

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-36, AS AMENDED

FACTUM OF THE MOVING PARTY JON NIX
(Returnable on May 28, 2015)

May 26, 2015

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FACTUM OF THE JON NIX

PART I - OVERVIEW

1. The fundamental issue to be determined on this motion is whether a stay of proceedings issued under the CCAA restrains a shareholder from calling a shareholder meeting under applicable corporate legislation. This is the threshold question to be determined by the Court before determining the related relief requested by Mr. Nix in respect of the shareholder meeting.

PART II - THE FACTS

The Parties

2. Xinergy Ltd. ("**Xinergy**") is an Ontario corporation incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("**OBCA**"). Xinergy is a holding

company for a number of US subsidiaries that operate coal mining assets in West Virginia and Virginia.

3. The current directors of Xinerger are Todd Swanson, Joesph Groia, Mark Holliday, Robert Metcalfe and Gregory Mason (the “**Board**”). Mr. Holliday was appointed by the Board immediately prior to the commencement of the Chapter 11 Proceeding (defined below) and not at a meeting of the shareholders of Xinerger.
4. Jon Nix (“**Mr. Nix**”) is the founder and the former Chairman and Chief Executive Officer of Xinerger. He is the largest shareholder of Xinerger holding approximately eighteen and one half percent (18.5%) of the outstanding common shares.

Chapter 11 Proceedings

5. On April 6, 2015, Xinerger, along with 25 of its 26 subsidiaries (the “**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 “**US Bankruptcy Code**”), in the United States Bankruptcy Court for the Western District of Virginia (the “**US Court**”).
6. As result of the Chapter 11 Proceeding, there was an automatic stay of proceedings against Xinerger and the Subsidiaries pursuant to §362 of the US Bankruptcy Code. The US Bankruptcy Court did not issue an order staying proceedings against Xinerger and the Subsidiaries.

7. On April 23, 2015, the Ontario Superior Court (the “**Canadian Court**”) issued the Initial Recognition Order (as amended, the “**Recognition Order**”) recognizing the Chapter 11 Proceeding and declaring the centre of main interest of Xinergy as the United States. The Recognition Order stayed all actions, suits or proceedings against Xinergy and the Subsidiaries in accordance with section 48 of the CCAA. The Canadian Court also issued the Supplemental Order. The Supplemental Order contains stay language from the Model CCAA Initial Order.
8. At the recognition hearing, the Canadian Court was advised by counsel for Mr. Nix of the dispute between certain shareholders and Xinergy and the fact that Mr. Nix has requisitioned the Board to hold a shareholder meeting.
9. On May 5, 2015, the US Court had a hearing (the “**US Hearing**”) on limited objections filed by Mr. Nix in respect of the DIP financing obtained by Xinergy subject to US Court approval as well as other issues. The objections were overruled and a final order in respect of the DIP financing was entered by the US Court on that date.

Shareholder Meeting

10. In February, after having certain disagreements with the Board, Mr. Nix requested that Xinergy call a shareholders’ meeting for the purposes of, among other things, removing two individuals from their positions as directors of Xinergy and electing two directors to serve on the Board. The Board, through its counsel, advised Mr. Nix that the Board was prepared to make those changes to the Board (one change to made immediately and one

change to be made at Xinergy's next annual meeting of shareholders) if Mr. Nix provided the Board with evidence of support for such changes from shareholders holding something less than, but close to, 50% of the outstanding common shares.

11. After soliciting only fifteen shareholders due to constraints imposed by Ontario corporate and securities law, Mr. Nix presented the Board with evidence that shareholders holding approximately 49.5% of the common outstanding shares supported Mr. Nix's proposed changes to the Board. Despite shareholder support for the proposed changes and despite the fact that the Board had agreed to effect the requested changes if Mr. Nix provided evidence of the requisite shareholder support, the Board refused to effect any change.
12. On April 16, 2015, Mr. Nix requisitioned the Board to call a shareholders' meeting pursuant to section 105 of the OBCA. The requisition proposed the following items be considered at the shareholders' meeting:
 - (a) setting the number of directors to be elected at the shareholder meeting at four (4);
 - (b) empowering the Board to determine from time to time the number of directors within the minimum and maximum numbers provided in the articles of Xinergy;
 - (c) the removal of Todd Swanson, Joseph Groia, and Mark Holliday as directors of Xinergy; and
 - (d) the election of Jeffrey A. Wilson and Debra Powers as directors of Xinergy and re-election of Robert Metcalfe and Gregory Mason as directors of Xinergy.
13. On May 7, 2015 the Board, through counsel, informed Mr. Nix that the Board did not intend to call a shareholder meeting as required by the OBCA. Xinergy subsequently has

filed a complaint (the “**US Complaint**”) seeking an order in the US Court enjoining the shareholder meeting.

14. On May 14, 2015, Mr. Nix filed a motion with the Canadian Court seeking certain administrative relief related to the conduct of the shareholder meeting as well as a declaration that the calling of the shareholder meeting did not violate the stay of proceedings in the Recognition Order. The purpose of the motion was to ensure the shareholder meeting is not further delayed and the parties will be bound by the result of the vote at the shareholder meeting.
15. Mr. Nix has called a shareholders’ meeting pursuant to section 105(4) of the OBCA. The record date of the shareholders’ meeting is May 20, 2015 and pending the outcome of this motion and the determination of the US Complaint, the shareholders’ meeting is to be held on June 19, 2015.
16. On May 13, 2015, Mr. Nix requested a shareholder list of Xinergy from TMX Equity Transfer Services (“**TMX Equity**”) and Xinergy pursuant to section 146 of the OBCA. TMX Equity subsequently requested payment of a fee for producing the list which Mr. Nix paid. On May 19, 2015, the Ontario Securities Commission partially revoked the cease trade order in respect of Xinergy to specifically allow for Mr. Nix to convert his non-voting common shares to voting common shares. On May 21, 2015, Xinergy’s counsel informed counsel to Mr. Nix that Xinergy would refuse to provide instructions to TMX Equity in any manner that could assist Mr. Nix in calling a shareholder meeting, including effecting the conversion of shares pursuant to the articles of Xinergy. Xinergy

has alleged that the stay under the Recognition Order and Supplemental Order applied to the request as well as Mr. Nix's request for a shareholder list.

PART III - THE ISSUES

17. The primary issues to be determined on this motion are:
- (a) Which of the two courts is the appropriate court to decide whether the stay of proceedings applies to the calling of a shareholder meeting?
 - (b) If the Canadian Court is the appropriate court to decide the issue, does the stay of proceedings apply to the calling of a shareholder meeting?
 - (c) If the stay of proceedings does apply to the calling of a shareholder meeting, which of the two courts is the appropriate court to determine whether the stay should be lifted for the purpose of holding a shareholder meeting?

PART IV - THE LAW

- (a) **The Canadian Court is the appropriate court to decide whether the stay of proceedings under the Recognition Order or Supplemental Order applies to the calling of a shareholder meeting**

18. In an application under the CCAA in a cross-border insolvency, the Canadian Court has the power under section 50 of CCAA to make any order considered appropriate in the circumstances.

CCAA, s. 50.

***Tucker v Aero Inventory (UK) Ltd.*, 2009 CarswellOnt 7007 (Ont. S.C.J. [Commercial List]) at para 24.**

19. Clearly, the Canadian Court can interpret orders it has previously made. The fundamental issue to be determined on this motion is the interpretation of the

Recognition Order, the Supplemental Order and the CCAA. Interpretation of those orders and the extent of the stay under the CCAA should be determined by the Canadian Court. The implications of the US Bankruptcy Code on the shareholder meeting will be addressed by the US Court as part of the US Complaint.

20. Xinergy has indicated that it intends to rely on the US Bankruptcy Code, the Recognition Order and Supplemental Order in order to prevent a shareholder meeting. At a 9:30 appointment before the Canadian Court, counsel for Xinergy alleged that the stay under the Supplemental Order applied to a request for a shareholder list under the OBCA even though such a request would clearly not be stayed under §362 of the US Bankruptcy Code.

21. The parties need certainty on the issue of whether the Recognition Order or Supplemental Order apply to the shareholder meeting called by Mr. Nix. Further, Xinergy and the Board have continuously frustrated shareholder attempts to hold a meeting by refusing to comply with requests properly made under the OBCA. If Xinergy and the Board are permitted to further delay the exercise of shareholder rights without a specific order of the US Court or the Canadian Court, the issues to be determined on this motion will have effectively been rendered moot by the delay of Xinergy and the Board.

(b) The stay of proceedings under the Recognition Order or Supplemental Order does not affect ongoing corporate governance of Xinergy including the calling of a shareholder meeting

22. The CCAA and Chapter 11 of the US Bankruptcy Code are “debtor-in-possession” statutes. Management continues to oversee the operations, business and governance of

the debtor. The governance of the company also continues to be subject to corporate law. By entering a reorganization process under Chapter 11 and the CCAA, Xinergy has not become exempt from compliance with provincial statutes, including the OBCA.

23. Even in bankruptcy, where the property of the debtor vests with a trustee, a corporation continues to “to exist as a body corporate and may hold meetings, remove directors and officers, accept resignations and elect or appoint other directors and officers.” Corporate governance continues throughout reorganization, bankruptcy and receivership processes.

Re Can. Cereal & Flour Mills Co. (1921), 2 C.B.R. 158, 51 O.L.R. 316, 67 D.L.R. 234 (S.C.). at paras 4 – 6.

Fintry Estates Ltd., Re, 1962 CarswellBC 15, (B.C.S.C. [Bankruptcy]) at para 18.

24. The purpose of a stay of proceedings under the CCAA is to maintain the *status quo* between the company and third parties. It is intended to prevent creditors from obtaining an advantage over other creditors while a company is attempting to reorganize its affairs. The stay is not intended to prevent ongoing compliance with corporate law or prevent ongoing corporate governance within the corporation.

Lehndorff General Partner Ltd., Re, 1993 CarswellOnt 183 (O.C.J. (Gen. Div. [Commercial List]) at para 6.

Stelco Inc., Re, 2005 CarswellOnt 1188 (O.N.C.A.) at para 36.

Canadian Airlines Corp., Re, 2000 CarswellAlta 622 (A.B.Q.B.) at para 17.

25. In *Unique Broadband Systems (Re)*, on a motion attempting to remove directors of a company under section 11.5 of the CCAA, Justice Wilton-Seigel stated that notwithstanding the company was in CCAA proceedings, shareholders of the company

“remain entitled to bring their own action to remove or replace directors under applicable corporate legislation.”

Unique Broadband System (Re), 2011 ONSC 224 at para 36.

26. On a later motion in the same proceeding, Justice Wilton-Seigel refused to enjoin a take-over bid and held that a stay of proceedings under the CCAA did not prevent a takeover bid made by a dissenting shareholder. In the proceeding, the dissenting shareholder ultimately requisitioned a shareholder meeting and the directors of the debtor responded by calling an annual general meeting. The meeting was ultimately postponed on consent after two directors were removed from the board and replaced with candidates chosen by the dissenting shareholder.

Unique Broadband System (Re), 2012 ONSC 1459.

Ninth Report to Court of Duff & Phelps Canada Restructuring Inc. as CCAA Monitor of Unique Broadband Systems, Inc. and UBS Wireless Services Inc. dated July 5, 2012; Affidavit of Robert Ulicki sworn on July 27, 2012.

27. The Ontario Court of Appeal has also held that the corporate governance regime in corporate legislation continues to operate during CCAA proceedings. In *Stelco Inc., (Re)*, the Court of Appeal held that the CCAA (in force at the time) did not permit the Court to remove directors since the right to remove directors is expressly vested in the shareholders of the company under corporate legislation - in that case, the *Canada Business Corporations Act*. The Court of Appeal stated the following:

The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities....

[T]he s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

...

There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative “gap” to fill. [Emphasis added]

Stelco Inc., Re, supra at paras 44, 48.

28. In 2009, section 11.5 of the CCAA was added to the statute expressly granting the Court authority to remove and appoint directors to the Board of the debtor company. In the clause-by-clause analysis, Industry Canada stated the purpose of subsection 11.5(2) was to provide the Court the authority to appoint directors in order allow the restructuring to continue “without resorting to the time consuming process of holding a shareholder meeting to elect new directors.” It is clear from the discussion that Parliament never intended to usurp the authority of the shareholders to appoint directors during CCAA proceedings and also has never intended that corporate legislation be superseded by the CCAA. The regimes are complimentary and intended to operate in parallel.

Industry Canada, Bill C-12, Clause by Clause Analysis, Topic: Removal of Directors (<https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00865.html#p12>).

29. Corporate governance of Xenergy continues to be governed by the OBCA, unless the Canadian Court makes a specific order exempting compliance with specific obligations. Typically, in CCAA proceedings the debtor company needs a specific order relieving it

of its obligation to hold a shareholder meeting in a timely manner. This is usually only done where the shareholders no longer have an economic interest in the debtor company. There is no such order in this case nor has any relief on the matter been brought before the Canadian Court.

Richtree Inc. (Re), 2005 CarswellOnt 255 at para 11.

Angiotech Pharmaceuticals Inc., Re, 2011 BCSC 450 at para 11.

30. The Recognition Order restrains and prohibits the commencement of “proceedings in any action, suit or proceeding” against Xinergy. The calling of a shareholder meeting under the OBCA clearly is not an “action, suit or proceeding against the debtor company.” The obligation to call the requisitioned meeting is that of the directors of Xinergy, not Xinergy itself. The calling of the shareholder meeting by Mr. Nix was in response to the failure of the Board to call the meeting when requisitioned to do so. If anything, calling the shareholders meeting is an action against the directors of Xinergy, but not Xinergy itself.

31. The Supplemental Order further stays “all rights and remedies... against or in respect of the Debtor, or affecting the Business or the Property.” The proper interpretation of the language in the Supplemental Order is that it prevents third parties, such as creditors, suppliers or employees from exercising rights and remedies against the company. The Supplemental Order does not prevent ongoing corporate governance within the company. It also does not prevent changing the individuals who manage or supervise the management of the business and affairs of the company in accordance with the

applicable corporate statute. Xinergy's property would be unaffected and its business of mining coal would continue in the normal course.

32. Under the OBCA the Board's refusal to call a shareholders' meeting gives Mr. Nix the right to call his own meeting. Xinergy's position is that the stay of proceedings under the CCAA prevents a shareholder from calling a shareholders' meeting or making any other request of the company under corporate legislation. In effect, this position would produce a result that Xinergy, an OBCA company, is not required to hold a shareholders' meeting unless the Board exercises its discretion to hold a shareholders' meeting. This effectively entrenches the Board and prevents the Board from having any accountability to shareholders (and potentially other stakeholders). This is the exact result section 105 of the OBCA is intended to prevent. The ability to requisition a meeting under section 105 is only meaningful if a meeting can be called in a timely and expeditious manner.

OBCA, s. 105.

***Paulson & Co. v Algoma Steel Inc.*, 2006 CarswellOnt 41 (Ont. S.C.J.) at para 41.**

33. Further, a requisitioned meeting is a meeting among the shareholders of Xinergy, as the owners of Xinergy, to determine which individuals shall be responsible for the management or supervision of the management of the business and affairs of Xinergy. The right to vote for the election of directors is a fundamental right that attaches to shares of a company. Other than the shareholders of Xinergy, no stakeholder of Xinergy has a right to vote for the election of directors, including the directors themselves, management of Xinergy, or any other person involved in the Chapter 11 Proceeding or

the proceedings in this Canadian Court. To conclude that the stay applies to the requisitioned meeting would be to conclude that the shareholders of Xinergy have no right to determine who is responsible for the management or supervision of the management of the business and affairs of a company which they own.

34. Xinergy has also asserted in its US Complaint and before the Canadian Court at a 9:30 appointment that the directors nominated by Mr. Nix would not act in the best interest of Xinergy and the Subsidiaries. This allegation is without merit and has no basis in evidence or fact. Mr. Nix only seeks the election of two (2) new directors while keeping two (2) existing directors on the Board. Further, every director elected at the shareholder meeting will owe a fiduciary duty to Xinergy and its stakeholders and will be required to act in the best interest of Xinergy throughout the Chapter 11 Proceeding and afterwards. Lastly, during the Chapter 11 Proceeding, Xinergy will continue to be supervised by the US Court and the Canadian Court.

35. The US Court has not granted a specific order staying actions or proceedings against Xinergy or the Subsidiaries. The stay of proceedings in the Chapter 11 Proceeding arose automatically pursuant to §362 of the US Bankruptcy Code. The automatic stay of proceedings under the US Bankruptcy Code is akin to the automatic stay under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. The Canadian Court is the only court that has issued an order specifically staying proceedings against Xinergy and the Subsidiaries.

36. In the US it is “well-settled” that the automatic stay under §362 of the US Bankruptcy Code does not apply to shareholders compelling a shareholders’ meeting for the purpose of electing a new board of directors. Enjoining a shareholders’ meeting under the US Bankruptcy Code requires a specific injunction order from the US Court and only in circumstances where the calling of a shareholder meeting is a “clear abuse” will a US Court grant such an order.

In re Marvel Entertainment Group, Inc., 209 B.R. 832 (1997) at 838.

In re Heck’s Properties, Inc., 151 B.R. 739 (1992) at 759-760.

37. At the US Hearing, counsel for the DIP lenders and Xinergy both agreed that “shareholder rights do not disappear in bankruptcy” and only “where shareholders are trying to be destructive of the bankruptcy process or distracting the bankruptcy process or trying to impede or delay progress in the bankruptcy cases” would the automatic stay under §362 of the US Bankruptcy Code possibly prevent the exercise of shareholder rights.

Transcript of US Hearing at page 58.

(c) If the stay under the Recognition Order or Supplemental Order applies to the calling of a shareholder meeting, the US Court is the appropriate court to determine whether the stay should be lifted for the purpose of holding a shareholder meeting.

38. The centre of main interest of Xinergy as determined by the Canadian Court is the United States. The Canadian Court also determined that the Chapter 11 Proceeding is the foreign main proceeding. The US Court is more familiar with the background of Xinergy’s financial difficulties and is exercising control over the restructuring process.

Xinergy Ltd. (Re), 2015 ONSC 2692

39. Mr. Nix's motion before the Canadian Court primarily deals with issues under the OBCA. The declaration sought that the stay of proceedings under the Recognition Order and Supplemental Order did not apply to the shareholder meeting was a necessary part of the relief sought to ensure that the shareholder meeting would be validly held.
40. The stay of proceedings contained in the Recognition Order and the Supplemental Order are ancillary to the stay of proceedings under the US Bankruptcy Code. If the US Court decides that the shareholder meeting should not be enjoined under the US Bankruptcy Code, the Canadian Court should recognize and give effect to that order notwithstanding the Recognition Order and Supplemental Order. Similarly, if the Recognition Order and Supplemental Order do not apply to the shareholder meeting and the US Court subsequently enjoins the shareholder meeting, the Canadian Court may recognize that order if satisfied that such an order is consistent with the CCAA.

CCAA, s. 48.

41. The Canadian Court should ultimately defer to the US Court on the stay issue in the interest of comity and cooperation. The US Complaint is set to be heard on June 9, 2015. Xinergy has chosen the venue of the US Court and the US Court will be fully briefed on the facts at issue in determining whether the shareholder meeting *should* be enjoined. A separate hearing on lifting the stay in Canada will be duplicative. Lastly, the stay under the US Bankruptcy Code should be determinative in both jurisdictions in order to prevent forum shopping.

PART V - RELIEF REQUESTED

42. For the foregoing reasons, Mr. Nix respectfully requests:
- (a) an order declaring that the stay of proceedings under the Recognition Order and Supplemental Order does not apply to the calling of the shareholder meeting under the OBCA and requests by a shareholder under the OBCA in furtherance of holding a shareholder meeting; and
 - (b) an order directing that a hearing be scheduled for the further relief requested by Mr. Nix in his notice of motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2015.

May 25, 2015

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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Tucker v Aero Inventory (UK) Ltd.*, 2009 CarswellOnt 7007 (Ont. S.C.J. [Commercial List]).
2. *Re Can. Cereal & Flour Mills Co.* (1921), 2 C.B.R. 158, 51 O.L.R. 316, 67 D.L.R. 234 (S.C.).
3. *Fintry Estates Ltd., Re*, 1962 CarswellBC 15, (B.C.S.C. [Bankruptcy]).
4. *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (O.C.J. (Gen. Div. [Commercial List])).
5. *Stelco Inc., Re*, 2005 CarswellOnt 1188 (O.N.C.A.).
6. *Canadian Airlines Corp., Re*, 2000 CarswellAlta 622 (A.B.Q.B.).
7. *Unique Broadband System (Re)*, 2011 ONSC 224.
8. *Unique Broadband System (Re)*, 2012 ONSC 1459.
9. *Richtree Inc. (Re)*, 2005 CarswellOnt 255.
10. *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 450.
11. *Paulson & Co. v Algoma Steel Inc.*, 2006 CarswellOnt 41 (Ont. S.C.J.).
12. *In re Marvel Entertainment Group, Inc.*, 209 B.R. 832 (1997).
13. *In re Heck’s Properties, Inc.*, 151 B.R. 739 (1992).
14. *Xinergy Ltd. (Re)*, 2015 ONSC 2692.

**SCHEDULE “B”
RELEVANT STATUTES**

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Order relating to recognition of a foreign main proceeding

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Terms and conditions of orders

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

11 U.S. Bankruptcy Code § 362 - Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546 (b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105-277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-866;]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of

any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet

mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109 (h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109 (g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506 (a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding

1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707 (b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707 (b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363 (c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)

(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)

(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521 (a)(2)—

(A) to file timely any statement of intention required under section 521 (a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524 (c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365 (p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521 (a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)

(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)

(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)

(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)

(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)

(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)

(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

Business Corporations Act, R.S.O. 1990, c. B.16

Requisition for shareholders meeting

105. (1) The holders of not less than 5 per cent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition. R.S.O. 1990, c. B.16, s. 105 (1).

Idem

(2) The requisition referred to in subsection (1) shall state the business to be transacted at the meeting and shall be sent to the registered office of the corporation. R.S.O. 1990, c. B.16, s. 105 (2).

Duty of directors to call meeting

(3) Upon receiving the requisition referred to in subsection (1), the directors shall call a meeting of shareholders to transact the business stated in the requisition unless,

(a) a record date has been fixed under subsection 95 (2) and notice thereof has been given under subsection 95 (4);

(b) the directors have called a meeting of shareholders and have given notice thereof under section 96; or

(c) the business of the meeting as stated in the requisition includes matters described in clauses 99 (5) (b) to (d). R.S.O. 1990, c. B.16, s. 105 (3).

Where requisitionist may call meeting

(4) Subject to subsection (3), if the directors do not within twenty-one days after receiving the requisition referred to in subsection (1) call a meeting, any shareholder who signed the requisition may call the meeting. R.S.O. 1990, c. B.16, s. 105 (4).

Calling of meeting

(5) A meeting called under this section shall be called as nearly as possible in the manner in which meetings are to be called under the by-laws, this Part and Part VIII. R.S.O. 1990, c. B.16, s. 105 (5).

Repayment of expenses

(6) The corporation shall reimburse the shareholders for the expenses reasonably incurred by them in requisitioning, calling and holding the meeting unless the shareholders have not acted in good faith and in the interest of the shareholders of the corporation generally. R.S.O. 1990, c. B.16, s. 105 (6).

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-36, AS AMENDED

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF THE MOVING PARTY JON NIX
(Returnable on May 28, 2015)

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