CITATION: Re Xinergy Ltd., 2015 ONSC 2692
COURT FILE NO.: CV-15-10936-00CL
DATE: 20150424

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 CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO **XINERGY LTD.** APPLICATION OF XINERGY LTD. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C 36, AS AMENDED	)	*Jane Dietrich and Natalie Levine*, for the Applicant *Aubrey E. Kauffman,* for Whitebox Advisors LLC, Highbridge Capital Management LLC and other DIP Lenders *Sean Sweig*, for Deloitte Restructuring Inc., the proposed Information Officer *James H. Grout,* for Jon Nix, a shareholder of the Applicant **HEARD:** April 23, 2015

NEWBOULD J.

[1] On April 6, 2015, Xinergy Ltd. ("Xinergy"), an Ontario corporation, commenced a voluntary reorganization proceeding in the United States Bankruptcy Court for the Western District of Virginia (the "U.S. Court") under chapter 11 of the United States Bankruptcy Code. On the same date, 25 of Xinergy's U.S. subsidiaries also filed voluntary petitions under chapter 11 of the Bankruptcy Code with the U.S. Court.

[2] On April 6 and 7, 2015 the chapter 11 Debtors filed 17 First Day Motions with the U.S. Court and on April 7 and 8, 2015, the U.S. Court entered the orders requested.

[3] Xinergy has now brought an application before this Court pursuant to Part IV of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended for an order recognizing the U.S. proceedings as foreign main proceedings and for orders recognizing some of the first day orders made by the U.S. Court. At the conclusion of the hearing I granted the orders requested for short reasons to follow. These are my reasons.

Business of the applicant

[4] Xinergy is a publicly traded company on the TSX under the ticker symbol XRG. As at September 30, 2014, the date of Xinergy's most recent public filing, there were approximately 58.3 million voting common shares issued and outstanding, and 7.5 million common non-voting shares issued and outstanding, totalling approximately 65.8 million common shares.

[5] The Chapter 11 Debtors are a U.S.-based producer of metallurgical and thermal coal with mineral reserves, mining operations and coal properties located in the Central Appalachian regions of West Virginia and Virginia. The Chapter 11 Debtors' principal operations include two active mining complexes known as South Fork and Raven Crest located in Greenbrier and Boone Counties, West Virginia. The Chapter 11 Debtors also lease or own the mineral rights to properties located in Fayette, Nicholas and Greenbrier Counties, West Virginia and Wise County, Virginia. Collectively, the Chapter 11 Debtors lease or own mineral rights to approximately 72,000 acres with proven and probable coal reserves of approximately 77 million tons and additional estimated reserves of 40 million tons.

[6] The Chapter 11 Debtors currently produce and ship coal from the South Fork mid-volatile metallurgical mine and the Raven Crest thermal operations. The Chapter 11 Debtors' primary customers for metallurgical coal—used in a chemical process that yields coke for the manufacture of steel—are steel producers, commodities brokers and industrial customers throughout North America, Europe and South America. Electric utilities and industrial companies in the southeastern United States and Europe are the principal customers for the Chapter 11 Debtors' thermal coal.

[7] Recently, U.S. demand for thermal coal has fallen sharply in large part due to (i) increasingly attractive alternative sources of energy, such as natural gas, and (ii) burdensome environmental and governmental regulations impacting end users. Simultaneously, the increasingly stringent regulatory environment in which coal companies operate has driven up the cost of mining and processing coal. Continued weakness in the market for metallurgical and thermal coal, combined with an extremely cold and snowy winter that impacted the mining and shipment of coal, has continued to erode Xinergy's cash position. Prior to approval by the U.S. Court of the post-petition DIP financing, Xinergy lacked the liquidity needed to maintain operations in the near term and to sustain its current capital structure. The confluence of these factors and Xinergy's substantial debt burden has taken Xinergy to the point of unsustainability absent the relief provided by the Chapter 11 proceeding.

[8] Xinergy has issued US$200 million in 9.25% Senior Secured Notes (the "Second Lien Notes"), of which approximately US$195 million (principal amount) is outstanding. As of the April 6, 2015, Xinergy was also obligated under two term loans totalling US$20 million in principal amount (the "First Lien Loans").

Requests for relief

[9] Xinergy seeks recognition of four of the orders granted by the U.S. Court. The U.S. Court orders are:

(a) Order Authorizing Xinergy Ltd. to Act as a Foreign Representative (the "Foreign Representative Order");

(b) Interim Order (I) Authorizing Debtors (a) to Obtain Post-petition Financing and (b) to Utilize Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; and (III) Scheduling Final Hearing (the " Interim DIP Order");

(c) Interim Trading Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Equity Interests in the Debtors' Estates (the "Interim Trading Order"); and

(d) Interim Order (I) Authorizing Debtors to Maintain Existing Bank Accounts and Business Forms and Continue to Use Existing Cash Management System; (II) Granting Administrative Expense Status for Intercompany Claims; and (III) Waiving the Requirements of Section 345(b) of the Bankruptcy Code (the "Interim Cash Management Order")

Recognition of foreign main proceeding

[10] Subsection 46(1) of the CCAA provides that a foreign representative may apply to the Court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

[11] A "foreign representative" for the purpose of subsection 46(1) of the CCAA is defined by subsection 45(1) of the CCAA, which provides:

> "Foreign Representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs or the purpose of reorganization; or
>
> (b) act as a representative in respect of the foreign proceeding.

[12] In the Chapter 11 proceedings, the Chapter 11 Debtors sought the appointment of Xinergy as the foreign representative of the Chapter 11 Debtors, within the meaning of subsection 45(1) of the CCAA. The Foreign Representative Order was granted by the U.S. Court on April 7, 2015.

[13] Subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding; and (ii) the applicant is a foreign representative in respect of that proceeding. There is no question but that the Chapter 11 proceedings are foreign proceedings and should be recognized under the CCAA.

[14] Subsection 47(2) of the CCAA requires that the Court specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding." I am satisfied that the Chapter 11 proceedings are foreign main proceedings.

[15] Subsection 45(2) of the CCAA provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests, or COMI. The registered office of Xinergy is in Toronto at its counsel's office. In considering whether the registered office presumption has been rebutted a court should consider the following factors in determining COMI (i) the location is readily ascertainable by creditors (ii) the location is one in which the debtor's principal assets and operations are found and (iii) the location is where the management of the debtor takes place. See *Lightsquared LLP, Re* (2012), 92 C.B.R. (5th) 321; *MtGox Co. (Re)* (2014), 20 C.B.R. (6th) 307.

[16] Although Xinergy's registered office is in Ontario, it has no operations in Canada. Additionally, Xinergy has no employees in Canada and no offices in Canada other than its registered office. The Chapter 11 Debtors operate on an integrated basis, with corporate and other major decision-making occurring from the consolidated offices in Knoxville, Tennessee. In particular:

(a) Corporate and other major decision-making occurs from the consolidated offices in Knoxville, Tennessee, although administrative employees frequently work remotely or from the Chapter 11 Debtors' mines in the United States;

(b) All of the senior executives of the Chapter 11 Debtors, including Xinergy, are residents of the United States;

(c) In order to fulfil the Canadian residency requirements of Ontario corporations, Xinergy has two Canadian directors;

(d) The majority of the management of the Chapter 11 Debtors, including Xinergy, is shared;

(e) Employee administration, human resource functions, marketing and communications decisions are made, and related actions taken, on behalf of all of the Chapter 11 Debtors, including Xinergy, in the United States;

(f) The Chapter 11 Debtors, including Xinergy, share a cash management system that is largely funded by the U.S. Subsidiaries, overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States;

(g) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions;

(h) While Xinergy maintains a bank account with The Toronto Dominion Bank in Ontario, the Chapter 11 Debtors use this account to make Canadian denominated deposits and to pay for Canadian services. When additional funds are required, a transfer is made from the U.S. operating account at Xinergy Corp. Xinergy is dependent on the U.S. subsidiaries for substantially all of its funding requirements; and

(i) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

[17] As the Chapter 11 proceedings are foreign main proceedings, an order is to go under subsection 48(1) of the CCAA staying all proceedings against Xinergy.

Interim DIP Order

[18] The Interim DIP Facility Order, inter alia:

(a) authorizes Xinergy Corp. to obtain post-petition financing pursuant to the DIP Facility up to an aggregate principal amount of $40 million;

(b) authorizes Xinergy and the other Chapter 11 Debtors to unconditionally guarantee all obligations arising under the DIP Facility;

(c) authorizes the Chapter 11 Debtors to use proceeds of the DIP Facility to pay in full the First Lien Loans (the holders of the First Lien Notes are the DIP lenders) ; and

(d) grants first priority super priority claims in connection with the DIP Facility.

[19] The authorization by the U.S. Court to use the proceeds of the DIP Facility to pay out the First Lien Loans, called a "rollup" provision, is not something that can be ordered in a CCAA proceeding as subsection 11.2(1) of the CCAA provides that DIP security may not secure an obligation that existed prior to an Initial Order. However, the issue is whether our Court should recognize the U.S. Court order authorizing that DIP facility under the principles of comity recognized in section 44 of Part IV of the CCAA.

[20] Such a provision has been recognized in *Hartford Computer Hardware Inc., Re* (2012), 94 C.B.R. (5th) 20 by Morawetz J. (as he then was) under section 49 of the CCAA which permits an order to be made if the Court is satisfied that it is necessary to protect the debtor's property or is in the interests of its creditors.

[21] It was obviously seen by the U.S. Court to be in the interests of Xinergy and the other Chapter 11 Debtors to make DIP order that it did. One question to consider is whether there would be any material adverse interest to any Canadian interests in recognizing the "rollup" features of the DIP facility. If there were such material adverse interest, it would put in play a consideration of that adverse interest vis-à-vis the principles of comity that speak to the recognition of an order made in a foreign main proceeding.

[22] In this case, there are four unsecured creditors of Xinergy in Canada being (i) a director owed approximately $1,674, (ii) TMX Equity Transfer Services owed approximately $4,000, (iii) TMX owed $16,492, and (iv) the solicitors for Xinergy (who consent to the rollup DIP facility). The bank account in Canada had approximately $48,415 in it on April 6, 2015. The Canadian unsecured creditors, however, had no economic interest in that bank account as it was secured to the holders of the First Lien Notes. The DIP facility has not changed that. Deloitte, the proposed Information Officer, is of the view that there will be no material prejudice to the Canadian creditors if the Interim Dip Facility order is recognized in these proceedings, and I accept that view.

[23] I am satisfied that the Interim DIP Facility Order should be recognized.

Other orders

[24] The interim trading order made by the U.S. Court ordered on an interim basis certain restrictions on the trading of Xinergy stock. In light of the rules under the Internal Revenue Code in the United States, transfers of the stock may, through no fault of the Chapter 11 Debtors, deprive the Chapter 11 Debtors of important tax benefits. The Interim Trading order was made to protect against this potential harm to debtors in chapter 11 proceedings. It is appropriate to recognize it in this CCAA proceeding.

[25] The relief granted by the U.S. Court in the Interim Cash Management Order will permit Xinergy and the other Chapter 11 Debtors to continue to operate in ordinary course, thereby preserving value for creditors. It is appropriate to recognize it in this CCAA proceeding.

[26] Xinergy has requested an order appointing Deloitte as Information Officer and granting a super-priority charge up to a maximum of $100,000 for its fees and those of its counsel. It is appropriate to make such an order. The DIP lenders consent to the charge. The appointment of Deloitte will help facilitate these proceedings and the dissemination of information concerning the Chapter 11 proceeding. The Information Officer will: (i) act as a resource to the foreign

representative in the performance of its duties; (ii) act as an officer to the Court, reporting to the Court on the proceedings, as required by the Court; and (iii) provide stakeholders of Xinergy with material information on the Chapter 11 proceeding. See *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 at para. 23 per Pepall J. (as she then was).

[27] For these reasons, I signed the orders as requested at the conclusion of the hearing.

Newbould J.

Released: April 24, 2015

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

APPLICATION OF XINERGY LTD. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C 36, AS AMENDED

REASONS FOR JUDGMENT

Newbould J.

Released: April 24, 2015