

**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

**AMENDED NOTICE OF MOTION
(Re: Shareholder Meeting)
(returnable on May 28, 2015)**

The moving party, Mr. Jon Nix (the largest shareholder of Xinergy Ltd. ("**Xinergy**")) will make a motion before a Judge of the Ontario Superior Court of Justice (Commercial List) on Thursday, May 28, 2015 at 10:00 o'clock in the morning, or as soon after that time as the motion can be heard, at 330 University Avenue, in the City of Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an order abridging the time of service of the Notice of Motion and the Motion Record herein and dispensing with further service thereof;
2. declaring the stay of proceedings granted pursuant to the Initial Recognition Order and Supplemental Order of Justice Newbould dated April 23, 2015 (as amended, the "**Recognition Order** and the "Supplemental Order", respectively) does not apply to the shareholder meeting

(the “**Shareholder Meeting**”) that was requisitioned by Jon Nix pursuant to Section 105(4) of the Ontario *Business Corporations Act* (“**OBCA**”);

3. or in the alternative to paragraph 2, an order that the stay of proceedings in the Recognition Order and/or Supplemental Order shall be lifted for the limited purpose of holding the Shareholder Meeting;

4. ordering that Xinergy immediately deliver Jon Nix a copy of Xinergy’s shareholder list pursuant to Section 146 of the OBCA;

5. an order granting certain related administrative relief regarding the conduct of the Shareholder Meeting to ensure that the Shareholder Meeting is not delayed, including, among other things, ordering that:

- (a) the Chair of the Shareholder Meeting shall be independent of both the management and current board of directors of Xinergy and Jon Nix;
- (b) the Shareholder Meeting shall occur on June 19, 2015;
- (c) the Shareholder Meeting shall not be cancelled, rescheduled or adjourned; and
- (d) the Chair of the Shareholder Meeting shall be entitled to treat any non-voting common shares of Xinergy (the “**Non-Voting Shares**”) as voting common shares (the “**Voting Shares**”) for the purpose of the Shareholder Meeting if presented with clear evidence that a holder of Non-Voting Shares has provided notice to Xinergy of such holder’s request that such Non-Voting Shares be converted to Voting Shares as provided for in the articles of Xinergy, notwithstanding any

record date set for the Shareholder Meeting or failure to act by Xinergy or transfer agent;

- (e) or in the alternative to paragraph 4(d), an order that the Chair of the Shareholder Meeting shall be able to consider and accept the votes of a shareholder if presented with clear evidence that the shareholder is the holder of Voting Shares, notwithstanding any record date set for the Shareholder Meeting or the failure to act by Xinergy or a transfer agent;

- 6. such further and other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

The Parties

- 7. Xinergy is an Ontario corporation incorporated under the OBCA that operates subsidiaries in the United States in the business of coal mining;

- 8. As of the date of Xinergy's most recent quarterly public filing, there were approximately 58.3 million Voting Shares issued and outstanding, and approximately 7.5 million Non-Voting Shares issued and outstanding;

- 9. Jon Nix is the founder and former Chairman and Chief Executive Officer of Xinergy;

- 10. Jon Nix is the largest shareholder of Xinergy being the registered and beneficial holder of 7,467,541 Non-Voting Shares and 4,592,563 Voting Shares.

Chapter 11 Proceeding

11. On April 6, 2015, Xinergy, along with 25 of its 26 subsidiaries, commenced a proceeding (the “**Chapter 11 Proceeding**”) by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Bankruptcy Code (the “**Bankruptcy Code**”), in the United States Bankruptcy Court for the Western District of Virginia (the “**US Bankruptcy Court**”);
12. The Chapter 11 Proceeding is expected to proceed on an expedited time line;
13. On April 23, 2015, the Ontario Superior Court recognized the Chapter 11 Proceeding under the *Companies’ Creditors Arrangement Act* (“**CCAA**”) and stayed all actions and proceedings against Xinergy until otherwise ordered by the Court;
14. Xinergy filed for Chapter 11 protection without notice to Jon Nix;

Consideration of Non-Voting Shares

15. On April 16, 2015, Jon Nix’s counsel sent a request to Xinergy requesting his Non-Voting Shares be converted to Voting Shares;
16. On April 20, 2015, the Ontario Securities Commission (the “**OSC**”) issued a cease trade order (the “**CTO**”) (which order replaced a temporary order issued by the OSC on April 8, 2015) ceasing all trading in the securities of Xinergy as a result of the failure of Xinergy to file continuous disclosure materials as required by Ontario securities law;
17. Xinergy’s counsel informed Jon Nix that the CTO prevented the conversion of the Non-Voting Shares to Voting Shares;

18. Subsequently, the OSC issued an order partially revoking the CTO for the limited purpose of allowing Jon Nix to convert his Non-Voting Shares to Voting Shares;

19. Xinergy has refused to effect the conversion and has not issued Voting Shares to Jon Nix pursuant to the articles of Xinergy;

~~20. Jon Nix has made an application to the OSC seeking a partial revocation of the CTO for the limited purpose of converting his Non-Voting Shares to Voting Shares, however, the application may not be considered prior to May 20, 2015, the record date set for the Shareholder Meeting;~~

21. In the circumstances it is fair and just for the Chair of the Shareholder Meeting to treat any Non-Voting Shares as Voting Shares for the purpose of the Shareholder Meeting if presented with clear evidence that a holder of Non-Voting Shares has provided notice to Xinergy of such holder's request that such Non-Voting Shares be converted to Voting Shares as provided for in the articles of Xinergy;

Support for Shareholder Meeting

22. Prior to the Chapter 11 Proceeding, Jon Nix requested that the board of directors hold a shareholder meeting for the purpose of removing certain individuals from their positions as directors of Xinergy and electing new directors to serve on the board;

23. The board did not agree to hold a shareholder meeting;

24. Jon Nix has received confirmations from shareholders holding approximately 49.5% of Xinergy's outstanding and issued Voting Shares and Non-Voting Shares stating such

shareholders will vote in favour of removing certain individuals from their positions as directors of Xinergy and electing new directors to serve on the board;

25. Jon Nix received the support for the proposed changes despite the fact that he was only able to solicit fifteen (15) shareholders due to Ontario securities law;

Requisition of Shareholder Meeting

26. On April 16, 2015, as the holder of not less than five percent (5%) of the issued Voting Shares of the Xinergy, Jon Nix requisitioned the directors of Xinergy to call a special meeting of shareholders under section 105 of the OBCA for the following purposes:

- (a) to set the number of directors to be elected at the Shareholder Meeting at four (4);
- (b) to remove Todd Swanson, Joesph Groia, and Mark Holliday as directors of Xinergy; and
- (c) to elect Jeff Wilson and Debra Powers and re-elect Robert Metcalfe and Gregory Mason as directors of Xinergy;

27. In response to the requisition, Xinergy refused to call a shareholder meeting and is currently seeking relief in the US Bankruptcy Court regarding the Shareholder Meeting;

28. Jon Nix has begun the process to call the Shareholder Meeting to be held on June 19, 2015, with a record date of May 20, 2015, in accordance with Section 105(4) of the OBCA;

29. Jon Nix seeks administrative relief in respect of the Shareholder Meeting to ensure it is not delayed;

Shareholder List

30. On May 13, 2013, Jon Nix requested a shareholder list of Xinergy from TMX Equity Transfer Services (“TMX Equity”), Xinergy’s transfer agent;
31. TMX Equity requested payment from Jon Nix and Jon Nix paid the applicable fee for the shareholder list;
32. Xinergy has refused to provide instructions to TMX Equity to deliver to the shareholder list to Jon Nix;
33. Over 10 days have passed since Jon Nix requested the shareholder list and Jon Nix is entitled to the list pursuant to Section 146(2) of the OBCA;
34. The moving party relies on:
 - (a) Sections 97, 99, 102, 105, 106, 107 122 and 146 of OBCA;
 - (b) Sections 11, 11.02, 48, 50 and the other provisions of the CCAA and the inherent and equitable jurisdiction of this Court;
 - (c) Rules 1.04, 2.03, 3.02, 16.08 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and
 - (d) Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) The Affidavit of Jon Nix sworn on May 13, 2015 and the exhibits attached thereto; and

- b) Such further and other material as counsel may advise and this Honourable Court may permit.

May 27, 2015

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Lawyers for Jon Nix

TO: THIS HONOURABLE COURT

AND TO: THE ATTACHED SERVICE LIST

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(AS AT MAY 27, 2015)**

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(AS AT MAY 26, 2015)**

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

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Court File No.: CV-15-10936-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AMENDED NOTICE OF MOTION
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(returnable on May 28, 2015)

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