

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT*
ACT, R.S.C. 1985, c.C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SYNAPTIVE MEDICAL INC.**

Applicant

**FACTUM OF THE APPLICANT
(Motion for KERP Approval Order,
returnable April 25, 2025)**

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TO: THE SERVICE LIST

TABLE OF CONTENTS

	Page No.
PART I - INTRODUCTION.....	1
PART II - SUMMARY OF FACTS	2
A. Background	2
B. Synaptive faces an existential employee flight risk	3
C. Synaptive's proposed KERP addresses this flight risk	5
D. Confidential KERP Exhibit.....	6
PART III - ISSUES.....	6
PART IV - LAW AND ARGUMENT.....	6
A. The KERP should be Approved.....	6
B. A sealing order is appropriate	10
PART V - ORDER REQUESTED	12

PART I - INTRODUCTION

1. Synaptive faces a crisis of confidence among its employees. Its desperate financial circumstances prior to the March 19 commencement of this CCAA proceeding required Synaptive to temporarily lay off 149 of its then-189 employees, 66 of whom were since permanently terminated. Synaptive also missed a payroll cycle and other employee payments before this CCAA proceeding started.

2. If proper incentives are not provided to Synaptive's critical employees, there is a real and significant risk that those employees will turn elsewhere for more stable work. Indeed, 6 employees have already left. Further employee flight would be incredibly value destructive, particularly in circumstances where Synaptive is already running on a lean staff following its layoffs. Synaptive's employees are highly skilled—a function of Synaptive's sophisticated, cutting edge medical technology business. They would be near-impossible to replace in the short term.

3. In response to this risk, Synaptive has worked diligently with the Monitor and Export Development Canada—Synaptive's seniormost secured creditor and DIP lender—to develop a KERP for its critical employees and seeks a corresponding \$500,000 charge to secure Synaptive's KERP obligations. The KERP and KERP Charge are tailored to provide appropriate incentives to Synaptive's critical employees while balancing the need to conserve Synaptive's cash flow so it can continue operating its business during this CCAA proceeding on its limited DIP budget. The Monitor supports the KERP and the relief sought on this motion.

4. It is appropriate in these circumstances for this Court to approve the KERP and KERP Charge. This is the only result that accords with the CCAA's prime objective of maximizing value for debtors and their stakeholders. It is also the only result that would allow Synaptive to continue

its business without significant employee-related disruptions and focus on finding a value-maximizing transaction in its ongoing SISP.

5. Synaptive also seeks a sealing order in respect of the confidential exhibit filed in support of this motion. That confidential exhibit contains highly sensitive personal and commercial information about each employee eligible to participate in the KERP, including their names and salary information. This is the archetypal information that sealing orders are designed to protect from public consumption.

PART II - SUMMARY OF FACTS

A. Background

6. Synaptive Medical Inc. (“**Synaptive**”) is a Canadian medical technology company. It was incorporated in Ontario in 2012 with a vision of leveraging high-tech solutions to improve surgical outcomes and qualities of life for neurosurgery patients. Synaptive’s products ensure that neurosurgeons and other healthcare professionals receive the right information at the right place and the right time, before, during and after surgical procedures. Synaptive achieves this goal through its advanced software algorithms, robotics and optical technologies designed to improve efficiencies while focusing on clinical results.¹

¹ Initial Affidavit of Magnus Momsen sworn March 18, 2025 (“**Initial Momsen Affidavit**”), paras 14 and 24, Exhibit “A” to the Affidavit of Magnus Momsen dated April 17, 2025 (the “**Second Momsen Affidavit**”), Tab 2 of the Motion Record dated April 25, 2025, pp A31 and A34 (“**MR**”). Page references to the Motion Record in these hyperlinked footnotes are to the “Current” page numbers on Caselines.

7. A detailed description of the factual background of Synaptive and the circumstances leading to it commencing this CCAA proceeding is set out in the Initial Momsen Affidavit.²

8. On March 19, 2025, this Court granted an initial order (the “**Initial Order**”) that provided Synaptive relief under the CCAA and appointed Richter Inc. as the monitor in this proceeding (in such capacity, the “**Monitor**”). Following the March 26 comeback hearing, this Court granted an amended and restated Initial Order (the “**ARIO**”) that, among other things, extended the stay period and granted customary charges, including: (i) the Administration Charge in the maximum amount of \$500,000; (ii) the DIP Lender’s Charge to secure Synaptive’s obligations under its \$7 million DIP facility; and (iii) the Directors’ Charge in the maximum amount of \$1,100,000 (each of the foregoing terms as defined in the ARIO).³

9. Further to the March 26 comeback hearing, this Court also granted an order approving a sale and investment solicitation process (the “**SISP**”) in respect of Synaptive, its business and its assets. Synaptive and the Monitor are both actively engaged in implementing the SISP, which remains ongoing.⁴

B. Synaptive faces an existential employee flight risk

10. Synaptive now brings this motion for approval of its proposed key employee retention plan (the “**KERP**”) and a corresponding charge to secure Synaptive’s obligations to the employees entitled to participate thereunder (the “**Participating Employees**”), up to the maximum amount of \$500,000 (the “**KERP Charge**”). 23 of those Participating Employees are Canadian employees

² Initial Momsen Affidavit, Exhibit “A” to the Second Momsen Affidavit, MR, pp A26-A63.

³ Second Momsen Affidavit, paras 5-6, MR, pp A20-A21.

⁴ Second Momsen Affidavit, para 6, MR, pp A20-A21.

of Synaptive, and 20 of the Participating Employees are U.S.-based employees of Synaptive Medical USA, Inc. (“**Synaptive USA**”, and together with Synaptive, the “**Synaptive Employers**”), Synaptive’s wholly owned subsidiary which exists solely for purposes of employing those U.S. employees.⁵

11. On March 4, 2025, prior to commencing this CCAA proceeding, Synaptive made the difficult decision to issue temporary layoff notices to 149 of the Synaptive Employers’ 189 employees (most of whom were brought back to work after Synaptive commenced this CCAA proceeding). Additionally, Synaptive had insufficient cash to meet certain of its payroll obligations prior to this CCAA proceeding, which resulted in, among other things, a missed payroll cycle.⁶

12. Employees are now anxious. These disruptions, Synaptive’s insolvency and this CCAA proceeding have considerably weighed on their confidence, resulting in feelings of uncertainty and anxiety about Synaptive and the employees’ roles within its business. Without appropriate incentives to remain with Synaptive, many employees are likely to look for work elsewhere.⁷

13. This risk is acute: Synaptive is already leanly staffed following its termination of a significant number of its employees, and the nature of its business—the development of cutting edge medical technology—means each of its highly skilled employees would be near-impossible to replace in the near-term.⁸

⁵ Confidential KERP Exhibit, Exhibit “D” to the Momsen Affidavit, MR, p A75. Note that this Exhibit is filed under seal and is not available on Caselines.

⁶ Second Momsen Affidavit, para 7, MR, p A21.

⁷ Second Momsen Affidavit, para 8, MR, p A21.

⁸ Second Momsen Affidavit, para 10, MR, pp A21-A22.

C. Synaptive’s proposed KERP addresses this flight risk

14. In order to address this employee flight risk, Synaptive has worked diligently with the Monitor and Export Development Canada—Synaptive’s seniormost creditor and DIP lender—to develop the KERP. The KERP facilitates and encourages the continued participation of the Participating Employees in the business.⁹

15. The following is a summary of the key terms of the KERP:

- (a) Aggregate Payment Amount: US\$130,378.66 and C\$315,451.10.
- (b) Eligible Employees: Each of the 43 Participating Employees are eligible to participate in the KERP.
- (c) Payment Structure: Single lump sum payment to each Participating Employee (each, a “**KERP Payment**”), payable on May 30, 2025.
- (d) Conditions for Payment: Each Participating Employee will only be eligible to receive a KERP Payment if such employee continues his or her active employment with the corresponding Synaptive Employer up to May 30, 2025.
- (e) Security: Synaptive’s obligations to Participating Employees under the KERP are secured by a court-ordered charge over Synaptive’s Property (as defined in the ARIO) up to a maximum amount of C\$500,000.¹⁰

⁹ Second Momsen Affidavit, para 11, MR, p A22.

¹⁰ Second Momsen Affidavit, para 12, MR, p A22; Confidential KERP Exhibit, Exhibit “D” to the Second Momsen Affidavit, MR, p A75; KERP Letters, Exhibits “B” and “C” to the Second Momsen Affidavit, pp A65-A69 and A71-A73.

D. Confidential KERP Exhibit

16. In his affidavit filed in support of this motion, Mr. Momsen attached a table listing each Participating Employee, the Synaptive Employer that employs him or her, his or her current annual salary and his or her proposed KERP Payment (the “**Confidential KERP Exhibit**”).¹¹

17. Because this Confidential KERP Exhibit contains highly sensitive personal and commercial information about employees, the proposed KERP Approval Order includes language sealing the Confidential KERP Exhibit such that it shall not form part of the public court record pending further order of this Court.¹²

PART III - ISSUES

18. The only issues on this motion are whether this Court should: (i) approve the KERP and corresponding KERP Charge; and (ii) seal the Confidential KERP Exhibit.

PART IV - LAW AND ARGUMENT

A. The KERP should be Approved

19. Synaptive seeks this Court’s approval of the KERP and implementation of appropriate protections for the Participating Employees through the \$500,000 KERP Charge. Synaptive has limited tools at its disposal to incentivize employees to remain at the company, with the KERP being chief among them. The KERP and KERP Charge are measured, balanced and ultimately necessary for Synaptive to find a value-maximizing transaction in its SISP for the benefit of its creditors. The Monitor supports the KERP and KERP Charge and recommends that this Court

¹¹ Confidential KERP Exhibit, Exhibit “D” to the Second Momsen Affidavit, MR, p A75.

¹² Proposed KERP Approval Order, para 6, MR, Tab 3, p A81.

approve them. It is appropriate in these circumstances for this Court to approve the KERP and the KERP Charge.

20. This Court has jurisdiction to approve a KERP and a KERP Charge under section 11 of the CCAA.¹³ The purpose of a KERP is to provide appropriate incentives to key employees so their skills, knowledge and expertise can be retained by the debtor at a time when such employees are likely to look for employment elsewhere due to the debtor's financial distress.¹⁴

21. Courts have established numerous factors to consider when assessing whether to approve a KERP or KERP charge. The most salient and frequently repeated of those factors are whether:

- (a) the employee is important to the success of the restructuring;
- (b) the employee has specialized knowledge that cannot be easily replaced;
- (c) the employee will consider other employment options if the KERP is not approved;
- (d) the KERP was developed through a consultative process involving the monitor and other professionals; and
- (e) the monitor supports the KERP and corresponding charge.¹⁵

22. Synaptive's KERP and KERP Charge meet each of these factors in the circumstances:

- (a) **Each Participating Employee is critical to Synaptive's restructuring and SISP efforts.** The Participating Employees consist of MRI scientists, optical scientists,

¹³ [CCAA, s 11](#); *Cinram International Inc., Re*, [2012 ONSC 3767](#), [para 91](#); *Hudson's Bay Company, Re*, [2025 ONSC 1897](#), [para 87](#).

¹⁴ *Grant Forest Products Inc., Re*, [\[2009\] O.J. No. 3344](#), [57 C.B.R. \(5th\) 128](#), [para 8](#).

¹⁵ *Walter Energy Canada Holdings, Inc., Re*, [2016 BCSC 107](#), [para 59](#); *Hudson's Bay Company, Re*, [2025 ONSC 1897](#), [para 88](#); *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#), [para 7](#); *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#), [para 29](#).

and magnet and gradient scientists, among other critical roles.¹⁶ Each Participating Employee's continued engagement is necessary for Synaptive's business to continue operating without disruption in a manner that delivers value for its customers and the neurosurgery and cancer patients who rely on its products. Synaptive is already very leanly staffed because of its previous employee terminations, and further disruptions could tip its business into dysfunction.¹⁷ The Participating Employees' involvement is also critical to Synaptive's ongoing efforts to find a value-maximizing transaction for the benefit of its creditors in the SISP. Synaptive can only realize that maximum value if its business continues running smoothly without significant disruption.

- (b) **Each Participating Employee has hard-to-replace, specialized knowledge.** The Participating Employees' have specialized knowledge that would be difficult or impossible to replace in the near-term. Synaptive's business is the development, marketing and sale of highly technical, complex and cutting-edge medical equipment. This business necessarily requires highly skilled employees who possess not only specialized technical expertise, but also familiarity with Synaptive's sophisticated products. It would be difficult, if not impossible, to replace any Participating Employee in the near-term. Even if a qualified replacement of any departing Participating Employee were to be found, it would

¹⁶ [Second Momsen Affidavit, para 10, MR, p A21.](#)

¹⁷ Second Momsen Affidavit, para 9, MR, p A21.

take months or longer to get that individual up to speed on Synaptive's business and products.¹⁸

- (c) **Participating Employees are likely to consider other employment options without the KERP.** Indeed, 6 employees have already left Synaptive's business since this CCAA proceeding commenced, meaning that the risk of employee flight in this case is not theoretical.¹⁹ More Participating Employees are likely to look for work elsewhere without an incentive to stay. This employee flight risk is a critical threat to Synaptive's success in this restructuring and the SISP.
- (d) **The KERP was developed through a consultative process involving the Monitor and the DIP Lender.** Synaptive has worked diligently with the Monitor and Export Development Canada—Synaptive's DIP lender and seniormost secured creditor—to develop a KERP and KERP Charge that is reasonable and balanced. These efforts resulted in an appropriately-sized KERP and KERP Charge that provides suitable incentives to Participating Employees to prevent employee flight.²⁰
- (e) **The Monitor supports the KERP and the KERP Charge.** The Monitor supports the KERP and KERP Charge. It describes in its Second Report that the loss of any of the Participating Employees during the CCAA Proceedings would be disruptive and potentially value destructive, and that the KERP provides a targeted and cost-effective means of preserving Synaptive's going-concern value.²¹ The Monitor also

¹⁸ Second Momsen Affidavit, para 10, MR, p A21-A22.

¹⁹ Second Momsen Affidavit, para 8, MR, p A21.

²⁰ Second Momsen Affidavit, para 11, MR, p A22.

²¹ Second Report of the Monitor dated April 22, 2025, para 5.4.

believes that the KERP is necessary and will provide appropriate incentives for the Participating Employees to remain in their current positions.²²

23. In sum, the KERP and KERP Charge meet each of the factors articulated in the caselaw. It is appropriate for this Court to approve them both so that Synaptive can focus on seeking a value-maximizing transaction in the SISP while minimizing the risk of a critical employee exodus.

B. A sealing order is appropriate

24. Synaptive's proposed KERP Approval Order contains language that, if granted, would seal the Confidential KERP Exhibit until further order of this Court. The Confidential KERP Exhibit contains highly sensitive personal and commercial information about each of the Participating Employees—a quintessential example of information that sealing orders are designed to protect from public consumption.²³

25. In its recent *Sherman Estate* decision, the Supreme Court of Canada clarified the governing legal standard that applicants must satisfy before a sealing order may be granted. The Supreme Court noted that court proceedings are presumptively open to the public, but that courts retain discretion to seal materials from the public in appropriate circumstances.²⁴ The three-part test for whether a sealing order is appropriate is whether:

- (a) court openness poses a serious risk to an important public interest;
- (b) the sealing order is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

²² Second Report of the Monitor dated April 22, 2025, para 5.5.

²³ Confidential KERP Exhibit, Exhibit “D” to the Second Momsen Affidavit.

²⁴ *Sherman Estate v. Donovan*, [2021 SCC 25](#), [paras 37-38](#).

(c) the benefits of the sealing order outweigh its negative effects.²⁵

26. Chief Justice Morawetz recently applied this test to a confidential KERP exhibit in the Bridging Finance receivership.²⁶ Importantly, C.J. Morawetz found there to be a public interest in ensuring the integrity of the sales process in that proceeding and any potential dispute resolution processes between the parties.²⁷ He noted that the KERP exhibit before him contained confidential and personal information with respect to the compensation of each eligible employee, and that no stakeholders would be materially prejudiced if that information were to be sealed.²⁸

27. The same reasoning applies to Synaptive's Confidential KERP Exhibit. Synaptive's proposed sealing language would protect two vital public interests: (i) maintenance of highly sensitive and confidential information about each Participating Employee, including his or her name and salary; and (ii) preservation of the integrity of the SISP, which could be impaired if potential bidders or Synaptive's competitors received access to this information. The proposed sealing order is necessary to prevent this serious risk—there are no reasonable alternatives that would adequately prevent public disclosure of this information. Synaptive is also not aware of any prejudice to any stakeholder or other negative effects that would flow from a sealing order in these circumstances.

28. In sum, Synaptive meets the Supreme Court's test for a sealing order in these circumstances, and such relief is otherwise appropriate and desirable.

²⁵ *Sherman Estate v. Donovan*, [2021 SCC 25](#), para 38.

²⁶ *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#), para 27.


²⁷ *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#), para 24.

²⁸ *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#), para 25.

PART V - ORDER REQUESTED

29. For all of the reasons above, Synaptive requests that this Court grant the requested KERP Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of April, 2025.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Cinram International Inc., Re*, [2012 ONSC 3767](#)
2. *Hudson’s Bay Company, Re*, [2025 ONSC 1897](#)
3. *Grant Forest Products Inc., Re*, [\[2009\] O.J. No. 3344, 57 C.B.R. \(5th\) 128](#) (Ont. Sup. Ct. J. (Commercial List))
4. *Walter Energy Canada Holdings, Inc., Re*, [2016 BCSC 107](#)
5. *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#)
6. *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#)
7. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
8. *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangement Act, R.S.C. 1985, c C-36

General power of court

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

Court File No. CV-25-00739279-00CL

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SUPERIOR COURT OF JUSTICE

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