

**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

**FACTUM**

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**FACTUM**

**I. OVERVIEW**

1. Xinergy Ltd. ("**Xinergy**" or the "**Applicant**") and 25 of its subsidiaries (collectively, the "**Chapter 11 Debtors**") have been involved in reorganization proceedings (the "**Chapter 11 Proceedings**") before the United States Bankruptcy Court for the Western District of Virginia (the "**U.S. Court**") for almost two months. Although all of Xinergy's operations and nearly all of its assets are located in the United States, Xinergy is a public, Ontario corporation and its common shares were previously traded on the Toronto Stock Exchange. In order to, among other things, protect certain limited assets, including potentially valuable tax attributes, Xinergy commenced recognition proceedings with this Court under Part IV of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 (the "**CCAA**").

2. A substantial shareholder, founder and former Chairman and Chief Executive Officer of Xinergy, Jon Nix ("**Nix**"), has brought a motion before this Court asking for this Court's countenance of his actions taken in violation of existing Court orders so that he may call a meeting of shareholders with a view to reconstituting the board of directors of Xinergy (the "**Board of Directors**"). Although under a slightly different procedural basis, the same issues are squarely before the U.S. Court at this time.

3. Nix's actions have the potential to destabilize the Chapter 11 Debtors' restructuring. Among other things, Nix's actions may lead to a default under the Chapter 11 Debtors' debtor-in-possession financing. The issues raised by Nix's motion are not technical or academic: the outcome may determine if the Chapter 11 Debtors are able to reorganize, to continue to operate their mines, to employ and pay their employees, and to fund their environmental, health and safety obligations.

4. This Court has already determined that the centre of main interests for Xinergy is the United States and that Xinergy's Chapter 11 Proceeding is a "foreign main proceeding." As such, consistent with the purpose of Part IV of the CCAA and the UNCITRAL model law (defined below) from which Part IV of the CCAA was derived, it is appropriate for the U.S. Court, as the court with supervision of the foreign main proceeding, to decide these issues in the first instance. Further, Nix, in his factum on this matter, appears to agree with this proposition.

## II. BACKGROUND

### Insolvency Proceedings

5. On April 6, 2015 (the "**Petition Date**"), Xinergy commenced a voluntary reorganization proceeding in the U.S. Court by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**").<sup>1</sup>

6. On the same date, Xinergy's 25 U.S. subsidiaries (the "**U.S. Subsidiaries**") also filed voluntary petitions under chapter 11 of the Bankruptcy Code with the U.S. Court to commence the Chapter 11 Proceedings.<sup>2</sup>

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<sup>1</sup> Affidavit of Michael R. Castle, sworn April 15, 2015 in support of the Application (*Initial Castle Affidavit*) at Exhibit A.

<sup>2</sup> Initial Castle Affidavit, *supra* note 1 at para 3.

7. On April 14, 2015, Xinergy filed an application with this Court pursuant to Part IV of the CCAA, seeking an order under section 48 of the CCAA (the “**Initial Recognition Order**”) and a further order under section 49 of the CCAA (the “**Supplemental Order**”).<sup>3</sup>

8. The Initial Recognition Order and Supplemental Order were granted by Justice Newbould, with Nix’s counsel present, on an unopposed basis, on April 23, 2015.<sup>4</sup>

9. The Initial Recognition Order confirms that the Chapter 11 Proceeding for Xinergy is a “foreign main proceeding” under the CCAA and grants a stay of proceedings against Xinergy as contemplated by section 48 of the CCAA.<sup>5</sup>

10. The Supplemental Order (i) recognized in Canada and gave effect to certain orders of the U.S. Court made in the Chapter 11 Proceeding; (ii) appointed Deloitte Restructuring Inc. as the information officer in respect of this proceeding (the “**Information Officer**”); and (iii) contained an arguably broader stay of proceedings than that granted in the Initial Recognition Order, including an explicit stay of any claims, rights, liens or proceedings against or in respect of Xinergy, the business and property of Xinergy and the directors and officers of Xinergy.<sup>6</sup>

11. A further Order (the “**Recognition Order**”) was granted on May 21, 2015 by this Court recognizing and giving effect to certain additional orders of the U.S. Court made in the Chapter 11 Proceedings including the *Final Order (I) Authorizing Debtors (A) to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Pursuant To 11 U.S.C. § 363 and (II) Granting Adequate Protection*

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<sup>3</sup> Affidavit of Michael R. Castle, sworn May 13, 2015 in support of the Applicant’s Motion (*Second Castle Affidavit*) at paras 9 and 10.

<sup>4</sup> *Ibid* at Exhibits “A” and “C.”

<sup>5</sup> Second Castle Affidavit at Exhibit “A,” paras 3 and 4.

<sup>6</sup> Second Castle Affidavit at Exhibit “C,” paras 4-7.

to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 (the “**Final DIP Order**”).

12. The agreement approved by the Final DIP Order (the “**DIP Credit Agreement**”) contains certain crucial milestones for the Chapter 11 Proceedings. Among other things, the DIP Credit Agreement requires that:

- by no later than seventy-five days following the Petition Date, the Chapter 11 Debtors must file a plan of reorganization that meets certain criteria;
- by no later than one hundred and twenty days following the Petition Date, the Chapter 11 Debtors must obtain an order of the U.S. Court authorizing the solicitation of votes on the plan of reorganization;
- by no later than one hundred and eighty days following the Petition Date, the Chapter 11 Debtors must obtain an order of the U.S. Court confirming the plan of reorganization; and
- by no later than two hundred and ten days following the Petition, the plan of reorganization must be effective.

If the Chapter 11 Debtors fail to meet any of the milestones, it is an Event of Default under the DIP Credit Agreement.<sup>7</sup>

13. The DIP Credit Agreement also provides that a Change of Control is an Event of Default.<sup>8</sup>

A “Change of Control” is defined as, *inter alia*:

as of any date a majority of the Board of Directors of [Xinergy] consists (other than vacant seats) of individuals who were not either (i) directors of [Xinergy] as of the Agreement Date, (ii) selected or nominated to become directors by the Board of Directors of [Xinergy] of which a majority consisted of individuals described in clause (i), or (iii) selected or nominated to become directors by the Board of Directors of [Xinergy] of which a majority consisted of individuals described in clause (i) and individuals described in clause (ii).<sup>9</sup>

<sup>7</sup> Affidavit of Jon Nix, sworn May 13, 2015 in support of the Nix Motion (*Nix Affidavit*) at Exhibit A (*DIP Credit Agreement*) at § 9.1(t).

<sup>8</sup> DIP Credit Agreement at § 9.1(f).

<sup>9</sup> DIP Credit Agreement at § 1.1



14. The DIP Credit Agreement further provides that it is an Event of Default if either Gregory L. “Bernie” Mason, the Chief Executive Officer of Xinergy, or Michael R. Castle, the Chief Financial Officer, cease to hold their current positions.<sup>10</sup>

15. Nix opposed entry of the Final DIP Order in the U.S. Court and, among other things, asked the U.S. Court to order revisions to the DIP Credit Agreement to eliminate the event of default related to changes to the Board of Directors. The U.S. Court overruled the objection in its entirety and Nix did not oppose the Recognition Order.

### **Business of the Applicant**

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

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

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<sup>10</sup> DIP Credit Agreement at § 9.1(n).

<sup>11</sup> *Initial Castle Affidavit*, *supra* note 1 at para 6.

southeastern United States and Europe are the principal customers for the Chapter 11 Debtors' thermal coal.<sup>12</sup>

18. As of April 6, 2015, the Chapter 11 Debtors had a total of 178 employees, all of whom are in the U.S.<sup>13</sup>

19. Xinergy is incorporated pursuant to the laws of the Province of Ontario. The U.S. Subsidiaries are incorporated under the laws of various U.S. states including Tennessee, Kentucky, Virginia, West Virginia and Delaware.<sup>14</sup>

20. The corporate headquarters and head office of Xinergy is located at 8351 E. Walker Springs Lane, suite 400, Knoxville, Tennessee and the registered office is located at 2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3C2, which is the office of Xinergy's Canadian solicitors, Cassels Brock & Blackwell LLP.<sup>15</sup>

21. Along with the amounts owing under the DIP Credit Agreement of up to US\$40 million, the Chapter 11 Debtors have issued US\$200 million in 9.25% Senior Secured Notes (the "**Second Lien Notes**"), of which approximately US\$195 million (principal amount) was outstanding as of the Petition Date.<sup>16</sup> Due to the nature of their businesses, the Chapter 11 Debtors also have significant health, safety and environmental obligations that impact their operating costs.<sup>17</sup>

### **Nix Actions**

22. On April 16, 2015, counsel for Nix delivered a letter and requisition for a shareholder meeting (the "**Requested Special Meeting**"). The requisition demanded that the Requested

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<sup>12</sup> *Ibid* at para 7.

<sup>13</sup> *Ibid* at Exhibit "B" para 15.

<sup>14</sup> Initial Castle Affidavit, *supra* note 1 at para 8, Exhibit "C".

<sup>15</sup> Initial Castle Affidavit, *supra* note 1 at para 8.

<sup>16</sup> *Ibid* at paras 10, 19-20.

<sup>17</sup> *Ibid* at Exhibit "B" paras 29-31.

Special Meeting be called to consider changes to the Board of Directors and specifically to (i) fix the number of directors at four; (ii) remove three existing directors; and (iii) elect two new directors.<sup>18</sup> At no point has Nix alleged that the current board is not validly and duly appointed.

23. The Board of Directors of Xinergy reviewed the letter and requisition and determined it was not appropriate to call the Requested Special Meeting at this time given the status of the restructuring proceedings and the potential impact of the Requested Special Meeting on the restructuring proceedings, including the debtor-in-possession financing. Accordingly, on May 7, 2015, Xinergy's counsel advised Nix's counsel that Xinergy would not call the Requested Special Meeting at that time, but would be seeking relief in this regard from the U.S. Court.<sup>19</sup>

24. The following day, May 8, 2015, the Chapter 11 Debtors filed a complaint with the U.S. Court (the "**Complaint**") seeking, among other things, (i) a declaration that the automatic stay in the Chapter 11 Proceedings prohibits Nix from calling or holding the Requested Special Meeting; (ii) a declaration that Xinergy is not required to call the Requested Special Meeting and, if the Requested Special Meeting is held by Nix, it shall have no force and effect; and (iii) an injunction enjoining Nix from taking any further action to call or hold the Requested Special Meeting.<sup>20</sup>

25. Despite the filing of the Complaint, Nix proceeded to take certain steps to call the Requested Special Meeting (the "**Out of Court Steps**") including (i) placing an ad in *The Globe and Mail* noticing a meeting of shareholders and purporting to set a record date;<sup>21</sup> (ii) attempting to convert certain non-voting common shares owned by Nix to common shares (including

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<sup>18</sup> Nix Affidavit, *supra* note 7 at Exhibit "K".

<sup>19</sup> Second Castle Affidavit, *supra* note 3 at Exhibit "G".

<sup>20</sup> Second Castle Affidavit, *supra* note 3 at Exhibit "H" para 117.

<sup>21</sup> Nix Affidavit, *supra* note 7 at Exhibit "O".



obtaining a partial lift of a cease trade order from the Ontario Securities Commission)<sup>22</sup> and (iii) requesting a shareholders list from Xinergy and its transfer agent on May 12, 2015.<sup>23</sup>

26. On May 14, 2015, Nix filed a motion in these proceedings, among other things requesting (i) a declaration that the Canadian Stay of Proceedings (as defined below) does not apply to the Out of Court Steps or a lifting of the Canadian Stay of Proceedings if it does apply; and (ii) an order under the *Business Corporations Act* (Ontario), RSO 1990, c. B.16, as amended (the “**OBCA**”) with respect to certain conduct at the Requested Special Meeting (the “**Nix Motion**” and collectively with the Out of Court Steps, the “**Nix Actions**”).<sup>24</sup>

27. On May 19, 2015, Xinergy filed a motion with the U.S. Court seeking a preliminary injunction enjoining Nix from taking any further action to call or hold the Requested Special Meeting (the “**Preliminary Injunction Motion**”) which is scheduled to be heard by the U.S. Court on June 9, 2015.<sup>25</sup>

28. Also on May 19, 2015, Nix filed a motion in the Chapter 11 Proceedings requesting the formation of an equity committee.

29. At a 9:30 hearing on May 20, 2015, Xinergy requested that the Nix Motion be adjourned (from its original return date of May 21, 2015) and that it be heard after the hearing of the Preliminary Injunction Motion in the U.S. Court on June 9. At that hearing, Justice Wilton-Siegel made an endorsement (the “**May 20 Endorsement**”) that the three legal issues outlined below be determined first, and for certainty, before a schedule is set, if necessary, to hear the remainder of the Nix Motion.

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<sup>22</sup> Nix Affidavit, *supra* note 7 at Exhibit “H”.

<sup>23</sup> First Report of the Information Officer, dated May 19, 2015 (*First Report*), at Appendix K, at Exhibits D and E.

<sup>24</sup> Nix Affidavit, *supra* note 7 at para 2.

<sup>25</sup> First Report, *supra* note 23 at Appendix K.

### III. THE ISSUES

30. In accordance with the May 20 Endorsement, the three issues to be determined at this time are:

- A. Which of the two courts (this Court or the U.S. Court) is the appropriate court to decide whether the stay of proceedings applies to the Nix Actions?
- B. If this Court is the appropriate court to decide the issue, does the stay of proceedings apply to the Nix Actions?
- 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?

31. As agreed at the 9:30 appointment on May 20, 2015, no new facts are put before this Court at this time, but for clarity, Xinergy disputes certain statements put forward as facts by Nix in his factum.

### IV. THE LAW AND ARGUMENT

#### **Issue 1: Which Court should decide whether the stay of proceedings applies to Nix Actions?**

##### There are Multiple Stays of Proceedings

32. At the present time, Xinergy is the beneficiary of a number of 'stays of proceedings' including:

- (a) the automatic stay under the Bankruptcy Code (the "**U.S. Automatic Stay**") which was engaged immediately upon the filing of the Chapter 11 Proceeding,<sup>26</sup>

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<sup>26</sup> 11 U.S.C. §362 (2012).

- (b) the stay embodied in paragraph 4 of the Initial Recognition Order, which among other things, prohibits the commencement of any “action, suit or proceeding against [Xinergy]” (the “**Non-Discretionary Canadian Stay**”), as is required by section 48 of the CCAA, upon a determination that the Chapter 11 Proceeding was a “foreign main proceeding”; and
- (c) the stay embodied in paragraph 7 of the Supplemental Order, made as an exercise of this Court’s discretion under section 49 of the CCAA, that “all rights and remedies of any individual...against or in respect of [Xinergy] or affecting the Business or Property are hereby stayed and suspended...” (the “**Discretionary Canadian Stay**” and together with the Non-Discretionary Canadian Stay, the “**Canadian Stay**”).

33. The Chapter 11 Proceeding of Xinergy has been recognized by this Court as ‘foreign main proceeding’ under part IV of the CCAA; however, such a recognition does not import the U.S. Automatic Stay into a Canadian Court Order. Rather the Canadian Court under sections 48 and 49 of the CCAA granted the Initial Recognition Order and the Supplemental Order which each created a separate stay of proceedings in Canada.

34. Specifically, Section 49 of the CCAA provides that “if the court is satisfied that it is necessary for the protection of the debtor company’s property or the interests of a creditor or creditors, [it may] make any order that it considers appropriate.” It is under this section that this Court exercised its discretion to grant the Supplemental Order, based largely on the model order used in this jurisdiction. This Court’s discretion as exercised by Justice Newbould on April 23, 2015, not the Bankruptcy Code, determined the breadth of the Discretionary Canadian Stay.

35. Given the distinct sources that create the U.S. Automatic Stay and the Canadian Stay, the breadth and application of the stays are not identical. Similarly, when a CCAA proceeding is

recognized as a “foreign main proceeding” under chapter 15 of the Bankruptcy Code, different stays are created. In a CCAA proceeding, the stay generally does not prevent the filing of any registration to preserve or perfect a security interest. However, in a chapter 15 proceeding, once a case is recognized as a foreign main proceeding, the automatic stay under the Bankruptcy Code operates to prevent “any act to create, perfect, or enforce any lien against property of the estate.”<sup>27</sup>

36. As the U.S. Automatic Stay is solely a creation of the Bankruptcy Code, it is a matter for the U.S. Court to interpret (along with other provisions of the Bankruptcy Code). Despite certain arguments by Nix regarding the scope of the U.S. Automatic Stay, that issue is simply not before this Court at this time and no weight should be accorded to these arguments.<sup>28</sup>

37. The Canadian Stay, however, is, as a creation of this Court’s orders, properly a matter for this Court to consider and interpret. Whether it is appropriate at this time for the Canadian Court to determine if the Canadian Stay applies to the Nix Actions is a threshold issue. As explained below, in light of the nature of these proceedings, it is not appropriate for this Court to interpret the Canadian Stay at this time.

#### Recognition Proceedings should defer to Foreign Main Proceedings

38. The same practical issue is directly before both the U.S. Court and this Court. This Court is being asked by Nix to decide if he should be able to proceed with calling the Requested Special Meeting. At the same time, the U.S. Court is being asked by Xinergy for a declaration that Nix is not entitled to proceed with the Requested Special Meeting.

<sup>27</sup> 11 U.S.C. §362(a)(4)(2012).

<sup>28</sup> *Babcock & Wilcox Canada Ltd., Re.*, [2000] OJ No 786 at para 12 (Ont Sup Ct J [Commercial List]) [*Babcock*] (“[F]oreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada...” (quoting the testimony of David Tobin, Director General, Corporate Governance Branch, Department of Industry, before the Standing Committee on Industry regarding Bill C-55, An Act to amend the BIA, the CCAA and the Income Tax Act)).

39. Consistent with the purpose of Part IV of the CCAA, where the same issue is before a court in a “foreign main proceeding” and in a recognition proceeding, the court hearing the recognition proceeding should defer to the court hearing the foreign main proceeding.<sup>29</sup>

40. The stated purpose of Part IV of the CCAA is to:

... provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in case of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of the debtor company’s property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.<sup>30</sup>

41. Section 44 of the CCAA codifies the principles of international comity that have long been recognized by Canadian Courts in insolvency proceedings.<sup>31</sup> Canadian Courts have held that where a debtor’s operations are closely connected to a foreign jurisdiction, the foreign court should exercise “principal control” over the insolvency proceedings in accordance with the

<sup>29</sup> See, e.g., *Matlack Inc., Re*, [2001] OJ No 6121 at paras 6-8 (Ont Sup Ct J [Commercial List]) (“Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings.”) [*Matlack*]. Although *Matlack* interprets the CCAA prior to the introduction of Part IV of the CCAA, courts have determined that the principles articulated under the prior versions of the statute continue to apply. *Re Xerium Technologies Inc.*, 2010 ONSC 3974 at paras 26-27.

<sup>30</sup> CCAA, s. 44.

<sup>31</sup> *Tucker v. Aero Inventory (UK) Ltd.* (2009), 183 ACWS (3d) 443 at para 16 (Ont Sup Ct J [Commercial List]) (citing, among other cases, *Lear Canada, Re* (2009), 55 CBR (5th) 57 (Ont Sup Ct J [Commercial List])).



principle of comity, and to avoid a multiplicity of proceedings,<sup>32</sup> conflicting judgments, and uncertainty.<sup>33</sup> It is in the best interests of both creditors and other stakeholders that the reorganization of a debtor is coordinated between foreign and domestic courts.<sup>34</sup> This coordination provides for stability and certainty for not only the debtor, but also its stakeholders.<sup>35</sup>

42. Moreover, Part IV of the CCAA is modeled after the Model Law on Cross Border Insolvency (1997) of the United Nations Commission on International Trade Law (“**UNCITRAL**”).

A fundamental principle underlying the Model Law is that.<sup>36</sup>

the proceeding pending in the debtor’s centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

43. Further, Part IV of the CCAA mandates that this Court cooperate “to the maximum extent possible” with a foreign court.<sup>37</sup> Section 52 of the CCAA requires this Court to cooperate by “any appropriate means”, including “coordination of concurrent proceedings regarding the same debtor company.”<sup>38</sup> Here, this means adjourning the hearing of the Nix Motion until the U.S. Court addresses the matter.

44. The Applicant submits that this Court should adjourn the Nix Motion until after June 9, 2015, in accordance with the purpose of Part IV of the CCAA and the principles of international comity. The Nix Motion should be adjourned to avoid inconsistent judgments, promote cooperation and coordination with the U.S. Court and increase certainty for both Xinergy and its

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<sup>32</sup> *Lear Canada, Re* (2009), 55 CBR (5th) 57 at para 15 (Ont Sup Ct J [Commercial List]) [**Lear**]; see also *Babcock*, [2000] OJ No 786 at paras 9-10 (Ont Sup Ct J [Commercial List]); *Matlack*, [2001] OJ No 6121 at paras 6-8.

<sup>33</sup> *Babcock*, [2000] OJ No 786 at para 10 (internal quotations omitted).

<sup>34</sup> *Lear*, 55 CBR (5th) 57 at para 15.

<sup>35</sup> *Ibid.*

<sup>36</sup> UNCITRAL, “Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency” (2014), at p 19.

<sup>37</sup> CCAA, s. 52(1).

<sup>38</sup> CCAA, s. 52(3)(e).

stakeholders. Once the U.S. Court has both heard and ruled on the Preliminary Injunction Motion, this Court can consider whether or not to recognize the U.S. Court's order with respect to the Preliminary Injunction Motion, and what impact that decision has on the Nix Motion.

## **Issue 2: Does the Canadian Stay of Proceedings apply to the Nix Actions?**

### The Non-Discretionary Canadian Stay

45. The Non-Discretionary Canadian Stay, which stays all proceedings, suits or actions against the debtor company, applies to both the Out of Court Steps and the Nix Motion. The Nix Motion itself is a proceeding (it is, in essence, an application under the OBCA). Similarly, certain of the Out of Court Steps, including requesting an order of the Ontario Securities Commission, fall squarely within the ordinary meaning of “proceeding” in both section 11.02 and section 48(1) of the CCAA.

46. Under section 48(1) of the CCAA, upon recognizing a foreign main proceeding, a Court is required to prohibit the commencement or continuance of “any action, suit or proceeding” against the debtor company.<sup>39</sup> Section 11.02(1) of the CCAA, using identical language, provides that a Court may prohibit the commencement or continuation of “any action, suit or proceeding” against a debtor company.<sup>40</sup> The only difference between the two sections is that under section 48 a Court is required to stay proceedings against a debtor, and under section 11.02 it is within the Court's discretion to stay proceedings.

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<sup>39</sup> CCAA, s. 48(1).

<sup>40</sup> CCAA, s. 11.02(1).

47. Courts have consistently interpreted section 11.02 in the context of the CCAA's remedial purpose and held that the power to grant a stay of proceedings should be construed broadly.<sup>41</sup> As such, under section 11.02 of the CCAA:

there is discretionary power to restrain judicial or extra-judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.<sup>42</sup>

48. Courts have also held that a stay of proceedings is intended to restrain "conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement."<sup>43</sup>

49. In broadly construing the power to grant a stay of proceedings, Courts have interpreted the definition of "proceeding" to include actions taken both in and out of court including a notice of eviction by a landlord, cessation of utility services, a letter of credit, and replacement of the operator under an oil and gas operating agreement.<sup>44</sup> Courts have also extended the stay to persons attempting to terminate executory contracts, mortgagees seeking to foreclose on their security, and landlords purporting to terminate leases.<sup>45</sup>

50. It is clear that the Nix Motion and the Out of Court Steps are proceedings that may be properly stayed under section 11.02 of the CCAA. Similarly, such proceedings are captured by paragraph 4 of the Initial Recognition Order made under section 48 of the CCAA, which contains substantially similar wording as section 11.02 of the CCAA. This interpretation is consistent with the purpose of the CCAA stay to maintain the *status quo*. The Nix Motion and the Out of Court Steps constitute conduct which is impairing Xinergy's ability to focus its efforts on restructuring

<sup>41</sup> *Lehndorff General Partner Ltd., Re*, [1993] OJ No. 14 at para 10 (Ont Sup Ct J [Commercial List]) [*Lehndorff*].

<sup>42</sup> *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1990] BCJ No 2278 at para 17 (BCCA) [*Quintette*].

<sup>43</sup> *Campeau v. Olympia & York Developments Ltd.*, [1992] OJ No 1946 at para 20 (Ont Sup Ct J (Gen Div)) [*Olympia & York*].

<sup>44</sup> See *Quintette*, [1990] BCJ No 2278 at para 16.

<sup>45</sup> *Lehndorff*, [1993] OJ No 14 at para 11.

and could impair Xinergy's ability to continue in business during the on-going restructuring proceedings.

### The Discretionary Canadian Stay

51. The Discretionary Canadian Stay is arguably broader than the Non-Discretionary Canadian Stay, and applies to stay any rights of individuals in respect of Xinergy, its business or property.<sup>46</sup> The Non-Discretionary Canadian Stay applies to "all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities...." Despite the statement in paragraph 31 of Nix's factum, the Supplemental Order and the stay contained therein does apply to shareholders, it applies to all individuals, including Nix, in any capacity. Moreover, to the extent that the Nix Actions can be construed as actions against the directors of Xinergy, as claimed by Nix in paragraph 30 of his Factum, paragraph 10 of the Supplemental Order clearly stays any such proceedings.<sup>47</sup>

52. Under section 105 of the OBCA, a holder of more than five percent of the issued common shares of Xinergy, has a right to requisition a shareholders' meeting in certain circumstances.<sup>48</sup> Courts overseeing CCAA proceedings have repeatedly refused to order shareholders' meetings or relieved debtor companies from the obligation to call an annual shareholders meeting in light of the debtor's restructuring proceedings.<sup>49</sup> For example, in *Re Stelco Inc.*, the Court refused to order the debtor to hold a shareholders' meeting because "the shareholder meeting would be

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<sup>46</sup> *Olympia & York*, [1992] OJ No 1946 at para 17 ("To ensure the effective nature of [the CCAA's] 'facilitative' process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.").

<sup>47</sup> Second Castle Affidavit, *supra* note 3 at Exhibit "C" at para 10.

<sup>48</sup> OBCA, s. 105(1), *Paulson & Co v. Algoma Steel Inc.*, [2006] OJ No 36 at para 40 (Ont Sup Ct J).

<sup>49</sup> See, e.g., *Homburg Invest Inc.*, Re, 2012 QCCS 4308 at paras 1 and 5 (exempting the debtor from holding a shareholders' meeting until further order of the Court); Order of Newbould, J., dated October 21, 2014, in *Growthworks Canadian Fund Ltd*, Re, CV-13-10279-00CL (delaying the time for the applicant to call an annual general meeting of shareholders until 90 days after the expiry of the stay period and any extension thereof).

premature and potentially quite destabilizing; in any event it would be quite diversionary of effort and focus.”<sup>50</sup>

53. Nix acknowledges that shareholder interests are not sacrosanct in a CCAA proceeding. In paragraphs 28 and 29 of his factum, Nix acknowledges that a debtor company may obtain an order relieving it of the obligation to call an annual general meeting. Although such orders relieving a debtor company from its obligations in this regard are typically embodied in separate orders that is because the obligation to call a meeting is that of the debtor company, and not a right to be exercised by a shareholder in the first instance.

54. Nix relies on *Unique Broadband Systems* to argue that shareholder rights should not be affected in a CCAA proceeding. In that case, the issue before the Court was whether the stay prohibited the purchase and sale of certain shares through a proposed partial takeover bid (the “**Partial Bid**”).<sup>51</sup> The Court found that a Partial Bid was not stayed by the initial order because the purchase and sale of shares alone would not affect the business or the property of the debtor company.<sup>52</sup> The issues surrounding delivery of a requisition for a shareholder meeting and the calling of such meeting were not directly before the Court.<sup>53</sup> In fact, the Court acknowledged that if the company did not call a meeting in response to a requisition by shareholders, the parties would likely be back before the Court to resolve their disputes.<sup>54</sup>

55. In this instance, this Court has already determined that a broad stay of proceedings is appropriate. The scope of the Discretionary Canadian Stay prohibits Nix’s actions to call a shareholders’ meeting absent further order of this Court while Xinergy is undergoing restructuring

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<sup>50</sup> *Stelco Inc., Re*, [2004] OJ No 4904 at para 2 (Ont Sup Ct J [Commercial List]). See also *Starcom International Optics Corp., Re*, [1998] BCJ No 506 at para 34 (BC Sup Ct) (in chambers) (dismissing a motion by a secured creditor to replace a debtor’s management because “[t]o permit the proposed change in management is to significantly alter the *status quo*...”).

<sup>51</sup> *Unique Broadband Systems, Re*, 2012 ONSC 1459 at para 31.

<sup>52</sup> *Ibid* at para 34.

<sup>53</sup> *Ibid* at paras 48-49.

<sup>54</sup> *Ibid* at para 49.



proceedings in the United States. A change in the Board of Directors (which is currently duly appointed) during these cross-border proceedings would be “destabilizing” and “diversionary of effort and focus”. Should it become appropriate for this Court to hear a lift stay motion, Xinergy will provide additional evidence regarding the impact of change in the board of directors as proposed, including a potential default under the DIP Credit Agreement.

56. Having the stay of proceedings apply to such shareholder rights does not deprive any individual of any rights. While Nix may have certain rights as a shareholder outside of these proceedings, the Supplemental Order can and does temporarily stay those rights. A temporal stay does not operate to deprive a party of rights. Instead, it is a temporary delay, which, upon an application to this Court and a balancing of the prejudices by this Court, may be lifted to allow an action or an exercise of rights to proceed.

57. Nix’s counsel was served with the initial application materials, was present when the Initial Recognition Order and Supplemental Order were made and made no objection to such order. Nix has not moved to appeal or amend the Initial Recognition Order or Supplemental Order. As such, any attempt to argue that the stay is not appropriate in these circumstances is a collateral attack on this Court’s prior orders and should not be permitted.

**Issue 3: If the Canadian Stay of Proceedings applies to the Nix Actions, which Court should determine if the Stay of Proceedings should be lifted to permit the Shareholders’ Meeting to proceed?**

58. If this Court considers whether to lift the stay of proceedings, it must engage in a balancing of prejudice. In deciding whether or not to lift a stay of proceedings, a Court should consider the

relative prejudice to the parties, the balance of convenience, and the merits.<sup>55</sup> A party seeking to lift the stay bears a very heavy onus.<sup>56</sup>

59. The U.S. Court is the proper venue for resolution of the parallel issues between the courts for two reasons.

60. First, this Court has already determined that the centre of main interests for Xinergy is the United States. These proceedings are merely recognition proceedings, intended to protect Xinergy's interests in Canada. As Xinergy's Chapter 11 Proceeding is a "foreign main proceeding," consistent with the purpose of Part IV of the CCAA as described above, this Court should defer to a the U.S. Court in connection with the Xinergy insolvency proceedings.<sup>57</sup>

61. Second, the U.S. Court, as the court hearing the primary proceedings in this restructuring, has before it substantially more information than this Court. Numerous orders have been made in the Chapter 11 Proceedings, only a small number of which have been brought before this Court for recognition.<sup>58</sup> Xinergy is a part of a larger enterprise currently undergoing a financial restructuring. The proceedings in front of this Court involve only one of twenty six Chapter 11 Debtors. In light of the primary nature of the Chapter 11 Proceedings, a motion that could fundamentally alter the path of the restructuring proceedings for all of the Chapter 11 Debtors should be heard by the U.S. Court and the supervising Judge who has a full picture of the matters at play before him.

62. If this Court determines that it should hear the Nix Motion, the hearing should be scheduled to ensure all information, including the U.S. Court's views on the U.S. Automatic Stay,

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<sup>55</sup> *Canwest Global Communications Corp., Re*, [2009] OJ No 5379 at para 32 (Ont Sup Ct J [Commercial List]).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Lear*, 55 CBR (5th) 57 at para 15.

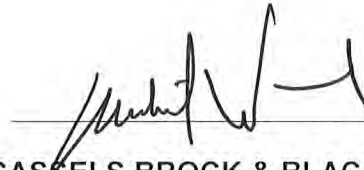
<sup>58</sup> First Report, *supra* note 23 at Appendix B.

the prejudice to the parties and the order requested in the Preliminary Injunction Motion, are properly before this Court.

**V. RELIEF REQUESTED**

63. Xinergy requests that an order be made adjourning the Nix Motion until after the U.S. Court rules on the Preliminary Injunction Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of May, 2015.



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**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

Cases

- 1     *Babcock & Wilcox Canada Ltd., Re.*, [2000] OJ No 786 (Ont Sup Ct J [Commercial List])
- 2     *Matlack Inc., Re.*, [2001] OJ No 6121 (Ont Sup Ct J [Commercial List])
- 3     *Re Xerium Technologies Inc.*, 2010 ONSC 3974
- Tucker v. Aero Inventory (UK) Ltd.* (2009), 183 ACWS (3d) 443 (Ont Sup Ct J
- 4     [Commercial List])
- 5     *Lear Canada, Re* (2009), 55 CBR (5th) 57 (Ont Sup Ct J [Commercial List])
- 6     *Lehndorff General Partner Ltd., Re.*, [1993] OJ No 14 (Ont Sup Ct J [Commercial List])
- 7     *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1990] BCJ No 2278 (BCCA)
- Campeau v. Olympia & York Developments Ltd.*, [1992] OJ No 1946 (Ont Sup Ct J (Gen
- 8     Div))
- 9     *Paulson & Co v. Algoma Steel Inc.*, [2006] OJ No 36 (Ont Sup Ct J)
- 10    *Homburg Invest Inc., Re.*, 2012 QCCS 4308
- Growthworks Canadian Fund Ltd.*, CV-13-10270-00CL (Order of Newbould, J., dated
- 11    October 21, 2014)
- 12    *Stelco Inc., Re.*, [2004] OJ No 4904 (Ont Sup Ct J [Commercial List])
- 13    *Starcom International Optics Corp., Re.*, [1998] BCJ No 506 (BC Sup Ct)
- 14    *Unique Broadband Systems, Re.*, 2012 ONSC 1459
- Canwest Global Communications Corp., Re.*, [2009] OJ No 5379 (Ont Sup Ct J
- 15    [Commercial List])

Secondary Sources

- 16    UNCITRAL, "Guide to Enactment and Interpretation of the UNCITRAL Model on Cross-Border Insolvency" (2014)

## **SCHEDULE “B”**

### **RELEVANT STATUTES**

#### ***Companies’ Creditors Arrangement Act, RSC 1985, c. C-36, as amended***

##### **Stays, etc. — initial application**

**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the 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 company; and

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

##### **Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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

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

##### **Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

##### **Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.



### **Purpose**

**44.** The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

### **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.

### **Other orders**

**49.** (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

### **Restriction**

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

### **Application of this and other Acts**

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

### **Obligations**

#### **Cooperation — court**

**52.** (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

#### **Cooperation — other authorities in Canada**

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

### **Forms of cooperation**

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a) the appointment of a person to act at the direction of the court;
- (b) the communication of information by any means considered appropriate by the court;
- (c) the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e) the coordination of concurrent proceedings regarding the same debtor company.

## ***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).

**United States Bankruptcy Code 11 U.S.C. § 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.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT, R.S.C. 1985, c. C36, 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. C36, AS  
AMENDED

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT  
(Returnable May 28, 2015)**

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