

Here is a Court File No. 09-CL-8172

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

RETURN ON INNOVATION CAPITAL LTD., as agent for ROI FUND INC., ROI SCEPTRE CANADIAN
RETIREMENT FUND, ROI GLOBAL RETIREMENT FUND and ROI YIELD PRIVATE PLACEMENT FUND and
ANY OTHER FUND MANAGED BY ROI from time to time

Applicants

- and -

GANDI INNOVATIONS LIMITED
GANDI INNOVATIONS HOLDINGS LLC
GANDI INNOVATIONS LLC
GANDI INNOVATIONS HOLD CO. and
GANDI SPECIAL HOLDINGS LLC

Respondents

FIFTEENTH REPORT OF THE MONITOR

April 18, 2011

Appendix A	Initial Order dated May 8, 2009
Appendix B	Expander Powers Order dated March 9, 2010
Appendix C	Claims Procedure Order dated March 9, 2010
Appendix D	Twelfth Report (without appendices) dated December 3, 2010
Appendix E	Justice Morawetz's Endorsement dated February 18, 2011
Appendix F	Thirteenth Report (without appendices) dated February 14, 2011
Appendix G	Notices of Disallowance
Appendix H	Notices of Dispute
Appendix I	Letter to Jaffe Raitt Heuer & Weiss dated April 18, 2011
Appendix J	Email Correspondence between Monitor, Hary and Garmoe
Appendix K	List of Payments
Appendix L	Invoices and Supporting Documentation
Appendix M	Eighth Report (without appendices) dated January 18, 2010
Appendix N	Endorsement of Madam Justice Karakatsanis dated March 19, 2010
Appendix O	Affidavit of Hary Gandhi (without exhibits) sworn February 22, 2010

1 PURPOSE

1.1 The Monitor's Fifteenth Report is filed in support of the Monitor's motion for a determination of the following preliminary issues in connection with the Indemnity Claims (as defined below) of Trent Garmoe ("Garmoe"), Hary Gandy ("Hary") and James Gandy ("James", and collectively, the "Claimants") against the Gandhi Group (as defined below), without admitting the validity or amount of such Indemnity Claims:

- i. Whether the allegations asserted by TA Associates (as defined below) in its arbitration against the Claimants, if proven, entitle the Claimants to be indemnified by any Gandhi entity other than Gandhi Innovations Holdings LLC ("Gandhi Holdings") for any award of damages and legal fees incurred by the Claimants in defending the arbitration; and
- ii. Whether the claims for indemnification by the Claimants in respect of the claims by TA Associates for recovery of their equity investment constitute equity claims.

2 INTRODUCTION AND BACKGROUND

2.1 Background

2.1.0 Gandhi Innovations Limited ("Gandhi Canada"), Gandhi Holdings and Gandhi Innovations LLC ("Gandhi San Antonio" and together with Gandhi Canada and Gandhi Holdings, "Gandhi") obtained protection from their creditors under the Companies' Creditors Arrangement Act ("CCAA") pursuant to an Order (the "Initial Order") of this Court dated May 8, 2009. A copy of the Initial Order is attached hereto as **Appendix A**.

2.1.1 The Initial Order appointed BDO Canada Limited (formerly BDO Dunwoody Limited) as Monitor of Gandhi.

2.1.2 On November 25, 2009, this Honourable Court added Gandhi Innovations Hold Co. ("Gandhi Holdco") and Gandhi Special Holdings LLC ("Gandhi Special", and

together with Gandhi and Gandhi Holdco, the “**Gandhi Group**”) as debtors to the Gandhi CCAA proceeding.

- 2.1.3 On June 5, 2009, Gandhi also obtained protection from their creditors in the United States by applying for and obtaining recognition of the within proceeding as a foreign main proceeding pursuant to Chapter 15 of the United States Bankruptcy Code.
- 2.1.4 On November 25, 2009, this Court approved the sale of substantially all of the business and assets of the Gandhi Group to Agfa Corporation and Agfa Inc. (collectively referred to as “**Agfa**”).
- 2.1.5 On January 15, 2010, the Monitor closed the sale to Agfa.
- 2.1.6 The total estimated purchase price (the “**Purchase Price**”) from the sale to Agfa is approximately \$40.4 million USD and is comprised of both a contingent and a non-contingent portion. Sale proceeds totaling \$25.0 million USD were received by the Monitor on closing. The contingent balance of the Purchase Price is payable over a period of two years out of collections of accounts receivable.
- 2.1.7 On March 9, 2010, this Court granted an order which, *inter alia*, expanded the Monitor’s powers to allow the Monitor to file, on behalf of the Gandhi Group, a plan of compromise or arrangement under the CCAA (the “**Expanded Powers Order**”). A copy of the Expanded Powers Order is attached as **Appendix B**.
- 2.1.8 On March 9, 2010, this Court issued an order (the “**Claims Procedure Order**”) authorizing the Monitor to conduct a process for calling and determining claims of the Gandhi Group’s creditors. Among other things, the Claims Procedure Order established June 30, 2010 as the Claims Bar Date. A copy of the Claims Procedure Order is attached as **Appendix C**.

2.2 Plan of Compromise and Arrangement

- 2.2.1 For reasons set out in the Monitor’s Twelfth Report and based on the information available to the Monitor at the time, including, the integrated nature of the Gandhi Group’s business and operations, the Monitor determined

that a consolidated plan of compromise and arrangement represented the most equitable distribution for the unsecured creditors of the Gandhi Group and proceeded to develop such a plan. A copy of the Twelfth Report without appendices is attached hereto as **Appendix D**.

2.2.2 Assuming the Purchase Price is received by the Monitor in full, the Monitor indicated in the Twelfth Report that the consolidated plan of compromise and arrangement would generate a distribution to unsecured creditors on a *pro rata* basis of approximately 26.8% of the value of their claims.

2.2.3 On January 4, 2011, this Court granted an order authorizing the Monitor to file a consolidated plan of compromise and arrangement and call a meeting of creditors of the Gandhi Group.

2.3 Indemnity Claims

2.3.0 Gandhi Holdings was incorporated pursuant to the laws of the State of Delaware on August 24, 2007. On September 12, 2007, the Gandhi Group re-organized their business structure so that Gandhi Holdings would be the parent of the various entities comprising the Gandhi group of companies world-wide.

2.3.1 The Claimants were directors and officers of Gandhi Holdings.

2.3.2 In September 2007, in conjunction with the reorganization described above, TA Associates, Inc. as general partner for TA Associates X, L.P., TA Atlantic and Pacific V, L.P., TA Strategic Partners Fund II, L.P., TA Strategic Partners Fund II-A, L.P., TA Investors II, L.P. and TA Subordinated Debt Fund II, L.P. (“**TA Associates**”), an equity fund based in Boston Massachusetts, advanced approximately \$75 million USD by way of debt and equity to the Gandhi Group. TA Associates’ total investment consisted of an equity investment in Gandhi Holdings in the amount of \$50 million USD and an unsecured loan in the amount of \$25 million USD which amount was guaranteed by other members of the Gandhi Group.

2.3.3 In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claim damages against the

Claimants in an amount in excess of \$75 million USD, primarily composed of the total amount of TA Associates' investment in the Gandhi Group.

- 2.3.4 On December 20, 2010, the Monitor received proof of claims of Hary and James against the Gandhi Group in the approximate amount of \$76 million and a proof of claim of Garmoe against the Gandhi Group in an approximate amount of \$88 million (the "Indemnity Claims"). The Claimants assert an entitlement to indemnification by the Gandhi Group in respect of an award which may be made against them in the arbitration described above together with all legal fees incurred by the Claimants in defending the arbitration.
- 2.3.5 On February 18, 2011, Justice Morawetz granted leave to the Claimants to file their Indemnity Claims late. A copy of Justice Morawetz's Endorsement is attached hereto as **Appendix E**. In his Endorsement, Justice Morawetz noted that the Monitor can apply to Court to have the preliminary issues identified in Section 1.1 of this Report determined.

2.4 Indemnity Claims to be Limited to Gandhi Holdings

- 2.4.0 If this Court determines that the Indemnity Claims are limited to Gandhi Holdings, the Monitor intends to amend the plan of compromise and arrangement to exclude Gandhi Holdings and prepare a separate plan in respect of Gandhi Holdings in order to facilitate an earlier distribution of funds available to creditors. The effect of excluding Gandhi Holdings and the impact on the creditors' claims was described in detail in the Monitor's Thirteenth Report to the Court. A copy of the Thirteenth Report, without appendices, is attached hereto as **Appendix F**.
- 2.4.1 The proofs of claim filed by the Claimants rely on indemnity provisions set out in the Amended and Restated Limited Liability Company Agreement (the "**LLC Agreement**") and a separate Indemnification Agreement entered into in connection with the Membership Interest Purchase Agreement in respect of Gandhi Holdings dated as of September 12, 2007 (and together with the LLC Agreement, the "**Indemnity Agreements**"). Gandhi Holdings is the only Gandhi entity that is a party to the Indemnity Agreements.

- 2.4.2 On March 11, 2011, the Monitor disallowed the Indemnity Claims in full. In particular, the Monitor advised the Claimants that based on the evidence filed in support of the Indemnity Claims, any indemnity claims would be solely against Gandhi Holdings. Copies of the Notices of Disallowance are attached hereto as **Appendix G**.
- 2.4.3 On March 25, 2011, the Claimants served their Notices of Dispute. Included in the Notices of Dispute were Articles of Association of Gandhi Canada which provide for certain indemnities in favour of directors and officers of Gandhi Canada. The Claimants have not provided the Monitor with an indemnity from any other member of the Gandhi Group. Copies of the Notices of Dispute are attached hereto as **Appendix H**.
- 2.4.4 The Claimants dispute the Monitor's position that the Indemnity Claims are limited to Gandhi Holdings for the following reasons:
- (i) The Claimants rely on the Articles of Association of Gandhi Canada which contain an indemnity in favour of directors and officers of Gandhi Canada under certain circumstances;
 - (ii) The Claimants allege that the Monitor failed to produce any corporate governance documents of the other Gandhi entities and that, if produced, such documents will demonstrate that all of the Gandhi entities are liable to indemnify the Claimants for the Indemnity Claims; and
 - (iii) The Monitor is estopped from limiting the Indemnity Claims to Gandhi Holdings because all of the Gandhi Group entities have previously paid defense costs related to the arbitration with the Monitor's approval.
- 2.4.5 Based on the evidence filed by the Claimants, including the Indemnity Agreements and the corporate documents of Gandhi Canada, the Monitor maintains its position that any indemnity claims would be limited to Gandhi Holdings. Each point raised by the Claimants in their Notices of Dispute is discussed below.

Articles of Association of Gandhi Canada

- 2.4.6 On their face, the Articles of Association of Gandhi Canada provide for an indemnity in favour of current and former directors and officers of Gandhi Canada for losses sustained as a result of claims brought by reason of their positions as officers and directors of Gandhi Canada or by reason of their positions as officers and directors of other Gandhi entities if they acted in those positions at Gandhi Canada's request.
- 2.4.7 Based on the Monitor's review of the pleadings in the arbitration proceeding, the claims brought by TA Associates against the Claimants were not claims against them by reason of their positions as directors or officers of Gandhi Canada. In any event, to the Monitor's knowledge, Hary and Garmoe were not directors and officers of Gandhi Canada.

Corporate Records of the Gandhi Group

- 2.4.8 The Monitor has reviewed the documents in its possession. To the Monitor's knowledge it does not have in its possession nor has it seen the corporate governance documents of any member of the Gandhi Group with the exception of the Articles of Association of Gandhi Canada, served by the Claimants in their Notices of Dispute.
- 2.4.9 The Monitor believes that such documents should be in the possession of former corporate counsel of the Gandhi Group: (i) Jaffe Raitt Heuer & Weiss Inc.; and/or (ii) Langley & Banack Inc. On April 18, 2011, the Monitor's counsel wrote a letter to Jaffe Raitt Heuer & Weiss inquiring whether it has any corporate records of the Gandhi Group. A copy of this letter is attached hereto as **Appendix I**. In addition, the Monitor will contact Langley & Banack to inquire of same.

The Monitor has not previously acknowledged or approved payment of the legal fees of the Claimants in connection with the arbitration

- 2.4.10 The Claimants assert that the Monitor's approval of the legal fees of Langley & Banack and the allocation of those payments to accounts associated with the

arbitration signals the Monitor's prior approval and acknowledgement of the Gandhi Group's obligations to indemnify the Claimants.

2.4.11 The Monitor did not intend to approve payment of any legal services rendered in connection with the arbitration.

2.4.12 Until the sale of the Gandhi Group to Agfa was completed, this CCAA proceeding was a debtor in possession restructuring with the business and affairs of the Gandhi Group being managed by their officers and directors, specifically Hary and Garmoe. Pursuant to the terms of the Initial Order, the Monitor was required to approve all expenditures over \$10,000 before payment was made. The Monitor approved payment of legal fees to counsel for the Gandhi Group on the general understanding that such fees were incurred by the Gandhi Group in connection with the CCAA, Chapter 15 proceedings, and for general corporate work for the Gandhi Group.

2.4.13 While reviewing the Gandhi Group's request for approval of legal fees, the Monitor repeatedly advised Hary and Garmoe that the Monitor will only approve legal fees incurred for the benefit of the Gandhi Group and not for other affiliated entities or individuals. An email correspondence to that effect between the Monitor, Hary and Garmoe in June 2009 is attached hereto as **Appendix J**. The Monitor further advised Hary and Garmoe that the Monitor will not approve payment for any goods or services which were rendered prior to the filing date.

2.4.14 The Monitor has reviewed the financial records of the Gandhi Group and has assembled a list of payments for legal fees made by Gandhi San Antonio from the commencement of the CCAA proceeding (May 9, 2009) until approximately January 2010 (the closing of the sale to Agfa) to Langley & Banack. A list of these payments is attached hereto as **Appendix K**. Of these payments, the following were authorized by the Monitor:

(i) \$25,711.54, payment made on July 24, 2009;

(ii) A retainer in the amount of \$50,000 approved in August 2009;

(iii) \$69,856.13, payment made on September 11, 2009; and

(iv) \$31,746.01 payment made on December 22, 2009.

2.4.15 The payments described above were made by the Gandhi Group prior to the completion of the sale to Agfa. With the exception of the backup produced by the Claimants in respect of the \$50,000 retainer, the Monitor does not currently have in its possession the invoices and backup documentation regarding these payments. There is no indication in the Claimants' proof of claims or notices of dispute that the Claimants have requested the supporting documentation from their former counsel, Langley & Banack. The Monitor intends to contact Langley & Banack to request the documentation supporting those payments and, provided it is received on a timely basis, will include it in a supplementary report.

2.4.16 Langley & Banack provided legal services to the Gandhi Group in connection with the Chapter 15 proceeding and other litigation matters concerning the Gandhi Group during the course of its restructuring proceeding. With the exception of the legal fees associated with the settlement of the Dualite Action (as defined below) and the \$50,000 retainer discussed in greater detail below, all other fees of Langley & Banack were approved by the Monitor on the understanding that the fees were incurred in connection with the Gandhi Group's CCAA and Chapter 15 proceedings in accordance with the terms of the Initial Order.

2.4.17 Following the completion of the sale of the Gandhi Group to Agfa, the Monitor approved the following payments to Langley & Banack:

(i) \$12,622.20, payment made on February 12, 2010;

(ii) \$2,061.71, payment made on February 17, 2010;

(iii) \$3,009.59, payment made on April 20, 2010;

(iv) \$290,317, payment made on May 6, 2010, for legal fees in connection with the settlement of a lawsuit by Dualite Inc. against, among others Gandhi Canada, Gandhi San Antonio, James and Hary (the "Dualite

Action“) in the amount of \$290,317 USD pursuant to an Order of Madam Justice Karakatsanis dated March 19, 2010.

- 2.4.18 Copies of the supporting documentation and invoices relating to these payments are attached hereto as **Appendix L**. As is evidenced by those documents, the approved payments were for services rendered in connection with the Dualite settlement and the Gandhi Group’s Chapter 15 proceeding.
- 2.4.19 The Monitor approved the \$50,000 retainer on the understanding that the retainer be used to satisfy the legal fees of the Gandhi Group incurred in preparation of the CCAA and Chapter filings and future services to be rendered on the Chapter 15 proceeding. It appears from the materials filed by the Claimants in support of their Notices of Dispute that the retainer was allocated among a number of matters and that \$3,187,78 of the retainer was allocated to cover the costs of the arbitration. The Monitor had no input, knowledge or control over such allocation and, had it been consulted, would have opposed such allocation as it did not involve any member of the Gandhi Group.
- 2.4.20 The reasons for the Monitor’s approval of the legal fees to Langley & Banack in connection with the Dualite Action were set out by the Monitor in its Eighth Report to the Court filed on a motion by the Gandhi Group for an order approving the legal fees associated with the Dualite Action (the “**Fees Motion**”). A copy of the Eighth Report, without appendices, is attached hereto as **Appendix M**. Payment of the legal fees was supported by the Monitor in this circumstance because the settlement benefited the Gandhi Group and its unsecured creditors. Furthermore, as was noted by the Monitor in the Eighth Report and by Justice Karakatsanis in her Endorsement dated March 19, 2010 (the “**Fees Endorsement**”), the promise of contribution to the settlement enabled Hary to focus on maintaining the business operations of the Gandhi Group and co-operate with the Monitor to complete the sale transaction. A copy of the Fees Endorsement is attached hereto as **Appendix N**.
- 2.4.21 The Claimants indicate in their proofs of claims that upon the Gandhi Group obtaining CCAA protection, TA Associates voluntarily stayed the arbitration proceeding which was not revived until approximately August 2010. The

Monitor similarly understood the arbitration to be dormant and had no knowledge of legal work being performed or fees incurred in connection with the arbitration following the Initial Order.

2.4.22 In support of the Fees Motion, Hary filed an affidavit sworn on February 22, 2010, which, among other things, set out his understanding as to the Monitor's reasons for approving the \$50,000 retainer discussed above:

22. In or around early August 2009, Mr. Davidson advised me that the Monitor would approve a \$50,000 retainer to LB. As the Dualite litigation was the only significant matter LB continued to work on for Gandi, aside from occasional issues relating to the bankruptcy proceeding, I understood the Monitor to be approving the payment of legal fees relating to Dualite.

2.4.23 At paragraph 24, of his Affidavit, Hary acknowledges that he was subsequently advised by the Monitor that the retainer was approved for legal fees related to the "bankruptcy". This acknowledgement and the Monitor's position are also reflected in the Fees Endorsement, which confirms that the legal fees were not being approved by the Monitor or paid by the Gandi Group in connection with the arbitration proceeding. A copy of Hary's Affidavit, without exhibits, is attached hereto as **Appendix O**.

All of which is respectfully submitted this 18th day of April, 2011.

BDO CANADA LIMITED
Monitor in the CCAA proceeding of
Gandi Innovations Limited,
Gandi Innovations Holdings LLC,
Gandi Innovations LLC,
Gandi Innovations Hold Co., and
Gandi Special Holdings LLC
Per:



Blair F. Davidson, CA•CIRP, CBV, CMC
President