CITATION: *Xinergy Ltd. (Re)*, 2015 ONSC 3699
COURT FILE NO.: CV-15-10936-00CL
DATE: 20150609

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO XINERGY LTD.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *J. Grout* and *A. Nicholson,* for the Applicant, Jon Nix

J. Dietrich and *N. Levine*, for the Respondent, Xinergy Ltd.

J. Bell, for the Information Officer, Deloitte Restructuring Inc.

A. Kauffman, for the DIP Lenders, Whitebox Advisors Inc. and Highbridge Capital Management LLC, and a Group of Second Lien Lenders

HEARD: May 21, 2015

ENDORSEMENT

[1] The applicant on this motion, Jon Nix ("Nix"), has called a shareholders meeting of Xinergy Ltd. ("Xinergy") pursuant to section 105(4) of the *Business Corporations Act*, R.S.O. 1990, c.B.16 (the "OBCA"). On this motion, he sought, among other things, a declaration that the stay of proceedings granted pursuant to the Recognition Order (as defined below) and the stay of proceedings granted pursuant to the Supplemental Order (as also defined below) do not apply to such action and further sought additional relief of an administrative nature relating to the proposed meeting.

[2] The motion has been bifurcated on consent. At this hearing, the parties addressed a single, but important, legal issue respecting the application of the stay of proceedings in each of these Orders to the actions of Nix related to calling the shareholders meetings. On May 29, 2015, the Court advised the parties that, for written reasons to follow, the Court found that the actions of Nix in calling the proposed shareholders meeting, and the related actions addressed in the motion, constituted the exercise of rights in respect of Xinergy by an individual for the purposes of paragraph 7 of the Supplemental Order and, accordingly, all such actions were stayed pursuant to such provision. This Endorsement sets out the Court's reasons for this finding.

Background

[3] Xinergy is a corporation incorporated under the OBCA that is a holding corporation for a number of U.S. subsidiaries that own and operate coal mining assets in West Virginia and Virginia.

[4] Nix is the founder and former chief executive officer of Xinergy. He is also the largest shareholder, owning approximately 18.5% of the outstanding common shares.

[5] On April 6, 2015, Xinergy and 25 of its 26 subsidiaries commenced a proceeding under Chapter 11 of Title 11 of the *United States Bankruptcy Code* (the "*Code*") (the U.S. Proceeding") by filing a voluntary petition in the United States Bankruptcy Court for the Western District of Virginia (the "U.S. Court"). As a result, an automatic stay of proceedings applies in respect of Xinergy and its subsidiaries pursuant to § 362 of the *Code*.

[6] On April 16, 2015, Nix requisitioned the board of directors of Xinergy (the "Board") to call a shareholders meeting pursuant to section 105 of the OBCA. The requisition proposed a reduction of the number of directors to four, the removal of three named directors, the election of two new proposed directors, and the re-election of the two remaining directors.

[7] On April 23, 2015, the Court issued an initial recognition order (the "Recognition Order") pursuant to section 48 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") recognizing the U.S. Proceeding as a "foreign main proceeding", declaring the centre of main interests of Xinergy to be the United States and containing a stay of proceedings. On the same day, the Court also issued a supplemental order (the "Supplemental Order") pursuant to section 49 of the CCAA containing, among other things, a stay of proceedings using language from the Model CCAA Initial Order.

[8] On May 7, 2015, the Board advised Nix by a letter of its counsel that it did not intend to call a shareholders meeting on the basis of its view that the requested meeting would not be in the best interests of Xinergy and the other debtors in the U. S. Proceeding for the reasons set out in such letter.

[9] On May 8, 2015, Xinergy filed a complaint with the U.S. Court (the "Complaint") seeking a declaration that the actions of Nix in attempting to call and/or hold the proposed shareholders meeting are subject to the automatic stay of proceedings under § 362 of the *Code*. In the alternative, Xinergy seeks an order enjoining Nix from taking any further action in respect of the proposed shareholders meeting.

[10] On May 12, 2015, Nix requested a shareholders list from Xinergy and its transfer agent. On or about May 13, 2015, Nix called a shareholders meeting to be held on June 19, 2015 pursuant to section 105(4) of the OBCA. The record date for the meeting is May 20, 2015.

[11] On May 14, 2015, Nix commenced this motion in this court (the "Nix Motion") seeking a declaration that the actions of calling the shareholders meeting, as well as seeking certain administrative relief related to the conduct of the meeting, including seeking an order requiring Xinergy to deliver a shareholder list to Nix, did not violate the stay of proceedings under the Recognition Order and under the Supplemental Order.

[12] On May 21, 2015, this Court granted a further order recognizing and giving effect to certain additional orders of the U.S. Court, including a final order respecting debtor-in-possession financing (the "Final DIP Order"). The Final DIP Order specifies a number of tight timelines for any plan of reorganization, and provides that a failure to meet any of these timelines would constitute an event of default under the DIP financing. The Final DIP Order also provides for an event of default on the occurrence of a "change of control", which is defined to include certain changes to the Board. Nix objected unsuccessfully to inclusion of the latter provision in the Final DIP Order at the hearing before the U.S. Court that considered and ultimately granted the Final DIP Order.

[13] On May 19, 2015, Xinergy filed a motion with the U.S. Court seeking a preliminary injunction enjoining Nix from taking any further action to call or hold the proposed shareholders meeting. This motion is scheduled to be heard by the U.S. Court on June 9, 2015.

[14] At a 9:30 a.m. conference before this Court on May 20, 2015, Xinergy requested that the Nix Motion be adjourned from its original return date of May 21, 2015 to a date after June 9, 2015. In view of Xinergy's time constraints regarding delivery of responding materials to the Nix Motion, the Court ordered that the issues addressed in this Endorsement be heard on an expedited basis on May 28, 2015 before a schedule is set, if required, to hear the remainder of the Nix Motion.

Stay Provisions

[15] The applicable stay provisions in the orders of this Court are as follows.

[16] Paragraph 4 of the Recognition Order provides as follows:

> THIS COURT ORDERS that until otherwise ordered by this Court:
>
> (a) all proceedings taken or that might be taken against the Debtor under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* are stayed;
>
> (b) further proceedings in any action, suit or proceeding against the Debtor are restrained; and
>
> (c) the commencement of any action, suit or proceeding against the Debtor is prohibited.

[17] Paragraph 7 of the Supplemental Order further provides as follows:

> THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Debtor, or affecting the Business or the Property, are hereby stayed and suspended except with leave of this Court or with the written consent of the Debtor and the Information Officer, provided that nothing in this Order shall (i) prevent the assertion of or the exercise of rights and

remedies outside of Canada, (ii) empower the Debtor to carry on any business in Canada which the Debtor is not lawfully entitled to carry on, (iii) effect such investigations or Proceedings by a regulatory body as are permitted by section 11.1 of the CCAA; or (iv) prevent the DIP Lenders from making any personal property lien registrations in Canada.

The Issue

[18] The parties are agreed that, notwithstanding the Recognition Order, this Court has the authority to determine issues pertaining to the application of the Recognition Order and the Supplemental Order to the actions of Nix in calling the proposed shareholders meeting and in seeking related relief from the Court pursuant to the Nix Motion. Conversely, the U.S. Court has the authority to determine any similar issues raised by the parties in the U.S. Proceeding.

[19] The parties also agree that the sole issue to be determined on this hearing is whether either or both of the stay of proceedings in the Recognition Order and the stay of proceedings in the Supplemental Order apply to Nix's actions in calling the proposed shareholders meeting and in seeking ancillary relief by bringing the Nix Motion.

[20] With respect to the application of the Recognition Order, the actions at issue do not fall within paragraph 4(a). The parties dispute whether such actions fall under the provisions of paragraphs 4(b) and 4(c) – in particular 4(c). I incline to the view that such actions would constitute the "commencement of a proceeding against the Debtor" for the purposes of paragraph 4(c) based on the interpretive principles applied below in respect of paragraph 7 of the Supplemental Order. However, given the determination below, it is not necessary to address this issue and I therefore decline to do so.

[21] Accordingly, the remainder of this Endorsement addresses the application of the stay of proceedings in paragraph 7 of the Supplemental Order to the actions of Nix in respect of the proposed shareholders meeting.

Preliminary Matter

[22] Xinergy argues, as a preliminary matter, that the Court should not address the issue on this hearing at this time on the grounds of prematurity. It argues that exactly the same issues are before the U.S. Court in the hearing scheduled for June 9, 2015. Xinergy submits that the principles of comity referred to in paragraph 44(a) of the CCAA require that the Court defer hearing this issue until after the U.S. Court renders its decision. In addition, Xinergy argues that the decision of the U.S. Court may be determinative, thereby removing the need for any determination by this Court.

[23] I accept that it is important in cross-border insolvencies to recognize and respect the principle of comity if such insolvencies are to function effectively. I am not persuaded, however, that the determination sought by Nix on this motion involves any infringement of that principle.

[24] On this motion, the issue is limited to a determination of whether the provisions of paragraph 7 of the Supplemental Order, which was issued by this Court, apply to the actions of Nix. The Court is not being asked to address the operation of any orders issued by the U.S. Court. Nor is it addressing the further issue of whether the stay under the Supplemental Order

should be lifted. Accordingly, it is not the case that the Court is being asked to determine the same issue as will be before the U.S. Court on June 9, 2015.

[25] While Xinergy says that it does not believe such a determination will be necessary after the U.S. Court renders its decision, I do not agree. If the U.S. Court were to find either that the stay in §362 of the *Code* does not apply or that such stay should be lifted, a determination of this Court will simplify the issues before the parties with respect to the operation of the Recognition Order and the Supplemental Order and may thereby remove the need for any further hearing. I note that counsel for the DIP Lenders and for most of the second lien lenders also supported this position. Further, Xinergy did not demonstrate any prejudice to it that would result if the Court were to render a determination on the issue before it.

[26] Accordingly, the preliminary submission of Xinergy is rejected.

The Applicant's Position

[27] Nix argues that the stay of proceedings in paragraph 7 of the Supplemental Order does not apply to his continuing actions in respect of the proposed shareholders meeting, including his actions in bringing this motion to request, among other things, a declaration to that effect and a copy of the shareholder list. He submits that the stay of proceedings in paragraph 7 of the Supplemental Order should not be interpreted to extend to prevent on-going corporate governance within Xinergy, including the calling of a shareholders meeting by a shareholder and actions in furtherance of the holding of such meeting.

[28] Nix relies in particular on three authorities: the statements of Blair J.A. at paragraphs 44-48 of *Stelco, Re*, [2005] O.J. No. 1171 (C.A.); and the decisions of this Court in *Unique Broadband Services, Re*, 2011 ONSC 224 (S. Ct.) ("USB #1") and *Unique Broadband Services, Re*, 2011 ONSC 1429 (S. Ct.) ("USB #2").

Analysis and Conclusions

[29] I conclude that both the plain meaning of paragraph 7 of the Supplemental Order and the policy of the CCAA compel an interpretation of that provision that engages the provisions of paragraph 7 in the present circumstances. I will address each consideration in turn.

[30] With respect to the plain meaning of paragraph 7 of the Supplemental Order, Nix has called the shareholders meeting pursuant to the exercise of his right as a requisitioning shareholder under section 105(4) of the OBCA. As such, on this motion and otherwise, he is asserting or exercising rights and remedies against or in respect of Xinergy. Such actions contravene the express language of paragraph 7 of the Supplementary Order, which is not limited to the assertion of rights and remedies as creditors. Similarly, Nix asserts a right to a copy of the shareholder list pursuant to section 146 of the OBCA. Such action also constitutes the exercise of his rights against Xinergy and, as such, is caught by the stay in paragraph 7 of the Supplementary Order. Clearly, given these findings, any other actions having the purpose of furthering the conduct of the shareholders meeting, including the bringing of the Nix Motion, must also be caught by the stay.

[31] With respect to the policy that should inform the interpretation of paragraph 7, it is necessary to begin with the policy of the CCAA. As is well established, the policy of the CCAA

is to maintain the *status quo* as between all stakeholders of a debtor corporation for a period of time to permit an orderly reorganization process to proceed with a view to obtaining approval for, and implementation of, a plan of compromise or arrangement between the debtor company and its creditors. To this end, pursuant to section 11 of the CCAA, considerable authority and discretion is vested in the Court to supervise an on-going process under the CCAA with a view to preventing one or more stakeholders from gaining an advantage over other creditors while the corporation is seeking to reorganize its affairs in order to maximizing the likelihood of a successful restructuring.

[32] This policy suggests that the provisions of any stay of proceedings granted in restructuring proceedings under the CCAA should be broadly construed. Such an interpretation balances the objective of ensuring maintenance of the *status quo* with the discretion of a court to lift the stay in circumstances where it is satisfied that the objectives of the CCAA will not be materially prejudiced.

[33] On the other hand, I accept that the commencement of proceedings under the CCAA, and in particular the issue of a stay of proceedings, does not suspend or terminate ongoing corporate governance of the debtor corporation. To this end, the debtor corporation continues to be governed by its board of directors, which continues to have the authority, among other things, to call meetings of shareholders. Accordingly, the rights and obligations of shareholders and directors of an OBCA corporation under the provisions of the OBCA and common law principles continue, except to the extent that an order of a court in the CCAA proceedings otherwise applies.

[34] The issue on this motion is, therefore, whether there is any policy reason why the stay of proceedings should not apply in respect of matters pertaining to internal corporate governance of a debtor company. Nix has failed to demonstrate any substantive reason why a stay of proceedings under the CCAA should not apply to shareholder actions in furtherance of the calling and holding of a shareholders meeting. Moreover, I think there are several reasons why it should apply from a policy perspective that are consistent with the policy of the CCAA.

[35] First, in many circumstances, shareholders of a debtor company in proceedings under the CCAA have a modest economic interest in the company at best. Second, the calling of a shareholders meeting in the course of a CCAA proceeding always carries the potential to distract or upset the reorganization process by diverting time and monetary resources away from the process of developing a plan of arrangement, when the primary goal of the debtor company necessarily must be to proceed as expeditiously as possible in order to maximize the likelihood of success. Third, in many circumstances, a change in the board of directors of a debtor company may have consequences for the business and affairs of a debtor company, including under outstanding DIP financing, or, more generally, for the likelihood of a viable plan of arrangement being proposed by the debtor company.

[36] These considerations argue in favour of a broad application of the stay with the necessary consequence that a court has the discretion to lift the stay in circumstances in which the court is satisfied that the purposes of the CCAA will not be adversely affected by the holding of the shareholders meeting. Application of the stay of proceedings in this context combined with the

Court's discretion to lift the stay permits the Court to assess the likelihood of any such prejudice to the reorganization process, or any abuse, on a case-by-case basis.

[37] In the case of a cross-border insolvency, there is also the added consideration that control of the reorganization process rests with the judicial authority in the centre of main interests. If that court is located outside Ontario, a broad application of a stay of proceedings permits courts in Ontario to take into consideration any determination of the same issue by such external judicial authority – that is, it allows the Ontario court the ability to recognize the principle of comity as a consideration in the exercise of its discretion to lift the stay.

[38] In reaching the conclusion that the stay of proceedings applies to actions directed toward the holding of a shareholders meeting, I have also concluded that the authorities relied upon by Nix do not support his position on this motion. In particular, both *Stelco* and *USB #1* dealt with the discretion of a court pursuant to the CCAA to remove directors. In *Stelco*, Blair J.A. held that the discretion of a court under section 11 of the CCAA was not available to remove a director given the existence of an explicit statutory procedure under the OBCA for doing so. The decision did not address whether the stay of proceedings in that case applied to an action by the shareholders to seek to remove directors. Similarly, the issue in *USB #1* was whether the court should exercise its express discretionary authority to remove certain directors under section 11.5 of the CCAA, as amended subsequent to *Stelco*. In *UBS #2*, the Court held that the stay of proceedings did not extend to a partial takeover bid. This is clearly a different circumstance which, as the Court stated at paragraph 35, did not involve legal rights and remedies of a contractual or statutory nature and therefore fell outside the language of the stay of proceedings.

[39] Further, it is well established that the discretion of a court under section 11 of the CCAA to grant a stay extends to issuing a stay that affects not only the secured and unsecured creditors of a debtor corporation but also "all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company": see *Lehndorff General Partner, Re*, [1993] O.J. No. 14 (Ont. Ct. J. (Gen. Div.- Comm. List)) at para. 10. While the cases referred to in paragraph 11 of that decision do not include any situations involving a shareholder seeking to call a shareholders meeting or seeking to remove or replace directors, I see no principled reason for, in effect, disregarding this consideration in respect of shareholders of a debtor company, as Nix suggests. I do not think that any of the decisions relied upon by Nix evidence a policy that third parties asserting their rights as shareholders in respect of matters of corporate governance should be excluded from the application of a stay of proceedings that would otherwise apply to all other third parties asserting rights against the debtor company. In other words, I do not accept that shareholders are any less third parties to a debtor corporation than such other parties to whom a stay of proceedings has been held to apply.

Conclusion

[40] Based on the foregoing, the Court finds that the continuing actions of Nix in respect of the proposed shareholders meeting, and the related actions addressed in the Nix Motion, constituted the exercise of rights in respect of Xinergy by an individual for the purposes of paragraph 7 of the Supplemental Order and, accordingly, all such actions are stayed pursuant to such provision.

Wilton-Siegel J.

Date: June 9, 2015