

**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*

**MOTION RECORD**

March 30, 2015

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AND TO: **FLETT BECCARIO**  
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# Index

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**INDEX**

<b>TAB</b>	<b>DOCUMENT</b>
1	Notice of Motion dated March 30, 2015
2	First Report of Zeifman Partners Inc. in its capacity as Court-Appointed Receiver dated March 30, 2015
A	Initial Order dated February 21, 2014
B	Statement of Claim dated December 19, 2013
C	Notice of Discontinuance dated October 23, 2014
D	Letter from M. Kirewskie to G. Azeff dated July 22, 2014
E	Email from G. Azeff to C. Kirewskie dated July 23, 2014
F	Letter from C. Kirewskie to G. Azeff dated September 10, 2014
G	Letter from G. Azeff to C. Kirewskie dated September 10, 2014

TAB	DOCUMENT
H	Letter from C. Kirewski to G. Azeff dated September 29, 2014
I	Letter from G. Azeff to C. Kirewski dated September 29, 2014
J	Letter from C. Kirewski to G. Azeff dated January 16, 2015
K	Letter from G. Azeff to C. Kirewski dated January 27, 2015
L	Letter from C. Kirewski to G. Azeff dated January 27, 2015
M	Letter from G. Azeff to C. Kirewski dated January 29, 2015
N	Letter from C. Kirewski to G. Azeff dated February 6, 2015
O	Letter from G. Azeff to C. Kirewski dated February 12, 2015
P	Letter from C. Kirewski to G. Azeff dated February 13, 2015
Q	Letter from C. Kirewski to G. Azeff dated February 15, 2015 (received March 6, 2015)
R	Letter from G. Azeff to C. Kirewski dated March 26, 2015
S	Letter from C. Kirewski to G. Azeff dated March 26, 2015
T	Letter from G. Azeff to C. Kirewski dated March 27, 2015
U	Letter from R. Macfarlane to C. Kirewski dated September 18, 2014
V	Letter from R. Macfarlane to C. Kirewski dated September 26, 2014
W	Notice of Application dated February 24, 2015
X	Letter from G. Azeff to C. Kirewski dated March 27, 2015
Y	Schedule re approximate amounts incurred
Z	Email correspondence chain among the parties
3	Draft Order

**tab 1**

**ONTARIO  
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**NOTICE OF MOTION**

Zeifman Partners Inc. ("**Zeifman**"), in its capacity as Receiver (in such capacity, the "**Receiver**") of all of the assets, undertakings and properties owned by Vandermeer Greenhouses Ltd. ("**Vandermeer**") acquired for or used in connection with the business carried on by Vandermeer (collectively, the "**Property**"), will make a Motion, on an urgent basis, to a Judge presiding over the Commercial List on March 31, 2015 at 9:30 a.m., or as soon after that time as the Motion can be heard at the court house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

**PROPOSED METHOD OF HEARING:** The Motion is to be heard orally.

**THE MOTION IS FOR:**

- (a) An Order staying or dismissing the application against Zeifman commenced on February 24, 2015 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**") before the Ontario Superior Court of Justice in Toronto in Court File No. CV-15-522653 (the "**Application**");
- (b) An Order 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 Credit Union Limited ("**Meridian**");
- (c) An Order directing that the Zirger Group and/ or its counsel pay to the Receiver costs in such amounts as may be determined by this Honourable Court to be reasonable and appropriate; and
- (d) Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

- (a) The Receiver was appointed pursuant to the Order of the Honourable Mr. Justice Spence of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") issued February 21, 2014 (the "**Initial Order**"). Meridian was the applicant for the Initial Order;
- (b) The Initial Order contains, among other things, a stay of proceedings prohibiting the commencement or continuation of any proceeding or enforcement process in

any court or tribunal against the Receiver, Vandermeer or the Property without the written consent of the Receiver or leave of the Court;

- (c) During the period between July 2014 and March 2015, the Zirger Group requested details regarding the Receiver's availability for a motion on at least six (6) separate occasions;
- (d) Upon receipt of each such request, the Receiver promptly provided the Zirger Group with multiple dates upon which its motion for leave could proceed. However, the Zirger Group failed to proceed;
- (e) In January 2015, counsel to the Zirger Group delivered to the Receiver a set of draft affidavits, without exhibits, prepared in connection with some proceeding that the Zirger Group intended to commence (provided it was granted leave), and again requested the Receiver's consent for it to do so;
- (f) The Receiver again denied the request for consent, and again provided a number of available dates for the hearing of the Zirger Group's motion for leave;
- (g) On March 6, 2015, the Zirger Group advised that its motion for leave would be returnable on April 2, 2015. The Receiver once again confirmed its availability for that date;
- (h) 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 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 that the Zirger Group confirm that the motion would not be proceeding on Thursday April 2, 2015;

- (i) At approximately 9:28 p.m. on Thursday March 26, 2015, the Zirger Group sent a letter (by facsimile transmission) to the Receiver's counsel, Fogler, Rubinoff LLP, 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 the attention of the Receiver's counsel until the next morning (*i.e.*, on Friday March 27, 2015);
- (j) 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;
- (k) The Notice of Application (the "**Notice of Application**") included in the Application Record was issued by the Ontario Superior Court of Justice on February 24, 2015. The Notice of Application seeks a broad range of relief including 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);

- (l) The Receiver did not consent to the issuance of the Notice of Application or the commencement of the Application. Until the late afternoon of March 27, 2015, the Receiver was not aware that the Application had been commenced;
- (m) No Order has been issued by this Honourable Court granting the Zirger Group the authority to have the Notice of Application issued by the Court or otherwise proceed with the Application or any other proceeding;
- (n) 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. 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;
- (o) The Application Record includes 6 Affidavits with a total of 275 exhibits. Along with the Application Record, the Zirger Group delivered a Supplementary Affidavit, Factum and Book of Authorities;
- (p) There is no urgency to the Zirger Group's intended proceeding and no legitimate excuse for late service of any materials in connection with any motion for leave to proceed;
- (q) As a direct result of the Zirger Group's pattern of repeatedly requesting dates and then failing to proceed, the Zirger Group has wasted estate resources;
- (r) As the Application Record was received late in the day 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), 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;

- (s) Due to its late service and large volume of materials, the Receiver 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 provide any meaningful written responding materials;
- (t) As this receivership proceeding was commenced and is continuing before the Commercial List division of the Court, any motion in this proceeding must be brought before that division as well;
- (u) The Zirger Group has refused to serve its materials on Meridian, despite its inclusion on the Service List in this proceeding and the repeated requests of both Meridian and the Receiver that it do so;
- (v) The relief sought by the Receiver herein is just and appropriate in these circumstances. The Zirger Group's conduct has unnecessarily lengthened the duration and cost of these proceedings. The Receiver estimates costs incurred in response to the Zirger Group's conduct to be in excess of \$20,000 (exclusive of HST) including review of the Application materials and preparation of the Motion Record herein;
- (w) The Application is, on its face, frivolous, vexatious and improper, and is an abuse of the process of the court;

- (x) the Initial Order including, in particular, paragraphs 7, 8 and 9 thereof;
- (y) Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, as amended;
- (z) Sections 101, 106 and 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended;
- (aa) Rules 2.1.0, 37.01, 37.05, 38 and 57.07 of the *Ontario Rules of Civil Procedure*; and
- (bb) Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

- (a) The Second Report of the Receiver dated March 30, 2015; and
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 30, 2015

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Lawyers for the Court-Appointed Receiver,  
Zeifman Partners Inc.

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

**NOTICE OF MOTION**

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Lawyers for the Court-Appointed Receiver,  
Zeifman Partners Inc.

**tab 2**

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**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 Lavallo, Dino Lavallo, Mary Lavallo, 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, Rubino 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 30<sup>th</sup> or Tuesday March 31<sup>st</sup>. 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 large, overlapping loops and a final horizontal stroke.

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

**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 A**

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

THE HONOURABLE MR.

)

FRIDAY, THE 21<sup>ST</sup>

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 appearing for ~~[NAME]~~ <sup>any other person on the service list</sup> 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.

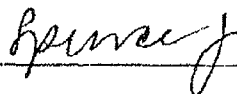
28. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver 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  
ON / 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**

Court File No.: *CV-13-49525-2*

**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: *PERMANENT 19, 2013* ISSUED BY: Christina Lewis  
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
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AND TO: ATTORNEY GENERAL OF ONTARIO  
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## Table of Contents

I.	Summary of Claim .....	4-9
II.	The Plaintiff's Claim.....	9-13
III.	The Parties.....	13-17
IV.	Factual Summary .....	17-41
V.	Liability of the Defendants .....	42-53
VI.	Plaintiffs' Injuries .....	53-54

### 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 13<sup>th</sup>, 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 13<sup>th</sup>, 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 FIT 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 8<sup>th</sup> 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.

n) 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) PLANet 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 digestate.
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 1 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 14<sup>th</sup> 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 7<sup>th</sup> 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 14<sup>th</sup>, 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 14<sup>th</sup>, 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 18<sup>th</sup>, 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 18<sup>th</sup> 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 18<sup>th</sup>, 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 31<sup>st</sup>, 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 7<sup>th</sup>, 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 13<sup>th</sup>, 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 7<sup>th</sup>, 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 13<sup>th</sup>, 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.

**MARSHALL KIREWSKIE**

Barristers & Solicitors  
201 - 88 Dunn Street  
Oakville, Ontario  
L6J 3C7

Paul Marshall  
LSUC #: 33983T

Cassandra Kirewskie  
LSUC #: 36765H

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

Counsel for the Plaintiffs

**tab C**

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 23<sup>rd</sup> day of October, 2014.**

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Cassandra Kirewskie  
Barristers & Solicitors  
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Tel: (905) 842-5070

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Solicitors for the Plaintiffs

TO: **GREGORY AZEFF**  
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Tel: (416) 365-3716  
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Counsel for Constellation Brands Canada Inc.

**LISE FAVREAU**  
Courtney Harris  
Crown Law Office Civil  
Constitutional Law Branch  
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Attorney General, Crown Law Office – Civil

**J. ROSS MACFARLANE**  
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Counsel for PlanET Biogas Solutions Inc.

Zirger

- and -

Vandermeer Greenhouses Ltd. et al.

Court File No.: CV-13-495252

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

**NOTICE OF DISCONTINUANCE**

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

**Paul Marshall (#33983T)  
Tel: (905) 842-5070x223  
Cassandra Kirewskie (#36765H)  
Tel: (905) 842-5070x224  
Fax: (905) 842-4123**

**Solicitors for the plaintiffs**

**tab D**



# Marshall Kirewskie

## Barristers & Solicitors

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**Cassandra Kirewskie**  
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E-mail: ckirewskie@bellnet.ca

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

July 22, 2014

By Fax: 416-941-8852

Gregory Ryan Azeff  
Fogler Rubino LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8


Dear Mr. Azeff:

**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 in the process of completing our application for leave to commence a proceeding before the Normal Farm Practices and Protection Board. Would you kindly advise as to your availability for hearing dates in the next month?

We look forward to hearing from you.

Sincerely,

  
Cassandra Kirewskie  
P. /nk

c. Clients

**tab E**

**Eng, Chloe**

---

**From:** Azeff, Greg  
**Sent:** Wednesday, July 23, 2014 4:15 PM  
**To:** 'ckirewskie@bellnet.ca'  
**Cc:** 'jrmacfar@flettbeccario.com'  
**Subject:** Vandermeer - Available dates

Cassandra: We have received your letter regarding your intended motion for leave. I have consulted with Mr. Macfarlane (cc'ed), who will also be making submissions at the hearing. August is proving difficult due to vacation schedules, but we are both available on any of the following dates:

August 12  
September 8, 10, 12, 15, 18 or 19

Please let me know which date you would prefer.

Thanks,  
Greg

**fogler  
rubinoff**

**Greg Azeff**  
**Partner**  
Fogler, Rubinoff LLP  
Lawyers  
77 King Street West  
Suite 3000, P.O. Box 95  
TD Centre North Tower  
Toronto, ON M5K 1G8  
Direct: 416.365.3716  
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[foglers.com](http://foglers.com)



*Proud to be named one of Ontario's Top 10 Regional Firms by Canadian Lawyer magazine 2013*

**tab F**



# Marshall Kirewskie

## Barristers & Solicitors

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**Cassandra Kirewskie**

M.A., LL.B.

E-mail: ckirewskie@bellnet.ca

**Nick Kirewskie**

OFFICE MANAGER

E-mail: mklaw@bellnet.ca

September 10, 2014

By Fax: 416-941-8852

Gregory Ryan Azeff  
Fogler Rubloff LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

**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 write to advise you that we will not be proceeding on September 18<sup>th</sup> with our application for leave to proceed against your client at the Normal Farm Practices Protection Board. We have decided to file our application in Toronto and understand from court staff that the court is booking October 31<sup>st</sup>, and the first 2 weeks of November except for November 6, 7, and 13<sup>th</sup>. Please provide us with your availability on 3 separate dates within this window so that we may complete the requisition form.

Sincerely,

A handwritten signature in cursive script, appearing to read 'C. Kirewskie', is written over the word 'Sincerely,'.

Cassandra Kirewskie  
/nk

---

88 Dunn Street, Suite 201, Oakville, ON L6J 3C7

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**tab G**



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September 10, 2014

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 Lavalley, Mary Lavalley, Dan Lavalley, 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**

I am writing in response to your September 10, 2014 letter. I will be available for any of the suggested dates, except for November 12 and 13, 2014.

Yours truly,

**FOGLER, RUBINOFF LLP**



Greg Azeff  
GA/ce

cc: Allan Rutman

**tab H**



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ckirewskie@bellnet.ca

Nick Kirewskie, Office Manager  
mklaw@bellnet.ca

September 29, 2014

By Fax: 416-941-8852

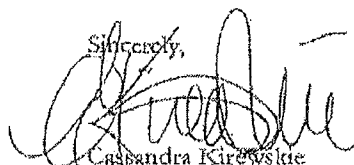
Gregory Ryan Azeff  
Fogler Rubinoff LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

RE: Joan Bourk; Larry Bourk; Reinhard Suelzle; Rosa Marano; Rosglia Zambito; Mario Spiewak; James Dell; Sophie Dell; Alfred Dyck; Pat McMaster; Jim McMaster; Carol Van Egmond; Ron Quevillon; Charlene Quevillon; Rick Meloen; Janet Meloen; Bruce Moore; Kristina Moore; Mary Lavalley; Sandra Moore; Jamie Werstroh; Jenna Osborne; Mike Frena; Tracey Frena; Alex Fast; Sue Fast; Robert VanNoort; Sharon VanNoort; George Lepp; Victor Klassen; Lynda Klassen; Brandon Berry; Sarah Berry; Richard Zirger; Judy Zirger; Paul Thiessen; Joanne Thiessen; Erica Lepp; Mark Lepp; Dan LaValle; Dino Lavalley; Arnold Mikolajewski; and, Esther Mikolajewski v. Zelfman Partners Inc.

We have not had the courtesy of a reply to our letter of September 10, 2014 asking for your availability. As some time has passed, the initial window we presented has closed. The next available dates for a long hearing are: November 10, 17, 24.

If we do not hear from you by Thursday October 2, 2014 as to your availability, we will set the application down for a hearing and file this correspondence with the Court as proof that we were unable to agree to a timetable.

Sincerely,  
  
Cassandra Kirewskie  
/nk

cc: Clients

**tab I**



Fogler, Rubinoff LLP  
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September 29, 2014

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

**VIA EMAIL & FAX**

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

Attn: Cassandra Kirewskie

Dear Ms. Kirewskie:

**Re: Joan Bourk et al. v. Zeifman Partners Inc.**

We have received your letter of today's date and have been provided with copies of correspondence between you and Mr. Macfarlane of last week, and take this opportunity to respond thereto.

With respect to your letter to the undersigned, we responded to your letter of September 10, 2014 on that same date and direct you to the attached letter in that regard. We are not responsible for your failure to set the matter down for a hearing on a timely basis.

We confirm that we are available on November 17 and 24, 2014 for the hearing, and note that this letter now represents the third time we have advised you of our availability for your motion.

With respect to your correspondence with Mr. Macfarlane, we agree that the Commercial List is the appropriate forum for the hearing of your motion, and that the appropriate proceeding for same is the receivership in which the stay was issued. Your position that Meridian Credit Union (*i.e.*, the creditor that brought the application for the order appointing the Receiver and granting the stay of proceedings) has no standing or interest in the matter is puzzling, to say the least. While you are free to move forward as you deem appropriate, you are advised that the Receiver neither consents to nor agrees with your intended course of action and will advise the court accordingly, if and when you do proceed.

We trust that the foregoing is sufficiently clear.

Yours truly,

**FOGLER, RUBINOFF LLP**

  
Greg Azeff  
GA/ce

cc: Allan Rutman  
J. Ross Macfarlane

Encl.

**tab J**



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Nick Kirewskie, Office Manager  
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January 16, 2015

**By Courier**

Gregory Ryan Azeff  
Fogler Rubino LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

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. Zeifman Partners as operator of 2021 Four Mile Creek Road, Niagara on the Lake

Since I wrote to you last, we have been in contact with the MOE. We understand that Paul Cline, the MOE's agricultural officer, conducted a site visit this past week following questions we raised about your client's new construction activities on the Vandermeer farm. In our view, the MOE has confirmed that it had no knowledge of your client's new construction or other related activities or their purpose. If this information is incorrect, kindly advise.

Would you also advise as to the nature of the work being performed and its purpose? In the spirit of openness and of maintaining good relations with the neighbouring farms and residences, would you also ask your client to provide us with a copy of the approvals it obtained to construct the new structures on site and to conduct the activities and practices they are intended to facilitate? We note that there is no record of an amendment proposal on the Environmental Registry.

We have also learned that on December 3, 2014, the Court approved of your client's request to increase the amount it is authorized to borrow from \$250,000.00 to \$1,000,000.00. We strongly suspect that your client requested these additional funds to cover the costs of the new construction.

Can you advise as to how the changes to the farm fulfill an agricultural purpose? We note that your client has made agreements with a waste disposal company, Sanimax, and St. David's Hydroponics. We gather that these agreements are to provide waste materials for storage and processing on the Vandermeer farm. Would you kindly provide us with evidence that the MOE has approved of these changes in the feedstock for the anaerobic digester?

Could you also advise as to whether your client provided the Court with copies of building permits from the Town of Niagara on the Lake?

We have enclosed draft copies of our affidavit evidence. We would like to bring the following aspects of our record to your attention. First, the case law has established two thresholds for granting leave to commence proceedings against a court appointed receiver. In *Bank of Commerce Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.) Blair J. notes that a number of authorities have taken the view that leave will normally be granted to a creditor unless it is perfectly clear that there is no foundation for the claim or the action is frivolous or vexatious.

In *Willann*, Blair J. took the view that the "normal" threshold is too low where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court. In such cases, where there have been numerous orders approving the conduct and activities of the Receiver, Blair J. suggested the Court adopt the test for the granting of an interlocutory injunction adopted by Chadwick J. in *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.) appeal dismissed (1991), 4 O.R. (3d) 608 (Ont. C.A.). That test is a "reasonable cause of action" or, "strong prima facie case."

Blair J. went on to clarify that the judicial protection a stay provides is in situations "where the approved conduct and the conduct subject to the proposed attack are in substance the same." With respect, no Court has considered whether your client's practices are normal farm practices. Consequently, the conduct that is the subject of the Applicants' application is not in substance the same as any conduct that might have been approved of by the Court. While this suggests that the appropriate test to apply would be the first, lower threshold, there is another issue to consider. That issue is whether the established tests apply to this situation.

As you know, our clients are not creditors of Vandermeer Greenhouses. They are not parties to the bankruptcy litigation. The case law only speaks to how creditors may obtain leave. There is no case law that sets out the test to be applied for non-creditors who wish to obtain a ruling as to the legality of the Receiver's activities on a farm.

The *Farming and Food Production and Protection Act* is a public interest statute. As such, the Receiver cannot contract out of its provisions: *Busse Farms Ltd. v. Federal Business Development Bank* [1997] 5 W.W.R. 34. The *Act's* preamble sets out its purposes:

It is desirable to conserve, protect and encourage the development and improvement of agricultural lands for the production of food, fibre and other agricultural or horticultural products. Agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands.

Because of the pressures exerted on the agricultural community, it is increasingly difficult for agricultural owners and operators to effectively produce food, fibre and other agricultural or horticultural products.

It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.

None of these purposes support the view that a farm in receivership causing nuisances for its neighbours should be treated differently than other farms.

Section 2(1) of the *Act* provides that a “farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.” The *Act* defines “farmer” as “the owner or operator of an agricultural operation” and a “disturbance” as “odour, dust, flies, light, smoke, noise and vibration.” The *Act* defines “normal farm practice” as a practice that,

- (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or,
- (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices.

Section 2 (1.1) of the *Act* provides that a “practice that is inconsistent with a regulation made under the *Nutrient Management Act, 2002* is not a normal farm practice.” Section 5 permits any person directly affected by a disturbance from an agricultural operation to apply to the Normal Farm Practices and Protection Board for a ruling on whether the disturbance is part of normal farm practice.

On application, the Board has three distinct powers, it may

- (a) dismiss the application if the Board is of the opinion that the disturbance results from a normal farm practice;
- (b) order the farmer to cease the practice causing the disturbance if it is not a normal farm practice; or
- (c) order the farmer to modify the practice in the manner set out in the order so as to be consistent with normal farm practice.

Section 6.1 of the *Act* places a limitation on the Board’s power. It states:

Despite any provision in section 4, 5 or 6 that gives the Board the power to determine whether a farm practice is a normal farm practice, the Board shall determine that a farm practice is a normal farm practice for the purposes of this Act if the practice is consistent with a regulation made under the *Nutrient Management Act, 2002*.

The legislative history of the *Act* does not contain any discussion that would support the view that the Legislature intended to exempt farms in receivership from the operation of the *Act*. Similar legislation exists across Canada. To our knowledge, no Canadian province has exempted a farm in receivership from legal scrutiny for its practices. In our view, it would be contrary to the principles set out in the *Act* to deny the Applicants a remedy for nuisances created by a farm in receivership. There is no legal or policy ground to justify treating nuisances created by a farm in receivership differently from those created by a solvent operation.

By refusing to grant leave, the Court would be denying access to justice. We sincerely doubt that your client will be able to persuade the Court that it should deny the Applicants a remedy when your client continues to change its practices on the Vandermeer farm without any legal oversight.

We believe that the lower threshold test applies in this case. That is to say that leave will be granted unless your client can prove that it is perfectly clear that there is no foundation for the Applicants' application or that the application is frivolous or vexatious.

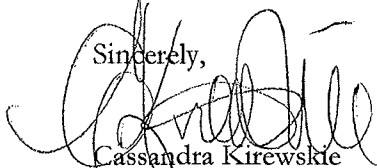
The Applicants must show that they have been affected by a disturbance and that your client's practices are the source of the disturbances. Our affidavits attach MOE records that document the disturbances coming from the Vandermeer farm. Those records demonstrate that the MOE believes your client to be the source of those disturbances. If your client refuses to consent, it will not be able to dispute this evidence. Nor will it be able to dispute that neither the MOE nor OMAFRA has the power to decide whether your client's practices are normal farm practices. As we have attached numerous exhibits where such advice was confirmed between MOE and OMAFRA officials, your client will also have to overcome the fact that both Ministries apparently see the merits of our clients' position and repeatedly advised them to seek a ruling as to whether your client's activities are normal farm practices. In light of this evidence, we do not see how your client can convince the Court that there is no foundation for our application or that it is frivolous or vexatious. We believe that the Court will not allow your client to use the Order as sword to prevent the Applicants from obtaining a legal determination as to whether its practices are legal.

While your client might consider withholding its consent on the basis that we intend to file our application in the courts, we believe that we have adduced enough evidence of bias for the Court to conclude that the Board lacks structural independence. We take the view that our decision to seek a court ruling is consistent with Dambrot J.'s comment that special circumstances could warrant an application under the *Act* being brought directly to the Court.

Kindly advise as to whether your client is prepared provide its consent to the filing of our application.

We look forward to hearing from you at your very earliest opportunity.

Sincerely,



Cassandra Kirewskie  
cc: clients

Encls.

**tab K**



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Lawyers

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January 27, 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 have received your letter of January 16, 2015 enclosing copies of the draft affidavits of Judy Zirger, Richard Zirger, Charlene Quevillon and Nick Kirewskie.

As no exhibits were included with the draft affidavits we are unable to consider your request at this time. Accordingly, at your earliest convenience please provide copies of all exhibits referenced in the affidavits.

Yours truly,

**FOGLER, RUBINOFF LLP**

  
Greg Azeff  
GA/cc

**tab L**



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Cassandra Kirewskie, M.A., LL.B.  
ckirewskie@bellnet.ca

Nick Kirewskie, Office Manager  
mklaw@bellnet.ca

January 27, 2015

BY FAX TO: 416-941-8852

Gregory Ryan Azeff  
Fogler Rubinoff LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

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. Zeifman Partners as operator of 2021 Four Mile Creek Road, Niagara on the Lake

We acknowledge receipt of your letter of today's date. We are not willing to provide you with copies of the exhibits at this time. We provided your client with a draft of our affidavits as a courtesy. Your client does not require copies of the exhibits in order to assess whether it is perfectly clear that there is no foundation for our application or whether it is frivolous or vexatious. It is obvious from the materials we have already provided that the Applicants are raising serious issues and that their concerns about the legality of your client's practices are well founded.

We first wrote to you on January 13<sup>th</sup>. We provided our draft affidavits on January 17<sup>th</sup>. Your client is delaying our hearing at the same time it is making substantial changes at the Vandermeer farm. Your client is fully apprised of the nature of the disturbances our clients are experiencing and has possession of all of the records pertaining to the Vandermeer operation. Your client knows that the only evidence as to its practices in our possession are the redacted records of a third party. Your client has care and control over all of the records of how it operates the anaerobic digester and of the testing that has been done by the MOE.

Your client knows that the Applicants are experiencing disturbances as a result of its practices and it knows which of its practices are causing the Applicants to experience putrid odours, strong vibrations, irritating dust, emissions and smoke. Your client certainly knows that its practice of dumping grocery store wastes and storing it in open bunkers is attracting mice, rats, seagulls and insects. If there is an issue on which your client needs to be satisfied in order to provide its consent, kindly advise.

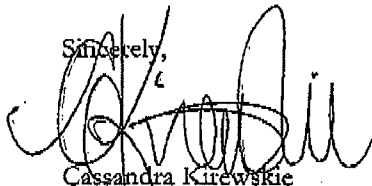
As you know, none of the practices we seek to challenge have been approved of by the Court. Both OMAFRA and MOE officials have told our clients that the only way forward is for them to seek a legal determination as to whether your client's activities are normal farm practices. Can your client explain to the Court why it believes the matters the Applicants wish to raise lack foundation or are frivolous and vexatious? We do not see a basis for your client to successfully bar the Applicants from having their day in court.

While your client might insist on a hearing before the Board, we urge you to recognize that the Board's lack of structural independence is a risk to your client as much as it is a risk to ours. The Board cannot make the legal findings that are required in this case. It may have expertise in respect of identifying disturbances but, does not have the competence to make legal determinations as to whether your client is complying with the Certificate of Approval and the numerous statutes that regulate the anaerobic digester on the farm. The findings that need to be made exceed the Board's jurisdiction.

If your client will not consent to the filing of our application, kindly provide your availability for a motion in the next month. Please note that we will provide the Court with a copy of all the letters wherein we sought your client's consent. Please be advised that we will also be filing an additional affidavit concerning the leachate management system on the Vandermeer farm. That affidavit will attach photographs of the food wastes your client has dumped on the property and pictures of the new equipment it has installed. It will also detail the extensive resources the MOE has committed to conduct an air monitoring study to measure the emissions from the digester, details of which your client is no doubt already aware.

We look forward to hearing from you by Friday January 30th.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Kirewskie', written over the word 'Sincerely,'.

Cassandra Kirewskie  
cc: Clients

**tab M**



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January 29, 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**

Thank you for your letter of January 27, 2015.

Firstly, you did not provide copies of your draft affidavits "as a courtesy"; you did so in connection with your request that the Receiver consent to your matter proceeding despite the stay of proceedings. It is patently absurd for you to make such request while refusing to provide copies of the evidence upon which you supposedly intend to proceed.

Secondly, while we will refrain at this time from specifically addressing the countless baseless allegations in the draft affidavits and your recent correspondence at this time, you are assured that we do not agree with them. However, we do find confusing your criticism regarding the Board's alleged lack of "structural independence", given that your clients had previously commenced proceedings before it (prior, of course, to their voluntary withdrawal of such proceedings). In our view, your clients' suggestion that the Board is biased against them is completely meritless. Similarly unpersuasive is your clients' suggestion that the Board was incorrect in respecting the stay of proceedings.

Thirdly, this is now the fourth time you have contacted us with respect to your supposed motion for leave to proceed. On each previous occasion we provided you with available dates shortly after your request, yet you inexplicably failed to proceed.

Of particular note was your request made September 10, 2014; despite the fact that we provided you with multiple available dates within hours of such request, when we next heard from you on September 29, 2014, you had once again failed to take any steps to proceed with your motion and, bizarrely, attempted to blame our office for not providing you with dates.

Nevertheless, by response dated September 29, 2014 (a copy of which is enclosed herein), we once again provided you with multiple available dates. Your response? Another failure to proceed.

It is abundantly clear from the correspondence that you are the sole cause of the delays in your matter proceeding. You have repeatedly wasted my time as well as that of the representatives of the Receiver and the other parties involved in this matter, all at the expense of the estate, and we specifically reserve the right to seek costs against your clients for same.

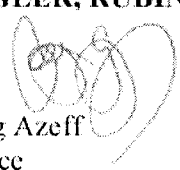
Notwithstanding the above, we confirm our availability for your motion on any day during the weeks of February 23<sup>rd</sup> and March 9<sup>th</sup>, 2015.

Finally, you can rest assured that copies of all previous correspondence between our offices with respect to this matter will be brought before the court if and when you do actually proceed.

We trust that the foregoing is satisfactory.

Yours truly,

**FOGLER, RUBINOFF LLP**



Greg Azeff  
GA/cc

Enclosure

**tab N**



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Nick Kirewskie, Office Manager  
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February 6, 2015

**BY FAX TO: 416-941-8852**

Gregory Ryan Azeff  
Fogler Rubinoff LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

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. Zeifman Partners as operator of 2021 Four Mile Creek Road, Niagara on the Lake

Thank you for your letter of January 29<sup>th</sup>. We have not yet received your reply to our letter of January 28<sup>th</sup> wherein we asked for your advice as to whether the Vandermeer property has been sold. Could you please advise as to whether your client is currently entertaining any offers to purchase the farm and business?

As you know, there is no obligation on our clients to provide yours with any drafts of our evidence. The courtesy we extended to you was to give your client an opportunity to review the record so that it make an informed decision as to whether it should provide its consent to avoid cost sanctions in the event that our motion for leave is successful. The record we have drafted, combined with the knowledge your client already has, amply demonstrates that our application is not frivolous or vexatious.

With respect to your comments concerning our correspondence some months ago asking for your availability for a hearing in Toronto, when we wrote to you on September 29<sup>th</sup>, we had not received your emailed correspondence dated September 10<sup>th</sup>. For some unknown reason, your email was apparently directed to my junk mail folder. I apologise for our miscommunication at that time but, it is a small matter in the context of this matter as a whole and, I note that as your client has

continued to operate the Vandermeer digester and has also apparently made changes to the site and feedstock without prior MOE approval, it has suffered no prejudice from the time it has taken the Applicants to assemble their evidence.

With respect, the real issue is not who is responsible for any perceived delay in setting our motion for leave down for a hearing but, whether your client should bear the responsibility, in costs, for the expense our clients have been put to. Had your client have consented, we could have avoided this step and had our application heard on the merits months ago. Had your client have allowed our application to proceed before the Board, our clients would not have been put to the expense of drafting extensive affidavit evidence to meet the test for leave. We would have presented oral evidence at the Board on the merits of our application. Your client made this step necessary and ought to be responsible for all the costs incurred as a result.

Your client has known at least since it became Vandermeer's private receiver on July 19, 2011 that neighbours had made many, many complaints about the nuisances they were enduring. Your client certainly knows which of its practices is responsible for each of these disturbances. Given that the Town of Niagara on the Lake set up a Working Group to deal with the disturbances emanating from the Vandermeer farm and called that group the "Vandermeer Working Group," can there really be any doubt as to whether our application has a foundation?

Does your client have any evidence to prove that the disturbances we complain of do not exist, or if it admits that they do, that it is not responsible for them? Does your client have any evidence to prove that its practices on the Vandermeer site do not create disturbances?

A majority of the exhibits we have attached are documents generated by the MOE or OMAFRA. Given that the Certificate of Approval obliges your client to keep records of each and every complaint regarding the operation of the site, we are confident that your client is fully apprised of how its practices are affecting its neighbours.

Your client had notice of the Zirgers' previous application to the Normal Farm Practices Board and appeared as the Respondent to answer it. It fought our requests for disclosure and accused our clients of abusing the process when we sought an adjournment to allow us enough time to receive the MOE's answer to our *Freedom of Information* request, which we did not receive until May 2014, well after the time the Board had set down the matter to be heard peremptorily for February 19, 2013. Your client tried to block us from having the evidence we needed to prove our case. If our application lacked a foundation, was frivolous and vexatious, why did your client oppose orders for disclosure? When the MOE finally provided us with its reply, it forwarded over 4,000 pages of records. Such a volume hardly suggests that the Government of Ontario considers this matter frivolous and vexatious.

With respect, we are surprised that you find our criticism of the Board's lack of structural independence "confusing" as we provided detailed reasons for withdrawing our application to the Board in our letter dated December 7, 2012. We described the reasons why our clients had a reasonable apprehension that the Board was biased. While it is certainly your client's prerogative to view these as "meritless," we have adduced evidence that supports our position.

Your client was also a party to a law suit Judi and Richard Zirger brought. While they have since discontinued their claim to focus on a legal process that has a better chance of leading to an amelioration of the smells, noises, smoke, vibrations and other disturbances they have been enduring

for years, the claim provided your client with further information concerning the foundation for the Applicants' application.

We pointed out to you in a previous letter that the jurisprudence on the test for leave is directed at creditors. As none of our clients are creditors, it is not even clear that the test applies in this case. If it does not, there is nothing in the *Food Production and Protection Act* to support your client's view that our application is barred by the stay of proceedings. Had the Legislature intended to exclude farms in receivership from scrutiny as to whether their practices are lawful, it would have said so. The fact that it did not lends credence to our view that the stay does not prevent the Court from making a determination as to whether your client's practices are lawful.

Your client does not need to review every single exhibit to assess whether our application is well founded or frivolous. The exhibits are fully described in the text of our draft affidavits. Both the MOE and OMAFRA counselled our clients to seek a ruling as to whether the disturbances they are experiencing are as a result of normal farm practices. If your client is prepared to reconsider our request, and genuinely requires certain exhibits to make a final decision, kindly advise and we will forward those. We have refrained from sending an entire version of our record to save the costs of photocopying and for no other purpose.

Your client has in its possession all of the evidentiary records pertaining to the feedstock, its pre-processing (if any) content, origins, and quantities. It also has control over all the records of MOE and OMAFRA site inspections, monitoring and investigations. Your client is obliged to keep records of sampling and testing activities at the site, monitoring activities, inspections, staff training, annual reports (including the amount of digestate transferred from the site), the quantity and source of organic waste, the name of the companies delivering the waste, the quantity and type of waste stored and processed at the site, the quantity and type of residual and rejected waste, house and site cleaning activities, specifics concerning the operation and duration of the flare's use, records of whether the wastes delivered to the site were in approved trucks, records of the operations manual, and records of the contingency and response plan. None of our clients has access to these records or any ability to keep similar records. If your client is searching a reason as to why it took ours as long as it did to assemble the evidence we have put before you, it should look first to this imbalance. The Manitoba Law Reform Commission has identified this as an area that is ripe for reform. Our clients are required to build their case and to prove that they have a foundation for their case in the absence of the evidence we have listed above.

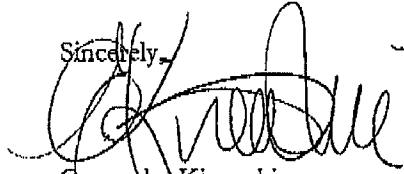
When we appeared on behalf of the Zirgers before the Board, your client resisted Orders for disclosure of evidence. It was insistent that we go forward in the absence of full disclosure. To obtain that, we engaged the FOI process but have been in the hands of the MOE as to when we would receive the records we sought. Our access to some of the records was delayed or denied by the objections we believe your client made. We have had to take additional steps to attempt to secure access to records that were denied to us.

With respect to your suggestion that we have made "countless baseless allegations" in our draft affidavits, we remind you of your obligation to conduct yourself in a civil manner. In our view, your characterization of the evidence we intend to lead attacks the competency of counsel and is thus uncivil. As you know, the requirement for civility extends throughout the judicial process. In Michael Code's words, "the right to a fair trial includes the right to be protected against the uncivil behaviour of an opponent..." Civility requires that we do not make personal attacks on opposing counsel; we should not attack their integrity or their competence. If we think opposing counsel is dishonest or incompetent, we can address those concerns through the court process. Given the

history we have set out herein, our clients have hardly made "countless baseless allegations." If your comment is directed to our allegation that the practices we have identified are not normal farm practices, with respect, your client is not the proper party to make this determination.

While we have your availability for the end of February and up to March 9<sup>th</sup>, we have been advised that the Court is booking potential hearing dates commencing after March 9<sup>th</sup>. Would you kindly provide us with your availability for the entire month of March as well as the first week of April?

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Kirewskie', written over the word 'Sincerely,'.

Cassandra Kirewskie

/nk

cc: Clients

**tab 0**



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February 12, 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 refer to your letter dated February 6, 2015. Apologies for the unusually delayed response but the undersigned was away on vacation until February 10, 2015.

To address your query, we confirm that the property has not been sold.


With respect, we do consider that your clients' draft affidavits contain a great number of erroneous statements. However, we confirm that our comments were not directed at the competency of counsel, but rather, to the content of the affidavits themselves, which we assume were based on information provided to you by your clients. We apologize if there was any misunderstanding in this regard, as we consider civility between counsel to be of the utmost importance.

You have our position with respect to your request for leave to proceed. Accordingly, we confirm our current availability on any of the following: March 18, 23, 24, 25, 26, 30 and 31; April 1, 2, 7, 8 and 9. However, we ask that you please confirm the date at your earliest opportunity so that we need not keep these dates free for an inordinately long period of time.

We trust that the foregoing is satisfactory.

Yours truly,

**FOGLER, RUBINOFF LLP**

  
Greg Azeff  
GA/cc

**tab P**



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Nick Kirewskie, Office Manager  
mklaw@bellnet.ca

February 13, 2015

BY FAX TO: 416-941-8852

Gregory Ryan Azeff  
Fogler Rubinoff LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

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. Zeifman Partners as operator of 2021 Four Mile Creek Road, Niagara on the Lake

Thank you for your letter of yesterday's date.

Our clients have reviewed your correspondence and are very concerned that your client has accused them of misleading the Court in some way. Could you please clarify which of their statements is false in your client's view? As the affidavits are in draft form, we will take the opportunity to correct any wrong information your client identifies to ensure that the Court has the best possible evidence.

We confirm that we will set our motion down to be heard on March 25<sup>th</sup>.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Kirewskie', is written over the word 'Sincerely,'.

Cassandra Kirewskie  
/nk

cc: Clients

**tab Q**



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Nick Kirewskie, Office Manager  
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February 5, 2015

By Fax 416-941-8852

Gregory Ryan Azeff  
Fogler Rubino LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON, M5K 1G8

Dear Mr. Azeff:

**RE: Joan Bourk; Larry Bourk; Reinhard Suelzle; Rosa Marano; Rosglia Zambito; Mario Spiewak; James Dell; Sophie Dell; Alfred Dyck; Pat McMaster; Jim McMaster; Carol Van Egmond; Ron Quevillon; Charlene Quevillon; Rick Meloen; Janet Meloen; Bruce Moore; Kristina Moore; Mary Lavalley; Sandra Moore; Jamie Werstroh; Jenna Osborne; Mike Frena; Tracey Frena; Alex Fast; Sue Fast; Robert VanNoort; Sharon VanNoort; George Lepp; Victor Klassen; Lynda Klassen; Brandon Berry; Sarah Berry; Richard Zirger; Judy Zirger; Paul Thiessen; Joanne Thiessen; Erica Lepp; Mark Lepp; Dan LaValle; Dino Lavalley; Arnold Mikolajewski; and, Esther Mikolajewski v. Zeifman Partners Inc.**

We write to advise that the Motion has been confirmed for Thursday April 2, 2015.

Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read 'C. Kirewskie', is written over the word 'Sincerely,'. Below the signature, the name 'Cassandra Kirewskie' is printed in a small, sans-serif font. To the left of the printed name is a small, handwritten mark that looks like 'nk'.

**tab R**



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Lawyers

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March 26, 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 refer to your letter received on March 6, 2015 advising that you intended to bring a Motion for leave on April 2, 2015.

You have yet to serve materials (despite having sent draft affidavits, without exhibits, on January 16, 2015).

You have exceeded the service timeline for the delivery of your materials pursuant to the Rules of Civil Procedure. My client will have no opportunity to cross examine your affiants or file responding materials. As such, this Motion cannot proceed.

Please confirm that this Motion will be adjourned (assuming it has not been abandoned). In the event we are required to attend on April 2<sup>nd</sup>, we will seek costs against your clients.

Yours truly,

**FOGLER, RUBINOFF LLP**

  
Greg Azeff  
GA/ce

**tab S**



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Cassandra Kirewske, M.A., LL.B.  
ckirewske@bellnet.ca

Nick Kirewski, Office Manager  
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March 26, 2015

BY FAX TO: 416-941-8852

Gregory Ryan Azeff  
Fogler Rubinoff LLP  
3000 - 77 King Street West  
PO Box 95  
Toronto, ON  
M5K 1G8

Dear Mr. Azeff:

RE: Richard Zirger, Judi Zirger, James Dell, Sophie Dell, Ron Quevillon, Charlene Quevillon, Dino Lavalle, Mary Lavalle, Dan Lavalle, Larry Bourk, Joan Bourk, Robert Zirger, Sharon Zirger, George Lepp, Erica Lepp and Mark Lepp v. Zeifman Partners as operator of 2021 Four Mile Creek Road, Niagara on the Lake

We write further to your letter of earlier today.

We have taken some time to review the exchange of correspondence concerning the scheduling of our application for leave to lift the stay and have drafted an additional affidavit attaching our correspondence for the Court's benefit.

We intend to proceed on April 2<sup>nd</sup>. As you will note from the exchange of correspondence, we first wrote to you on May 22, 2014. We provided you with draft copies of our affidavit evidence on January 16<sup>th</sup>. We confirmed the Court date on March 6<sup>th</sup>.

It has taken your client almost 11 months of correspondence to raise the possibility of examinations. With respect, your client has had since at least January 16<sup>th</sup> to advise us of its desire to examine our clients. Had your client have advised us in a timely fashion, time for examinations could have been built into the scheduling of the hearing. It was not built into the schedule as your client never indicated anything other than it was ready to proceed on April 2<sup>nd</sup>.

At this time, we could not even arrange examinations as some of our clients are out of the country on winter holidays. Had your client had provided us with notice of its intention to examine, we could have set up a schedule, avoided these costs and any delay your client may cause.

As we have previously advised your client, the threshold test on a leave application is fairly low. The Court has found that the more stringent test of requiring the Applicants to demonstrate a strong *prima facie* case will only apply in situations where the allegations could have been raised in earlier proceedings or where the conduct subject to the proposed attack is in substance the same as the conduct approved earlier by the Court: *80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc.* [2008] O.J. No. 269.

As a result, the only relevant evidence your client could adduce is that the Court has approved of its conduct. We have reviewed the Court's file and see no evidence that the practices the Applicants complain of have been brought to the Court's attention, let alone approved by it.

As a result, the only issue for the Court to decide is whether there is some foundation for our application that some of your client's practices on the Vandermeer farm are not normal farm practices and that the application is not frivolous and vexatious.

We believe that the evidence we will file tomorrow, which your client has already seen (except for one affidavit which sets out our understanding of the new construction your client has embarked upon at the Vandermeer farm without the MOE's knowledge or approval) will meet that threshold.

We will file a confirmation notice on Monday. Kindly advise if you will still be seeking an adjournment.

Sincerely,



Cassandra Kirewskie

/nk

cc: Clients

**tab T**



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March 27, 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 refer to your letter of March 27, 2015.

Your position on this matter is puzzling. You have failed to comply with the *Rules of Civil Procedure*, which require service of motion materials at least seven days in advance. What makes this failure particularly bizarre is the fact that you seemed to have affidavits prepared, in draft, in January, yet you still haven't served your materials. April 2<sup>nd</sup> represents the sixth date for which we have confirmed our availability. On each previous occasion, you failed to proceed, without explanation. There is obviously no urgency to this matter, yet you now intend to short serve your materials, and deny us our right to cross examine your affiants.


With respect to your comments regarding cross-examination, we simply cannot fathom why you think we should have notified you of any intention to cross-examine before you have served your materials. Typically, such notice is given after an affidavit has been served. Delivery of a set of draft affidavits, without exhibits, does not constitute service.

You have refused our entirely reasonable request to adjourn this matter. Consequently, we have no choice but to attend a 9:30 chambers attendance on Tuesday next week to seek an

adjournment. We intend to bring all previous correspondence on this matter to the court's attention, and will seek costs against your clients. Please confirm your availability to attend.

Yours truly,

**FOGLER, RUBINOFF LLP**



Greg Azoff  
GA/cc

cc: Ross Macfarlane

**tab U**

# FLETT BECCARIO

(Founded 1919)

Flett Beccario, Barristers & Solicitors  
Mailing: P. O. Box 340, Welland, ON L3B 5P9  
Courier: 190 Division Street, Welland, ON L3B 4A2

Tel: 905-732-4481  
Toll Free 1-866-473-5388

Reply To: **J. Ross Macfarlane**, Ext. 274  
Fax No: (905) 732-2020  
E-mail: [jrmacfar@flettbeccario.com](mailto:jrmacfar@flettbeccario.com)  
Assistant: Colleen Balint, Ext. 277

**VIA FAX (905) 842-4123**

September 18, 2014

Marshall Kirewskie  
Barristers & Solicitors  
88 Dunn Street  
Suite 201  
Oakville, Ontario  
L6J 3C7

**Attention: Cassandra Kirewskie**

Dear Ms. Kirewskie:

Re: **Zirger v. Vandermeer Greenhouses Ltd.**

Thank you for your letter dated September 17, 2014.

Meridian Credit Union Limited (there is no "Meridian Bank") is the applicant in this proceeding and the senior secured creditor with an interest in the property that is the subject of your clients' allegations. To take the position that it has no interest in matters affecting the receivership is unjustifiable.

The Commercial List requires Co-operation, Communication, and Common Sense: your reply is antithetical to these principles.


I have given you my availability for hearing dates. If you choose another date without confirming my availability, I will send an agent to request an adjournment. The waste of the court's time and my client's costs will be for your account. If you persist in refusing to serve me with your materials, I will simply obtain a copy from counsel for the Receiver.

At this juncture I should note that I am not able to estimate the time required to argue your motion without having seen your motion materials. I would both respectfully suggest and request that rather than scheduling a 10:00 hearing to argue the matter, you schedule a 9:30 appointment at first

instance, on a mutually convenient date, so that all affected parties (being your clients, the Receiver, and all parties on the service list in the receivership) can have input to the amount of time required for argument and the timetabling of responding materials, reply materials, cross-examinations, examinations of witnesses, facta, and all other steps that may be required for a proper hearing of the matter. I am more than willing to cooperate with you to have the matter dealt with expeditiously and efficiently.

If you choose to follow the path you have indicated, our exchange of correspondence will form part of Meridian's responding materials.

Yours truly,



**J. ROSS MACFARLANE**  
For the Firm

JRM\*cb

c.c.: Bernie Huber  
Greg Azeff



# 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

September 17, 2014

**By Fax: 1-905-732-2020**

Ross Macfarlane  
Flett Beccario  
Barristers & Solicitors  
190 Division Street  
Welland, Ontario  
L3B 4A2

Dear Mr. Macfarlane:

**RE: Joan Bourk; Larry Bourk; Reinhard Suelzle; Rosa Marano; Rosglia Zambito; Mario Spiewak; James Dell; Sophie Dell; Alfred Dyck; Pat McMaster; Jim McMaster; Carol Van Egmond; Ron Quevillon; Charlene Quevillon; Rick Meloen; Janet Meloen; Bruce Moore; Kristina Moore; Mary Lavalley; Sandra Moore; Jamie Werstroh; Jenna Osborne; Mike Frena; Tracey Frena; Alex Fast; Sue Fast; Robert VanNoort; Sharon VanNoort; George Lepp; Victor Klassen; Lynda Klassen; Brandon Berry; Sarah Berry; Richard Zirger; Judy Zirger; Paul Thiessen; Joanne Thiessen; Erica Lepp; Mark Lepp; Dan LaValley; Dino Lavalley; Arnold Mikolajewski; and, Esther Mikolajewski v. Zeifman Partners Inc.**

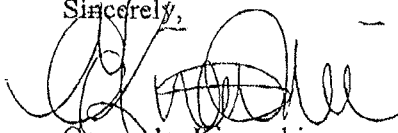
We write further to your letter of September 11<sup>th</sup>.

The individuals listed above intend to be Applicants in this matter. Each of the individuals listed is experiencing disturbances which they believe emanate from the Vandermeer farm. In time, other individuals may also come forward to complain about the effect of the activities on the farm on their crops, homes and health.

While we understand that your client may be interested in the outcome of our application, we are of the view that once the Court appointed a receiver, the Receiver became an officer of the Court, answerable to all interested parties but not an agent of Meridian Bank. Consequently, we do not believe that your client has standing in either our application for leave or, if successful, in our application for a determination as to whether the activities on the Vandermeer property are normal farm practices. As a result, we will not be serving our materials on your client or consulting your client with respect to any hearing dates.

If you can provide evidence that your client is the farmer who is operating the agricultural operation at 2021 Four Mile Creek Road, we will certainly review it.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cassandra Kirewskie', written over a horizontal line.

Cassandra Kirewskie  
/nk

cc: Clients

**tab V**

# FLETT BECCARIO

(Founded 1919)

Flett Beccario, Barristers & Solicitors  
Mailing: P. O. Box 340, Welland, ON L3B 5P9  
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Reply To: **J. Ross Macfarlane**, Ext. 274  
Fax No: (905) 732-2020  
E-mail: [jrmacfar@flettbeccario.com](mailto:jrmacfar@flettbeccario.com)  
Assistant: Colleen Balint, Ext. 277

**VIA FAX (905) 842-4123**

September 26, 2014

Marshall Kirewskie  
Barristers & Solicitors  
88 Dunn Street  
Suite 201  
Oakville, Ontario  
L6J 3C7

**Attention: Cassandra Kirewskie**

Dear Ms. Kirewskie:

Re: **Zirger v. Vandermeer Greenhouses Ltd.**

Thank you for your letter dated September 26, 2014.

The only proper route for your clients to seek leave is via a motion brought in the receivership proceeding. Based upon your correspondence since July 22, 2014, you appear to be suggesting that you will be commencing a new, separate application in the Superior Court (not on the Commercial List), against a Receiver appointed by an order of the Superior Court (Commercial List), solely for the purpose of seeking leave to commence an application to the Normal Farm Practices Protection Board.

What you are proposing, apparently for the sole purpose of trying to avoid having my client's position represented in court, is a multiplicity of proceedings as prohibited by s. 138 of the *Courts of Justice Act*.

Whether you like it or not, Meridian Credit Union Limited will be represented at your hearing. You can do it cooperatively, or you can do it the way you are proposing.

Again, please include me directly in any discussions of scheduling.

Yours truly,

A handwritten signature in dark ink, consisting of a series of fluid, overlapping loops and strokes, positioned above the printed name.

**J. ROSS MACFARLANE**

For the Firm

JRM\*cb

c.c.: Bernie Huber  
Greg Azeff



# 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: nklaw@bellnet.ca

September 26, 2014

By Fax: 1-905-732-2020

Ross Macfarlane  
Flett Beccario  
Barristers & Solicitors  
190 Division Street  
Welland, Ontario  
L3B 4A2

Dear Mr. Macfarlane:

**RE: Joan Bourk; Larry Bourk; Reinhard Suelzle; Rosa Marano; Rosglia Zambito; Mario Spiewak; James Dell; Sophie Dell; Alfred Dyck; Pat McMaster; Jim McMaster; Carol Van Egmond; Ron Quevillon; Charlene Quevillon; Rick Meloen; Janet Meloen; Bruce Moore; Kristina Moore; Mary Lavalle; Sandra Moore; Jamie Werstroh; Jenna Osborne; Mike Frena; Tracey Frena; Alex Fast; Sue Fast; Robert VanNoort; Sharon VanNoort; George Lepp; Victor Klassen; Lynda Klassen; Brandon Berry; Sarah Berry; Richard Zirger; Judy Zirger; Paul Thiessen; Joanne Thiessen; Erica Lepp; Mark Lepp; Dan LaValle; Dino Lavalle; Arnold Mikolajewski; and, Esther Mikolajewski v. Zeifman Partners Inc.**

We write further to your letter of September 18<sup>th</sup>.

Please note the proper style of cause in this matter. Contrary to your letter, Meridian Credit Union Limited is not the applicant in these proceedings.

As we noted in our previous letter to you, the individuals listed above intend to be Applicants in this matter. Each of the individuals listed is experiencing disturbances which they believe emanate from the Receiver's activities on the Vandermeer farm. Your client, to the best of our knowledge, is not operating the farm. As such, we see no grounds for your claim to have standing.

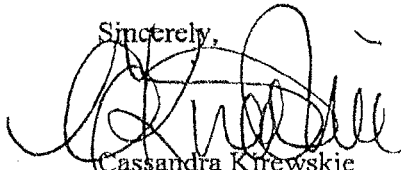
Zeifman Partners Inc. has been operating the farm since July 19, 2011. This past February, Zeifman Partners Inc. were Court appointed. As such, Zeifman Partners Inc. are now an officer of the Court, responsible to it for its activities in operating the Vandermeer farm. Your client may have a financial interest but, as it is neither the owner nor operator of the farm, it is not accountable to the Court for the activities which are disturbing the Applicants. Since the

Applicants' challenge is to the Receiver's activities, we simply cannot see how your client could possibly provide any assistance to the Court in determining whether the Receiver's activities are normal farm practices.

As for commencing our application in the Commercial Court, we are satisfied that the Superior Court has jurisdiction to hear our application and note that the leading case on the test for granting leave to commence proceedings against a court appointed receiver was decided by the Superior Court (see: *Bank of America Canada v. Willam Investments Ltd.*). We also note that the Ontario Court of Appeal recently considered the test in *117387 Ontario Inc. v. National Trust Co.*, an appeal brought from a decision of a motions court judge of the Superior Court. While it might be your preference to appear in the Commercial Court, either Court can hear our application.

If your client can provide us with case law to the contrary and also evidence that it is either the owner or operator of the Vandermeer farm, we will reconsider our position and include your client in our discussions as to the timing of our application.

Sincerely,



Cassandra Kirewskie  
/nk

cc: Clients

**tab W**



CV-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

Address of Court Office:

393 University Avenue

10<sup>th</sup> 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 include 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**  
**Barristers & Solicitors**  
201 – 88 Dunn Street  
Oakville, Ontario  
L6J 3C7

**Paul Marshall** (#33983T)  
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**Solicitors for the Applicants**

**tab X**



Fogler, Rubinoff LLP  
Lawyers

77 King Street West  
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TD Centre North Tower  
Toronto, ON M5K 1G8  
t: 416.864.9700 | f: 416.941.8852  
foglers.com

March 27, 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 have received your materials. Specifically, at approximately 3:30 pm on Friday afternoon we received a full banker's box containing a 9 volume Application record, plus a factum and book of authorities, for an Application returnable next Thursday.

You have contemplated a motion for leave to proceed for almost a year, yet you have completely disregarded the service requirements in Rules of Civil Procedure. Furthermore, it appears that you have now commenced the Application itself, without first obtaining leave, in flagrant breach of the Initial Order (a copy of which is enclosed herein for your convenience). You have also elected to proceed in the wrong court; the Initial Order requires that you bring any motion for leave in the Commercial List. We have previously advised you of same.

Finally, we note that you have also continued with your refusal to add Mr. Macfarlane to the service list, despite his – and our – repeated requests that you do so. As you know, Mr. Macfarlane's client, Meridian Credit Union, was the creditor that originally brought the motion to have the Receiver appointed. We know of no legitimate basis for your refusal.


In light of your late service, by letter dated March 26, 2015 we quite reasonably requested an adjournment. You refused, despite that fact that at the time of that refusal you still hadn't served your materials.

You are advised that we have reserved time before the Commercial List on Tuesday March 31, 2015 for a 9:30 attendance to deal with this matter, and we will seek all of our costs against you.

Please advise as to whether you intend to attend.

Yours truly,

**FOGLER, RUBINOFF LLP**



Greg Azeff  
GA/cc

cc: Ross Macfarlane

**tab Y**

	<b>Fees</b>
Zeifman Partners Inc.	\$14,691.00
Fogler, Rubinoff LLP (Gregory R. Azeff)	\$6,596.00
Amount	\$21,287.00
HST	\$2,767.31
<b>Total</b>	<b>\$24,054.31</b>

**tab Z**

**Eng, Chloe**

---

**From:** Paul Marshall <p.marshall@bellnet.ca>  
**Sent:** Thursday, July 24, 2014 4:43 PM  
**To:** Azeff, Greg; 'Cassandra Kirewskie'  
**Subject:** RE: Vandermeer - Available dates

Greg – we would prefer September 18<sup>th</sup>. Please reserve this date in your calendar.

Thank you, Paul Marshall

---

**From:** Azeff, Greg [mailto:gazeff@foglers.com]  
**Sent:** Wednesday, July 23, 2014 4:40 PM  
**To:** 'Cassandra Kirewskie'  
**Cc:** 'Paul Marshall'  
**Subject:** RE: Vandermeer - Available dates

My view is that Meridian has standing because it will be affected by any disruptions to the conduct of the receivership – i.e., it has an interest in the stay provisions being enforced – but you are, of course, free to raise that issue at the hearing. That said, I haven't raised that issue with Mr. Macfarlane and he may come at it from a different direction.

Greg

**From:** Cassandra Kirewskie [mailto:ckirewskie@cogeco.ca]  
**Sent:** Wednesday, July 23, 2014 4:23 PM  
**To:** Azeff, Greg  
**Cc:** 'Paul Marshall'  
**Subject:** RE: Vandermeer - Available dates

Greg: Could you please explain how Meridian's counsel would have standing?

Thanks,

Cassandra

**From:** Azeff, Greg [mailto:gazeff@foglers.com]  
**Sent:** July 23, 2014 4:15 PM  
**To:** ckirewskie@bellnet.ca  
**Cc:** jrmacfar@flettbeccario.com  
**Subject:** Vandermeer - Available dates

Cassandra: We have received your letter regarding your intended motion for leave. I have consulted with Mr. Macfarlane (cc'ed), who will also be making submissions at the hearing. August is proving difficult due to vacation schedules, but we are both available on any of the following dates:

August 12  
September 8, 10, 12, 15, 18 or 19

Please let me know which date you would prefer.

Thanks,  
Greg



**Greg Azeff**  
**Partner**  
Fogler, Rubinoff LLP  
Lawyers  
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TD Centre North Tower  
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[foglers.com](http://foglers.com)



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**tab 3**

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

THE HONOURABLE

)

TUESDAY, THE 31<sup>st</sup>

)

JUSTICE

)

DAY OF MARCH, 2015

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*

**ORDER**

**THIS MOTION**, made on an urgent basis by Zeifman Partners Inc. in its capacity as Receiver (in such capacity, the “**Receiver**”) of Vandermeer Greenhouses Ltd. (“**Vandermeer**”), was heard this day at the court house, 330 University Avenue, Toronto, Ontario.

**ON READING** the Motion Record, the Second Report of the Receiver dated March 30, 2015 (the “**Second Report**”), filed, and upon hearing submissions of counsel for the Receiver, no one else attending,

1. **THIS COURT ORDERS** that the time for service and filing of this Notice of Motion and the Motion Record be and they are hereby abridged and dispensing with further service thereof.
  2. **THIS COURT ORDERS** that the application against Zeifman commenced on February 24, 2015 by James Dell, Sophie Dell, Ron Quevillon, Charlene Quevillon, George Lepp, Erica Lepp, Richard Zirger, Judy Zirger, Dan Lavalley, Dino Lavalley, Mary Lavalley, Joan Bourk and Larry Bourk (collectively, the "**Zirger Group**") before the Ontario Superior Court of Justice in Toronto in Court File No. CV-15-522653 (the "**Application**") shall be and it is dismissed.
  3. **THIS COURT ORDERS AND DIRECTS** the Zirger Group to serve all motion records and other court materials on all parties on the service list in this proceeding (the "**Service List**"), including, in particular, Meridian Credit Union Limited ("**Meridian**").
  4. **THIS COURT ORDERS AND DIRECTS** that the activities of the Receiver and its counsel, as disclosed in the Second Report, be and they are hereby approved.
  5. **THIS COURT ORDERS AND DIRECTS** that the costs of the Receiver and Meridian shall be payable as follows:
-

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

**ORDER**

**Fogler, Rubinoff LLP**  
77 King Street West  
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Toronto, ON M5K 1G8

**Greg Azeff (LSUC #45324C)**  
[gazeff@foglers.com](mailto:gazeff@foglers.com)

Tel: (905) 365-9700  
Fax: (905) 941-8852

Lawyers for the Court-Appointed Receiver,  
Zeifman Partners Inc.

MERIDIAN CREDIT UNION LIMITED  
Applicant

-and-

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**MOTION RECORD**

**Fogler, Rubinoff LLP**  
77 King Street West  
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**Greg Azeff (LSUC #45324C)**  
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Lawyers for Zeifman Partners Inc.