further and other relief as to this Honourable Court seems just.

19. The Plaintiffs claim against CEM Engineering:

- a) general damages in the amount of \$5,000,000.00;
- b) special damages in an amount to be determined at, or before, the trial of this action;
- c) aggravated damages in the amount of \$100,000.00;
- d) punitive damages in the amount of \$100,000.00;
- e) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C. 43;
- f) their costs of this action, including Harmonized Sales Tax; and,
- g) such further and other relief as to this Honourable Court seems just.

III. THE PARTIES

i) The Plaintiffs

20. Richard and Judi Zirger (interchangeably the "Zirgers," "Richard," or "Judi") are spouses who own the property municipally known as 59 Hunter Road, RR #3, in the Town of Niagara on the Lake ("Zirger farm"). Their property was and is, at all material times, adjacent to the Vandermeer property ("Vandermeer property") at 2021 Four Mile Creek Road, Niagara on the Lake.

ii) The Defendants

a) Vandermeer Nurseries

21. Vandermeer is a corporation incorporated pursuant to the laws of Ontario. Vandermeer operates a cut flower chrysanthemum growing business from its greenhouses adjacent to the Zirger farm. At all material times, Vandermeer obtained funding from Ontario and private lenders to develop, construct and operate an anaerobic digester on its property to create energy from renewable biomass.

b) Meridian Credit Union

22. Meridian Credit Union ("Meridian") is a credit union which holds security on the Vandermeer property.

23. On July 19, 2011, Meridian appointed Zeifman Partners Inc. the Receiver in respect of the Vandermeer property, assets and undertaking.

c) The Town of Niagara on the Lake

24. NOTL is a municipality incorporated under the *Municipal Act 2001*, S.O. 2001, c.25, as amended.
25. NOTL, through its agents, servants and employees, was, at all material times, responsible for municipal zoning, approving site plans and granting building permits within its municipal boundaries, and in particular, those that Vandermeer submitted.

d) Vincor Canada (c.o.b. as "Constellation Brands")

26. Vandermeer processes grape pomace which it obtains from Vincor Canada as agricultural waste.
27. As of June 5, 2006, that is more than three years before Vandermeer's Certificate of Approval to operate a Waste Disposal Site was granted, in a deal worth \$1.58 billion Canadian dollars and which required Canadian court approval, Vincor became a subsidiary of Constellation Brands Inc. Constellation is the world's leader in premium wine with a broad portfolio of more than 100 wines, beers and spirits. In its undated public announcement on the internet, Constellation stated that it has 10,000 employees. Constellation trades on the New York Stock Exchange under the symbol "STZ."
28. As a marketer and producer of wines and related products, Vincor did not meet the legal definition of a farm operation as found in O. Reg. 347.
29. In an undated entry on its website that appears to be from 2012, Vincor International states that it was the world's 8th largest wine company by revenue. Vincor trades on the Toronto Stock Exchange under the symbol "VN." The entry also states that Vincor "engages in the production, marketing, and distribution of wines and related refreshment beverages, principally in Canada, the United Kingdom, the United States, and Australia."
30. On June 13, 2012, Vincor announced that it would now operate as Constellation Brands.

31. As a global multi-national marketing agency traded on the Toronto and New York Stock Exchanges, Constellation Brands does not meet the legal definition of a farm operation. Consequently, the materials Vandermeer obtains from Constellation do not meet the legal definition of "agricultural waste."

e) The Ontario Power Authority

32. The Ontario Power Authority ("OPA") was established by *The Electricity Restructuring Act, 2004*. The OPA, through its agents, servants and employees, was, at all material times, responsible for procuring sources of renewable energy for Ontario and in particular, renewable energy from Vandermeer Nurseries.

33. The *Electricity Restructuring Act, 2004* set out the following objectives for the OPA:

- 1) To forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the medium and long-term;
- 2) To conduct independent planning for electricity generation, demand management, conservation and transmission and develop integrated power system plans for Ontario;
- 3) To engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;
- 4) To engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;
- 5) To establish system-wide goals for the amount of electricity to be produced from alternative energy sources and renewable energy sources;
- 6) To engage in activities that facilitate load management;
- 7) To engage in activities that promote electricity conservation and the efficient use of electricity;
- 8) To assist the Ontario Energy Board by facilitating stability in rates for certain types of customers; and,
- 9) To collect and provide to the public and the Ontario Energy Board information relating to medium and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs.

D) The Queen in right of Ontario

34. Ontario is named in these proceedings pursuant to the provisions of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, as amended.
35. Ontario, as represented by the Minister of the Environment ("MOE") and the Minister of Agriculture, Food and Rural Affairs ("OMAFRA"), are the executive branches of the provincial government in the Province of Ontario and, through its agents, servants and employees, was responsible at all material times for funding, regulating and supervising the approval, construction and operation of Vandermeer's anaerobic digester.
36. Anaerobic digestion projects could currently fall under the following *Acts* and regulations:
 - Assessment Act*, R.S.O. 1990, c. A.3, as amended
 - O. Reg. 282/98*
 - Drainage Act*, R.S.O. 1990, c. D.17, as amended
 - Electricity Act*, 1998, S.O. 1998, c.15
 - O. Reg. 160/99*
 - Environmental Assessment Act*, R.S.O. 1990, c. E.18, as amended
 - Environmental Bill of Rights*, 1993, S.O. 1993, c.28, as amended
 - Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended
 - RRO 1990, Regulation 347*
 - O. Reg. 359/09*
 - O. Reg. 452/09*
 - Farming and Food Production Protection Act*, 1998, S.O. 1998, c.1
 - Greenbelt Act*, 2005 S.O. 2005, Ch. 1.
 - Green Energy Act*, 2009, S.O. 2009, c.12
 - Nutrient Management Act*, 2002, S.O. 2002, c.4, as amended
 - O. Reg. 106/09*
 - O. Reg. 267/03*
 - Pesticides Act*, R.S.O. 1990, c. P.11, as amended
 - O. Reg. 63/09*
 - Planning Act*, R.S.O. 1990, c. P. 13, as amended
 - O. Reg. 452/09*
 - O. Reg. 419*

g) PLANer Biogas

- 37. PlanET Biogas ("PlanET") is a corporation incorporated pursuant to the laws of Ontario. PlanET specializes in the design, construction and service of biogas plants.
- 38. Vandermeer retained PlanET to design, build and obtain permits, licenses, certificates and approvals for an anaerobic digester on its property. PlanET services Vandermeer's digester.
- 39. PlanET was contractually bound to notify Vandermeer if, after the time of the proposal or bid closing, changes were made to the applicable laws.

h) CEM Engineering

- 40. CEM is an engineering consulting firm located in St. Catharines, Ontario.
- 41. CEM offers consulting, design and project services for the biogas sector. CEM liaised with NOTL concerning Vandermeer's application for site plan approval, building permits and gave advice in respect of anaerobic digestion and in particular, odours emanating from the digester. CEM advised NOTL that there would be little impact of siting an anaerobic digester on the Vandermeer property.

IV. FACTUAL SUMMARY

i) Niagara on the Lake's unique agricultural environment

- 42. All the farmland in Niagara on the Lake is primarily flat. The farms are unique in size and are much smaller than the majority of farms in Ontario. Most farms are 25 acres or less and 40% are less than 10 acres in size.
- 43. All the farmland in Niagara on the Lake is governed by the Ontario Greenbelt Plan (2005) ("Plan"), designated "Protected Countryside- Agricultural system" and a "specialty crop area - Niagara Peninsula Tender Fruit and Grape Area." Both Vandermeer Nurseries and the plaintiffs' farm are located in a protected agricultural zone for tender fruit growing.
- 44. One of the Plan's central objectives is to preserve agricultural land as a continuing commercial source of food and employment.

45. According to the Plan, lands within speciality crop areas shall not be re-designated for non-agricultural uses.
46. The Plan defines "agricultural-related uses" as "those farm-related commercial and farm-related industrial uses that are *small scale* and *directly related* to the farm operation and are required in close proximity to the farm operation."
47. The Plan defines "minimum distance separation formulae" to mean "formulae developed by the Province to separate uses so as to reduce incompatibility concerns about *odour from livestock facilities*."
48. The Plan defines "infrastructure" to include "waste management systems, electric power generation and transmission including *renewable energy systems*..." (emphasis in original)
49. For lands falling within the Protected Countryside, the Greenbelt Plan, all existing, expanded or new infrastructure subject to and approved under the *Planning Act* or other environmental approval is permitted provided it supports agriculture or the rural economic activity that exists and is permitted within the Greenbelt.
50. The location and construction of infrastructure and expansions, extensions, operations and maintenance of infrastructure in the Protected Countryside are subject to the following:
 - a. Planning, design and construction practices shall minimize, wherever possible, the amount of the Greenbelt, and particularly the Natural Heritage System, traversed and/or occupied by such *infrastructure* ;
 - b. Planning, design and construction practices shall minimize, wherever possible, the *negative impacts* and disturbance of the existing landscape, including, but not limited to, impacts caused by light intrusion, noise and road salt; and,
 - c. Where practicable, existing capacity and coordination with different *infrastructure* services is optimized so that the rural and existing character of the Protected Countryside and the overall urban structure for southern Ontario established by Greenbelt and any provincial growth management initiatives are supported and reinforced.
51. *Planning Act* decisions must conform to the policies in the Greenbelt Plan (2005).

ii) The Niagara Biosphere

52. Both the Zirger farm and the Vandermeer property are located approximately 6 km from an internationally recognized and protected area, the Niagara Escarpment Biosphere Reserve.
53. A biosphere is comprised of all the land, water and atmosphere that support life. A biosphere reserve is an international designation of recognition from UNESCO (the United Nations Educational Scientific and Cultural Organization) for an area in the world which is deemed to demonstrate a "balanced relationship between humans and the biosphere." The UNESCO designation means that collaborative efforts among people in the designated area are to promote the sustainability of local economies and communities as well as the conservation of the terrestrial/ or coastal ecosystems they are in.
54. A biosphere reserve designation gives an area international recognition for the important ecological and cultural values in an area. It also provides a mechanism to apply sound stewardship and protection to the use of resources in an area to support present and future generations.
55. Ontario's Niagara Escarpment Biosphere is only one of 16 biosphere reserves in Canada and is part of a network of 580 reserves in 114 countries.
56. The UNESCO designation recognizes the Niagara Escarpment as an internationally significant ecosystem for its special environment and unique environmental plan. The designation puts Ontario's Niagara Escarpment in the company of such other well-known biospheres as the Galapagos Islands, the Serengeti and the Florida Everglades.
57. Given its location approximately 6 km away from this internationally recognized biosphere reserve, there is a unique growing environment on the Zirger farm that merits protection.

iii) The plaintiffs' farm

58. Richard Zirger's family has owned the property at 59 Hunter Road continuously for over 40 years.
59. From the time his parents bought the farm, the family has grown peaches, apples, pears and other tender fruits.

60. In 2006, Richard's mother became unable to live independently at the farm.
61. In 2008, the plaintiffs bought the family farm and applied to obtain a building permit from NOTL to construct a new house on the property.
62. On or about May 7, 2009, NOTL granted Richard a building permit to construct a new house. On or about May 8, 2009, Richard paid NOTL's fees for lot grading, building and water metering. Construction on the new Zirger house was completed in November 2009.
63. Until recently, the plaintiffs used migrant workers to harvest their crops and their fruits have been sold as a cash crop.
64. Since Vandermeer began operating its anaerobic digester, the plaintiffs' crops have been damaged by airborne matter that is causing, among other things, premature aging of the trees and the sudden appearance of both black spots on their fruit and the Peach Tree Bore. These occurrences are only evident on the farm properties that are in line with the wind direction from the digester.
65. As the plaintiffs cannot sell damaged fruit, their farm is now experiencing farm losses.
66. More recently, the plaintiffs made the difficult decision to plough under their peach orchard as the trees were irretrievably damaged and their fruit unfit for human consumption.
67. The plaintiffs believe that with the Vandermeer digester located next door, any food crop they might be able to grow would not meet CanadaGAP requirements.
68. CanadaGAP, is an independent, not for profit food safety program for companies that produce, pack and store fruits and vegetables. It is designed to help implement effective food safety procedures within fresh produce operations. Its two manuals, one specific to Greenhouse operations, the second for other fruit and vegetable operations, have been developed by the horticultural industry and reviewed for technical soundness by Canadian government officials. The manuals are designed for companies implementing Good Agricultural Practices (GAPs) and maintaining an effective food safety program.
69. The manuals are based on a rigorous hazard analysis applying the seven principles of the internationally-recognized HACCP (Hazard Analysis and Critical Control Point) approach. The program was benchmarked to and officially recognized by the Global

Food Safety Initiative (GFSI). Audit and certification services for the program are delivered by accredited Certification Bodies.

70. According to section 2.1 of its fruit and vegetable manual, food production sites must be assessed for biological, chemical and physical hazards due to previous use and adjacent agricultural and non-agricultural activities.
71. The plaintiffs believe that the activities on the Vandermeer site jeopardize food safety. In particular, they believe that as a result of situating the digester on the Vandermeer property, they will never be able to demonstrate to CanadaGAP that there is no threat to food safety from
- a) cross-contamination from crops with novel traits;
 - b) air, water and soil pollution from the Vandermeer site; or,
 - c) unusually high levels of animal and bird activity with associated feces.
72. The plaintiffs are especially concerned about the effect of the growing rat and mouse population on food safety and have recently noticed that a snowy owl is living near the digester, suggesting that the rodent population is abnormally high.

iv) Vandermeer Greenhouses

73. Vandermeer operates two greenhouse sites, one in Ajax, Ontario, the other next to the Zirger farm in Niagara on the Lake. Vandermeer grows flowers at both locations.
74. The Vandermeer's property in Niagara on the Lake is 6.7 hectares in size, with approximately 280,000 sq. feet of greenhouse space.
75. The Vandermeer property is subject to two site specific by-laws. In 1986, NOTL passed by-law No. 500DU-86, an amendment to by-law 500A-74, which zoned the property "Special Exemption 21.A.2 V Greenhouse Establishment Zone," permitting a greenhouse operation.
76. According to By-law 500 Dv-86, an anaerobic digester is not a permitted use on the part of the Vandermeer property that is zoned "Special Exemption 21.A.2 V Greenhouse Establishment Zone." The digester is not an accessory structure to the permitted use.
77. Greenhouses can be operated anywhere as they are not dependent on the quality of the soil or natural growing conditions. In fact, greenhouses are often used to overcome

shortcomings in the growing qualities of land, such as a short growing season or low levels of light.

78. Heating is one of the greatest costs associated with greenhouse operations. The higher costs of heating a greenhouse with natural gas or oil has lead greenhouse operators to switch to alternative fuels, including biogas.

79. To reduce its costs, in May 2006, Vandermeer attempted to obtain approval for a wind turbine system on its Niagara property. At the public hearings held to consider the project, area residents expressed their disapproval. Vandermeer abandoned the project.

80. Subsequently, Vandermeer obtained significant public funding through OMAFRA's Ontario Biogas Systems Financial Assistance Program ("OBSFA") to assist it with the costs of developing an anaerobic digester for its Niagara on the Lake site.

v) Anaerobic Digestion

81. Anaerobic digesters are commonly used to handle excess animal manure at cattle, poultry and swine operations, to control odour from manure and to create energy. These facilities are usually located on large farm properties, a considerable distance away from neighbouring farms.

82. There is a continuing controversy over whether anaerobic digestion creates green energy and some proposals for digesters have been fought off by community opposition as digesters are known to facilitate factory farming, emit gases and raise safety issues.

83. An anaerobic digester composts (or "digests") organic materials in a machine that limits access to oxygen. This encourages the generation of methane and carbon dioxide ("biogas") which is then burned as fuel through an energy recovery system to make electricity and heat. Non-agricultural source materials produce more gas than farm based materials which, in turn, allows for greater rates of power generation.

84. Methane is extremely flammable and may form explosive mixtures with air. Methane is also an asphyxiant and may displace oxygen in an enclosed space. Possible health effects of breathing in methane at high concentrations, resulting in oxygen deficiency, are increased breathing and pulse rates, lack of muscular coordination, emotional upset, nausea and vomiting, loss of consciousness, respiratory collapse and death.

85. Methane off-gas can penetrate the interiors of buildings and expose occupants to significant levels of methane. Some buildings have specially engineered recovery systems below their basements to actively capture methane and vent it away.
86. Where there is more gas than the energy recovery system can use, either through high gas production rates or poor maintenance of the system, flares can be used to eliminate excess gas that pose health and safety risks.
87. The handling of digester feedstock and the process of anaerobic digestion produces other gases including (but not limited to): nitrogen and sulphur oxides; hydrogen sulfide; particulate matter; carbon monoxide and ammonia. The presence of these gases also poses safety risks, including (but not limited to): explosion; asphyxiation; disease; excessive noise and hydrogen sulphide poisoning. Biogas and its constituents, many of which are colourless and odourless, can unknowingly expose operators and visitors to serious bodily harm and in some circumstances, exposure has been fatal. Appropriate test equipment must be available at all times to monitor gas levels in the digester.
88. Common hazards associated with anaerobic digesters also include drowning, spills, electric shock, chemical burns and noise exposure. Several anaerobic digesters have been damaged or destroyed by fires fuelled with biogas. In light of the risk of explosion, significant safety precautions must be taken. No open flames should ever be used near a digester. Also, equipment such as large engines and electric generators should be inspected daily and must be suitable to the environment so that a spark will not ignite the highly combustible gas anaerobic digestion produces. There must be no smoking near the digester.
89. As a consequence of these risks, extreme caution and adequate signage are necessary when working with biogas. Digester-associated tasks and maintenance should be performed without anyone having to enter confined spaces, including pits. Adequate ventilation, appropriate precautions, good work practices, engineering controls, and adequate personal protective equipment minimize the dangers associated with biogas. All employees associated with anaerobic digestion systems or who manage organic residuals must be appropriately trained and both safety equipment and an emergency

action plan must be in place, clearly visible to all visitors, and made available to all local emergency services.

90. The solid, post-digestion remains of the process of anaerobic digestion, commonly known as the "digestate," are often sold to be used as fertilizer. Since the digestate may contain chemical contaminants, in many jurisdictions there are regulations which specify its permissible contents and how it may be used. These management criteria aid in the control of algae-producing pollutants, inhibiting the contamination of ground and surface water.
91. The risk of ground or surface water pollution is compounded where an anaerobic digestion operation uses feedstock from other farm or non-agricultural sources. Improper on-site feedstock storage of imported feedstock material can increase the risk of algae producing nutrients leaching into ground and surface waters.

vi) Approvals Process for Biogas Systems in Ontario

92. According to the Ontario Ministry of Agriculture, Food and Rural Affairs ("OMAFRA") there are four main approval routes for biogas systems in Ontario, based on the type of material being digested, and the type of energy produced. Those four processes are:
- a) Nutrient Management Regulated Mixed Anaerobic Digestion Facility (RMADF) approval for manure-based biogas systems mixing up to 25 percent of certain off-farm materials, and producing any type of power output;
 - b) Renewable Energy Approvals (REA) for all electricity-based biogas projects (except systems with RMADF approval or agricultural systems at a farm with a Nutrient Management Strategy);
 - c) Certificate of Approval for non-electricity biogas projects (such as using biogas as a heating fuel) using waste as inputs; or,
 - d) No approval for non-electricity biogas systems using only exempt wastes such as agricultural waste.
93. Vandermeer's project does not comply with any of these approval routes.

vii) Vandermeer's project

94. On February 11, 2008, Vandermeer submitted a site plan application to the Planning and Development Services department at NOTL proposing the development of primary and secondary Anaerobic Digester tanks, a Digestate Storage tank, input or feedstock storage bunkers, and a generation station. The site plan drawing shows that Vandermeer was planning to build two generators on its site, with a combined nameplate capacity of 750 kwh hours.
95. The anaerobic digester was designed with a cogeneration unit so that heat and power could be provided to Vandermeer's greenhouse and excess power could be sold to the grid.
96. Vandermeer has represented to the community that its project provides "green energy to power and heat [their] greenhouses and ... significantly reduce [their] carbon footprint." In media interviews given after construction was completed, it reportedly promised that there would be no odours from the digester and that the facility is "an asset to the community." In an undated letter it alleges it sent to its neighbours, Vandermeer said: "We believe that going green is the right thing to do for the environment, as well as the smart thing to do to manage energy costs. We remain committed to being a good corporate citizen."
97. Vandermeer represented to NOTL that it would only use farm based materials, namely, chicken manure, silage and grape pomace, in its digester.
98. By letter dated March 31, 2008, MOE commented on Vandermeers' application for site plan approval. MOE confirmed that feedstock would be from the existing agricultural operation and also other agricultural based materials. MOE noted that additional approvals might be required and specifically stated that in the event that Vandermeer began accepting non-agricultural based waste, the facility would require a Certificate of Approval or an approved Nutrient Management Strategy.
99. On June 2, 2008, NOTL approved Vandermeer's application for a site plan agreement, enacting By-law No. 4224-08. In approving Vandermeer's application, NOTL established specific standards and procedures regarding the supervision and control of Vandermeer's digester.

100. According to section 14.4 of by-law 4224-08, should NOTL receive complaints regarding the noise, odour, storm run-off, traffic and/or maintenance of the site, Vandermeer is to use best efforts to resolve them. In the event that Vandermeer fails to do so, section 14.6 of the By-law provides that NOTL shall have the right on 15 days' notice enter the lands and do any work required.
101. The By-law contemplates the possibility that Vandermeer might change what it put in its digester. Section 14.1 of By-law No. 4224-08 states: "Should the Owner [Vandermeer] begin accepting non-agricultural based waste (not exempt per Ontario Regulation 347) to supplement or be wholly used as feedstock, the digester facility would require a certificate of approval from the Ministry of the Environment pursuant to the Environmental Protection Act and/or an Ontario Ministry of Agriculture, Food and Rural Affairs approved Nutrient Management Strategy pursuant to the Nutrient Management Act."
102. On June 26, 2008, NOTL granted Vandermeer Building Permit #8612 for the construction of 3 anaerobic digestion tanks. While the construction of the generation station and permanent covers for the input storage bunkers required separate and additional building permits, Vandermeer never proceeded with these as the storage bunkers are uncovered, leaving them open to the air and elements, creating putrid odours and attracting mice, rats and birds.
103. NOTL granted another building permit to Vandermeer on July 15, 2008, permitting the construction of a foundation for a pre-fabricated steel storage building (Permit #8836).
104. On or about July 25, 2008, Vandermeer signed a Renewable Energy Standard Offer Program Contract ("RESOP") with the Ontario Power Authority ("OPA") to provide electricity to the provincial grid.
105. None of the local residents were notified of or invited to consider Vandermeer's project. No public hearings were convened and NOTL did not impose any additional regulatory requirements on the project.
106. Paragraph 9 of the RESOP contract characterizes biogas as a renewable fuel. Schedule 2 defines bio-gas as the product of a renewable resource and organic matter

that is derived from a plant and available on a renewable basis as renewable biomass.

The contract defines renewable biomass and bio-gas as renewable fuels, not waste.

107. Schedule 2 defines a Renewable Generation Facility as facility that generates electricity exclusively from a renewable fuel.

108. Section 3.7 specifically prohibits Vandermeer from using any other source or fuel for generating the electricity it is selling to the grid. Section 7.1(12) provides that in the event the generator uses another type of fuel, the contract will be in default.

109. Paragraph 10 sets a contract price for the electricity generated from Vandermeer's renewable fuel.

110. The plaintiffs state that Vandermeer's project is a renewable energy project.

111. On October 1, 2008, Vandermeer sought to add non-agricultural source materials as feedstock for its digester and applied for a Certificate of Approval pursuant to s. 27 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, with Ontario's Ministry of the Environment ("MOE"). No public hearings were convened to consider Vandermeer's application.

112. The structural work for the digester was completed in or about December 2008 and the digester became operational in or about April 2009.

113. The plaintiffs state that as Vandermeer's anaerobic digester was designed for electrical production, it is a Renewable Energy Project which requires a Renewable Energy Approval ("REA") to legally operate in Ontario.

114. On October 30, 2009, MOE granted Vandermeer a Provisional Certificate of Approval for a farm based anaerobic digestion facility. The Certificate effectively transforms a portion of the Vandermeer property into a Waste Disposal Site without rezoning, studies or public consultation.

115. The Certificate states that the Site is to be constructed, operated and maintained in a manner which ensures the health and safety of all persons and prevents adverse effects on the natural environment or on any persons.

116. The Certificate does not impose any criteria for the land application of the digester.

117. NOTL granted Vandermeer a further building permit on December 23, 2009 for the construction of a control room building (Permit #9443).

118. After Vandermeer applied for a Certificate of Approval to change its feedstock, NOTL did not take any steps to ensure that Vandermeer was in compliance with its by-laws.

viii) **Digester contents**

119. The Certificate of Approval allows Vandermeer to input a variety of materials into its digester. According to its daily log, Vandermeer uses the following inputs to feed its digester: pomace obtained from Vincor; coffee; separated solids; waste from Tim Hortons; peppers; and, pet food. It does not input any manure.
120. According to Part B, section 1 of the Certificate, Vandermeer may input:
- a) Organic waste;
 - b) Agricultural waste;
 - c) O. Reg. 267/03 Schedule I and Schedule II off-farm anaerobic digestion materials;
 - d) Grape pomace from Vincor (considered "agricultural waste");
 - e) 50% of the total input must be "on-farm anaerobic digestion materials..."
121. "On-farm anaerobic digestion materials" are anaerobic digestion materials that are generated at an agricultural operation.

a) ***Organic Waste***

122. According to the Certificate, "Organic waste" means "materials limited to solid or liquid municipal and industrial waste derived from plants or animals, listed in Part B, Condition 1.2 of this Certificate, and all readily biodegradeable..."
123. Part B, Condition 1.2 states:

The operation of this *Site* is limited to receipt and processing of the following types of *organic waste*:

- (a) liquid fats, oils and grease (FOG), of plant and animal origin, and accompanying food residuals collected from grease interceptors and/or grease traps at food production, food processing and/or food wholesale and retail facilities;
- (b) liquid flocculation and scum waste from dissolved air floatation (DAF) systems from wastewater for the production of animal- or plant-based materials or from the production of any other food for human consumption;
- (c) solid DAF from wastewater for the production of animal- or plant-based materials or from the production of any other food for human consumption that has been treated to a minimum temperature of 70C for a minimum of one (1) hour or at a minimum temperature of 50C for a minimum of twenty (20) hours, to ensure complete inactivation of pathogens prior to being delivered to the *Site*. Reports confirming

treatment, provided by the supplier of the solid DAF, shall be maintained at the *Site* to verify compliance with this condition; and
 (d) dried spent grain and solubles (DSGS) from an ethanol plant.

124. In a Vandermeer Working Group meeting, Vandermeer was directed to stop putting DAF into the digester, highlighting the *ad hoc* way the digester is being operated. At the time, the plaintiffs were told that the lead time for this change would be 55 days. However, the plaintiffs noticed an immediate odour reduction.

b) Agricultural Waste

125. O. Reg. 347 defines "agricultural waste" as waste generated by a farm operation activity but does not include,
- (a) domestic waste that is human body waste, toilet or other bathroom waste, waste from other showers or tubs, liquid or water borne culinary waste,
 - (b) waste from a sewage works to which section 53 of the *Ontario Water Resources Act* applies,
 - (c) a dead farm animal within the meaning of Ontario Regulation 106/09 (Disposal of Dead Farm Animals) made under the *Nutrient Management Act, 2002* or a regulated dead animal within the meaning of Ontario Regulation 105/09 (Disposal of Deadstock) made under the *Food Safety and Quality Act, 2001*,
 - (d) inedible material within the meaning of Ontario Regulation 31/05 (Meat) made under the *Food Safety and Quality Act, 2001*, or
 - (e) any material that is condemned or derived from a carcass at a registered establishment within the meaning of the *Meat Inspection Act* (Canada).

126. According to O. Reg. 347, a "farm operation activity" means an activity mentioned in paragraphs 1 to 4 of the definition of "farm operation." A "farm operation" means an agricultural, aquacultural or horticultural operation, other than a race track or a zoo, that is engaged in any or all of the following:

1. Growing, producing or raising farm animals.
2. The production of agricultural crops, including greenhouse crops, maple syrup, mushrooms, nursery stock, tobacco, trees and turf grass.

3. The processing, by the operator of the farm operation, of anything mentioned in paragraphs 1 and 2, where the processing is primarily in relation to products produced from the agricultural, aquacultural or horticultural operation.

4. The use of transport vehicles by the operator of the farm operation, to transport anything mentioned in paragraphs 1 and 2, where the use of transport vehicles is primarily in relation to products produced from the agricultural, aquacultural or horticultural operation.

127. Paragraph 1.3 (b) of Vandermeer's Certificate of Approval states:

(b) In accordance with Item 7, grape pomace received from Vincor Canada is considered to be *agricultural waste* and may be accepted at the *Site*. Should the process in the production of the grapes as described in Item 7 change, or should the *Owner* wish to accept grape pomace from a new source, the *Owner* shall notify the *Director* and the *District Office* and provide supporting information for review to determine whether the grape pomace will continue to be, or is, considered *agricultural waste*...

128. According to its internet website, Vincor Canada is not a farm operation or an agricultural operation. Vincor is Canada's largest producer and marketer of wine and related products. Its Canadian headquarters is in Mississauga. As described elsewhere herein, Vincor is a subsidiary of an American multi-national firm. Vincor Canada's waste is not "agricultural waste."

129. Vandermeer's digestate is not derived from inputs that are at least 50% agricultural-sourced material. Vandermeer does not have a Nutrient Management Plan, Nutrient Management Strategy or Non-Agricultural Source Management Plan.

130. In or around September 2013, Vandermeer notified the plaintiffs that it intended to increase productivity by adding three more local wineries as suppliers of grape pomace.

c) *O. Reg. 267/03 Schedule I Waste*

131. Schedule I of O. Reg. 267/03 of the *Nutrient Management Act* provides that:

The following materials may be received at an agricultural operation for treatment in a regulated mixed anaerobic digestion facility:

1. Waste products from animal feeds listed in Classes 1, 2, 3, 4 and 5 of Part 1 of Schedule IV to the Feeds Regulation, 1983 (SOR/83-593) made under the *Feeds Act* (Canada), excluding any materials that contain an animal product that has not been denatured.

2. Materials that previously would have been a product described in paragraph 1 but are no longer suitable for use in feeding farm animals for reasons that do not include contamination by another material.
3. Organic waste matter derived from the drying or cleaning of field or nut crops.
4. Organic waste matter derived from the processing of field or nut crops.
5. Organic waste matter derived from the production of ethanol or biodiesel.
6. Aquatic plants.
7. Organic waste matter derived from food processing at,
 - i. bakeries,
 - ii. confectionery processing facilities,
 - iii. dairies and facilities that process dairy products,
 - iv. fruit and vegetable processing facilities,
 - v. cereal and grain processing facilities,
 - vi. oil seed processing facilities,
 - vii. snack food manufacturing facilities,
 - viii. breweries and distilleries,
 - ix. wineries, and
 - x. beverage manufacturing facilities.
8. Revoked: O. Reg. 338/09, s. 81 (3).
9. Fruit and vegetable waste.
10. Organic waste materials from a greenhouse, nursery, garden centre or flower shop that is not part of an agricultural operation

132. A regulated mixed anaerobic digestion facility is defined as a mixed anaerobic digestion facility that is regulated under Part IX.1 of the *Nutrient Management Act* and is not subject to an environmental compliance approval issued in respect of an activity mentioned in subsection 27 (1) of the *Environmental Protection Act*.

133. O.Reg. 267/03 defines a "mixed anaerobic digestion facility" as anaerobic digestion of both on-farm anaerobic digestion materials and off-farm anaerobic digestion materials in the same facility.

134. O. Reg. 267/03 defines a "mixed anaerobic digestion facility" as an anaerobic digestion facility that treats both on-farm anaerobic digestion materials and off-farm

anaerobic digestion materials on a farm unit on which an agricultural operation is carried out.

135. As Vandermeer's digester is not regulated under the *Nutrient Management Act, 2002* and operates pursuant to Certificate of Approval obtained under s. 27(1) of the *EPA*, it is not a regulated mixed anaerobic digestion facility. As a result, it has no legal authority to process waste from wineries.

136. O.Reg. 347 defines "anaerobic digestion materials" as materials that are intended for treatment in a mixed anaerobic digestion facility, whether the materials are generated at the agricultural operation or received at the agricultural operation from an outside source.

ix) Ontario's commitment to clean energy

137. In May 2009, the Legislature of Ontario passed the *Green Energy and Green Economy Act, 2009*, which enacted the *Green Energy Act, 2009* ("GEA") and amended and repealed various statutes. The legislative changes were made to pursue the policy objectives of the *GEA*, which came into force on September 9, 2009.

138. *GEA* was created to expand renewable energy generation in Ontario. One of the purposes of the *Act* is to remove barriers to green energy projects.

139. Section 1 of the *GEA* defines "renewable energy source" as an energy source that is renewed by natural processes to include biomass, biogas and biofuel. With reference to the provisions of the *Electricity Act*, *GEA* defines a "renewable energy generation facility" as a generation facility that generates electricity from a renewable energy source and it specifically excludes a waste disposal site. *GEA* incorporates the definition of "waste disposal site" from s. 25 of the *Environmental Protection Act*, R.S.O. 1990 190, c. E-19. Although the *EPA*'s definition of "waste" does not include the type of materials Vandermeer is putting in its digester, those materials are classified as "waste" by regulation.

140. According to O. Reg. 347, "agricultural waste" is waste that is generated by a "farm operation activity." A "farm operation activity" is defined by its engagement in a number of activities, including growing greenhouse crops. "On-farm anaerobic digestion materials" are those anaerobic digestion materials that are generated at an

"agricultural operation" -- a term that is not defined by the Regulation and which excludes marketing agencies and fast food outlets.

141. GEA defines "renewable energy project" as the construction, installation, use operation, changing or retiring of a renewable energy generation facility.
142. Section 2 of the GEA states that it is to be administered in a manner that promotes community consultation.
143. These objectives were reflected in amendments to the *Electricity Act, 1998*, S.O. 1998, c. 15, Sch. A to create a Feed in Tariff ("FIT") Program, to the *Environmental Protection Act*, R.S.O. 1990, c. E.19 to provide for a new streamlined renewable energy approval process, and to the *Planning Act*, R.S.O. 1990, c. P.13 to remove municipal approval requirements for renewable energy projects.
144. Ontario provides various sources of funding for biogas electricity projects. OMAFRA provided significant funding for the Vandermeer project through the Ontario Biogas Systems Financial Assistance Program.

x) **The Feed-In Tariff ("Ontario FIT Program")**

145. On September 24, 2009, the Minister of Energy gave directions to the Ontario Power Authority ("OPA"), pursuant to s. 25.32 and 25.35 of the *Electricity Act, 1998*, to create an electricity price program for power from renewable energy sources.
146. The OPA is a corporation created without share capital established under the *Electricity Act, 1998*. The *Electricity Act, 1998* provides that the business and affairs of the OPA are to be carried on without the purpose of gain and any profits are to be used by the OPA for the purpose of carrying out its objects. The OPA acts in accordance with directions from the Minister of Energy. The objects of the OPA include forecasting electricity demand in the Province for the medium and long term.
147. Ontario amended the *Electricity Act, 1998* to provide for the development of an electricity price program, known as the Feed-In Tariff. The *Electricity Act, 1998* defines a FIT Program as:
 - a. ... a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type,

generator capacity and the manner by which the generation facility is used, deployed, installed or located.

148. The Ontario FIT Program is open to projects that produce electricity from renewable sources including wind, solar photovoltaic, bioenergy and waterpower up to 50 MW.

149. The direction was publicly released and set out the broad policy objectives of the FIT Program including to promote clean energy, create jobs, introduce a simpler method to procure and develop generating capacity from renewable energy sources, and, at the same time, encourage community and Aboriginal equity participation in the program.

150. On the same day, the OPA issued the FIT Rules version 1.0 defining the specific procedure pursuant to which applications would be received and processed for FIT Contracts.

151. The Minister's direction set out specific features to be included by the OPA in the design of the FIT Program including price setting, general contract provisions, transition provisions from previous renewable energy programs, domestic content, and restrictions to project siting on prime agricultural land.

152. In addition, the OPA was required to develop and deliver a number of program elements to encourage community, Aboriginal and municipal involvement. The September 24, 2009 direction also required that the OPA conduct a formal program review at least once every two years.

153. Vandermeer's project was transitioned into the FIT program.

154. As Vandermeer's anaerobic digester is a Renewable Energy Project, Vandermeer should have applied for a Renewable Energy Approval from Ontario and Ontario should have considered the project on that basis.

xi) Adverse Effects

155. Since Vandermeer's digester was constructed and commissioned, the Zirgers have noticed that noise and odour levels on their property have increased substantially. The plaintiffs believe that the Vandermeer Waste Disposal Site is the cause of these and other nuisances.

156. The Zirgers believe that off-farm waste is stored at the Vandermeer site in open bunkers, causing additional odours and inviting vectors, rats and mice.
157. While the defendants have attempted to eliminate the odours and to address the noise levels, the bunkers storing the feedstock for the digester remain open to the air and the Zirgers continue to experience unpleasant odours, unwanted vectors, spills and noises.
158. The Zirgers worry that the activities being conducted on the Vandermeer property are affecting their health. They have dull headaches and cough more often, have difficulty breathing, experience nausea, nasal and sinus pain, throat irritation and their sleep is interrupted by noises and pungent odours. They have also experienced psychiatric symptomology including: depression; anger; anxiety; irritability; hopelessness and stress.
159. As a result of these nuisances, the Zirgers have lost the use and enjoyment of their property. They cannot leave any of their windows open as the smell from the Vandermeer property is putrid and easily absorbed by the fibres in their home. They cannot sit or eat outdoors with friends or relatives nor can they enjoy gardening or invite friends or relatives over to enjoy the farm.
160. The Zirgers have also encountered difficulty retaining trades and fruit pickers to work on their farm. Trades and pickers have complained about the smell and reported suffering nausea and headaches as a result.
161. Migrant workers have also complained about the difficult working conditions caused by the putrid odours coming from the Vandermeer property. They have worked with masks over their noses to cope with the odour.

xii) **The Vandermeer Working Group**

162. Concerned neighbours insisted on NOTL becoming involved in addressing the nuisances emanating from the Vandermeer property and as a result, a Vandermeer Working Group was created with NOTL's acquiescence. The Vandermeer Working Group was formed to address the many public complaints NOTL received about noises, odours, vectors and other adverse impacts of the digester.

163. The Working Group is comprised of concerned residents and representatives from NOTL, MOE, the Region of Niagara and OMAFRA. There could have been more community involvement but, when a large number of concerned neighbours attended the third Vandermeer Working Group Meeting on July 27, 2010, Stephen Bedford, who was then the Director of NOTL's Planning Department and the Chair of the Vandermeer Working Group, restricted participation in the Group to two families and two farmers.

164. On an *ad hoc* basis, the Ministries of Agriculture and Environment are assisting Vandermeer to resolve complaints but, have not been able to eliminate the adverse effects of the digester.

165. Minutes of the Working Group's meetings contain statements suggesting that affected parties should take their concerns to the Normal Farm Practices Protection Board for a hearing. Even so, some Minutes also discourage members from doing so as they state that rather than seeking a Board hearing, it would be "more conducive to continue with open dialogue between everyone as positive changes have been made on site as a result of the Working Committee."

166. Despite the statement noted above, the plaintiffs state that little has changed as a result of the Working Group's meetings.

xiii) The plaintiffs' attempt to obtain information about the digester

167. On May 11, 2012, the plaintiffs made a number of *Freedom of Information* requests concerning the Vandermeer site and project.

168. While NOTL, the Region of Niagara and OMAFRA responded to their request in a timely manner, as of this date, MOE has yet to fulfill its statutory obligations by responding to the plaintiffs' request.

169. In addition, MOE has not responded to the plaintiffs' request for information concerning a change Vandermeer proposed to make in a notice they received from Vandermeer dated July 31, 2012. Despite numerous follow up letters, MOE has not responded to the plaintiffs' concerns or request for information.

xiv) The Normal Farm Practices Board

170. On May 15, 2012, the plaintiffs filed an application in the Normal Farm Practices Protection Board to determine whether the activities being carried on at the Vandermeer site are normal farm practices.

171. Appended to the plaintiffs' application was a request for documentary disclosure from Vandermeer. The plaintiffs sought an Order compelling Vandermeer to disclose all of the following documents and records:

- a) copies of all records and supporting documentation submitted by Randy Van Berkel in application for a Certificate of Approval to operate a Waste Disposal Site at 2021 Four Mile Creek Road;
- b) copies of all government approvals for the anaerobic digester, including design specifications, minimum distance separation calculations and any consideration that was given to the location of the digester;
- c) copies of any records considering the potential for the digester posing environmental, health and safety risks;
- d) copies of all records describing the Respondent's attempts to mitigate the odour, noise, vibration and emissions from the digester, including any consultations that were made with third parties for same;
- e) copies of all documents showing the receipt of off farm waste and all documents describing its content;
- f) copies of all signage at the site;
- g) copies of all documents related to the release of untreated biogas at the site, including each instance when the flare was in operation, its duration and why it was utilized;
- h) copies of all odour, noise and other nuisance complaints and particulars of any responses, actions or measures taken or recommended to reduce or eliminate same;
- i) copies of any and all records confirming the enrolment and completion of the Biogas Systems Operators' course by personnel employed by the Respondent and any other training for employment at the site;
- j) copies of all records pertaining to health and safety precautions at the site, including emergency preparedness measures and procedures and staff training at the site;
- k) copies of the results of any and all analyses concerning emissions, metal concentrations, noise, vibrations and odour emanating from the site and also the nutrient content of the digestate;

- l) copies of any and all information and records concerning the quantities of digestate transferred off-site and particulars concerning its final destination and use;
- m) copies of all the Respondent's annual reports concerning the operation of the digester;
- n) copies of any and all charges under environmental legislation relating to the operation of the digester; and,
- o) copies of all applications for government funding of the digester project, including any and all responses and approvals thereto.

172. On August 2, 2012, Chairman Little made an Order for a four day hearing commencing on November 13, 2012.

173. Chairman Little ordered that all documentary evidence was to be exchanged on or before September 14th at 12:00 noon. His Order did not respond to the plaintiffs' request for documentary disclosure nor specify the nature of the documents Vandermeer was to disclose. Disclosure was to be made on a voluntary basis without any guidelines or supervision by the Board, with the Receiver determining relevance.

174. On August 15, 2012, the plaintiffs wrote to OMAFRA seeking a status report on their *Freedom of Information* request.

175. On August 20, 2012, OMAFRA advised the plaintiffs that it would not make a decision on their request until September 7th and that third parties, (whom the plaintiffs believed were related to or in the employ of Vandermeer), would have 30 days to appeal their decision, following which records responsive to the request would be released, with any necessary redactions.

176. In a letter dated September 5, 2012, Vandermeer's Receiver advised the plaintiffs that it was concerned about jeopardizing any sale of the Vandermeer property and as a consequence, would be providing only limited disclosure to the Board. As a condition of receiving even this limited disclosure, Vandermeer's Receiver demanded that the plaintiffs and their counsel sign an undertaking agreeing not to use the documents for any purpose as they contained "sensitive commercial information."

177. The plaintiffs took the position that the undertaking was over-broad as many of the listed documents, including Minutes of the Vandermeer Working Group, could not be

classified as "sensitive commercial information." Accordingly, they asked the Receiver to reconsider its position and to state grounds for each claimed confidence.

178. In a letter dated September 12, 2012, the Receiver presented a redrafted undertaking for the plaintiffs to sign but, also, indicated that as it was responding to the application as the Receiver, and not as Vandermeer. Consequently, the Receiver stated did not "know whether there is other documentation that exists that is relevant to the issues in this proceeding, or that might otherwise fall within the scope of the list set out in your application." The Receiver committed to making "best efforts" to produce other specific documents on request, provided it determined they were relevant.
179. On September 14th, the plaintiffs wrote to the Board to advise of the state of its attempt to obtain documentary disclosure through its various *Freedom of Information* requests, to give notice that it would not be able to meet the Board's timetable for disclosure and to request an Order for written interrogatories.
180. Also on September 14th, the plaintiffs wrote to the Receiver advising that its request for an undertaking was contrary to the Board's Rules.
181. The Receiver replied on the same date by asserting that the plaintiffs had "an ulterior purpose" in seeking disclosure.
182. On September 18th, the plaintiffs wrote to the Board to express their concerns about the lack of disclosure and to question whether the proper parties were before the Board. They noted that the Receiver had not disclosed any odour complaints, any internal OMAFRA documents concerning odour, seagull and fly issues or the composition of the materials placed in the digester to produce gas; farm practices at Vandermeer; classification of the digestate; emails concerning problems with peach trees located around the digester; crop damage from ammonia; or any safety manuals or particulars of any specialized training Vandermeer's employees obtained to operate the digester.
183. In light of the lack of disclosure, the plaintiffs raised concern about the fairness of the hearing and reiterated their request for written interrogatories pursuant to ss. 28 and 31 of the Board's Rules.
184. The plaintiffs wrote to the Board again on October 18th requesting an adjournment, directing the Board's attention to the continuing problem they were having obtaining disclosure and expressing concern that as the Board had not yet ruled on written

interrogatories, the timing of the documentary exchange would not permit follow up questions or an opportunity to retain experts. The Receiver objected to the plaintiffs' request and claimed that it would be prejudiced thereby.

185. On October 18th, the Board sent the plaintiff's a Notice of Hearing which was signed by its Secretary who stated the Board's address as: "OMAFRA, 1 Stone Road West, Guelph Ontario N1G 4Y2."

Bias: The Board is not impartial

186. The Board shares offices and staff with OMAFRA.
187. Vandermeer obtained funding for its project from OMAFRA.
188. OMAFRA employees have an on-going relationship with Vandermeer and its staff.
189. OMAFRA employees worked with Vandermeer to have its pomace and digestate exempted from the *EPA* and *Nutrient Management Act* regulations. In an email dated September 11, 2009, Don Hilborn of OMAFRA wrote to three other OMAFRA employees stating that "we need to get pomace allowed."
190. OMAFRA's employees are members of the Vandermeer Working Group. They have been working with Vandermeer to respond to the plaintiffs' odour and other complaints.
191. On May 27, 2010, well after all approvals had been granted, Jake DeBruyn, OMAFRA's main contact person on the Vandermeer project at that time, sought the assistance of another OMAFRA employee to develop a safety manual for Vandermeer.

The Board refused to order disclosure

192. To address the problems they were having obtaining disclosure, the plaintiffs asked the Board to allow it to make written interrogatories of Vandermeer.
193. On October 22, 2012, the Board decided that it would review the plaintiffs' list of questions, determine their relevancy and forward only those considered relevant to the Receiver who would then decide on which questions it would answer. The Board left scheduling responses to the parties, with a residual jurisdiction to intervene as necessary.

194. By letter dated October 31st, the Receiver advised as to its three witnesses. Two of its witnesses were OMAFRA employees and the third, an employee of MOE. As a result of this information, the plaintiffs again wrote to the Board to express concern over the lack of an even playing field. Given the lack of disclosure, the plaintiffs pointed out the advantage the Receiver would have at the hearing as the plaintiffs still had not received responses to their FOI requests nor any disclosure from Vandermeer. The plaintiffs reiterated their request for an adjournment.
195. On November 6, 2012, the Farm Board rejected the plaintiffs' request for an adjournment.
196. On November 7th, six days before the scheduled hearing, the Receiver delivered its document brief. It refused to provide any financial information showing whether its income is from growing flowers or selling renewable energy to the grid and if both, in what proportion.
197. On November 13th, the parties attended at the Board. Following a lengthy discussion that was conducted in front of Vandermeer's chief witness who is employed by OMAFRA, the Chair granted an adjournment on terms, rescheduling the hearing for February 19, 2013 without making any Orders concerning the disclosure of evidence.
198. The plaintiffs withdrew their application on December 7th, citing the Board's lack of impartiality, lack of structural independence, bias and errors of law in its handling of the disclosure issues. The plaintiffs also had concerns as to whether the proper parties were before the Board.
199. On December 13th, the Receiver wrote to the Board accusing the plaintiffs of abusing the Board's process and reiterating its request to have the application summarily dismissed "because the applicants were so obviously not prepared to proceed, and had abused the process of the tribunal." In closing its letter, the Receiver stated: "Unless the application is dismissed, these applicants will be allowed to continue to bring the administration of justice through this tribunal into disrepute."

V. LIABILITY OF THE DEFENDANTS

i) Strict Liability

200. The activities on Vandermeer's property constitute a non-natural usage of the land in the area where the plaintiffs live and where Vandermeer conducts its business in that;

- a. the plaintiffs grow fruit for human consumption and as such require no permits, permissions, public consultations, notices or studies to farm while the activities on the Vandermeer property are not properly characterized as "farming" since they require legal authorizations, permits, approvals, warning signage, notices, inspections, safety precautions, emergency planning and specialized training;
- b. the plaintiffs farm their land while the Vandermeer's property grows flowers in greenhouses and uses agricultural products to manufacture something that cannot be grown, planted, harvested or eaten and which is therefore a non-agricultural product, namely energy;
- c. the practices in the area where the plaintiffs live support fruit farming while the escape of gases into the air and water table from stockpiling rotting grapes and other feedstocks and operating the digester endanger the continued viability of the plaintiffs' orchard;
- d. while the plaintiffs experience variable profits and losses depending on sale of the yield from the year's crop of edible agricultural products, Vandermeer makes a consistent and predictable profit from selling renewable energy under a long-term contract;
- e. while the farming activities on the plaintiffs' property contribute to purifying the air and creating sweet smells, the activities on the Vandermeer property create odour and greenhouse gas emissions;
- f. the land in the area where the plaintiffs live poses no health or safety risks to its neighbours while the activities on the Vandermeer property pose a significant risk of harm to human health and the signage around the property reflects this;
- g. Vandermeer's property stores a substantial quantity of methane gas which is not usually found in greenhouses or on small tender fruit farms and which is a dangerous greenhouse gas that is highly flammable and poses an explosion risk that if materialised, could cause irreparable harm to the plaintiffs. Methane off-gas can also penetrate the interiors of buildings, displacing oxygen and exposing occupants such as the plaintiffs to significant levels of methane and creating a risk of explosion and harm to human health;
- h. the activities on Vandermeer's property create traffic of a character, noise and duration that is out of character with the traffic and noise patterns in the quiet rural neighbourhood that surrounds it;
- i. the land in the area where the plaintiffs live is warmed by the sun and open to the elements, the seasons and the natural environment while the Vandermeer's

property has largely been covered over by greenhouses, gravel roads, unsightly equipment, storage bunkers, tanks and a large open flare;

- j. while safety on the Vandermeer property depends on releasing excess gas in an uncontrolled manner through an open flare which runs for days and weeks on end, open flares are not found on any other properties in the area and no other property poses comparable health and safety risks to its neighbours;
- k. while neighbouring farms employ temporary migrant workers with no specialized training to tend to and pick crops, Vandermeer employs full-time, long-term employees who require significant specialized knowledge, training and supervision and who enjoy benefits and working conditions that more closely resemble factory workers than farmers;
- l. while fruit pickers working on the plaintiffs' farm would not normally be exposed to any health or safety risks during the course of their employment but for the digester, employees at the Vandermeer property are at risk of explosion; asphyxiation; disease; excessive noise and hydrogen sulphide poisoning;
- m. while anaerobic digesters are usually used to handle excess animal manure at large cattle, poultry and swine operations and to control odour from manure, Vandermeer's digester was never used to control odour from excess on-farm animal waste and in fact does not use proportionally 50% by volume of manure as a feedstock. As a result, excess animal waste is not a local concern that requires a remedy;
- n. as Vandermeer's digester uses less than the 50% by volume of manure as required by Ontario regulations, it is processing industrial waste which is an unnatural use of prime agricultural lands;
- o. while the plaintiffs only buy the amount of energy they require for themselves and to operate their farm, the Vandermeer property creates more energy than is needed to heat its greenhouse;
- p. the feedstock Vandermeer uses, its open storage, and raw input are a cause of many on-going odour and vector problems that the plaintiffs have been experiencing;
- q. although Vandermeer's property is zoned for mixed agricultural and residential uses, it's being used to generate energy for commercial sale, which is neither a residential or agricultural use;
- r. the activities on the Vandermeer property are harmful to the long-term interests of local agriculture. While Vandermeer's property is in a protected tender fruit area, greenhouse cultivation of flowers can be conducted anywhere. Using the property to generate energy for commercial sale is contrary to the local land use and opposed to the long-term interests of local agriculture. These activities will negatively impact the local agriculture industry, reduce any carbon reduction benefits and compete with local agriculture if farmers decide to grow crops specifically as a feedstock for creating energy.

201. The escape of gases, odour, noise, and vectors from Vandermeer's non-natural usage of land has interfered with the plaintiffs' use and enjoyment of their property causing the plaintiffs' damage.

202. The plaintiffs also state that the conversion of off-farm waste at the Vandermeer site to commercial energy is not a normal farm practice.
203. There are significant health, safety environmental and economic risks associated with anaerobic digesters. Normal farm practices do not present these risks to neighbouring farms.
204. The plaintiffs state that Vandermeer is strictly liable to them.

ii) Nuisance

a) Private Nuisance

205. The plaintiffs state that using prime agricultural lands to dispose of waste is not a normal farm practice.
206. The plaintiffs further state that the odour, noise, pests, traffic, seepage, contamination, emissions, fumes and escape of gases from the Vandermeer site have caused unreasonable damage to their property and unreasonable interference with the enjoyment and use of their property.
207. Emissions from the digester have caused physical damage to the plaintiffs' crops and economic loss, unreasonably interfering with the plaintiffs' enjoyment and use of their property. Emissions from the digester have also caused the plaintiffs physical harm, discomfort and inconvenience.
208. Vandermeer owns the land on which the digester is situated, manages and controls the operations of the digester and/ or the Waste Disposal Site and is therefore liable to the plaintiffs for the nuisances that originate from it.

b) Public Nuisance

209. The plaintiffs submit that the siting and operation of the Waste Disposal Site has created a public nuisance.
210. The plaintiffs further submit that the operation of the anaerobic digester unreasonably interferes with the comfort and convenience of the persons residing in or coming within the sphere of its influence in that it:
- a. creates excessive noise and interferes with public rights of passage on a public roadway;

- b. poses health and safety risks from air contamination and offensive odour; and,
- c. interferes with the proper operation of the SLOMA drain and other watercourses.

211. The plaintiffs state that as the defendant NOTL is responsible for planning and granting building approvals, it knew or ought to have known that locating an anaerobic digester on a small farm property in a prime agricultural area was contrary to good planning principles as it would create constant traffic, emissions, noise, odour and vectors, causing a public nuisance.

212. The plaintiffs state that as the defendants MOE and OMAFRA have regulatory authority for environmental planning and approvals in Ontario, they knew or ought to have known that locating an anaerobic digester on a small property in a prime agricultural area would create constant traffic, emissions, noise, odour and vectors, causing a public nuisance.

213. The plaintiffs state that using prime agricultural property as a Waste Disposal site creates an unreasonable and substantial interference with public rights and in particular, the right to a healthy environment in section 7 of the Canadian *Charter of Rights and Freedoms*.

214. The plaintiffs plead and rely upon s. 103 of the *Environmental Bill of Rights*, S.O. 1993, C.28, permitting any person who has suffered personal injury or direct economic loss as a result of a public nuisance causing harm to the environment to bring an action in respect of such losses.

215. The plaintiffs state that the defendants Vandermeer, NOTL and Ontario are liable to them.

iii) Trespass

216. The plaintiffs state that Vandermeer has discharged or has caused the discharge of emissions onto their property causing damage and interference with the use and enjoyment of their land.

217. The plaintiffs therefore state that Vandermeer is liable to them in trespass.

iv) Negligence

218. The plaintiffs claim negligence against all defendants.

a) Vandermeer Nurseries

219. The plaintiffs state that Vandermeer owed them a duty of care and was negligent in that it:

- a. misrepresented to NOTL the nature of its project;
- b. misrepresented to NOTL the likely effects of its project;
- c. misrepresented to NOTL that there would be no escape of gases and no odours from the digester;
- d. misrepresented that its project was a small scale on farm project;
- e. failed to notify the plaintiffs about its application for a Certificate of Approval to convert their farm property into a Waste Disposal Site;
- f. minimized and/or misstated the impacts of its digester on neighbouring farms;
- g. failed to mitigate the adverse effects of its operation, including but not limited to: odour; noise; and vectors;
- h. failed to develop a safety manual; and,
- i. failed to properly train its staff to operate, regulate, inspect and monitor the anaerobic digester and related activities on its property.

220. The plaintiffs state that Vandermeer knew or ought to have known it was reasonably foreseeable that the anaerobic digester and emissions from the digester would pose health, safety and nuisance risks to the Zirgers, interfere with the use and enjoyment of their property, diminish their property's value, cause physical damage to the plaintiffs' crops and economic loss.

221. As a result of Vandermeer's negligence, the plaintiffs have suffered a diminution in the value of their property, crop loss and physical harm, discomfort and inconvenience.

b) CEM Engineering

222. CEM owed the plaintiffs a duty of care in that the plaintiffs are adjacent property owners who were mostly likely to be affected by the siting of an anaerobic digester on the Vandermeer property.

223. It was reasonably foreseeable that the plaintiffs would be exposed to any adverse effects of the digester.

224. CEM was responsible for designing the digester and for designing the facility to minimize odour emissions and especially emissions when materials are transferred into a storage facility and transferred from the storage facility into the mixed anaerobic digestion facility.

225. CEM was negligent in that it:

- a) misrepresented to NOTL that the Vandermeer project was an on-farm project when it knew or ought to have known that Vandermeer had applied or was contemplating applying for a RESOP program contract;
- b) misrepresented to NOTL that anaerobic digestion produces no odours;
- c) misrepresented to NOTL that the concrete vessels it designed were completely air tight when they are not and allow putrid odours to escape;
- d) misrepresented to NOTL that odours "have no opportunity to escape" when in fact they have and have caused and continue to cause the plaintiffs' damage;
- e) misrepresented that "Should [odours] escape, then anaerobic digestion (in the absence of oxygen) would cease";
- f) failed to establish the appropriate set-back requirements for the nearest odour receptor;
- g) knew or ought to have known that the digester would be using significantly less than 50% manure;
- h) knew or ought to have known that the digester was designed to utilize more than 25% off-farm waste;
- i) knew or ought to have known Vandermeer required MOE approval to operate its digester and should have obtained such approval prior to seeking site plan approval from NOTL;
- j) failed to apply for a Renewable Energy Approval when it knew or ought to have known that Vandermeer's project is a renewable energy project;
- k) ensure that the facility was designed to manage non-combusted bio-gas;
- l) failed to ensure that the methods the digester uses to store, treat and process feedstock and output minimize odour and other emissions; and,
- m) designed a project that created sink holes on the site, endangering the plaintiffs' property and lives.

226. As a result of these failures, omissions and breaches, the plaintiffs state that CEM has caused them damage.

c) The Ontario Power Authority

227. The OPA owed the plaintiffs a duty of care in that the plaintiffs are adjacent property owners who were mostly likely to be affected by the siting of an anaerobic digester on the Vandermeer property.

228. It was reasonably foreseeable that the plaintiffs would be exposed to any adverse effects of the digester.

229. The OPA was responsible for awarding Vandermeer a renewable energy contract in the form of an RESOP or FIT contract.

230. The OPA was negligent in that it failed to ensure that the Vandermeer project obtained a Renewable Energy Approval.

d) The Town of Niagara on the Lake

231. The plaintiffs state that NOTL owed them a duty of care and was negligent in that:

- i) it failed to formulate appropriate policies for protecting the unique agricultural land where the Vandermeer and Zirger farms are situated;
- ii) failed to take a precautionary approach to siting the digester on specialty crop lands zoned for tender fruit growing;
- iii) failed to take a precautionary approach to considering and deciding to approve Vandermeer's application for site plan approval, building permits and the relocation of the Sloma drain thereby breaching the plaintiffs' s. 7 *Charter* rights;
- iv) failed to consider and impose the appropriate set back distances;
- v) approved the project despite the fact that it did not comply with the *Nutrient Management Act and Regulations*;
- vi) relied on CEM Engineering's statements with respect to the operation of the digester and the odours it would create without independent verification or study;
- vii) approved the project when it violated zoning by-laws and the total lot coverage exceeded by-law limits;
- viii) failed to consider how changes to the materials inputted into the Vandermeer digester would impact on its consideration and approval of the

- project, and, in particular, impact on whether the project still met the regulatory criteria for "agricultural purposes," and "on-farm" projects;
- ix) failed to consider how legislative changes to the laws applicable to the project would impact on its consideration and approval;
 - x) failed to impose a condition that in the event that Vandermeer sought to change the inputs to its digester, that it would have to initiate a new application and rezone its property appropriately;
 - xi) failed to impose a condition that in the event that Vandermeer changed its inputs and applied for a MOE Certificate of Approval to convert its farm into a waste disposal site that public notice and hearings would be required to properly assess the project, its impacts and the potential harms;
 - xii) failed to impose appropriate additional conditions to protect the plaintiff's in the event that Vandermeer obtained Ontario's approval to make changes to the project and feedstock;
 - xiii) granted Vandermeer Nurseries municipal approvals on the basis of insufficient information before Ontario had reviewed and approved the project;
 - xiv) failed to impose, remove or alter the land use controls placed on the Vandermeer property and project;
 - xv) failed to notify the plaintiffs of Vandermeer's application to change the use of their property;
 - xvi) failed to notify the plaintiffs of Vandermeer's application to build an anaerobic digester on its property;
 - xvii) failed to establish legal standards for the use of anaerobic digester technology in the municipality;
 - xviii) failed to convene a public hearing to consider Vandermeer's application for building permits;
 - xix) failed to properly assess Vandermeer's application for site plan approval;
 - xx) failed to require Vandermeer to provide a scale drawing showing the relationship between the anaerobic digester and neighbouring land uses, including neighbours' residences, lot lines and adjacent public roads;
 - xxi) failed to perform a Minimum Distance Separation calculation properly and prior to granting Vandermeer building permits;
 - xxii) failed to require Vandermeer to conduct an environmental impact study and/or air and odour dispersion modelling;
 - xxiii) failed to inspect and enforce its property standards and nuisance by-laws, including the Noise, Zoning, Open Air Burning; Property Standards and Clean Yards By-laws;
 - xxiv) granted Vandermeer a building permit to construct structures that contravened its by-laws, relevant Ontario laws and regulations or, in the

alternative, that it failed to ensure compliance with its building permits and site plan agreement and in particular, failed to enter the property to remedy odour, noise and vector complaints and failed to require that Vandermeer provide a Nutrient Management Plan when it altered its material inputs;

- xxv) failed to require Vandermeer to obtain a building permit for the storage bunkers and failed to ensure that the bunkers were properly enclosed to reduce odours and other nuisances;
- xxvi) failed to ensure that all storage tanks were covered;
- xxvii) permitted Vandermeer to operate an open flare, exposing the plaintiffs to unreasonable health and safety risks;
- xxviii) failed to consult appropriate third party experts;
- xxix) promised Vandermeer quick approval;
- xxx) failed to impose spill mitigation measures to protect the Sloma Drain and Four Mile Creek from impacts and potential spills from the site;
- xxxi) approved of a design which facilitated the creation of sink holes on the site and which poses a threat to the plaintiffs' property and lives; and,
- xxxii) acted hastily.

232. The Zirgers state that NOTL knew or ought to have known it was reasonably foreseeable that the facility and emissions from the anaerobic digester would pose health, safety and nuisance risks to the Zirgers, interfere with the use and enjoyment of their property, diminish their property's value, cause physical damage to the plaintiffs' crops and economic loss.

e) Her Majesty the Queen in Right of Ontario

233. The plaintiffs state that Ontario owed them a duty of care which arises from Ontario's laws and various representations OMAFRA and MOE made to the plaintiffs at the Working Group and in other forums and was negligent in that it:

- a) did not protect and failed to take reasonable and adequate steps to protect the environment, human food crops, the plaintiffs and persons located near the digester from its adverse effects;
- b) failed to take a precautionary approach to its consideration and approval of Vandermeer's project;
- c) exempted Vandermeer's project from the *Nutrient Management Act* and Regulations;
- d) failed to impose a Nutrient Management Strategy/ Plan with a contingency plan;

- c) failed to advise the plaintiffs about Vandermeer's project and/ or application for a Certificate of Approval;
 - f) failed to hold public hearings about Vandermeer's project and/ or application for a Certificate of Approval;
 - g) failed to conduct an environmental assessment or impact study about Vandermeer's project and/or application;
 - h) failed to properly assess Vandermeer's application for a Certificate of Approval;
 - i) failed to ensure that Vandermeer's application met the requirements and regulatory changes for REA approval under the *GEA* and *Green Economy Act* and *EPA*;
 - j) exempted Vandermeer's renewable energy project from the regulatory framework for renewable energy approvals and environmental protection in the province of Ontario, thereby breaching same;
 - k) failed to enforce the *Green Energy Act* by requiring Vandermeer to apply for a Renewable Energy Approval;
 - l) permitting Vandermeer to process off-farm waste
 - m) failed to impose a Nutrient Management Strategy/ Plan on the project which describes: the procedures that will be used to decide whether the off-farm material meets the Waste Regulation requirements; how any permanent nutrient storage facilities for storage of off-farm material will meet the Waste Regulation requirements; the procedures that will be used at the operation to manage the digester's output to meet the requirements of the Waste Regulations; and, how Vandermeer's facility will meet the Waste Regulation requirements;
 - n) failed to classify the digestate as "waste" and subject it to waste regulation controls;
 - o) failed to ensure that Vandermeer developed a safety manual;
 - p) failed to conduct adverse effect studies;
 - q) failed to regulate, inspect and monitor Vandermeer's facility;
 - r) failed to impose any standards to protect the Sloma Drain which is located within 50 feet of the digester and Four Mile Creek (which empties into Lake Ontario); and,
 - s) approved the project when it is incompatible with local zoning and farming practices.
234. The Zirgers state that Ontario knew or ought to have known it was reasonably foreseeable that the facility, anaerobic digester and emissions from the digester would pose health, safety and nuisance risks to the Zirgers, interfere with the use and enjoyment of their property, diminish their property's value, cause physical damage to the plaintiffs' crops and economic loss.
235. The Zirgers state that Ontario knew or ought to have known it was reasonably foreseeable that the Vandermeer project qualified as a renewable energy project and should have been considered as such pursuant to s. 47.3 of the *Environmental Protection Act*.

v) Section 7 of *The Charter of Rights and Freedoms*

236. Anaerobic digesters are incapable of making chemical contaminants in the materials used to create energy disappear. Digesters are known to emit nitrogen and sulfur oxides, particulate matter, carbon monoxide and ammonia and may also release other contaminants.

237. Air pollutants with a nitrogen base (NOx) released by the digester are similar to those from an internal combustion engine. And while emissions from vehicles are strictly regulated, the emissions standards governing digesters are low.

238. Since the burning temperatures of methane are so low, the digester does not destroy pathogens. The ammonia in the gasses coming from the waste materials will not be oxidized and will be released from the digester stack directly into the atmosphere.

239. Vandermeer flares excess gas which is not regulated and which creates a significant risk of adverse mental and physical health impacts. The plaintiffs live in a constant state of fear and worry and have lost a great deal of personal autonomy and control over their health and well-being as a result of the Vandermeer project. The Director's decision and the Ministers' failures compound these impacts.

240. The plaintiffs have been deprived of personal choices that most Canadians take for granted, such as not living in a constant state of fear for their health and safety and being able to work and engage in recreation outdoors.

241. The plaintiffs plead that the statutory process that granted Vandermeer approval to operate a Waste Disposal Site next to the plaintiffs' property violates their right to security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*.

242. The plaintiffs plead that Ontario violated section 7 of the *Canadian Charter of Rights and Freedoms* by:

- a) failing to have a plan to respond to the public, a safety and emergency management plan, and engineering assessments and environmental reports to ensure that the Vandermeer site does not cause harm to human health, the environment, archaeology or natural heritage;
- b) failing to conduct adverse impact studies on the Vandermeer project prior to its approval;
- c) failing to require that public hearings be held to consider the project;
- d) failing to appropriately monitor emissions from the site;

- e) locating a Waste Disposal Facility next to the plaintiffs' home thereby threatening the plaintiffs' physical and psychological well-being and safety;
- f) failing to respond to the plaintiffs request for access to information concerning the project and its effects; and,
- g) permitting Vandermeer to make changes to its operations on an *ad hoc* basis, without further review, study or approvals.

243. The plaintiffs plead that there are adverse health effects caused by having an anaerobic digester located so close to their home. They further plead that requiring them to prove these effects now reverses the burden of proof, violating section 7 of the *Charter*.

244. The plaintiffs further state that Ontario's decision to grant Vandermeer a Certificate of Approval was made in a manner that was contrary to the principles of fundamental justice in that Ontario has arbitrarily, without study, legislated a scheme that permits an anaerobic digester to be operating in a mixed agricultural and residential community without investigating the possibility of adverse health effects.

245. The plaintiffs further state that Ontario's decision was contrary to the principles of fundamental justice in that Ontario;

- a) failed to hold public hearings to consider the project;
- b) failed to assess the special nature of the Vandermeer site and surrounding agricultural lands;
- c) failed to conduct an environmental review of the project and its likely affect on tender fruit crops and trees; and,
- d) failed to consider the application of the precautionary principle.

V. THE PLAINTIFFS' INJURIES

246. As a result of the defendants' various breaches, the plaintiffs have suffered injuries, which include, but are not limited to:

- a. loss of use and enjoyment of their property;
- b. loss of their cash crop production;
- c. loss of their peach trees;
- d. loss of their property value;
- e. physical pain and discomfort;
- f. interrupted sleep; and,
- g. such further and other damages as may be advised prior to trial.

247. As a further result of the defendants' various breaches, the plaintiffs have suffered pecuniary damages up to the present and will continue to suffer pecuniary damages in the future, the full particulars of which are not known at this time but will be provided at or before the trial of this action.
248. The plaintiffs state that the defendants' conduct demonstrates a wanton and careless disregard of the plaintiff's legal rights and is conduct that deserves this Court's sanction in the form of aggravated, punitive and exemplary damages.
249. The plaintiffs plead and rely upon the provisions of the *Negligence Act*, R.S.O. 1990, c. N-1, as amended.
250. The plaintiffs propose that this action be tried in the City of Toronto, in the Province of Ontario.

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tab E

Court File No.: CV-13-495252

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RICHARD ZIRGER AND JUDY ZIRGER

Plaintiffs

- and -

**VANDERMEER GREENHOUSES LTD; MERIDIAN CREDIT UNION; HER MAJESY
THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF
THE ENVIRONMENT AND THE MINISTRY OF AGRICULTURE; THE ATTORNEY
GENERAL OF ONTARIO; THE CORPORATION OF THE TOWN OF NIAGARA ON
THE LAKE; PLANET BIOGAS SOLUTIONS; and CEM ENGINEERING**

Defendants

NOTICE OF DISCONTINUANCE

THE PLAINTIFFS wholly discontinue this action against the defendants, Vandermeer Greenhouses Ltd; Meridian Credit Union; Her Majesty The Queen In Right of Ontario as Represented by The Ministry of the Environment and The Ministry of Agriculture; The Attorney General of Ontario; The Corporation of The Town Of Niagara On The Lake; Planet Biogas Solutions; and CEM Engineering.

NOTE: If there is a counterclaim, the defendant should consider Rule 23.02, under which the counterclaim may be deemed to be discontinued.

NOTE: If there is a crossclaim or third party claim, the defendant should consider Rule 23.03, under which the crossclaim or third party claim may be deemed to be dismissed.

Dated at Oakville, Ontario, this 23rd day of October, 2014.

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Zirger

- and -

Vandermeer Greenhouses Ltd. et al.

Court File No.: CV-13-495252

**SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO**

NOTICE OF DISCONTINUANCE

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tab F

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

B E T W E E N:

MERIDIAN CREDIT UNION LIMITED

Applicant

and

VANDERMEER GREENHOUSES LTD.

Respondent

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1995 c. B-3, as amended, section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and Rule 14.05(3)(g) of the *Rules of Civil Procedure*

**SECOND REPORT OF ZEIFMAN PARTNERS INC., IN ITS
CAPACITY AS COURT-APPOINTED RECEIVER**

1. Pursuant to the Order of the Honourable Mr. Justice Spence of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated February 21, 2014 (the "**Initial Order**", a copy of which is attached hereto as **Exhibit "A"**), on the application of Meridian Credit Union Limited ("**Meridian**"), Zeifman Partners Inc. ("**Zeifman**") was appointed as Receiver (in such capacity, the "**Receiver**") of the Respondent, Vandermeer Greenhouses Ltd. ("**Vandermeer**").
2. Vandermeer is a cut flower chrysanthemum grower located in Niagara-on-the-Lake, Ontario. Vandermeer's primary production area is a ground crop with a plant capacity of over 5.9 million stems. The property is 16.5 acres and includes a 275,000 square foot greenhouse (the

"**Greenhouse**") and two residences. Vandermeer also owns and operates an anaerobic digestion facility (the "**Anaerobic Digester**") capable of producing over 8,000 kwh of electricity a day.

3. Prior to the Initial Order, Zeifman had been acting as a receiver privately-appointed by Meridian.

PURPOSE OF REPORT

4. The Receiver has filed this Second Report on an urgent basis in order to advise the Court of certain developments in this proceeding, and to seek an Order, among other things:

- (a) Dismissing or staying the application against Zeifman Partners Inc. commenced on February 24, 2015 by James Dell, Sophie Dell, Ron Quevillon, Charlene Quevillon, George Lepp, Erica Lepp, Richard Zirger, Judy Zirger, Dan Laval, Dino Laval, Mary Laval, Joan Bourk and Larry Bourk (collectively, the "**Zirger Group**") before the Ontario Superior Court of Justice in Toronto in Court File No. CV15-523653 (the "**Application**");
- (b) Directing the Zirger Group to serve its materials on all parties on the service list in this proceeding (the "**Service List**"), including, in particular, Meridian;
- (c) Directing that the Receiver be indemnified in respect of costs in an amount determined by this Honourable Court to be reasonable and appropriate; and
- (d) Approving the activities and conduct of the Receiver and its counsel as disclosed herein.

BACKGROUND

5. In 2012, Richard Zirger and Judy Zirger made an application to the Normal Farm Practices Protection Board ("NFPPB") dealing with substantially the same issues that are now complained of by the Zirger Group. Richard Zirger and Judy Zirger withdrew that complaint more than two years ago, on December 7, 2012.

6. Pursuant to a Statement of Claim dated December 19, 2013 (the "**Zirger Claim**"), Richard Zirger and Judi Zirger commenced an action against Vandermeer, Meridian and various other parties. A copy of the Zirger Claim is attached hereto as **Exhibit "B"**.

7. On October 23, 2014, the Receiver was provided with a copy of a Notice of Discontinuance dated October 23, 2014 in respect of the Zirger Claim. A copy of the Notice of Discontinuance is attached hereto as **Exhibit "C"**.

8. By letter dated July 22, 2014, Ms. Cassandra Kirewskie of Marshall Kirewskie, legal counsel to Richard Zirger and Judy Zirger, contacted Gregory Azeff of Fogler, Rubinoff LLP, counsel to the Receiver, to advise that an application for leave to commence a proceeding before the NFPPB was being brought on behalf of Richard Zirger, Judy Zirger and a number of other individuals, and to request advice regarding available hearing dates for same. A copy of the letter dated July 22, 2014 is attached hereto as **Exhibit "D"**.

9. By email dated July 23, 2014 from Mr. Azeff to Ms. Kirewskie, the Receiver provided seven (7) acceptable dates in August and September for the hearing. A copy of the email dated July 23, 2014 is attached hereto as **Exhibit "E"**.

10. By letter to the Receiver's counsel dated September 10, 2014, Ms. Kirewskie advised that her clients would not be proceeding with their application for leave to proceed before the Normal Farm Practices and Protection Board on September 18, 2014. Ms. Kirewskie requested advice regarding the Receiver's availability for a hearing in late October and early November, 2014. A copy of the letter dated September 10, 2014 is attached hereto as **Exhibit "F"**.

11. By letter dated September 10, 2014 from Mr. Azeff to Ms. Kirewskie, the Receiver provided its advice regarding available dates for the hearing in late October and early November, 2014. A copy of the letter dated September 10, 2014 is attached hereto as **Exhibit "G"**.

12. By letter to the Receiver's counsel dated September 29, 2014, Cassandra Kirewskie took the position that the Receiver had not replied to her correspondence of September 10, 2014, and advised that in the event she did not hear from the Receiver prior to October 2, 2014, the matter would be set down for a hearing on a date in November 2014, without regard to the Receiver's availability. A copy of the letter dated September 29, 2014 is attached hereto as **Exhibit "H"**.

13. By letter dated September 29, 2014 from Gregory Azeff to Cassandra Kirewskie, the Receiver reminded Ms. Kirewskie that it had in fact responded to her letter of September 10, 2014, and provided her with a copy of such response. The Receiver also advised as to its availability for a hearing in November 2014. A copy of the letter dated September 29, 2014 (without enclosures) is attached hereto as **Exhibit "I"**.

14. Under cover of letter dated January 16, 2015, Ms. Kirewskie delivered to the Receiver a set of draft affidavits, without exhibits, prepared in connection with a proceeding that she hoped to commence, and again requested the Receiver's consent for it to do so. A copy of the letter dated January 16, 2015 (without enclosures) is attached hereto as **Exhibit "J"**.

15. By letter dated January 27, 2015, the Receiver requested copies of the exhibits to the draft affidavits. A copy of the Receiver's letter dated January 27, 2015 as **Exhibit "K"**.

16. By letter dated January 27, 2015, the Zirger Group refused the Receiver's request for copies of the exhibits to the draft affidavits, and requested dates for the hearing of a motion to lift the stay of proceedings. A copy of the Zirger Group's letter dated January 27, 2015 as **Exhibit "L"**.

17. By letter dated January 29, 2015, the Receiver confirmed its availability for a hearing of the Zirger Group's motion during the weeks of February 23 and March 9, 2015. A copy of the Receiver's letter dated January 29, 2015 is attached hereto as **Exhibit "M"**.

18. By letter dated February 6, 2015, the Zirger Group requested the Receiver's availability for the entire month of March (after March 9) and the first week of April, 2015. A copy of the Zirger Group's letter dated February 6, 2015 is attached hereto as **Exhibit "N"**.

19. By letter dated February 12, 2015, the Receiver confirmed its availability for a hearing of the Zirger Group's motion for the entire month of March (after March 9) and the first week of April, 2015, providing a total of 12 available dates during that period. A copy of the Receiver's letter dated February 12, 2015 is attached hereto as **Exhibit "O"**.

20. By letter dated February 13, 2015, Ms. Kirewskie advised that the Zirger Group's motion for leave would proceed on March 25, 2015. A copy of Ms. Kirewskie's letter dated February 13, 2015 is attached hereto as **Exhibit "P"**.

21. By letter dated February 5, 2015 (but delivered March 6, 2015), the Zirger Group confirmed that its motion for leave would proceed on April 2, 2015. A copy of the Zirger Group's letter dated February 5, 2015 is attached hereto as **Exhibit "Q"**.

LATE DELIVERY OF MOTION MATERIALS

22. As of March 26, 2015, the Zirger Group had not served its motion materials (or otherwise contacted the Receiver since March 6, 2015). Accordingly, at approximately 10:36 a.m. on Thursday March 26, 2015, the Receiver sent a letter to Ms. Kirewskie, advising that the Zirger Group was in breach of the Ontario *Rules of Civil Procedure* regarding service deadlines, and requesting that the Zirger Group confirm that the motion would not be proceeding on Thursday April 2, 2015. A copy of letter dated March 26, 2015 is attached hereto as **Exhibit "R"**.

23. At approximately 9:30 p.m. on Thursday March 26, 2015, Ms. Kirewskie sent a letter (by facsimile transmission) to Mr. Azeff, advising that the Zirger Group intended to proceed with its motion on Thursday April 2, 2015, and that its materials would be delivered the next day. The letter did not come to Mr. Azeff's attention until the next morning (*i.e.*, on Friday March 27, 2015). A copy of Ms. Kirewskie's letter dated March 26, 2015 is attached hereto as **Exhibit "S"**.

24. In light of Ms. Kirewskie's response, by letter sent (by email) in the morning of March 27, 2015, Mr. Azeff requested her availability for a chambers attendance before the Commercial List on either Monday March 30th or Tuesday March 31st. A copy of Mr. Azeff's letter sent the morning of March 27, 2015 is attached hereto as **Exhibit "T"**.

APPLICATION RECORD

25. Ms. Kirewskie did not respond to Mr. Azeff's letter of March 27, 2015. However, at approximately 3:45 pm on Friday March 27, 2015, the Receiver's counsel received a full banker's

box containing the Zirger Group's materials, including a nine volume application record (the "**Application Record**") filed in connection with the Application, as well as a Supplementary Affidavit, Factum and Book of Authorities.

26. Meridian's counsel has previously raised these issues with Ms. Kirewskie. Attached hereto as **Exhibits "U"** and **"V"**, respectively, are copies of letters from Meridian's counsel to Ms. Kirewskie dated September 18 and 26, 2014.

27. The Notice of Application included in the Application Record (the "**Notice of Application**", a copy of which is attached hereto as **Exhibit "W"**)) was issued by the Ontario Superior Court of Justice on February 24, 2015 and is returnable April 2, 2015. The Notice of Application indicates that the Zirger Group is seeking a broad range of orders that go far beyond a request for leave to proceed, and includes grounds of relief under the *Farming and Food Production Protection Act* (Ontario), the *Environmental Protection Act* (Ontario), the *Planning Act* (Ontario), the *Greenbelt Act* (Ontario), the *Nutrient Management Act* (Ontario) and the *Green Energy Act* (Ontario).

BREACH OF INITIAL ORDER

28. The Receiver did not consent to the issuance of the Notice of Application or the commencement of the Application, and is not aware of any Order issued by this Honourable Court granting the Zirger Group the authority to do so. Until the late afternoon of March 27, 2015, the Receiver was not aware that the Application had been commenced. The Receiver has consented only to dates for the hearing of a motion for leave to proceed.

29. The Zirger Group (including its legal counsel, Ms. Kirewskie, in particular) knew of the Initial Order and was aware of the stay of proceedings and its effects. In fact, Ms. Kirewskie and

her partner, Paul Marshall, were present in Court when the Initial Order was made. The Zirger Group had the Notice of Application issued and commenced the Application despite such knowledge and awareness, in a deliberate and flagrant breach of the Initial Order.

URGENT NEED TO ATTEND COURT

30. The Application Record was delivered to the offices of Fogler, Rubinoff LLP late in the afternoon on Friday March 27, 2015 and the Application is, on its face, returnable Thursday April 2, 2015 (unless and until otherwise ordered by this Honourable Court). Mr. Azeff immediately wrote to Ms. Kirewskie to advise of the inappropriateness of the Zirger Party's conduct in breaching the stay of proceedings, its late delivery of its voluminous materials and its failure to bring the matter before the Commercial List. Mr. Azeff notified Ms. Kirewskie of his intention to attend before the Commercial List at a 9:30 chambers attendance on Tuesday March 31, 2015. A copy of Mr. Azeff's second letter of March 27, 2015 is attached hereto as **Exhibit "X"**.

31. In the interim, out of an abundance of caution the Receiver has had to commence its review of a significant amount of material in a very brief period of time, expending further estate resources. However, due to the late service and large volume of materials, the Receiver's counsel will have no ability to properly review and consider the Application Record and other materials, conduct any cross-examinations of the Zirger Group's affiants, or prepare and file any meaningful written responding materials.

COST AWARD

32. Since July 2014, the Receiver's counsel has attempted to accommodate the Zirger Group's supposed desire to proceed with a motion for leave. Upon receipt of each request by the Zirger

Group for dates available for the Zirger Group's motion, the Receiver's counsel responded promptly and provided a number of options. Once confirmed, the Receiver and its counsel reserved the date in their respective calendars. In some instances the Zirger Group did not even notify the Receiver that it would not be proceeding; it simply didn't serve materials and took no further steps. In other instances, the Zirger Group notified the Receiver shortly before the hearing date that it would not be proceeding as previously scheduled, and requested that the Receiver provide new dates.

33. As a direct result of the Zirger Group's pattern of repeatedly requesting dates and then failing to proceed, and other conduct in this proceeding, the Zirger Group has continuously and cavalierly wasted estate resources. In particular, the circumstances surrounding commencement of the Application and delivery of the Application Record, in flagrant breach of the Initial Order, are such that the Receiver is of the view that it would be fair and appropriate for this Honourable Court to hold the Zirger Party responsible for the resulting costs incurred by the Receiver.

34. Attached hereto as **Exhibit "Y"** is a schedule setting out the approximate amounts incurred in response to the Zirger Group's conduct since the commencement of this proceeding. The schedule indicates that a total of approximately \$24,000.00 has been spent in response to the Zirger Group's activities, conduct and correspondence since July 2014, including an amount of approximately \$6,596.00 incurred in connection with the preparation of this Second Report (but not including the associated urgent attendance before the Commercial List). Such costs do not include the significant costs incurred by Zeifman and paid by Meridian prior to the court appointment under the Initial Order, in responding to the NFPPB application that was ultimately withdrawn.

REFUSAL TO SERVE MATERIALS ON SERVICE LIST

35. The Zirger Group has refused to serve its materials on Meridian, despite it being the applicant in this proceeding and the repeated requests of both Meridian and the Receiver that it do so. Attached hereto as **Exhibit "Z"** is a copy of an email correspondence trail among the parties, in which the Receiver's counsel and Meridian's counsel request that Ms. Kirewskie serve the Zirger Group's materials on Meridian.

36. Meridian is the highest-ranking secured creditor, and is owed a substantial amount by Vandermeer. Meridian was the applicant for the Initial Order, is on the Service List and clearly has an interest in any proceeding by the Zirger Group in connection with Vandermeer and its outcome. The Receiver is not aware of any legitimate basis upon which the Zirger Group can refuse to serve its materials on Meridian and the parties on the Service List.

37. The Receiver recommends that this Honourable Court issue an Order directing the Zirger Group to serve any materials filed in this proceeding or any other proceeding in respect of Vandermeer in the future on all parties on the Service List including, in particular, Meridian.

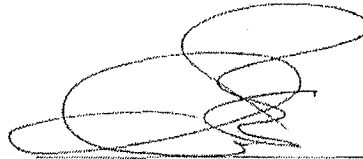
CONCLUSION

38. For all of the above reasons, the Receiver respectfully requests that this Honourable Court issue an Order:

- (a) Dismissing or staying the Application commenced by the Zirger Group;
- (b) Directing the Zirger Group to serve any materials it may file in this proceeding in the future on all parties on the Service List, including, in particular, Meridian;

- (c) Directing that the Receiver be indemnified in respect of costs in an amount determined by this Honourable Court to be reasonable and appropriate; and
- (d) Approving the activities and conduct of the Receiver and its counsel as disclosed herein.

March 30, 2015

A handwritten signature in black ink, consisting of several overlapping loops and a final horizontal stroke, positioned above a horizontal line.

ZEIFMAN PARTNERS INC., in its capacity
as the Court-appointed receiver of Vandermeer
Greenhouses Ltd. and not in its personal or
corporate capacity

MERIDIAN CREDIT UNION LIMITED
Applicant

-and-

VANDERMEER GREENHOUSES LTD.
Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**SECOND REPORT OF ZEIFMAN
PARTNERS INC., IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER**

Fogler, Rubinoff LLP
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Greg Azeff (LSUC #45324C)
Tel: 416-365-3716
Fax: 416-941-8852

Lawyers for Zeifman Partners Inc.

tab G

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MERIDIAN CREDIT UNION LIMITED

Applicant

and

VANDERMEER GREENHOUSES LTD.

Respondent

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1995 c. B-3, as amended, section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and Rule 14.05(3)(g) of the *Rules of Civil Procedure*

**FIRST REPORT OF ZEIFMAN PARTNERS INC., IN ITS
CAPACITY AS COURT-APPOINTED RECEIVER**

1. Pursuant to the Order of the Honourable Mr. Justice Spence of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated February 21, 2014 (the "**Initial Order**", a copy of which is attached hereto as **Exhibit "A"**), on the Application of the Applicant, Meridian Credit Union Limited ("**Meridian**"), Zeifman Partners Inc. was appointed as Receiver (in such capacity, the "**Receiver**") of the Respondent, Vandermeer Greenhouses Ltd. ("**Vandermeer**").

2. Vandermeer is a cut flower chrysanthemum grower located in Niagara-on-the-Lake, Ontario. Vandermeer's primary production area is a ground crop with a plant capacity of over 5.9 million stems. The property is 16.5 acres and includes a 275,000 square foot greenhouse and two

residences. Vandermeer also owns and operates an anaerobic digestion facility capable of producing over 8,000 kwh of electricity a day.

PURPOSE OF REPORT

3. The Receiver has filed this First Report in order to update the Court regarding its activities and in support of a Motion seeking an Order, among other things:

- (a) Approving the activities and conduct of the Receiver and its counsel as disclosed herein;
- (b) Authorizing the Receiver to borrow an amount of up to \$1,000,000 in order to fund the cost of the receivership proceeding; and
- (c) Approving the fees and disbursements of the Receiver and its legal counsel.

RECEIVER'S ACTIVITIES

4. Since the date of its appointment under the Initial Order, the Receiver has engaged in the following activities:

- (a) Communicated with creditors and other stakeholders;
- (b) Responded to and managed legal claims commenced by third-parties against Vandermeer and the Receiver, among others;
- (c) Negotiated and entered into the Supply Agreements (as defined below);
- (d) Managed various operational matters including:
 - (i) staffing and human resources,

- (ii) purchase of grinder and accessories for operations, and
- (iii) repair and replacement of digester equipment as required from time to time;
- (e) Communicated with third parties expressing an interest in acquiring Vandermeer's property (the "**Property**");
- (f) Entered into a short-term lease with Green Tower Industries Inc. ("**GTII**"); and
- (g) Negotiated transaction terms with prospective purchasers of the Property.

STATUS OF LITIGATION

5. Pursuant to a Statement of Claim dated December 19, 2013 (the "**Zirger Claim**"), Richard Zirger and Judi Zirger commenced an action against Vandermeer, Meridian and various other parties. A copy of the Zirger Claim is attached hereto as **Exhibit "B"**.

6. On October 23, 2014, the Receiver was provided with a copy of a Notice of Discontinuance dated October 23, 2014 in respect of the Zirger Claim. A copy of the Notice of Discontinuance is attached hereto as **Exhibit "C"**.

7. By letter dated July 22, 2014, Marshall Kirewskie, legal counsel to Richard Zirger and Judi Zirger, contacted the Receiver's counsel to advise that an application for leave to commence a proceeding before the Normal Farm Practices and Protection Board was being brought on behalf of Richard Zirger, Judi Zirger and a number of other individuals, and to request advice regarding available hearing dates for same. A copy of the letter dated July 22, 2014 is attached hereto as **Exhibit "D"**.

8. By email dated July 23, 2014 from Gregory Azeff of Fogler, Rubinoﬀ LLP, counsel to the Receiver, to Cassandra Kirewskie of Marshall Kirewskie, the Receiver provided seven (7) acceptable dates in August and September for the hearing. A copy of the email dated July 23, 2014 is attached hereto as **Exhibit "E"**.

9. By letter to the Receiver's counsel dated September 10, 2014, Cassandra Kirewskie advised that her clients would not be proceeding with their application for leave to proceed before the Normal Farm Practices and Protection Board on September 18, 2014. Ms. Kirewskie requested advice regarding the Receiver's availability for a hearing in late October and early November, 2014. A copy of the letter dated September 10, 2014 is attached hereto as **Exhibit "F"**.

10. By letter dated September 10, 2014 from Gregory Azeff to Cassandra Kirewskie, the Receiver provided its advice regarding available dates for the hearing in late October and early November, 2014. A copy of the letter dated September 10, 2014 is attached hereto as **Exhibit "G"**.

11. By letter to the Receiver's counsel dated September 29, 2014, Cassandra Kirewskie took the position that the Receiver had not replied to her correspondence of September 10, 2014, and advised that in the event she did not hear from the Receiver prior to October 2, 2014, the matter would be set down for a hearing on a date in November 2014, without regard to the Receiver's availability. A copy of the letter dated September 29, 2014 is attached hereto as **Exhibit "H"**.

12. By letter dated September 29, 2014 from Gregory Azeff to Cassandra Kirewskie, the Receiver reminded Ms. Kirewskie that it had in fact responded to her letter of September 10, 2014, and provided her with a copy of such response. The Receiver also advised as to its

availability for a hearing in November 2014. A copy of the letter dated September 29, 2014 (without enclosures) is attached hereto as **Exhibit "I"**.

13. Other than its receipt of the Notice of Discontinuance in respect of the Zirger Claim, the Receiver has not heard anything further from Ms. Kirewskie since the Receiver's letter dated September 29, 2014.

GTII LEASE

14. The Receiver anticipated completing a sale of the Property to GTII, and entered into a three month lease with GTII effective February 22, 2014. Attached hereto as **Exhibit "J"** is a copy of the lease agreement between the Receiver and GTII.

15. GTII subsequently assigned its rights under the lease to Niagara Anaerobic Digester Inc. and Niagara Anaerobic Greenhouse Inc., but remained liable thereunder.

16. GTII failed to pay certain expenses and was thus in default of its obligations under the lease agreement. By letter from the Receiver's counsel dated April 25, 2014, the Receiver notified GTII of its defaults and demanded that such defaults be remedied forthwith. GTII failed to remedy the defaults, and the lease agreement was terminated effective April 28, 2014. A copy of the letter dated April 25, 2014 is attached hereto as **Exhibit "K"**.

SUPPLY AGREEMENTS

17. The Receiver had been processing materials supplied by North American Waste Management ("NAWM"), a party related to GTII, through the digester pending completion of the sale. Unfortunately, as a result of changes to its business model, GTII did not proceed with

the proposed transaction, and with the ending of the GTII interest in the Property, NAWM ceased supplying materials for processing.

18. The Receiver agreed to accept materials from other sources to replace those previously supplied by NAWM, but such materials have proved to be in a more solid form than those supplied by NAWM, which was in a macerated state with smaller and less solid material. The mixers in the digester are unable to process material in the more-solid form, and consequently digester operations have been limited pending deliver of a grinder to accommodate raw materials.

19. Pursuant to agreements between the Receiver and each of St. Davids Hydroponics Ltd. ("SDHL") and Sanimax Limited ("Sanimax"), SDHL and Sanimax agreed to provide funding for the Receiver to purchase a Titus II Grinder & Hopper (the "Equipment") required for processing of certain types of materials. Copies of the agreements with SDHL (the "SDHL Agreement") and Sanimax (the "Sanimax Agreement") are attached hereto as Exhibits "L" and "M", respectively, with the pricing redacted.

20. Pursuant to the SDHL Agreement and the Sanimax Agreement (together, the "Supply Agreements"), the Receiver agreed to purchase the Equipment from Titus Inc. for a purchase price equal to the amount of \$151,522 and to accept materials from each of SDHL and Sanimax for processing.

21. The Supply Agreements for digester inputs are intended to complement agreements with the Ontario Power Authority for the sale of energy and are expected to enhance the value of the Anaerobic Digester segment of Vandermeer's business.

EFFORTS TO SELL PROPERTY

22. Pursuant to the Initial Order, the Receiver was authorized to market the Property for sale.

23. As noted above, although the Receiver had initially anticipated selling the Property to GTII, the proposed transaction did not proceed.

24. Pursuant to an Asset Purchase Agreement dated June 26, 2014 (the "**APA**"), the Receiver agreed to sell the Property to 2258324 Ontario Ltd. (the "**Purchaser**"). A copy of the APA (with the purchase price redacted) is attached hereto as **Exhibit "N"**.

25. The APA contained a condition precedent in favour of the Purchaser, pursuant to which the Purchaser had the opportunity to review the Zirger Claim and related materials before committing to the transaction.

26. On July 10, 2014, the Purchaser's counsel contacted the Receiver's counsel to advise that the Purchaser would not be proceeding with the transaction contemplated in the APA. The Purchaser continues to express interest but to date no further offers have been received.

RECEIPTS & DISBURSEMENTS

27. Attached hereto as **Exhibit "O"** is a copy of the Receiver's statement of receipts and disbursements for the period ended November 7, 2014 (the "**R&D Statement**").

APPROVAL OF FEES AND DISBURSEMENTS

28. The Receiver seeks approval of its fees and disbursements as well as those of its legal counsel, Fogler Rubino LLP, and its former legal counsel, Pallett Valo LLP.

29. The Receiver's accounts for the period between February 21, 2014 and October 31, 2014 include the amounts of \$103,814.05 in fees and \$2,338.07 in disbursements plus Harmonized Sales Tax ("HST") in the amount of \$13,736.44, for a total amount of \$119,888.56 (the "**Receiver's Accounts**"). Attached hereto as **Exhibit "P"** is the Affidavit of Allan Rutman of Zeifman Partners LLP sworn November 11, 2014 incorporating copies of the Receiver's Accounts, as well as a summary of the personnel, hours and hourly rates of the Receiver.

30. The accounts of the Receiver's legal counsel for the period between May 22, 2014 and October 31, 2014 include the amounts of \$10,748.00 in fees and \$70.04 in disbursements plus HST in the amount of \$1,406.37, for a total amount of \$12,224.41 (the "**Counsel Accounts**"). Attached hereto as **Exhibit "Q"** is the Affidavit of Gregory Azeff of Fogler, Rubinoff LLP, counsel to the Receiver, sworn November 12, 2014, incorporating copies of the Counsel Accounts, as well as a summary of the personnel, hours and hourly rates of the Receiver's legal counsel.

31. The accounts of the Receiver's former legal counsel for the period between February 21, 2014 and April 25, 2014 include the amounts of \$2,200.00 in fees and \$69.50 in disbursements plus HST in the amount of \$295.04, for a total amount of \$2,564.54 (the "**Former Counsel Accounts**"). Attached hereto as **Exhibit "R"** is the Affidavit of Bobby Sachdeva of Pallett Valo LLP, former counsel to the Receiver, sworn November 12, 2014, incorporating copies of the Former Counsel Accounts, as well as a summary of the personnel, hours and hourly rates of the Receiver's former legal counsel.

INCREASE TO BORROWING LIMIT

32. The Initial Order authorized the Receiver to borrow an amount of up to \$250,000 in order to fund the receivership. As shown in the R&D Statement, the Receiver requires additional funding to complete the receivership.

33. The Receiver's borrowing limit has been exceeded for reasons that include the following:

- (a) Borrowing was intended to be short term, pending completion of an Agreement of Purchase and Sale with GTII. Unfortunately, as a result of changes to its business model, GTII did not proceed with the proposed transaction. As such, funding needs are for a longer term and for a more significant amount than initially projected;
- (b) Lower than expected digester revenue; and
- (c) Weak floral sales combined with operating costs that are difficult to reduce.

34. The Receiver recommends that this Honourable Court grant an Order increasing the borrowing limit by the amount of \$750,000, to a maximum amount of \$1,000,000.

CONCLUSION

35. For all of the above reasons, the Receiver respectfully requests that this Honourable Court issue an Order:

- (a) Approving the activities and conduct of the Receiver and its counsel as disclosed herein;

- (b) Authorizing the Receiver to borrow an amount of up to \$1,000,000 in order to fund the cost of the receivership proceeding; and
- (c) Approving the fees and disbursements of the Receiver and its current and former legal counsel.

November 17, 2014

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ZEIFMAN PARTNERS INC., in its capacity
as the Court-appointed receiver of Vandermeer
Greenhouses Ltd. and not in its personal or
corporate capacity

MERIDIAN CREDIT UNION LIMITED
Applicant

-and-

VANDERMEER GREENHOUSES LTD.
Respondent

Court File No. CV-14-10443-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FIRST REPORT OF ZEIFMAN
PARTNERS INC., IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER**

Fogler, Rubinoff LLP
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Greg Azeff (LSUC #45324C)
Tel: 416-365-3716
Fax: 416-941-8852

Lawyers for Zeifman Partners Inc.

tab H

CY-15-523653
Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JAMES DELL, SOPHIE DELL, RON QUEVILLON, CHARLENE QUEVILLON, GEORGE
LEPP, ERICA LEPP, RICHARD ZIRGER, JUDY ZIRGER, DAN LAVALLE, DINO
LAVALLE, MARY LAVALLE, JOAN BOURK and, LARRY BOURK

Applicants

- and -

ZEIFMAN PARTNERS INC. as operator of the waste disposal site at 2021 Four Mile Creek
Road, Niagara on the Lake

Respondent

**APPLICATION UNDER Rule: 14.05(3), Rule 72.03 and Rule 75.06 of the *Rules of Civil
Procedure***

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim
made by the Applicants appears on the following pages.

THIS APPLICATION will be heard on *April 2, 2015* at *10 am*
in the forenoon or as soon thereafter as the application may be heard at 393 University Avenue,
Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in
the application or to be served with any documents in the application, you or an Ontario lawyer
acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the
Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have
a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you
or your lawyer must appear at the hearing.

not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATED: February 24, 2015

ISSUED BY: 

Local Registrar *(in Breen)*

Address of Court Office:

393 University Avenue

10th Floor

TORONTO

M5G 1E6

TO: Zeifman & Partners
c/o Greg Azeff
Fogler, Rubinoff
77 King Street West
Suite 3000, P.O. Box 95
TD Centre
Toronto M5K 1G8

APPLICATION

1. The Applicants make an application for:

- a) an Order lifting the stay of proceedings dated February 24, 2014;
- b) an Order pursuant to ss. 2 and 5 the *Farming and Food Production Protection Act*, 1998, S.O. 1998, c.1 declaring that the following disturbances coming from 2021 Four Mile Creek Road, Niagara on the Lake ("the Vandermeer farm") do not result from normal farm practices:
 - i) putrid, sharp and pungent odours that are frequent, offensive, intense and lingering;
 - ii) visible and invisible dust and floating and falling particles of solid material with unknown combustion, respiratory, health, environmental and explosion risks;
 - iii) unusual numbers of unsanitary and irritating flies, seagulls, rats and mice that leave droppings everywhere, including on produce grown for human consumption;
 - iv) smoke and other emissions which pose a health and food safety hazard to food crops;
 - v) frequent loud noises;
 - vi) bright lights;
 - vii) strong vibrations;
- c) an Order for the Respondent, who is currently operating the Vandermeer farm, anaerobic digester and waste disposal site, to cease the following practices as they are the cause of the disturbances listed above:
 - i) operating 24/7/365;
 - ii) operating without adequate noise and odour abatement technology;
 - iii) authorizing commercial waste disposal trucks to enter the Vandermeer farm;
 - iv) operating without taking appropriate measures to protect neighbouring farms from contamination to soil, air, water and crops;
 - v) receiving, storing, inputting, processing and/or land applying any wastes that were not generated on the Vandermeer farm;
 - vi) receiving, storing, inputting, processing and/or land applying grape pomace that was not received from a "farm operation" as defined by O. Reg. 347 of the *Environmental Protection Act*;

- vii) receiving, storing, inputting, processing and/or land applying agricultural waste that was not received from a "farm operation" as defined by O. Reg. 347 of the *Environmental Protection Act*;
- viii) receiving, storing, inputting, processing and/or land applying "off-farm anaerobic digestion materials" that were not generated at an agricultural operation and that were received from an outside source as described in O. Reg. 347 of the *Environmental Protection Act*;
- ix) receiving, storing, inputting, processing and/or land applying any wastes that were not generated by and received from a local farm operation within a 5 kilometer radius of the Vandermeer farm;
- x) inputting any materials in the digester that do not meet the legal classification of exempt agricultural materials as set out in Ont. Reg. 347 of the *Environmental Protection Act*;
- xi) inputting more than 50% of off-farm wastes into the digester;
- xii) inputting an inconsistent and variable feedstock which is the cause of many disturbances such as odourous burps from changes in the feedstock;
- xiii) receiving, storing, inputting and/ or land applying any wastes that have strong odours, such as: grape pomace; DAF; fats, oil and grease ("FOG"); spoiled peppers; spoiled dog food; spoiled and off-spec foods;
- xiv) inputting any wastes that have not been content tested and which are not a pathogen free and odourless agricultural feedstock generated at and received from an Ontario farm operation;
- xv) storing feedstock and digestate in open bunkers and close to watercourses, the Sloma Municipal Drain and Four Mile Creek;
- xvi) processing non-farm wastes;
- xvii) operating an open flare;
- xviii) venting raw biogas;
- xix) land applying non-farm wastes and/ or land applying digestate in a manner that contravenes O.Reg. 267/03;
- xx) opening the feedstock and/or digestate storage containers and leaving their contents exposed to the open air;

d) in the alternative, an Order for the Respondent to modify the following practices:

i) operating 24/7/365:

The Applicants ask this Court for an Order that the Respondent:

- minimize traffic movements on the farm by only operating between the hours of 7 am and 7 pm;
- be prohibited from operating any machinery or equipment that generates disturbances outside these hours;
- the waste disposal site be closed on weekends and holidays for the same reasons;
- the waste disposal site have seasonal rest and dormant periods annually when the greenhouses' energy requirements are reduced and when the potential for the Respondent's activities to cause harm to the Applicants' crops are at the greatest;

ii) truck deliveries and other sources of noise:

The Applicants ask this Court for an Order that the Respondent:

- take fresh steps to minimize the noise disturbances from truck deliveries, pumps, compressors, generators, the power plant and overall scheme of the operation;

iii) receiving off-farm wastes:

The Applicants ask this Court for an Order that the Respondent:

- weigh and record the weight of all loads entering the farm to ensure compliance with the Vandermeer Certificate of Approval and post this information on-line on website available to the Applicants and other concerned residents on a weekly basis;
- monitor and screen its feedstock for disease;
- carefully and thoroughly wash all vehicles, tires, clothes and footwear off as they leave the Vandermeer farm;
- take appropriate preventative measures to ensure that any waste materials it receives have been adequately pasteurized as the digester's feedstock contains plant and animal pathogens and parasites that may be dangerous to human health and crops;
- only use Vandermeer farm wastes to power the digester to reduce the amount of traffic, noise, dust, vibrations and other disturbances on and near the Vandermeer farm and to reduce the risks of contamination from the pathogenic content of the feedstock and digestate; or, in the alternative, that the Respondent minimize the impact of transporting

any local farm wastes onto the Vandermeer farm through logistics and the use of alternative methods of transportation;

- the Respondent post all of its monitoring data on line on a weekly basis to ensure compliance with this Order;

iv) storing wastes:

The Applicants ask this Court for an Order that the Respondent:

- totally enclose the Vandermeer storage facilities and keep the digester feedstock and digestate covered at all times to prevent odours and pathogens from escaping;
- ensure that the buildings on the site be made airtight to eliminate odours escaping through the building envelope;
- install the best available technology for eliminating or abating odours from its storage facilities and also from any other part of its operation or activities that create odour;
- ensure that the feedstock is stored for a maximum of 10 days to enhance bio-security and to reduce the risk of cross-contamination;
- store only farm wastes as a feedstock for the digester to enhance bio-security and to reduce the risk of cross-contamination as well as the amount of traffic, noise, dust, vibrations and other disturbances on and near the Vandermeer farm;
- minimize the impact of run-off through soil erosion avoidance techniques and the use of a storage cover at all times;
- have a vegetated filter strip designed, engineered and constructed by a qualified person to intercept and treat runoff by settling, filtration, dilution, adsorption of pollutants and infiltration into the soil as set out in the O. Reg. 267/03 of the *Nutrient Management Act, 2002*, S.O. 2002, c.4;

v) Inputting non-farm wastes:

The Applicants ask this Court for an Order that:

- the Respondent use only on-farm agricultural wastes to power the digester to reduce the amount of traffic, noise, dust, vibrations and other disturbances on and near the Vandermeer farm;
- the Respondent be prohibited from receiving, storing, inputting, processing any wastes that were not generated by and received from a local farm operation;
- the Respondent totally enclose its storage facilities and keep its feedstock covered at all times to prevent odours and pathogens from escaping;
- the Respondent input a consistent, pathogen free and odourless feedstock;

vi) Processing wastes:

The Applicants ask this Court for an Order that:

- The Respondent avoid drastic changes to the feedstock to reduce the number of biogas “burps” and to reduce odours, control pathogens and reduce the risk of cross-contamination;
- the Respondent take appropriate preventative measures to ensure that any waste materials it processes at the Vandermeer farm have been properly pre-treated and/or pasteurized as the digester’s feedstock contains plant and animal pathogens and parasites that may be dangerous to human health and crops;
- the Respondent implement a practice to test all wastes prior to their processing;
- the Respondent implement such testing and inspection on site;
- the Respondent check moisture loads for health and safety reasons;

vii) Land applying digestate:

The Applicants ask this Court for an Order that:

- any resultant waste material that is not land applied on the Vandermeer farm be transported by carriers or brokers who have a Certificate of Approval to do so and appropriate training and that spill procedures will be in place;
- the Respondent be required to test all materials that leave the farm and that it be required to share the findings of such testing with the Applicants as soon as such material leaves the Vandermeer farm;
- the Respondent implement a practice to test all digestate and other resulting products to alleviate the risk of cross-contamination;
- the Respondent implement such testing and inspection on site;
- the Respondent create a Nutrient Management Plan for the storage, handling and disposal of its digestate that governs the location, rates and time of year its digestate may be land applied which complies with the *Nutrient Management Act, 2002*, S.O. 2002, c.4 and Regulations;
- the Respondent use or dispose of the digestate in a manner that prevents excess run-off to underground or surface waters;
- the Respondent use only safe and approved methods of transporting the digestate;

viii) lighting:

The Applicants ask this Court for an Order that the Respondent:

- take fresh steps to minimize the light disturbances from truck deliveries and the industrial type spot lighting around the farm;
- take steps to address the visual impact of its activities by creating an appropriately sized berm and planting mature trees to screen and reduce the wind flow, reduce noise, light and dust disturbances;

ix) operating without a bio-filter:

The Applicants ask this Court for an Order that:

- the Respondent be required to purchase two bio-filters, one of which is to be installed immediately and the other which is to be stored on site, together with spare parts as a contingency to ensure that it is continuously taking all available measures to reduce the odour disturbances resulting from its activities;
- that such bio-filters will reflect the best available technology;

x) operating an open flare:

The Applicants ask this Court for an Order that:

- The Respondent enclose the flare to reduce the risk of fire, explosion and emissions as such smoke and lights are disturbances which are uncontrolled and unregulated;

xi) Contingency measures:

The Applicants ask this Court for an Order that the Respondent:

- take appropriate measures to be able to isolate the waste disposal site in the event of a catastrophe, fire, explosion, contamination or other emergency;
- e) an Order pursuant to s. 2(1.1) of the *Farming and Food Production Protection Act, 1998*, S.O. 1998, c.1 declaring that the Respondent's receipt of wastes, treatment, nutrient management, storage, management, transport, land application and records keeping practices are inconsistent with O. Reg. 267/03 of the *Nutrient Management Act, 2002*, S.O. 2002, c.4 and as such are not normal farm practices;
- f) an Order for the Respondent to disclose all of its records pertaining to its financial, maintenance and operational records;
- g) an Order declaring that the Normal Farm Practices and Protection Board is biased;
- h) an Order that this Honourable Court assume jurisdiction of this matter and hear it;

- i) costs on a substantial indemnity scale; and,
- j) such other and further relief as counsel may advise and this Honourable Court permit.

2. The grounds for this application are that:

- a) the Applicants are tender fruit growers and/or residents who live in close proximity to the Vandermeer farm;
- b) the Certificate of Approval the Ministry of Environment ("the MOE") granted to the owner of the Vandermeer farm on October 30, 2009 converts the entire farm to a waste disposal site;
- c) the Applicants are experiencing the following disturbances:
 - i) putrid odours;
 - ii) smoke and other emissions;
 - iii) excessive noise;
 - iv) vibrations;
 - v) unusually large numbers of seagulls, rats and mice;
 - vi) bright lights; and,
 - vii) swarms of flies;
- d) the Applicants believe that the Respondent's practices on the Vandermeer farm are the source of these disturbances as follows:
 - i) putrid odours from the materials used to feed the digester and from feedstock stored in open bunkers, which the Applicants believe includes: food waste from Tim Horton's; spoiled and off-spec pet food waste; grape pomace from off-farm anaerobic digestion materials; rotting produce; fat, oil and grease from unknown sources; silage; chicken parts and manure; rodents; spoiled soft drinks; and, waste water from food processing;
 - ii) smoke and other emissions from the diesel generator, the feedstock storage bunkers, the digester and the open flare which often runs 24 hours a day for as many as 12 days on end to burn excess gas and which gives the rural neighbourhood an industrial appearance and which places the waste disposal site at risk of explosion;
 - iii) excessive noise heard both outside and within the Applicants' homes with the doors and windows closed. Noise from: machinery; vehicles; trucks and traffic; loaders banging; pumps; the tractor used to move feedstock; the generator; and the bird audio-deterrent used to scare birds away from the feed bunkers;
 - iv) vibrations, the source of which is unclear but must includes vibrations from machinery and vehicular traffic;
 - v) unusually large numbers of seagulls which paint outdoor furniture, bbq's, cars, walkways, decks, patios, trees and everything in their path white with seagull droppings and make it impossible for the Applicants to have the benefit of and to

enjoy the use of their outdoor spaces, creating a health hazard and risking the safety of the Applicants' food crops;

vi) bright lights that enter homes at odd hours disturbing residents and preventing them from getting a restful night's sleep;

vii) swarms of flies which leave their droppings everywhere, and make it impossible for the Applicants to have the benefit of and to enjoy the use of their outdoor spaces, creating a health hazard and risking the safety of the Applicants' food crops; and,

vii) unusually large numbers of rats and mice whose presence threatens the food safety of crops intended for human consumption and who live in such large numbers that a snowy owl has taken up residence near the site as it provides a stable source of food;

- e) both the MOE and the Ministry of Agriculture ("OMAFRA") have confirmed that the Vandermeer farm is the source of these disturbances;
- f) the Respondent had been operating the Vandermeer farm as a private receiver from July 19, 2011 until it was appointed the Receiver of Vandermeer Greenhouses' business and assets on February 24, 2014;
- g) as the Applicants are not creditors of Vandermeer, they were denied standing in the receivership application;
- h) the December 2, 2014 Order approving the Respondent's activities as Receiver does not approve of the practices that are the subject of this application;
- i) no Court or tribunal has considered whether the disturbances coming from the site are as a result of normal farm practices;
- j) the MOE and OMAFRA have repeatedly told the Applicants that they should seek such a determination;
- k) the Receiver is receiving, storing, processing and land applying wastes that the Applicants believe violate the Certificate of Approval and other applicable laws;
- l) the Vandermeer waste disposal site is permitted to operate without any time restrictions, that is 24 hours a day, 7 days a week, 365 days a year when other neighbouring farms do not create disturbances at night, weekends or holidays and when other anaerobic digester projects have limited hours of operation and even industrial waste disposal sites are not permitted to operate continuously;
- m) the Applicants have worked with the owner, the Town of Niagara on the Lake, the Region of Niagara, the MOE and OMAFRA to mitigate these and other nuisances but, despite any changes that have been made to the site and its operation, the practices on the site continue to deprive the Applicants of the use and enjoyment of their homes, properties and farms;

- n) the Respondent's practices threaten some of the Applicants' livelihoods as they believe, and have in some cases been advised, that the emissions and other disturbances coming from the site are damaging their crops and rendering them unsafe for human consumption;
- o) the Applicants believe that the Respondent is not using the legally required percentage of on-farm and/ or agricultural source materials to feed the digester, as such, the Applicants believe that the activities on the site are not normal farm practices;
- p) this Honourable Court has jurisdiction to decide whether the activities on the site are normal farm practices as the Normal Farm Practices Board cannot give the Applicants a fair hearing;
- q) the Applicants state that the factual elements required to prove a violation of Ontario law are under the control of the Respondent or of a government agency. Without government cooperation, the Applicants have little possibility of meeting the evidentiary burden imposed by the *Act*, and would therefore effectively be denied access to the courts. And since Ontario law creates no alternative mechanism for resolving this type of disputes, the Applicants would be unable to obtain relief in respect of significant land-use disturbances. The Applicants state that this represents an unacceptably broad encroachment on traditional common law rights and as a result, require disclosure of all of the records pertaining to the farm and digester's operation, which are in the possession of the Respondent. The Applicants have no access to this information. While they have attempted to inform themselves through FOI requests, the MOE has not released all of its information to them, refused continuing access and required them to make a separate request for information from May 21012 (the date of their request) to the present;
- r) If this Court does not hear the Applicants' application, the Applicants will never have recourse against the effect on have to wait until the Respondent concludes a sale of the site to challenge the legality of the activities being carried on there, which would deprive the Applicants of their legal rights;
- s) the Receiver has been operating the digester since July 2011 and in that time, has only disclosed one potential purchaser, Green Tower Industries, a waste disposal and management company based in Quebec, not a farmer, who decided not to complete the purchase for reasons unknown to the Applicants;
- t) it could be years before the Vandermeer farm is sold, if ever;
- u) the Applicants will continue to suffer a greater and on-going inconvenience from not having the nature of the activities legally determined than the Respondent would from having this Court consider whether the practices on the site are normal farm practices;
- v) the Applicants will be denied access to justice if their application is not heard;

- w) *The Farming and Food Production Protection Act*, 1998, S.O. 1998, Ch.1, ss. 2(1.2) and 5;
- x) *The Environmental Protection Act*, R.S.O., c. E. 19;
- y) *The Planning Act*,
- z) *The Greenbelt Act, 2005*, S.O. 2005, c.1;
- aa) *The Nutrient Management Act, 2002*, S.O. 2002, c. 4;
- bb) *The Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A.; and
- cc) Rules 1, 2, 14, 38, 39 and 59 of the *Ontario Rules of Civil Procedure*.

3. The following documentary evidence will be used at the hearing of the application:

- i) the affidavit of Richard Zirger, sworn January 7, 2015;
- ii) the affidavit of Judi Zirger, sworn January 7, 2015;
- iii) the affidavit of Sophie Dell, sworn January 9, 2015;
- iv) the affidavit of Charlene Quevillon, sworn February 19, 2015;
- v) the affidavit of Ron Quevillon, sworn February 19, 2015;
- vi) the affidavit of Nick Kirewskie, sworn February 24, 2015; and,
- vii) such further and other materials as counsel may submit and this Honourable Court permit.

February 24, 2015

Marshall Kirewskie
Barristers & Solicitors
 201 – 88 Dunn Street
 Oakville, ON
 L6J 3C7

Paul Marshall
 LSUC #: 33983T

Cassandra Kirewskie
 LSUC #: 36765H

Tel: (905) 842-5070
 Fax: (905) 842-4123

Counsel for the Applicants

Zirger et al.

- and -

Zeifman Partners Inc.

Court File No.:

SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPLICATION

Marshall Kirewskie
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Solicitors for the Applicants

tab I



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April 1, 2015

Reply To: Greg Azeff
Direct Dial: 416.365.3716
E-mail: gazeff@foglers.com
Our File No. 14/3857

VIA EMAIL

Marshall Kirewskie
Barristers and Solicitors
88 Dunn Street, Suite 201
Oakville, ON
L6J 3C7

Attn: Cassandra Kirewskie

Dear Ms. Kirewskie:

Re: Richard Zirger, Judi Zirger, James Dell, Sophie Dell, Ron Quevillon, Charlene Quevillon, Dino Lavallo, Mary Lavallo, Dan Lavallo, Larry Bourk, Joan Bourk, Robert Zirger, Sharon Zirger, George Lepp, Erica Lepp and Mark Lepp v. Vandermeer Greenhouses and Niagara Anaerobic Digester Inc. 2021 Four Mile Creek Road, Niagara on the Lake

We are prepared to have your Application adjourned *sine die* provided that you agree to bring a proper motion to lift the stay of proceedings, within the receivership proceeding, before the Commercial List, as mandated by paragraph 29 of the Initial Order. You will also agree to bring any such motion on proper notice to the service list in the receivership proceeding.


We have no issue with an expedited timeline for the hearing of such a motion. If you are granted leave to proceed, then you can bring your Application back on.

If these conditions are not acceptable to you, then we will attend tomorrow to request that your Application be dismissed in its entirety and will seek costs.

Please advise.

Yours truly,

FOGLER, RUBINOFF LLP


Greg Azell
GA/cc

cc: Allan Rutman

tab J

FILE/DIRECTION/ORDER

BEFORE JUDGE RST MORAWETZ

COURT FILE # CV-15-522653

Ziger

Plaintiff(s)

Vs

Zeifman

Defendant(s)

COUNSEL: Paul Marshall + Cassandra Kireoskie Phone No: _____

for Applicant

Greg Rzeff and Joshua Freeman Phone No: _____

for Respondent

J. Ross TheFarlane for Recusor

A) REPORTED SETTLED () COUNSEL TO TAKE DISMISSAL ORDER.

B) NOT READY; ADJOURN TO: _____

D) NOT READY; STRUCK OFF THE LIST ()

C) OTHER: _____

The Application has been issued in contravention of the Recusor's
Order - Paragraph 7. The Application is stayed pending the return
of a proper motion for leave to be brought in the Recusor's process
on return to the Service List. Service to be effected in accordance
with the E-Service Protocol used in Commercial List matters.

Scheduling to be done through Commercial List Office
Costs of today to be addressed by the judge hearing
the leave motion.

April 2, 2015

DATE

RST

JUDGE'S SIGNATURE

tab K



Marshall Kirewskie

Barristers & Solicitors

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Nick Kirewskie
OFFICE MANAGER
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May 15, 2012

By Regular Mail & Fax to: (519) 826-3259

Normal Farm Practices Protection Board
Ministry of Agriculture, Food and Rural Affairs
1 Stone Road West
Guelph, Ontario
N1G 4Y2

Dear Board Members:

RE: Vandermeer Nurseries' Anaerobic Digester
2021 Four Mile Creek Road Niagara on the Lake L0S 1J0
Certificate of Approval #9512-70NNZJ (October 30, 2009)

We represent Judy and Richard Zirger. The Zirgers live at 59 Hunter Road, RR #3, Niagara on the Lake, next to Vandermeer Nurseries. Together with other residents, the Zirgers have been experiencing unusual vibrations, noises, odours and other disturbances.

The Zirgers believe that the source of all these and other disturbances is Vandermeer Nurseries' anaerobic digester. For some time, they and other residents have been working with Vandermeer Nurseries and officials from the Province of Ontario (both the Ministries of Environment and Agriculture), the Town of Niagara on the Lake and the Region of Niagara to eliminate these disturbances.

The Town of Niagara on the Lake has established a working group to deal with complaints emanating from the anaerobic digester. The Vandermeer Working Group is comprised of the following members:

- Don Hilborn, OMAFRA
- Randy van Berkel, Vandermeer Greenhouse
- Hugh Fraser, OMAFRA
- Paul Cline, MOE
- George Lepp, Farm Representative
- Lola Emberson, Town of NOTL
- Richard Zirger, neighbour

88 Dunn Street, Suite 201, Oakville, ON L6J 3C7
Tel: (905) 842-5070 Fax: (905) 842-4123 E-mail: mklaw@bellnet.ca

- Charlene Quevillon, neighbour
- Dan LaValle, neighbour
- Ron Planche, EA to Kim Craitor, MPP
- Stephen Bedford, Town of NOTL
- Sandra Philip, Region of Niagara, Public Health

From time to time other individuals representing other stakeholders join the Group. The Working Group meets regularly to document and address odour and noise complaints.

While some steps have been taken to reduce odours and noise from the site, the Zirgers continue to experience disturbances that cannot be resolved through the process in place. In the Zirgers' view, these disturbances are not only interfering with the enjoyment and use of their property, but also pose health and safety risks.

The Working Group's mandate is to ameliorate the sounds and odours coming from the digester. It cannot decide whether operating a waste disposal site is a normal farm practice. Nor can it determine whether the conversion of off-site generated organic waste at the Vandermeer site to commercial energy is a normal farm practice. More importantly, the Group lacks the power to order that the digester cease operating.

Neighbours have been encouraged to bring an application for a Hearing before this Board at Working Group meetings. Accordingly, please find enclosed both a Hearing Application on the prescribed form and a Notice of Application for a Hearing before the Board following the *Ontario Rules of Civil Procedure*.

Given that there have been very significant efforts made by both parties and also by third parties to address and resolve the Zirgers' complaints and that those efforts have been unsuccessful, the Applicants respectfully ask the Board to use its discretion to waive its pre-hearing mediation requirement. For the reasons set out herein and in our Notice of Application, we respectfully ask that the Board accept our application for a Hearing. Kindly confirm your acceptance of our application and advise as to when this matter will be heard.

Thank you.

Sincerely,



Paul Marshall

/nk

Encls.

MERIDIAN CREDIT UNION LIMITED
Applicant

-and-

VANDERMEER GREENHOUSES LTD.
Respondent

Court File No. CV-14-10443-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**THIRD REPORT OF ZEIFMAN
PARTNERS INC., IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER**

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Lawyers for Zeifman Partners Inc.