Court File No. CV-17-589016-00CL

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 BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

(the "**Applicants**")

REPLY FACTUM OF THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES (Plan Sanction Order)

March 26, 2018

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PART I - OVERVIEW

1. VR Global Partners, L.P. ("**VR**"), the sole Affected Creditor[1] who voted against approval of the Applicants' Plan, has not satisfied the very heavy burden that it must meet to show that the Plan is not fair and reasonable. As reaffirmed recently by Justice Newbould, there is a long standing principle that:

> There is a very heavy burden on parties seeking to show that a plan is not fair and reasonable, involving matters of substance, when the Plan, as here, has been approved by the requisite majority of creditors. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen Div.) per Blair J. (as he then was) at paragraphs 36 to 40. [2]

2. Even if one accepts that the Class A Shares and the Class B Shares may have different values given the voting restrictions on the Class B Shares (and for the reasons set out in the

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[1] Defined terms not otherwise defined herein have the meaning provided to them in the Factum of the Applicants and Required Consenting Parties dated March 20, 2018 [the "**March 20 Factum**"].
[2] *Re 4519922 Canada Inc.*, 2015 ONSC 4648 at para 29 ["***Castor***"], Reply Book of Authorities of the Applicants ["**BOA"]** Tab 1, citing *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen Div.) ["*Olympia*"], Book of Authorities of the Applicants and Required Consenting Parties dated March 20, 2018 [the "**March 20 BOA**"] Tab 9.

March 20 Factum, the Applicants and Requisite Consenting Parties submit that the difference in value between the Class A Shares and the Class B Shares is not material), any such difference in value is equitable and justifiable in the circumstances given the substantial additional value provided by Baiyin and Gramercy and the practical reality that no plan could proceed without their support.

3. VR's argument relies on the misconceptions that:

(a) the interests and claims of Baiyin and Gramercy against the Applicants are 'identical' to that of other holders of the Secured Notes; and

(b) the law prohibits identically situated creditors from receiving different consideration under a plan.

4. VR urges a narrow reading of the Plan and the law to support their proposition that the slightly different consideration they are receiving is unfair and unreasonable. However, when considering fairness and reasonableness, the courts need to look at all the facts and circumstances and should not take a narrow view of only one particular fact or element of the proposed Plan out of context. [3] In this case, the Court should not look only to the narrow point that Baiyin, Gramercy and VR are all Noteholders, but rather should look to the complete contextual circumstances, including the many different ways in which Baiyin and Gramercy are supporting the Plan.

PART II - LAW AND ARGUMENT

Baiyin and Gramercy's Interests and Claims are Different than Those of the Other Noteholders

5. Contrary to VR's assertions, VR, Baiyin and Gramercy are not identically situated. Specifically, unlike Baiyin and Gramercy, VR has not (i) provided $20 million of Interim

[3] *Re Sammi Atlas Inc.*, 1998 CarswellOnt 1945 at para 4, March 20 BOA Tab 5; *Re Canadian Airlines Corp.,* 2000 ABQB 442 at para 144, March 20 BOA Tab 4.

Financing to the Applicants that is not being repaid and is instead at closing (unlike most DIP financing) being converted to exit financing on Plan Implementation; nor (ii) provided material consensual waivers of obligations owing under the Gold Streams and Forward Agreements.

6. VR's only interest is as a holder of $19.7 million of the principal amount of the Secured Notes. In contrast, Baiyin-related parties and Gramercy-related parties hold approximately $56.5 million and $82.8 million of the principal amount of the Secured Notes, respectively. Over and above the Secured Notes (and not including $20 million of Interim Financing provided by Baiyin and Gramercy), approximately $117.5 million and $80 million was advanced and/or remains outstanding to the Banro Group by Baiyin-related parties and Gramercy-related parties, respectively, pursuant to a variety of streaming, forward and other loan arrangements.[4]

7. VR entirely disregards the fact that the Affected Secured Claims include not only the Claims under the Secured Notes but also the Claims under the Doré Loan and the Claims under the Namoya Forward II Agreement. Collectively, the Proven Doré Loan Claim and the Proven Namoya Forward II Claim represent approximately US$30 million of Affected Secured Claims which are held only by Baiyin- and Gramercy-related parties.

8. In the circumstances of this Plan, it is important for the parties and the Court to recognize, when considering overall reasonableness and fairness of the Plan, that the terms of this Plan involve a broad set of agreements and obligations being restructured under the terms of the Recapitalization set out in the Support Agreement and a complete restructuring package for the Applicants and their stakeholders provided mainly by Baiyin and Gramercy, whose support is necessary for the restructuring to proceed.

[4] Affidavit of Rory James Taylor sworn December 21, 2017 at footnote 1,Tab 2A of the Applicants' Motion Record returnable March13,2018, p.101

There is No Prohibition on 'Identically' Situated Creditors Receiving Different Consideration under a Plan

9. Even if Baiyin, Gramercy and VR (along with the other Noteholders) were 'identically' situated creditors as alleged by VR, which they are not, there is no requirement under the CCAA or concepts of fairness or reasonableness that the Plan treat them exactly the same.

10. As the Ontario Court of Appeal has held, parties are entitled to put anything into a plan that could lawfully be incorporated into a contract.[5] There is no allegation that it is unlawful for two creditors who are owed identical debts each contractually agreeing to settle those obligations under different terms.

11. It is in that context that courts have repeatedly held that there is nothing wrong with some creditors negotiating different terms as long as such different treatment was disclosed.[6] As was stated in *Re Keddy Motor Inns Ltd*.,

> Equality of treatment — as opposed to equitable treatment — is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.[7]

12. The voting restrictions on the Class B Shares to be received by Affected Secured Creditors other than Baiyin and Gramercy were clearly disclosed in the Plan and the material circulated to Affected Secured Creditors prior to the Creditors' Meetings. With that full disclosure, 23 other Noteholders, unrelated to Baiyin and Gramercy, voted to approve the Plan. VR was the lone dissenting Affected Secured Creditor.

13. Although this Plan has the same economics among the Noteholders across the Class A Shares and the Class B Shares, other court-approved CCAA plans have in fact had different

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[5] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para 62, March 20 BOA Tab 14.
[6] *Re Central Guaranty Trustco Ltd.,*1993 CarswellOnt 228 at para 9, BOA Tab 2.
[7] *Re Keddy Motor Inns Ltd.*, 1992 CarswellNS 46 at para 37, BOA Tab 3 ["***Keddy***"].

economics within the same class. For example, in the CCAA proceedings of OPTI Canada Inc., the recapitalization plan sanctioned by the Court of Queen's Bench of Alberta provided additional payments to certain noteholders who made the initial commitment to backstop the recapitalization plan. Although other noteholders were later given a limited backstop opportunity, the consideration to be received by those noteholders was less.[8]

14. The substantial additional value provided by Baiyin and Gramercy, coupled with the practical consideration that no plan would be feasible without their cooperation, supports the conclusion that the additional consideration they are to receive, if any, is entirely equitable.

The Opposing Creditors Have Not Met the Heavy Burden

15. It is a longstanding proposition of CCAA case law that the creditors of a company must live with a plan of their own design and not a creation of the court.[9] It is not open to the Court to re-write a plan, second guess business people, nor descend into the negotiating arena and substitute its own view of what is fair and reasonable for that of the business judgement of the participants.[10]

16. As such, courts have repeatedly held that there is a very heavy onus on a creditor seeking to upset a plan as fair and reasonable once supported by the double majority of creditors required under the CCAA.[11] In *Re Uniforêt inc*., when dismissing a challenge to plan sanction based on allegations related to unequal creditor treatment as being unfair and unreasonable, the Court held:

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[8] *In the Matter of the Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and *in the Matter of the Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and *in the Matter of OPTI Canada Inc.* and *OPTI Technology Ltd*. ["***OPTI Canada***"], Sanction Hearing and Stay Extension Order dated September 7, 2011, Court File No. 1101-09476 at para 8(a), BOA Tab 4; *OPTI Canada* Plan of Compromise and Reorganization (Recapitalization Plan), Court File No. 1101-09476 at ss. 5.3(a)(ix) and (xi), BOA Tab 5.
[9] *Keddy* at para 49, BOA Tab 3.
[10] *Castor* at para 29, BOA Tab 1.
[11] *Olympia* at para 39, March 20 BOA Tab 9; *Keddy* at paras 43-44, BOA Tab 3; *Castor* at para 29, BOA Tab 1.

> Absent bad faith, the CCAA should not be employed to permit a cranky minority creditor to frustrate a feasible and fair plan that has been blessed by an overwhelming majority of all the creditors of a debtor.[12]

17. It is in this context that this Court must now decide if providing certain Noteholders with shares that, while entitled to the same economic treatment as the shares to be received by Baiyin and Gramercy but which are subject to voting restrictions for a maximum of 3.5 years, is so egregiously unfair that the business judgment of the Affected Secured Creditors who voted to support of the Plan, including 23 other Noteholders who are to receive the same shares, is to be overridden. For the reasons set out above, it is submitted that the business judgement of the Affected Secured Creditors should be respected and this Court should find that the Plan is fair and reasonable, as the Monitor did.

PART III - RELIEF SOUGHT

18. The Applicants and the Requisite Consenting Parties request that this Court grant the proposed Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of March, 2018.

Cassels Brock & Blackwell LLP	McCarthy Tétrault LLP	Goodmans LLP
Lawyers for the Applicants	Lawyers for *Baiyin International Investment Ltd./Baiyin Nonferrous Group Company, Limited*	*Lawyers for Gramercy Funds Management LLC*

[12] *Re Uniforêt inc.*, 2003 CarswellQue 3404 at para 33, March 20 BOA Tab 13.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re 4519922 Canada Inc.*, 2015 ONSC 4648.
2. *Re Central Guaranty Trustco Ltd.,*1993 CarswellOnt 228.
3. *Re Keddy Motor Inns Ltd.*, 1992 CarswellNS 46.
4. *In the Matter of the Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and *in the Matter of the Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and *in the Matter of OPTI Canada Inc.* and *OPTI Technology Ltd*., Sanction Hearing and Stay Extension Order dated September 7, 2011, Court File No. 1101-09476.
5. *In the Matter of the Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and *in the Matter of the Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and *in the Matter of OPTI Canada Inc.* and *OPTI Technology Ltd*., Plan of Compromise and Reorganization (Recapitalization Plan), Court File No. 1101-09476.

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