EXHIBIT "B"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re:

XINERGY LTD

Chapter 11
Case No. 15-70444

*2) Debtor motion for joint administration of related Chapter 11 cases.

*7) Debtor motion for entry of order establishing notice, case management and administrative procedures.

*8) Debtor motion for entry of order (i) authorizing debtors to maintain existing bank accounts and business forms and continue to use existing cash management system (ii) granting administrative expense status for intercompany claims and (iii) waiving the requirements of section 345(b) of the Bankruptcy Code.

*11) Debtor motion for entry of interim and final orders authorizing (i)payment of certain prepetition claims of critical vendors (ii) payment of 503(b)(9) claims to certain critical vendors and (iii) financial institutions to honor and process related checks and transfers.

*124) Objection filed by Jon Nix (Westermann)

*147) Reply filed by Debtor.

*12) Debtor motion for entry of order authorizing (i) debtors to continue and renew their liability, property, casualty and other insurance programs and honor all obligations in respect thereof and (ii) financial institutions to honor and process checks and transfers.

*13) Debtor motion for entry of order authorizing (i) debtors to continue and renew surety bond program and (ii) financial institutions to honor and process checks and transfers.

*14) Debtor motion for entry of order authorizing (i) debtors to pay certain prepetition taxes, governmental assessments and fees and (ii) financial institutions to honor and process related checks and transfers.

*22) Debtor motion for entry of order (i) authorizing debtors (A) to obtain postpetition financing and (B) to utilize cash collateral (ii) granting adequate protection to prepetition secured lenders and (iii) scheduling final hearing.

*124) Objection filed by Jon Nix (Westermann)

*147) Reply filed by Debtor.

*90) Motion for relief from stay filed by Creditor Pamela Myles.

*138) Objection filed by Debtor.

*92) Motion to shorten notice on motion for relief filed by Creditor Pamela Myles.

*139) Objection filed by Debtor.

*94) Motion for relief from stay filed by Creditor Janet K. Williams.

*140) Objection filed by Debtor.

*96) Motion to shorten notice on motion for relief filed by Creditor Janet K. Williams.

*141) Objection filed by Debtor.

*102) Debtor motion for entry of order approving procedures for the retention and compensation of ordinary course professionals.

*124) Objection filed by Jon Nix. (Westermann)

*147) Reply filed by Debtor.

*103) Debtor motion to establish procedures for interim monthly compensation and reimbursement of espenses of retained professionals.

*124) Objection filed by Jon Nix. (Westermann)

*147) Reply filed by Debtor.

*105) Application to employ Cassels Brock & Blackwell, LLP as special counsel.

*124) Objection filed by Jon Nix. (Westermann)

*147) Reply filed by Debtor.

*106) Application to employ Stubbs Alderton & Markiles, LLP as special corporate counsel.

*124) Objection filed by Jon Nix. (Westermann)

*147) Reply filed by Debtor.

*107) Application to Employ Michael Wilson, PLC as special conflicts counsel.

*124) Objection filed by Jon Nix. (Westermann)

*147) Reply filed by Debtor.

*108) Application to employ Seaport Global Securities, LLC as financial advisors and investment bankers for debtor.

*124) Objection filed by Jon Nix. (Westermann)

*135) Supplemental objection filed by Jon Nix. (Westermann)

*147) Reply filed by Debtor.

Transcript of proceedings held and testimony adduced in the above-styled suit, pursuant to notice, before the Honorable Paul M. Black, Judge of the United States Bankruptcy Court for the Western District of Virginia, held on the 5th day of May, 2015, in the United States Bankruptcy Court, 212 Church Avenue, Roanoke, Virginia.

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PROCEEDINGS

THE COURT: All right. Good morning, everyone. Ms. Lee?

THE CLERK: Your Honor, this morning, we have several matters in Xinergy case.

MR. BROWN: Good morning, Your Honor.

THE COURT: Mr. Brown.

MR. BROWN: Tyler Brown on behalf of the debtors in this case. With me at counsel table is Michael Castle the chief financial officer of the companies and my colleague, Justin Paget from Hunton and Williams as well. THE COURT: All right.

MR. BROWN: Do you want to take other appearances, Judge?

THE COURT: Yes, why don't we do that. The counsel that are expected to appear today, have them identify themselves, who they represent and who they have with them today.

MR. BARRETT: Good morning, Your Honor. Peter Barrett from the lawfirm of Kutak Rock. And we represent as local counsel to the DIP lenders. With me is Bryan Hermann from Paul Weiss.

THE COURT: Good morning. Welcome.

MR. WESTERMANN: Good morning, Your Honor, may it please the Court, Robbie Westermann from Hirschler Fleischer in Richmond. Your Honor, with me is Mr. Tom Califano from DLA Piper in New York who has been admitted pro hac vice, and next to him is our client, Mr. Jon Nix.

THE COURT: All right. Welcome.

MR. LINGAFLET: Good morning, Your Honor. Phillip Lingafelt, Glenn, Feldmann, Darby and Goodlatte. I represent as local counsel for Ms. Pamela Myles and Janet K. Williams. I have with me today Ms. Maria Hughes who is their lead counsel.

THE COURT: All right.

MR. LINGAFELT: She's from Charleston, West Virginia with the firm of Hughes and Goldner.

THE COURT: All right. Welcome.

MS. HUGHES: Good morning, Your Honor.

MR. HIGGS: Morning, Your Honor. Steven Higgs here for Waynes Supply Company and Cecil I. Walker Machinery Company and on the telephone is Suzanne Trowbridge who has been admitted pro hac vice from West Virginia.

THE COURT: All right. Thank you, Mr. Higgs. MR. PEARL: Good morning, Your Honor. Pete Pearl here on behalf of Penn Virginia Operating Company, a lessor and creditor in this case.

THE COURT: All right. Thank you, Mr. Pearl.

Well, let's take up some housekeeping matters first, Mr. Brown. We've got a number of uncontested matters on the docket. We've got several contested matters and I wanted to hear your thoughts and perhaps other counsel's thoughts on the order in which you want to take these matters up. MR. BROWN: Yes, sir. Our thoughts were -

THE COURT: Let me make one other comment before you get started on that.

We've also have got a number of people that have called in on the telephone. The Court has tried to be accommodating in that regard. As I'm aware only one person I believe from Goodwin and Goodwin has filed a motion and order and has asked to participate by telephone. That order has been granted. We have changed the procedures for this telephone appearances or attempts to listen in by allowing the court to use a pin code to call in to chambers to get that pin code. It appears that that pin code has been circulated by someone and there are people on the phone who have not identified themselves and we don't know who they are. This may be the last time we do that. We may be going to a paid service because this is not the way it was intended to work. So I'm giving everybody a heads up that whoever shared the pin code should not have done so. So, I'll alert everybody to that.

Ms. Lee, do you have a list of those who have identified themselves who are appearing by telephone?

THE CLERK: We do.

THE COURT: All right. Who do you know that has called in and is listening in?

THE CLERK: All right. We have Kay Shields, Patrick Mohon, Sarah Barnett, Jeffrey Buehler, Joe Malley, Suzanne Trobridge, excuse me if I mispronounced that, Patrick Hollahan.

THE COURT: Just put it this way. There were more dings than there are people on the phone who have identified themselves. So, I'll just alert you to that. So, this may be the last time we do this.

MR. BROWN: Yes, sir.

THE COURT: All right. So, let me hear from you as to how we're going to proceed in this matter.

MR. BROWN: Yes, sir. So, our hope was we would proceed with the items number one through seven on our agenda which are the uncontested matters, Your Honor. I believe each one of these have been resolved. We have had questions and some comments from the U. S. Trustee's office and we have agreed to forms of orders with respect to each one of these.

I would then suggest that we move next to items 15 and 16 on the agenda which were two relief from stay matters and proceed with those. And then we would come back and clean up with eight through 14 and 17 and 18 because those all concern an objection from Mr. Jon Nix.

THE COURT: All right. Anybody have any concerns with that proposed method of moving forward?

(No response)

THE COURT: All right, then that's the order we'll take matters up. So, we'll allow you to proceed with the matters that are one through seven on the docket at this time.

MR. BROWN: Thank you, Your Honor. The first one up is the joint administration motion that the Court may remember from the first day hearings. We got interim approval on that, but we had one holdover issue which is that the U. S. Trustee's office and the debtors wanted to discuss the form of a consolidated monthly operating report. We're pleased to report to the Court we've reached an agreement about that and so what we'd like to do is revise the form order to reflect the fact that we have an agreed operating report process. With that, we would ask for final approval.

THE COURT: Ms. Garber?

MS. GARBER: Your Honor, that is correct.

THE COURT: If you'd come to the podium, please.

MS. GARBER: For the record, Margaret Garber on behalf of the United States Trustee and that is correct. The United States Trustee in all of these matters that Mr. Brown is going to introduce as uncontested reflect agreements between my office and the debtor and I ask to be allowed to endorse those orders prior to their being submitted to the Court.

THE COURT: Mr. Brown?

MR. BROWN: Yes, Your Honor. That would be our intention. We've previously circulated black lines and we think we have an agreement, so we'll certainly get the endorsement.

THE COURT: All right. This is on the joint administration motion?

MR. BROWN: Yes, sir.

THE COURT: Okay. All right, the joint administration motion will be granted along the lines requested along with the caveats in the order that you've just outlined with the U. S. Trustee's office. We'll look for that order from your office.

MR. BROWN: Thank you. Moving to the next one is the case management order. Your Honor, there were no objections to this and we amended the order to change it from interim to final and we would ask to be able to submit that order and have it approved.

THE COURT: Okay. Ms. Garber, do you have anything to add on this?

MS. GARBER: No, sir.

THE COURT: All right. Are there any parties that wish to comment on the case management order that's before the Court today?

(No response)

THE COURT: Okay, this order will be approved and we will look for an order from

your office, Mr. Brown.

MR. BROWN: Your Honor, the third matter on the agenda was the cash management order or motion that was approved on an interim basis, and with comments from the U. S. Trustee's office, we have solved we think the remaining issue and that was we had a bank account at Sidney National Bank in West Virginia, and Sidney was not on the trustee's approved list as a deposit institution that they would accept and we were able to get Sidney National approved, so that's taken care of that problem, and as a result of that, we are willing to strike any waiver of Section 345(b) of the bonding requirements for an account. And we've also separately agreed to let the U. S. Trustee know - we notify them in the event we plan to open any new bank accounts so we can get their approval as well. And again, we would ask that this be approved. We will get the U. S. Trustee's endorsement on the order and we think this reflects the understanding.

THE COURT: All right. Ms. Garber?

MS. GARBER: It does reflect our understanding. THE COURT: Are there any parties that wish to be heard on the debtor's motion to approve the cash management order on a final basis today?

(No response)

THE COURT: Okay, there being none, the Court will approve the cash management motion and look for an order from your office, Mr. Brown.

MR. BROWN: The fourth item on the agenda, Your Honor, is the insurance motion, and there were no objections filed at all. I believe we may have had some questions, but we have essentially revised the order to change it from interim to final and I understand that is acceptable to the U. S. Trustee's office and we will again get the endorsement of the U. S. Trustee on that order before submitting it.

THE COURT: Ms. Garber?

MS. GARBER: That's fine, Your Honor.

THE COURT: All right, are there any creditors or parties in interest who wish to be heard on the debtor's motion for entry of the insurance order on a final basis?

(No response)

THE COURT: Okay, there being none, we'll ask your office to submit the order along the lines requested, Mr. Brown.

MR. BROWN: Fifth up on the agenda, Your Honor, is the surety bond motion. We received informal comments from counsel from Lexon which was one of our insurance surety bond issuers, and the one comment is consistent with some comments we have received in other cases, and the comment is in the event there is non-payment of the premiums for the surety bonds, that the automatic stay be modified upon ten days prior notice to allow the bond issuer to recover the amount of the premium from the deposits they hold, and we have run that language by the U. S. Trustee's office as well and we believe we have an agreement to the form order.

THE COURT: Ms. Garber?

MS. GARBER: I have agreed to the form of the order, Your Honor.

THE COURT: All right, are there any creditors or parties in interest who wish to be heard on the debtor's motion for approval of an order on the surety bond program?

(No response)

THE COURT: Okay, there being none, the Court will approve the surety bond request and ask for an order from your office, Mr. Brown.

MR. BROWN: Okay. Six on the agenda, Your Honor, relates to taxes and this was also a first day motion that was granted on an interim basis. We have received no objections to that and so we have made changes to conform it to a final order and we'd ask that that be approved. The U. S. Trustee has seen the form of order as well.

MS. GARBER: I have agreed to the form of this order as well, Your Honor.

THE COURT: All right, are there any creditors or parties in interest who wish to be heard on the debtor's request for entry of an order authorizing the debtor to pay certain prepetition taxes, governmental assessment fees and financial institutions to honor and process related checks and transfers?

(No response)

THE COURT: Okay. There being no parties wishing to be heard on that matter, the Court will approve it in a final manner and ask for the order from your office, Mr. Brown.

MR. BROWN: Seventh on the agenda, Your Honor, relates to the restrictions on trading relating to net operating losses, and this was approved on an interim basis. We have received no objections to this motion. I will add as well, Your Honor, that since the filing of the case here, we have filed a CCAA recognition process in Canada and this is one of the orders that were presented to the Canadian court and the Canadian court has in fact recognized the NOL order that was issued on an interim basis in this Court. So, we would ask that the NOL motion be approved on a final basis. Ms. Garber has been provided a copy of the order and there are no objections as far as I'm aware, so we would propose that it be entered with the endorsement of the U. S. Trustee.

MS. GARBER: I agree to the form of this order as well.

THE COURT: All right. Are there any creditors or parties in interest who wish to be

heard on the debtor's motion for entry of a final order establishing notification procedures and approving restrictions on certain transfers of equity interests in the debtor's estates?

(No response)

THE COURT: Okay, there being none, the Court will approve the order on a final basis and ask for an order from your office, Mr. Brown.

MR. BROWN: Thank you, Your Honor. At this point, we would ask to move to items 15 and 16 on the agenda and these concern the motions for relief from stay that were filed on behalf of Pamela Myles and Janet Williams. And I'll turn the podium over to counsel.

THE COURT: All right, Mr. Lingafelt?

MR. LINGAFELT: May it please the Court, Your Honor, we filed a motion to shorten notice for both of these ladies. There have been no objections to it. In speaking with the debtor's counsel, we understand that they do not object to treating this morning's hearing as a preliminary hearing on the motions for relief from stay. So, we would respectfully request the Court to grant our motion to shorten notice.

THE COURT: Mr. Brown?

MR. BROWN: Your Honor, I believe we did file an objection and Mr. Paget will address that, Your Honor.

THE COURT: All right. Mr. Paget?

MR. PAGET: Thank you, Your Honor. Justin Paget, co-counsel on behalf of the debtors. Mr. Brown is correct, Your Honor. I did file an objection to the motion to shorten notice; however, we do not have an objection to having a preliminary hearing today on shorten notice. Our

objection does go to having a final hearing today on the two motions that Ms. Myles and Ms. Williams filed. Our position is under the case management order in this case which was entered on an interim basis and just approved by the Court on a final basis, subject to endorsement by the U. S. Trustee, that without consent of the debtors, this hearing should be a preliminary hearing. Although the movants did file their motion to shorten, the debtors have not consented to holding a final hearing today. Moreover under the Court's pre-hearing order that was entered, without the debtor's consent, the hearing today is a preliminary hearing absent the movants demonstrating cause. And we do not believe the movants have argued cause let alone established it to hold a final hearing today.

THE COURT: Mr. Lingafelt?

MR. LINGAFELT: Your Honor, we would acknowledge that probably the best thing to do is to handle it as a preliminary hearing today. We have Ms. Hughes here able to outline the matters in West Virginia for the Court to give you some basis to begin to understand going forth and so we'd ask that you allow her to be heard on that.

THE COURT: All right. If you'd come forward, please, and identify yourself for the record.

MS. HUGHES: Good morning again, Your Honor. My name is Maria Hughes. I'm with the lawfirm of Hughes and Goldner in Charleston, West Virginia. I'm here today on behalf of two clients in two separate lawsuits. Pamela Myles and Janet Williams. If the Court would allow me, I'd like to address both of them collectively instead of individually.

THE COURT: That's fine. There's a little bit of a different procedural posture in terms of discovery having taken place; is that correct?

MS. HUGHES: Yes, sir and no, sir. If the Court would permit, I'll give you a little background on each of these cases. They were actually filed - both of them were filed in October of 2014 in the Circuit Court of Boone County, West Virginia. The Myles case has been moved effective March 30th to Kanawha County; however, Your Honor, substantial discovery has been conducted in both cases. I would disagree with my opposing counsel's assessment of where we are in discovery and I could give the Court a rendition - two to three minutes - of the facts, the procedural posture and then make four very succinct points as to -

THE COURT: Well, I've read your complaint, so you can shorten your recitation of the facts and maybe just give me sort of a - you can give me a brief overview of that, but you can also tell me about the procedural posture.

MS. HUGHES: Yes, sir. As Your Honor knows, Mr. Hagwood was the top official in West Virginia over all of the West Virginia operations. He is named as an individual defendant in both lawsuits. Initially two security guards came forward. Mr. Hagwood had masturbated in their presence and those two security guards filed lawsuits. Following the filing of those two lawsuits, the insurance carrier came forward and the insurance carrier resolved those lawsuits and they hired defense counsel in West Virginia to defend the cases.

Following the resolution of those two security guard cases, two secretaries came forward, Miss Williams and Miss Myles. Miss Myles as the Court knows from the complaint initially reported the conduct to Mr. Mason, Bernie Mason, in February of '14. Mr. Mason did nothing for two or three months. I stand corrected, Your Honor. She reported it to Mr. Hypes who then reported it to Mr. Mason. Mr. Hypes nor Mr. Mason did anything for two or three months. It was only after one of the security guards

was asked to perform sexual acts and she came forward that Mr. Mason finally took seriously what was going on with Miss Myles and he went to her at that point in time.

In the meantime, Mr. Hagwood has been masturbating in the presence of Miss Williams all this while as well. The Court may ask if Mr. Hagwood denied this conduct and the answer is no, sir. During his deposition, Mr. Hagwood pled the Fifth Amendment.

THE COURT: Now, has he been deposed in both cases or just one case?

MS. HUGHES: He has been deposed in the Williams case, Your Honor. There are six depositions that have taken place in the Williams matter. Let me start first of all and tell the Court that written discovery is essentially over. I mean there are some -

THE COURT: In which case?

MS. HUGHES: In both cases. We propounded discovery in the Myles case as well. They did respond in the Myles case. There are a couple of issues that we intend to take up with the circuit court on the motion to compel, but other than that, Your Honor, we have propounded all of our written discovery in both cases.

As far as the Williams case is concerned, it is set for trial in seven months. We've taken six depositions; we have deposed every individual defendant except for Mr. Hypes. Mr. Hypes is lower management, Your Honor. He would not even be involved in this bankruptcy. Mr. Mason who is the only executive whom they believe is going to be tied up and needs to focus on this bankruptcy - Mr. Mason has already been deposed and we may not even need to depose Mr. Mason in the Myles matter because during the deposition of Mr. Mason, I questioned him about Miss Myles.

THE COURT: Okay, I'm listening. Go ahead.

MS. HUGHES: Okay. So, it would be our position, Your Honor, that contrary to what the debtor's counsel is - in the manner they are assessing this matter, we are substantially complete with discovery in the Williams case which is set for trial in seven months. They still have to depose Miss Williams and they still have to depose one of the security guards, but that involves defense counsel in West Virginia. It would not involve this bankruptcy.

THE COURT: All right.

MS. HUGHES: In the Myles case, there are going to be many fewer depositions. We may not even have to depose Mr. Mason as I said given that we've already deposed him at length about Miss Myles.

So, good reason exists to grant relief in this matter, Your Honor, and I'll give the Court four points that I'd like to make in relation to the relief that we are requesting.

First, we have agreed to first seek recovery from the insurance policy and we have every reason to believe that that's going to be sufficient. There is a three million dollar policy; there's a ten million dollar policy. These are the only claimants, Miss Myles and Miss Williams. There's one other individual that defense counsel has pointed out in West Virginia unrelated to the Hagwood -

THE COURT: Is this a wasting policy in terms of defense costs? Does the defense costs come out of the policy?

MS. HUGHES: Yes, sir, it does.

THE COURT: Okay, have you agreed to limit your recovery to the availability of any proceeds of insurance in either of these cases?

MS. HUGHES: Your Honor, what we agreed to do initially when we contacted

debtor's counsel is that we came to an agreement that - we started the conversation with debtor's counsel to inquire if we could come to a consent order. Debtor's counsel would only agree if we would not file a subsequent proof of claim if for any reason there was any issue with coverage on the policy. But there's 13 million dollars worth of coverage. There's limited claimants. There's only these two women and this individual -

THE COURT: Well, can you point me to any cases where relief from stay has been granted to proceed in another forum where there is insurance coverage available, but the claimant has not agreed to limit their recovery to available insurance proceeds?

MS. HUGHES: Your Honor, I can point to the case that we cited in our brief which they have tried to distinguish and I believe in two of the cases, they failed to distinguish and I would like the opportunity to file a reply if at all possible before the final hearing.

THE COURT: Okay, well you had some other points you wanted to make. I'll hear those and then I'll hear from debtor's counsel.

MS. HUGHES: Okay. The carrier did cover the last two claims of the security guards which I think is important for this Court to understand and there is 13 million dollars in coverage for these limited claimants, so it's not going to dilute the proceeds - us going after those insurance proceeds is not going to dilute any insurance pool for any other claimants of which we're aware.

They are defending and paying full costs, so that the debtor is not going to have any financial responsibility in terms of proceeding in the other forum. Only if the insurance fails, which I believe would be a remote incident, only if the insurance fails have we asked to be able to come back and fall in line with all the unsecured creditors -

THE COURT: What do you mean if the insurance fails? Explain that.

MS. HUGHES: Well, I guess there's a possibility, Your Honor, that the carrier could have a change of heart and say well, we're no longer going to cover. I mean I guess there's that possibility. I don't believe the money is an issue at all because I don't believe that these two women are going to realistically recover more than 13 million dollars in any jury trial even with defense costs coming out of that. And the retention coming out of it. And I believe the retention has already been exhausted in the settlement of the first two claims because these are all related claims. That's my understanding.

So, the first point being we're only asking to come back and stand in line with the other unsecured creditors. We are not asking to collect from the debtors directly. We're asking let us seek first from the insurance policy and then let us come back and fall in line through the bankruptcy proceedings if there is any need to. That's all we're asking, Your Honor, because to fail to ask that of the Court could really put us at great risk and great prejudice if the carrier for some reason would decide not to cover or the carrier for some reason - well, would decide not to cover. There's plenty of money here. That's not the issue.

The second point I'd like to make, Your Honor, is this would not interfere with the bankruptcy in any fashion because even the debtor's counsel recognize that. We were actually circulating consent orders prior to us coming here today, but we couldn't agree upon the terms. And the only difference in what we're asking today and what they wanted in their consent order was that we would stick strictly to the policy and that we wouldn't fall back in line in case there's a denial of coverage. That should suggest to this Court and at least suggest to me that there is no distraction then. If they're willing to do it through a consent order with the policy, well then what's the difference in doing a consent order with allowing us to come back and file proofs of claim. In either case, whether with the proof of claim or without

the proof of claim, we're not seeking to collect directly from the debtors and we're going through the bankruptcy proceeding in either case with the proof of claim or without the proof of claim -

THE COURT: All right, you lost me on that. With or without the proof of claim, you're not seeking to recover directly from the debtors. Explain that.

MS. HUGHES: Yes, sir. What I'm saying is it's a contingent interest if you will. If we exhaust the insurance policy and is a contingent interest, we would have to fall back in line with the unsecured creditors through a proof of claim. We wouldn't be trying to collect any judgement against the debtors directly without having done so through this Court through a proof of claim. And in either case, Your Honor, either with that contingent interest or without it, we must establish liability first and it has to be liquidated regardless in either this forum or the forum in West Virginia, and we must involve executives to some degree. Even if we had agreed, Your Honor, to proceed just under the insurance policy and only the insurance policy, it's still going to involve the executives to some degree, but a very limited degree I would submit because Mr. Mason has already been deposed and there's very limited reason for him to be involved in the litigation at this point.

The third point I'd like to make is that otherwise the debtors have not met their burden to show that they would be prejudiced during litigation. They're not going to have any costs. The carrier is defending as I said. There is existing counsel in West Virginia on behalf of the defense that the carrier has hired who is dedicated to the cases. They would not involve bankruptcy counsel. There's practically no involvement of the three lower individuals, the three lower management individuals, in this bankruptcy. They are such a level - a lower level of management that they're not even going to be needed during this bankruptcy. Mr. Mason again has already been deposed.

Now, finally and the most important thing I want this Court to understand, if I walk away from here today and I haven't done my job, I want this Court to understand that our clients are going to suffer significant prejudice if this case remains in estate posture or if this case is liquidated here in Roanoke. The reason why Miss Williams is seven months away from trying her case she has had to endure two years of this, Your Honor, where Mr. Hagwood masturbated in her presence, asked her to perform unwelcome sexual acts. Miss Williams still works for the company. To this day, Bernie Mason still comes into her office. She is very uncomfortable. She wants this behind her. They say it's going to be a brief delay in their brief. Well, respectfully, Your Honor, what's a brief delay. We have no idea of knowing how long this bankruptcy is going to take and it certainly is expected to take longer than seven months. So, she's going to miss her jury trial in West Virginia for which she's already prepared emotionally and through her counsel.

The other thing is all the witnesses but for Mr. Mason are in West Virginia. They all reside in West Virginia. To bring this case here and liquidate it would require three to four hours of travel and most importantly which I haven't hit upon is that she has individual claims against Mr. Mason and against these other three individuals and against Mr. Hagwood. Mr. Hagwood is not a party - the debtor's counsel isn't alleging in this case that this Court should enjoin any litigation against Mr. Hagwood. But yet, as this Court might expect, no litigation is going to proceed without Mr. Hagwood's presence and so this could result in multiple pieces of litigation. It could result in a very fragmented approach to these lawsuits. The witnesses are intertwined. The facts overlap. There's really no reason to isolate Miss Myles' claim when Miss Williams is seven months from trial and most of the depositions have been taken.

In summary, Your Honor, the plaintiffs have valid claims under West Virginia law, valid individual claims against the individuals that did nothing, did nothing when they reported this conduct.

They had to be subjected in Miss Williams' case for two years for this individual exposing himself to the workplace, her direct supervisor and if they're not able to pursue their claims, then I don't know how women are safe in the workplace to begin with. They have an insurance policy of 13 million dollars. Their insurer paid the first two individuals and it would be prudent for this Court to allow this relief, number one, to liquidate the claim expeditiously -

THE COURT: Is the 13 million dollars in aggregate or per claim?

MS. HUGHES: It's an aggregate, Your Honor. There's an underlying policy of three million and the ten million is an excess policy.

THE COURT: All right. Okay.

MS. HUGHES: But it would be prudent for this Court to allow this to proceed expeditiously for these two women who will be prejudiced and it will not cause harm to the debtors in this instance and it would also actually protect the debtors to allow this case to be liquidated at the expense of their carrier up in West Virginia and get the benefit of the insurance premiums they paid.

THE COURT: Just so I'm clear on what your position is, you are not at this point willing to limit your claim to the available insurance coverage?

MS. HUGHES: Your Honor, to do so I think would risk great prejudice to my clients in the event that - I've given this a lot of thought. Believe me I would like to take the easy path, but it's not going to be an easy path in that regard because if that carrier some day looks at us and says we deny coverage, then what have I done for my clients?

THE COURT: I'm not going one way or another. I'm just trying to understand everybody's position.

MS. HUGHES: I understand, Your Honor. Thank you.

THE COURT: Mr. Paget?

MR. PAGET: Thank you, Your Honor. Justin Paget again for the debtors.

Although we're here on a preliminary hearing today, Your Honor, the debtors believe the Court can deny the motion for relief from stay today without prejudice because it's apparent from the face in the motion, the movants have not carried their burden to establish cause to lift the stay. I think that's true for three reasons. First the motion has failed to acknowledge the prejudice to the debtor's estates by allowing a litigation to proceed against the debtor/defendants. Not only must this factor be considered, but it is the most important factor. The early stages of these cases are extremely critical to the debtors. In the first few weeks of these cases, the debtors management has been 100 percent focused on negotiating with critical vendors, communicating with the other of the debtor's creditors and vendors and their employees so as to avoid significant disruption to these bankruptcy cases. The debtors have been focused on satisfying conditions proceeding to close the DIP loan. Meeting with the U. S. Trustee and various other time consuming tasks that are involved in these Chapter 11 cases. And the job is far from done. The debtors must continue many of these tasks in the coming weeks. Equally important, Your Honor, the debtors are now 45 days away from the first milestone which requires them to propose a Chapter 11 plan. It's the first of several milestones the debtors must comply with in order to be in compliance with the terms of their DIP facility. Allowing litigation to go forward against the debtor/defendants would distract the debtors from important tasks such as these and the debtor's management would be forced to participate in time consuming discovery and to expend precious resources in matters that are not related to the restructuring of the -

THE COURT: Well, how do you respond to counsel's suggestion that most of the

discovery in these cases is complete?

MR. PAGET: Your Honor, in one of the cases - I believe it was filed six days before the bankruptcy was filed, so I'm not sure in that case one could say that discovery is complete or substantially complete. In the other case, we're seven months from trial. My understanding is that the debtor/defendants have not yet had the opportunity to conduct discovery. So, I don't think either case could be characterized as trial ready, Your Honor, particularly in the case that was filed a mere six days before the bankruptcies were filed.

Your Honor, the very essence of the bankruptcy stay is to give the debtors a short breathing spell from collateral matters such as these in order to focus on the key task at hand which is the restructuring. That's particularly true in the early stages of the case which we're in now. The motions for relief do not explain how the prejudice of the debtors is outweighed by the hardship of the movants which is a required showing and therefore we would submit that the movants have not met their burden.

The second reason to deny the motions today, Your Honor, is the existence of a liability insurance policy that may cover unproven claims is not a sufficient reason standing alone to grant relief. Importantly as Your Honor just heard, the movants have not agreed to proceed solely against the insurance policy proceeds. Thus in the event a judgement exceeded the availability under the insurance policies or as opposing counsel conceded, Your Honor, the policy did not cover the judgements for some reason, the movants then intend to enforce the balance of the judgement against the debtors by filing a proof of claim. Each of the cases that the movants cited in their briefs, Your Honor, involve a situation where the plaintiffs proceeded solely against the insurance policy. Most of those cases also involve a finding that there would be little to no impact on the debtor's reorganization efforts. Neither of those situations are true here. In

fact one of the primary cases that the movants relied on, Your Honor, a case in re *Robertson* at 244 BR 880, involved a no asset Chapter 7 case which the Court held had basically run its course. We are obviously dealing with a completely different set of circumstances here.

The third reason the Court should deny the motions today is that there would be little hardships of the movants from delaying - from a short delay in pursuing their claims. As I mention, Your Honor, one of these cases -

THE COURT: All right, let me ask you based on that comment; how do you propose that these claims be liquidated?

MR. PAGET: Your Honor, what we're asking today is that the motions be denied without prejudice. The movants could re-file their motions at a more appropriate time and the Court could address -

THE COURT: Well, tell me what more appropriate time - I mean they're sitting over there listening. What to you would be a more appropriate time?

MR. PAGET: What they're trying to do, Your Honor, I think they're trying to put the cart before the horse. They're attempting to basically start the claims adjudication reconciliation process now when the focus should be on restructuring. So I think the answer to the question is once the restructuring efforts have been substantially pursued such as a plan being filed, a plan being confirmed, then that would probably be a more appropriate time. Once the cases shift to claims adjudication and the claims could be liquidated in several ways. Again a motion for relief could be filed at a later time such as that or - opposing counsel indicated that they would be filing a proof of claim. The claims could be liquidated through the claims adjudication process in this Court.

THE COURT: Well, are they entitled to a jury trial on this claim and what authority do I have as bankruptcy judge to conduct a jury trial if they're entitled to one to liquidate this claim that just really I think would probably arguably fall into a encore matter?

MR. PAGET: I think Your Honor could make that determination at another time. Either the Court could determine that it could handle it and make proposed findings and send it to district court to do a trial. Bankruptcy courts consider state law matters all the time. Or the Court at a different time could decide whether or not it could abstain. But our argument today is that's not a today issue, Your Honor.

THE COURT: Well, I'm trying to understand, but I'm trying to consider whether or not this falls under the category of a personal injury claim, but whether you have to have bodily injury for that. Is that something that's even been referred to the bankruptcy court for its ability to liquidate?

MR. PAGET: My understanding, Your Honor, is the case law is split on that.

THE COURT: All right. Go ahead, you can continue.

MR. PAGET: As I was saying, Your Honor, a third reason we believe the motion can be denied today is because there would be little hardship to the plaintiffs. These cases are not trial ready as I mentioned, one having been filed six days before the bankruptcy, the other not scheduled for trial - not scheduled for six months.

We think the Court can resolve these motions, thus we believe in the balancing test which the Court should do. That the potential prejudice to the debtors substantially outweighs the hardships of the movants from a short delay as I was discussing.

THE COURT: Well, let me ask you this. If hypothetically they were to agree to limit

their recovery to available insurance proceeds, would your position be any different?

MR. PAGET: Yes, Your Honor, I think if they were to limit their claim simply to insurance proceeds, our position would be different.

THE COURT: All right.

MR. PAGET: For these reasons, we think the Court can deny the motions today and does not need to set a final hearing in these matters.

THE COURT: All right. Mr. Lingafelt, I'll give you and your client the last word on the motions today. You and your colleague. Do you have anything to add?

MS. HUGHES: Very briefly, Your Honor, it's not a six day case. Again, the Myles case was filed in October of 2014. It was only moved to another circuit court in March effective March 30th. Substantial discovery has been conducted in the form of written exchanges and also overlapping depositions. The other thing is counsel said in response to the Court's question that if we agreed to limit our recovery to just the insurance proceeds that they would have a different position. I fail to see how it's a distraction in that instance. It's not a distraction in that instance, but it's a distraction in the other instance. They have not set forth any evidence to show why the two situations are different in the form of distraction. Mr. Mason isn't even here today, Your Honor. I don't understand how they can argue that these individual defendants who have been sued are somehow going to be so caught up in focusing on this bankruptcy that they don't need to be distracted by the litigation. Again, the short delay that they define is undefined and it's going to create a greater hardship on our clients than respectfully on the debtors.

THE COURT: All right. What I think I want to do on this, Mr. Lingafelt, and I'm sorry your last name again?

MS. HUGHES: Hughes.

THE COURT: Ms. Hughes and Mr. Paget, I want to set this for a final hearing. I don't want to set it on an omnibus hearing date because we've got a number of other things that we generally need to take up on those omnibus hearing dates. I mean I can set it for hearing here in Roanoke on May 27th, but I do want some briefing on two issues between now and the 27th if that works for the two of you. One is from Ms. Hughes' perspective, I want to see if there's any case law out there that you cite to me where courts have allowed proceedings like this to continue when the plaintiff/claimant insists on not limiting their recovery to available insurance coverage because I haven't found one. I was looking. Most of the circumstances in the cases you cite in your pleadings, there is a cause of action against the debtor that's covered by insurance and the claimants have agreed to limit their recovery to available insurance proceeds. That's not what you're asking here, so I want to see if you've got any case law that supports your position.

From the debtor's position, I'd like to know if this matter is stayed for some period of time, how do you propose that this claim be liquidated within the confines of this bankruptcy court's jurisdiction? And I'd like each of you to have the opportunity - I'm willing to set it outside of 30 days to give you a little extra time and maybe set it for the first or second week of June with the consent of the parties on that if those dates don't work for you. So, if you want to look at your calendars - Ms. Hughes, do you have your calendar with you?

MS. HUGHES: I know that May 27th is agreeable with my calendar, Your Honor.

THE COURT: Mr. Paget, Mr. Brown?

MR. PAGET: May 27th also works for me. What time, Your Honor?

THE COURT: Well, Mr. Paget, since you'll be driving from Richmond, I'll give you - are

you in Charleston, Ms. Hughes?

MS. HUGHES: Yes, sir.

THE COURT: Okay. Each of you have a three hour drive from different directions so I'll leave it up to you. The Court is wide open that day and I'll give you your choice of times. You can start at 1:30 in the afternoon. Mr. Lingafelt?

MR. LINGAFELT: If it's in the afternoon, I'm fine. If it's 9 o'clock, I have to be in -

THE COURT: Why don't we say 1:30 on May 27th and we'll set this for final hearing.

Mr. Paget, I'd ask you to maybe get with Mr. Lingafelt and work on an order carrying this matter over for a final hearing on May 27th at 1:30. I'll grant the motion to shorten notice but we're going to treat this as a preliminary hearing today and set this for final hearing on May 27th with counsel at 1:30. And I'd like to have the briefs on the issues I've discussed - today is the fourth, why don't we say by May 15th? And that any replies to the various briefs filed by May 22nd.

Thank you.

THE CLERK: Just to clarify for the clerk's office, both motions for relief are set for 1:30 on May the 27th. Both motions to shorten are granted and all can be included in one order from Mr. Lingafelt's -

THE COURT: We can do it in one order with both contested matters captioned or two separate orders, however you want to do it. Just so the clerk's office can go back and relate it back to both docket entries that are on the docket.

MR. LINGAFELT: Yes, Your Honor.

THE COURT: Thank you, Ms. Hughes.

All right, Mr. Brown?

MR. BROWN: Yes, sir, Your Honor, at this point, we'd like to continue with the item eight on the agenda. Stepping back to eight. And this is the motion - it's a second day motion; it wasn't heard at the first day hearing, Your Honor. It's a motion -

THE COURT: Bear with me.

MR. BROWN: I'm sorry, this is the ordinary course of professionals motion number eight.

THE COURT: Right. I have it.

MR. BROWN: Yes, sir. In this motion, Your Honor, we're seeking authority to employ some professionals that typically are employed by the debtor from time to time, the debtors from time to time for various tasks, including for things such as accountants for tax returns. There is a sole practitioner in Charleston who does regulatory work, small contracts. There's a pending fourth circuit appeal involving the Sierra Club that Jackson Kelley is involved in. We were able to get a continuance from the fourth circuit with respect to oral argument which was scheduled very soon. We filed the suggestion of bankruptcy, but the court actually came back and asked for periodic reporting on the status of the case, so there are a few minor issues that they help with. They've helped in the past on some environmental issues.

And then we have the Densmore firm that's listed which was the counsel that was just talked about as defense counsel in the sexual harassment cases and they've handled some other matters as well.

With respect to these professionals, the idea is to not have to have them come in and get specifically retained under 327(a) and file interim and monthly fee applications. Instead to pay them in the

ordinary course subject to a couple requirements. First, they would file a declaration with respect to the matters on which they are to be employed indicating they don't have any adverse interest to the estate. There would be opportunities for parties to object to their retention in the ordinary course. We would have authority under these procedures to pay up to a monthly cap in terms of fees with an aggregate cap that would apply over the course of the cases, and if they exceeded the cap in any month, they'd have to come in and file fee applications.

We have reviewed the process with the U. S. Trustee's office. We've obtained some informal questions about the professionals and we don't believe there are any objections at the moment to the proposed order with respect to the U. S. Trustee's office. We have received as I'm sure you know the limited objection of Jon Nix which applies to a number of motions and this is the first one in which there is an objection from Jon Nix. The objection seems to be that they don't want any professionals retained right now. They want the ability at some point in the future to make up their own mind in the event the board is reconstituted as to what professionals they want to use. From our perspective, these procedures would be available not only to the ordinary course professionals that the debtor is using now, but any ordinary course professionals that may be added later. This merely is a process, so we don't believe there's anything raised in the objection that's relevant at all to this motion, Your Honor. And as I mentioned with the U. S. Trustee on board with respect to the form of the order, we'd ask you approve of the process.

THE COURT: All right. Mr. Westermann, Mr. Califano?

MR. CALIFANO: Your Honor, our objections really are and what we want to get out to the Court was our concern of the process moving where there's an issue of authority. I think we can deal with that all in the context of the DIP, so we're willing to withdraw our objection to items nine, ten, 11, 12 and

14. There's an issue in particular with Seaport retention that we'd like to discuss in the context, but I think we can deal with the issues that we're concerned about and that we'd like to bring to the Court's attention all in the context of the DIP. So, in the interest of moving things quicker today, we'll withdraw those objections and just defer to the issues.

THE COURT: All right. Mr. Brown, is that acceptable to you, to take up matters eight, nine, ten, 11 and 12 and then turn to the other matters?

MR. BROWN: Yes, Your Honor.

THE COURT: Okay. Ms. Garber, anything to add on this ordinary course of professionals motion?

MS. GARBER: Your Honor, I agree to the form of this order.

THE COURT: Okay. All right, are there any other creditors or parties in interest that want to be heard on the debtor's motion for entry of an order approving procedures for retention and compensation for ordinary course professionals effective as of petition date?

(No response)

THE COURT: All right, item number eight on the agenda, the ordinary course professional motion will be granted and we'll look for an order from your office, Mr. Brown.

MR. BROWN: Yes, sir.

THE COURT: We can take up item nine now.

MR. BROWN: Yes, sir. Item nine is the motion for interim compensation procedures. And Your Honor, we have worked closely with the U. S. Trustee's office on this and provided a number of comments and answered a lot of questions and we ultimately have revised the process slightly.

So, I'd like to explain to the Court how it's changed from what was originally proposed.

THE COURT: All right.

MR. BROWN: What we ask would be that professionals would be allowed to be compensated on a monthly basis. There is a notice process and an objection process and provided there are no objections, there would be an ability of professionals to be paid now 80 percent as opposed to 85 percent, that was a change we've agreed to with the U. S. Trustee's office, and so there's a 20 percent hold-back rather than 15 on fees. Expenses would be able to be compensated on a hundred percent basis. And then every three months, Your Honor, we would file - professionals would file interim compensation motions or applications to have those blessed. And in the event, they were approved on an interim basis, then the hold-back would be provided. It's a fairly typical process that's used in lots of cases and I'd like to point out a couple of clarifications that we've agreed upon that will be reflected in the order that the U. S. Trustee has seen and approved.

First of all, the clarification that all attorneys retained under 327 shall apply for compensation pursuant to 330. There was a reference to 328 in the order that has been removed. There was some debate about whether 328 applies to attorneys and professionals in this case, but in any event, we certainly clarified if you are a 327 attorney, you're compensated under 330. We also have made a reference in the order to the fact that each of the professionals will make reasonable attempts to comply with the Appendix B guidelines of the U. S. Trustee's office including serving statements in a searchable format, using billing categories, using tenth of an hour increments or actually point one, six minute increments, no block or lump billing in formulating budgets. So, those are some of the procedures we've agreed to. The monthly operating reports themselves will report payments that are made to professionals in the monthly process.

Parties may object to the payments to professionals if they are not timely filed in the monthly operating reports. Let me set that better. If payments to professionals aren't reflected in timely filed monthly operating reports, then those professionals may be at risk. So, there's some hammer there if you will to make sure that the debtor does its reporting, to make sure that the debtor is keeping current on its administrative expenses and in the event there's some manifest exigency that may arise, there's an ability to potentially withhold payments. But those were negotiated terms that will be included in the order. The monthly statements will contain customary detail requested by the U. S. Trustee listing the individuals by title, billing rates, individual hours spent, breakdown of disbursements. And then finally with respect to the monthly statements, objections are preserved until the final fee application. So if the U. S. Trustee's office did not want to lodge any objection with respect to a monthly statement, they haven't waived any rights with respect to the interim applications.

Those I believe address all of the concerns and as I said we have now I believe a form of an agreed order.

THE COURT: Ms. Garber?

MR. BROWN: There's one additional clarification and that is if someone doesn't follow the process for an interim compensation application, file it on time, then they can't continue to draw monthlies until they get their application heard.

MS. GARBER: Your Honor, I have agreed to the form of this order. I'd ask that I be allowed to endorse it prior to it being submitted to the Court.

THE COURT: Mr. Brown?

MR. BROWN: Certainly.

THE COURT: All right. Are there any creditors or parties in interest who wish to be heard on the motion of the debtors, the debtor's motion to establish procedures for interim monthly compensation and reimbursement of expenses for retained professionsals?

(No response)

THE COURT: Okay. There being none, the Court will approve the motion with the caveats that counsel has expressed from the podium and on the record today and we'll look for that order from you, Mr. Brown, within the time required and please get Ms. Garber's endorsement.

MR. BROWN: Yes, sir. Next up, Your Honor, is the retention application for Hunton and Williams. Other than again some informal comments from the U. S. Trustee's office and some questions which we have answered, there were no objections except for the Nix limited objection which has been withdrawn. But the changes we have proposed to make on the order are as I mentioned earlier are to remove any references to Section 328 and then to include in the order what we included really already in the application which is a reference to we're going to make reasonable efforts to comply with the Appendix B guidelines. And with that, Your Honor, I believe the U. S. Trustee is prepared to endorse an order and we will certainly seek the endorsement before we submit it.

MS. GARBER: Your Honor, I'm prepared to endorse this order.

THE COURT: All right, thank you, Mr. Brown and Ms. Garber. Are there any creditors or parties in interest that wish to be heard on the application of the debtors and debtors in possession for entry of an order authorizing employment and retention of Hunton and Williams as counsel for the debtor?

(No response)

THE COURT: Okay, there being none, the Court will approve the application and look for an order from your office, Mr. Brown. Ms. Garber, do you want to endorse that order?

MS. GARBER: Yes, I do.

THE COURT: All right. Okay.

MR. BROWN: Your Honor, the next matter on the agenda is item 11 and this is the application to employ the Canadian lawfirm of Cassels Brock and Blackwell. Cassels Brock has been an advisor to the debtors for a long time, but they are specifically assisting us with the CCAA recognition proceedings as well as continuing to provide some advice under Canadian corporate law. The debtors believe their services are necessary and appropriate for purposes of getting those orders recognized and continuing to advise the companies with respect to the parent corporation which was a Canadian based company. We believe - we did set forth within their application the terms of their employment and we ask that their retention be approved on the same conditions that were just mentioned with respect to the Hunton and Williams application, the removal of any reference to Section 328 and the reasonable efforts to comply with the Appendix B guidelines. And we will seek the endorsement of the U. S. Trustee on this order. I believe she is in agreement on the form of the order.

MS. GARBER: I agree with Mr. Brown, Your Honor.

THE COURT: All right, thank you, Mr. Brown, Ms. Garber. Are there any creditors or parties in interest who wish to be heard on the application of the debtors and debtors in possession for the entry of an order authorizing the employment and retention of Cassels Brock and Blackwell as special counsel?

(No response)

THE COURT: Okay, there being none, the Court will approve the application and ask for an order from your office, Mr. Brown.

MR. BROWN: Yes, sir. Your Honor, next up on the agenda is item 12 and this is the application to retain Stubbs Alderton and Markiles as special counsel under 327(e). Your Honor, the Stubbs Alderton firm has a long history with the debtors, and what they are specifically providing help and advice on, first they were involved in a prepetition negotiation of a facility with Whitebox and Highbridge that ultimately was used to be the platform to negotiate the DIP loan. An attorney there was closely involved in helping us to close that transaction and execute the schedules in connection with the DIP loan. And has provided general corporate and transactional advice to the debtors prepetition and is continuing to serve as a resource for the debtors to provide the most efficient advice going forward. Again, we believe their services are necessary, that the terms of their engagement are appropriate, they are set forth in the application, and with the same changes proposed to be made to the Hunton and Williams and Cassels' retention, removal of 328 and a reasonable effort to comply with the Appendix B guidelines, we ask that that application be approved and we would seek the endorsement of the U. S. Trustee's office who has signed off on the form of the order.

MS. GARBER: Your Honor, I have agreed to the order on behalf of the United States Trustee.

THE COURT: All right, let me ask you this. Would it create much heartburn to add some language to the order along the lines to the effect of Stubbs Alderton and Markiles will use reasonable efforts to insure that professional services it provides will not be unnecessarily duplicative of those services provided by Hunton and Williams and your Canadian firm?

MR. BROWN: Yes, sir.

THE COURT: I'd just like to have - I mean I want to make sure we don't have too many cooks in the kitchen.

MR. BROWN: I understand that completely and we did provide some answers to the U. S. Trustee's office's concerns about that issue. So inclusion of that language is absolutely fine with us.

THE COURT: Okay. That's the gist of the language. I think Ms. Garber understands my concern and perhaps between the two of you, you can craft something that will incorporate that.

MR. BROWN: We will do so.

THE COURT: Okay.

MR. BROWN: Your Honor, the next item on the agenda -

THE COURT: Just one other thing. Are there any other creditors or parties in interest that wish to be heard on the application for the retention of Stubbs Alderton and Markiles as special counsel?

(No response)

THE COURT: Can't tell if someone is trying to speak up on line or not.

THE CLERK: Is someone trying to speak on the phone line here or does someone just not have their phone on mute?

THE COURT: All right. Everybody that's on line that's listening in or on the telephone listening in, please be sure and put your phone on mute unless you are preparing to speak. There being no other parties that wish to be hard on this matter, the Court will approve the application with the caveat that the Court just expressed. We'll look for the order from your office, Mr. Brown.

MR. BROWN: Yes, sir. So, I'll skip over for just a moment the Seaport retention and come back to that next. The next is item 14, the Wilson retention. The firm of Michael Wilson has served as conflict counsel to the debtor on one matter. Our firm, Your Honor, had a conflict with being adverse to AEP, a power company, with respect to their utility deposit. We began discussions with AEP and quickly determined that the parties were going to be at loggerheads and they needed to resolve it, so we've got special counsel involved to handle that. Mr. Wilson, his rate is specified in his application. We believe he is qualified to assist the debtors in the event that other matters may pop up; we're not aware of any other matters at the moment. We've made that representation to the U. S. Trustee's office and we've agreed on a process. In addition to the same changes that were applicable to the Hunton and Williams retention, the removal of 328 and reasonable efforts to comply with the Appendix B guidelines, we've also agreed that in the event the firm Hunton and Williams needed to use the assistance of Mr. Wilson in the future, he would supplement his affidavit to give notice of the services beyond AEP that he proposed to provide. So, we've agreed to the inclusion of language there and the U. S. Trustee has signed off on the language and we would ask that she endorse the order.

THE COURT: Ms. Garber?

MS. GARBER: Your Honor, that does reflect the agreement between the debtor and the United States Trustee.

THE COURT: All right. It looks like there was already one matter on the docket that Mr. Wilson is helping get resolved it looks like. Are there any creditors or parties in interest that wish to be heard on the application of the debtors and debtors in possession for entry of an order authorizing the employment and retention of Michael Wilson as special conflicts counsel? Michael Wilson, PLC.

(No response)

THE COURT: Okay. There being none, the Court will grant the application and ask for an order from your office, Mr. Brown, consistent with your agreement with Ms. Garber.

MR. BROWN: Yes, sir. Okay, Your Honor, I'd like to move backwards in the agenda to number 13. And this is the application to retain the services of Seaport Global Securities, LLC as financial advisor and investment bankers to the debtors. Your Honor, Mr. Steve Sebastian, the director of Seaport Securities is here in the courtroom and certainly could answer any questions the Court may have about the application. As I'm sure the Court is aware, we've provided a proffer of Mr. Sebastian's testimony at the initial hearing, the interim hearings, but Seaport - I call them Global Hunter, Your Honor, has been involved in a number of things since the debtors found themselves with liquidity concern, but ultimately they were engaged among other things to raise DIP financing and they have performed those services and resulted obviously at the end of the day in a loan from Whitebox Highbridge which was approved on an interim basis.

We believe that the terms of their engagement are reasonable. They were negotiated at arms length and we need their services going forward in order to meet the restructuring guidelines, a restructuring milestone in our DIP loan. We have a total of 75 days from our petition date to get an approved plan on file.

We are 30 days in and they are hard working with us in coordination with us to try to propose a restructuring to our DIP lenders. So we need their services and we believe their fee structure is appropriate in this case.

Your Honor, we did work with both Seaport's counsel and Mr. Sebastian and the U. S. Trustee's office to resolve a number of questions and to address some of the concerns that the U. S. Trustee had and we have made changes to the proposed form of order to address several things.

First with respect to certain indemnity language that was contained in the engagement letter, or the indemnity attach to the engagement letter of Seaport Security. It no longer requires a filing with an application with this Court. There is no indemnity offered for bad faith, self dealing, breach of fiduciary duty -

THE COURT: Go back to the sentence you just said before that.

MR. BROWN: Yes, sir, let me get the language in front of me.

THE COURT: Okay. Have you shared any of this language with Mr. Califano and Mr. Westermann?

MR. CALIFANO: We haven't seen anything, Your Honor.

MR. BROWN: Not the changes with the U. S. Trustee's office.

THE COURT: Okay.

MR. BROWN: And we'll certainly circulate this, Your Honor. We haven't heard of any objections to the Seaport objection. None of the issues raised by Mr. Nix with respect to Seaport went to any indemnity provisions, so these were issues we were negotiating with the U. S. Trustee's office.

THE COURT: Okay.

MR. BROWN: But what it says is, essentially notwithstanding anything to the contrary to the engagement letter, any requests for payment of any indemnity pursuant to the engagement letter shall be made by means of an application, interim or final, as the case may be and subject to review by this Court to insure the payment of the indemnity conforms to the terms of the engagement letter. So, whereas I made quick reference that no application - I misstated - there is a process by which to the extent that Seaport were to seek indemnity, they have to file an application with this Court and have an opportunity to be heard on

that.

As I mentioned, there is a carve-out for certain conduct, bad faith, self-dealing, breach of fiduciary duty, gross negligence, willful misconduct. Same kind of carve-outs that we see in other matters.

If reimbursement of attorney's fee are sought, they'll be subject to 330 review for reasonableness and subject to the fee guidelines. No other reimbursement by counsel except for in connection with the request for payment of indemnity. So what that means is essentially any application to pay attorney's fees has to go through the fee application process and only with respect to the indemnity. Half-houring - the Seaport Global Hunter will agree to record their time. We've agreed with the U. S. Trustee's office that they may record their time in half hour increments. As an investment banker, they're not typically asked to record time, but they're certainly willing to do that on a half hour basis. And their time doesn't need to comply with all of the various other requirements, you know, individual time entries. The bottom line is they provide a general accounting on a half hour basis of what they've done in the case. That as I understand it will satisfy the U. S. Trustee's office.

We need to clarify that - and there's a provision in the proposed order that Seaport will not obtain any DIP financing fee in connection with the Whitebox Highbridge fee, the Highbridge DIP loan that was approved by this Court on an interim basis and for which we're seeking approval on a final basis today. There is agreed language that has been reached between the DIP lenders, the debtors and Seaport on that and that will be included in the letter.

And then finally, this morning the U. S. Trustee's office and our office was able to reach an agreement of how the U. S. Trustee's office would review monthly and interim fee approvals for Seaport. So, to the extent that the debtor will be receiving monthly invoices from Seaport to cover their monthly

obligations, they will file a monthly; they will also file interim applications and the U. S. Trustee has the opportunity to review those payments for reasonableness. And we've worked out the language with Ms. Garber on that.

THE COURT: Just out of curiosity, is that language somewhat consistent with the Deutsche Bank application in James River?

MR. BROWN: It is indeed, Your Honor, with one clarification. There is a definition that's now been included or some clarity that's now been concluded on what the reasonableness review would be by the U. S. Trustee's office and again Ms. Garber and we worked on the language together. I believe we've got an agreement now as to how that provision would work. It's essentially the same kind of carve-out, Your Honor.

THE COURT: All right.

MR. BROWN: Now, with that, I don't want to steal the thunder from Ms. Garber if she has anything to add on that. But there's also the Nix objection that's still pending with respect to this.

THE COURT: Let me hear from Ms. Garber and then we'll talk globally a little bit about the other objection.

MS. GARBER: Your Honor, Mr. Brown has I think correctly recited the United States Trustee's both objections and concerns with regard to the Seaport Global application to be employed and I think once the order is fully circulated, because there were changes as recent as this morning to the application, I think it preserves the United States Trustee's - as a carve-out for the United States Trustee to object to Seaport Global Securities fee application on a reasonableness standard. The U. S. Trustee is comfortable with the language as has been amended this morning.

THE COURT: All right. All right, Mr. Califano, the floor is yours.

Let me talk a little bit about where we are here on this objection by Mr. Califano's client. Gentlemen, Mr. Sebastian, is that correct? From Seaport is here. There's been a declaration submitted from Mr. Sebastian. There's a proffer of what his testimony would be if he were called to testify. Are you anticipating putting evidence on and having a need to cross-examine Mr. Sebastian?

MR. CALIFANO: No, Your Honor.

THE COURT: Okay. So, you're -

MR. CALIFANO: The issue - it really depends on one thing, Your Honor, I think. Our issue is - we believe a showing for the fees hasn't been met but we would have less of a concern if this was a retention under 330 or if other parties other than the U. S. Trustee had the ability to look at the fees. By limiting the review to 328(a), all the parties have a very limited opportunity and ability to look at the fees. I don't think that the declaration establishes their market and I'm not sure under the context of this case that these fees are reasonable under the circumstances, especially since it seems like a pretty straight forward case.

We would be less concerned were we to have the ability to look at the fees or other parties, not just the equity group that we represent, but if that was expanded, the ability to review the fees under 330, was expanded to include other parties - I understand and it's the first time I heard it because I haven't heard anything about what is going on that they've given review to the U. S. Trustee's office. If other parties were given that ability, I think our concerns would be resolved.

THE COURT: Okay. Step back for a minute. Can we resolve this application without resolving the larger objection to the DIP financing? Should we not get everything out on the table

at one time and then address these matters together?

MR. CALIFANO: I would agree with Your Honor that we should address everything at once because it goes to the core of the case, how we got here and how we go forward. So, I think that's a very good suggestion by Your Honor. We deal with everything -

THE COURT: Well, I'm just getting your opinion. I want to hear from Mr. Brown also and Ms. Garber as well.

MR. CALIFANO: My opinion should be that everything should be looked at as a whole.

THE COURT: Okay. Mr. Brown? What are your thoughts on the matter?

MR. BROWN: I disagree, Your Honor. I think we're here on the first matter up, we're talking about, is an application to retain a professional. The terms are laid out in the application. Nothing in the objection or any declaration filed against it suggest that Seaport's fees are not reasonable, they're not market, they weren't negotiated. But one issue that they raised the first time around in their objection was they wanted the ability to ditch Seaport later in the event the board was reconstituted. We can't run this case that way. So, you know, there's no evidence needed at this point; there's nothing that's come in, in opposition to the application that supports the need to go put on the evidence about this. They haven't come forward with anything. But the application on itself should be granted.

With respect to the 330 issue, the 328 issue, Your Honor, I think that's a legal argument as to whether investment bankers are entitled to get their success fee on the front end and be subject to the 328 review rather than - it's like a contingency fee. You don't hire somebody on a contingency basis, let them do the work and then later with cause replace them and say sorry, I'm going to review your fee on

reasonableness on the back end and say because I struck a deal the day after your were fired, you're not getting your fee. That's just not the way it works. And so there's certainly an appropriate carve-out for the U. S. Trustee's office whose job is to make sure the fees being paid by the debtor that they've agreed to pay are consistent, are reasonable versus what the work was that was performed.

But giving that responsibility over to a party who has already announced they intend at some point to perhaps remove that professional is inappropriate and it's not fair to Global Hunter who is now actively doing that work, and needs to get retained and we're following the process for retention. Nothing requires an evidentiary hearing on that issue.

MR. CALIFANO: And Your Honor, I think once again Mr. Brown has miss-characterized our position. I'm not saying there needs to be an evidentiary hearing, but I think this issue needs to be looked at in a larger context. What we have here, Your Honor, is a board - I mean, this is different than a number of these cases where there's been an issue about a shareholder meeting once Chapter 11 is filed. This board knew there was an issue about their authority and their continued existence months before the filing. And the record just set forth in Mr. Nix's exploration in which the debtor doesn't even address and their reply is that through a period of months prior to the filing at a time when this board hadn't even decided whether to file, there was an issue as to its continued existence and its authority and the support it had from shareholders, they delayed and reneged on agreements to reconstitute the board, and they forced us to take the legal steps necessary to get the board replaced. In fact, in the reply, the debtors say, well, we're premature because they don't even have to answer under Canadian law till the seventh. Well, that's true but if they're going to force us to jump over every legal hurdle and force us to satisfy every obligation to get a shareholder meeting, which is clearly supported by 49 and a half percent at least of the shareholders and

that's all we were allowed to go to, then they can't complain that our actions which we take simply to maintain the status quo are delaying their process. This is what they have chosen. They chose to file this case when they knew there was an issue, when there was a cloud over whether they had the appropriate authority. They chose that path. They chose to hire professionals when that issue was out there. If they were responsible and they were truly concerned about the reorganization process, they would have resolved the board issue prior to the filing. And they had the opportunity to do it because this process started months ago.

THE COURT: Well, what happened - I've been reading these papers - I'm trying to understand what's going on in Canada. What happened at the April 23rd hearing?

MR. CALIFANO: At the April 23rd hearing - and what was different in the filing in Canada from these first day affidavit hearings, the Canadian counsel set forth that there had been a requisition for a meeting which is the process that you need to go through under Canadian law. What I understand is at least five percent of the shareholders can ask for a meeting and then the debtor has a period of time to reply.

There's a hearing set for May 21st in the Ontario Superior Court on Mr. Nix's motion to compel a shareholder meeting. It's regrettable that it has to go through that course. And we haven't heard from the board as to why they believe -

THE COURT: Well, I'm still - you haven't answered my question. What happened at the April 23rd hearing - there was a hearing on April 23rd, correct?

MR. CALIFANO: There was a hearing -

THE COURT: And what happened there?

MR. CALIFANO: And the issue was brought to the court's attention.

THE COURT: Okay.

MR. CALIFANO: Okay. And it was declared in open court that Mr. Nix would follow the procedure and the debtors at that point in that court did not take a position. They said that they were considering the request and they would respond. So, time has not -

THE COURT: All right. Did the court in Canada on April 23rd issue any kind of a ruling?

MR. CALIFANO: Not on the issue of the shareholder meeting or the board composition.

THE COURT: Okay. So who set the hearing on May 21st? The court or Mr. Nix?

MR. CALIFANO: Mr. Nix requested that a hearing be set through his attorneys and the court set it for that day.

THE COURT: Okay. I'm just trying to understand where we are on this. So, if there is a hearing on May 21st, Mr. Nix's motion may or may not be granted. If it is granted, when would there be realistically under Canadian law a hearing to determine whether or not there's going to be -

MR. CALIFANO: Well, the next step, Your Honor, would be a shareholder's meeting.

THE COURT: Right. I'm just trying to understand the time-line that you're laying out for me.

MR. CALIFANO: Okay. The next step would be - I don't know how long it would take for the Canadian court to rule, but the next step would be a special meeting to be held.

THE COURT: And under the by-laws of Canadian law, how much time do they have to

give notice -

MR. CALIFANO: From what I understand -

THE COURT: Wait a minute.

MR. CALIFANO: Oh, I'm sorry.

THE COURT: - for such a meeting?

MR. CALIFANO: From what I understand and this is where I get into territory that I probably shouldn't, but the court can compel the special meeting on an expedited basis. So, the court can determine on the 21st, if Mr. Nix's motion is granted, when that special meeting will be held and in what forum.

THE COURT: So, what does Mr. Nix propose that the Court do in the interim in this bankruptcy case while his motion may or may not be granted - there are time-lines and deadlines that I'm not sure other parties are going to wait on while all this stuff plays out in Canada.

MR. CALIFANO: I understand, Your Honor, and I think that's a problem that the board created because they knew that this issue was out there well before the filing. So, what we're trying to do and I think our objection is limited to try and maintain the status quo, and we didn't say that we would terminate Global Hunter. We said that a new board may be constituted and issues shouldn't be determined here that tie the hands of that new board.

THE COURT: This board right now - don't take anything from the way I'm asking questions. I'm just trying to understand.

MR. CALIFANO: No, I understand.

THE COURT: But the way that this board is right now, this board has the ability to

exercise its business judgement in the best interest of the debtor; isn't that correct?

MR. CALIFANO: That is correct, Your Honor.

THE COURT: Okay. So how do I look behind that business judgement now under the case law that's been cited to me over what may or may not happen in the future?

MR. CALIFANO: Well, I don't think we're asking you to look behind their business judgement. I think we're asking you to maintain the status quo to the extent possible. But, Your Honor, I would like to turn the question around to the debtor on this record which is why didn't they resolve this issue before they filed and why are they forcing shareholders who are attempting to exercise their legal rights to go through every step of the process. A letter was sent on April 16th, the requisition letter, after they reneged on agreements through February and after months of dealing with the current board. On April 16th, it asked for a timely response. It asked for a response within 24 hours. So this issue had been out there for months. I can't imagine that it was a surprise to the current board. The current board has chosen not to respond. They're taking every minute of their time under Canadian law. And at the same time, while they're insisting on that extended process and sitting back and taking every bit of their time under Canadian law, they're turning that issue against us by saying Judge, we have to keep this process moving, we have milestones, we've got timing issues. And milestones and timing issues that were negotiated when they knew there was an issue about the constitution of the board.

So, they created the issue and they're trying to use it against us. I think that, Your Honor, is the question that this debtor should be prepared to answer as opposed to saying why shouldn't their business judgement be honored. We're not seeking - and we've been very careful not to object to issues like the DIP itself, even though their submission so far doesn't give any idea of what the DIP is going to be

used for and how it was sized and what was the thinking behind it. We've tried to get that information. All we could get was the one page that was filed with the Court.

So, Your Honor, I understand what you're saying and the time-line is there, but that time-line and those timing pressures were created by a board that doesn't feel like it has to answer to shareholders. And I think there's one thing in their reply that's very telling. They complain that we want to second-guess the board. Whether or not we want to second-guess the board, the issue is people are entitled to second-guess directors. All right? In the Chapter 11 process, the actions of management pre and post petition are constantly second guessed and tested by creditors and other parties in interest. There's nothing inherently wrong with second guessing. Judges are subject to second guessing. That's why you have appeals courts.

But the issue that's telling - the thing that's telling about that, the fact that it's so prominent in their reply is they don't want to be second guessed. They've acted in a manner to maintain control throughout a process when they knew that they shouldn't, when they knew that they didn't have the mandate of the shareholders and when the shareholders were seeking to get a different, differently constituted board. And I think it's very important, Your Honor, for the Court to note that this started well before the Chapter 11. Okay? And if we had to have testimony well before the Chapter 11 was even contemplated, before they realized they had to file, this board has hung on to control of this debtor for reasons which I'm not sure of. And now, here it's trying to use the timing of the Chapter 11 process and the timing of things that they negotiated and they agreed to, to maintain that control and to frustrate the rights of shareholders.

And another thing that's in their reply that I think tells us a lot is that they say we're

embarking on a expensive and litigious process. We're not, Your Honor. We're not. We came here on the second day to raise some issues, but this could be resolved very simply. They could hold a shareholder meeting. They could live up to one of their agreements they made in February on the reconstitution of the board. But they're not. And then in the footnote, they threaten to come back to this Court and seek a stay of the shareholders' pursuit of their legal rights that they themselves are forcing us to pursue. The process that they're dictating that we follow, they've already intimated in a footnote that they're going to come back here and seek a stay.

Now, we cited in our papers the case law, one case from the Western District of Virginia, the Marvel case that is fairly well known that shareholder rights are not stayed by the Chapter 11 filing. So, we're going to have another unnecessary hearing because they're refusing to comply with both their prepetition agreement and with the wishes of the shareholders.

So, I think it's inequitable to turn the question to us and say well, we've got a bunch of milestones and here's the timing that you're under and how can I hold things up. Well, Your Honor, they are forcing us to go through that process. They're the ones who put us in this position by having refused to comply with wishes of shareholders prepetition. They're now trying to use the bankruptcy. And they're trying to use time-lines that they themselves have agreed to. So, I think it's inequitable to put the shareholders in that position. And we still don't have a response from them as to why -

THE COURT: Well, aren't you going to have that on May 21st?

MR. CALIFANO: Well, hopefully we'll get it on May 7th which is when they are supposed to respond to the request. But based on past history, I'm afraid it's going to be a terse letter that just says they decided -

THE COURT: But isn't the court in Canada going to take this up on May 21st regardless what their response is or their lack of response?

MR. CALIFANO: It is, Your Honor.

THE COURT: Okay.

MR. CALIFANO: But I don't think and what perplexes me is that in the case where everybody says speed is essential, why they would force that 16 day process, why they would have forced this, basically this since early February process of making agreements, reneging on agreements, forcing the shareholders to jump through hoops. I think yes, we will get an answer on the 21st. I started this long monolog in response to Your Honor's question as to whether we should hold things up when there are milestones and a number of other parties involved. This problem was created by this board, Your Honor, and I think it's inequitable to allow them to hide behind a problem they created or rely on a problem they created to further deny the shareholder rights and basically allow them to benefit from what I believe are improper actions which they don't even bother to dispute in their submission. There's no dispute about the whole recitation of facts through February when Mr. Nix and others attempted to have a resolution which would not be very public and contentious and where there were agreements with this current board which were reneged on without explanation.

THE COURT: All right. Well, let's circle back around to what the matter is before the Court right now which is the application of Seaport Global Securities. Your primary objection is what? Articulate that for me. Is it the lack of review of compensation from your client or -

MR. CALIFANO: The problem is and it may not be my place - whatever new board may be constituted - the new board that may be constituted is now tied either to Global Hunter or if they

choose to go with another advisor, being obligated to pay fees to Global Hunter, if they're not using them, and at the same time would only allow a limited review of those fees. So, I think that when you look at the situation and where things may go here, that's where our objection lies, Your Honor.

THE COURT: All right. Let me hear from Mr. Brown. I'm sorry. Identify yourself for the record again, please.

MR. HERMANN: Good morning, Your Honor. Brian Hermann from Paul Weiss Rifkind Wharton and Garrison on behalf of the DIP lenders and ad hac group both prepetition bond holders. I call it an ad hac group because we don't represent a hundred percent of the bonds, but we do represent over 99 percent of the bonds. So, it's just about all of the bonds.

Your Honor, I've been quiet because our issue with respect to Global Hunter's retention was resolved and that was to clarify in the order that there is no fee paid to Global Hunter in connection with the DIP financing, and I think that language still needs to be tweaked but we have an agreement with the debtors and with Global Hunter on that.

The reason I really rise is to respond to some of what Mr. Califano is saying. Your Honor, I think that hidden in his message to the Court is their desire for delay. That is certainly the theme that runs through all of their objections. In the case of Seaport Global, it has to do with whether or not they get 328 or 330 review. In the case of the DIP you'll hear about in a little bit and has been alluded to a little bit so far, but he doesn't like the milestones. But the theme is delay. And the reason I say that in connection with Global Hunter is because Mr. Califano knows full well that investment bankers typically are retained under 328 and their fees are reviewed under 328, not 330, and what has become accepted practice in every jurisdiction that I'm aware of is that you give the United States Trustee's office the 330 review, but

everybody else is down by the 328 review. And what Mr. Califano didn't tell you, but I think is implicit in his presentation, is that it will be very difficult for the debtors to retain any investment banker, but I'm sure it will be the case with Global Hunter, if other parties have 330 review. Investment bankers just don't work under that arrangement nor should they be asked to given the types of fees that they rely upon. And so, I think his objection on that basis is just a veil of attempt to delay the process.

Second, in terms of whether the fees are market, I can tell you based on my own experience which is what it is, having been around the country in lots of different bankruptcy courts, these fees are I would say at the low end of market. Mr. Califano certainly had more than ample opportunity to prepare evidence to the contrary and Mr. Sebastian is in the court and he can be examined on that issue if Mr. Califano would like. But all the evidence thus far would demonstrate that the fees are market. There's been no evidence to suggest that they're not.

And in terms of the new board which is I think the thrust of Mr. Califano's presentation, it is always the case that, Mr. Califano is right in this sense, that shareholder rights do not disappear in bankruptcy. You could always be in a situation where there is a shareholder meeting that's coming up outside of the court, but nothing is put on hold because of that shareholder meeting. They may replace the board; they may not. But the court and the debtors have to act with what's in front of them. You can't just sit around and I think Your Honor is sensing that, you can't just sit around and wait for that to happen. Now, Mr. Califano's case, we have a hearing in Canada in which he's going to try to get the Canadian court or persuade the Canadian court that a shareholder meeting should be held. But shareholder rights while they do continue in bankruptcy, it's not a guarantee that they continue in bankruptcy. And Mr. Califano only

cited you to half of the case law or at least one case, the Marvel case, and one other in the Western District of Virginia, that stands for the proposition that shareholder rights continue in bankruptcy. There are other cases that clearly stand for the proposition that where shareholders are trying to be destructive of the bankruptcy process or distracting of the bankruptcy process or trying to impede or delay progress in the bankruptcy cases, the automatic stay may inhibit their ability to do that. Now, there's no motion that's been made to enforce the automatic stay, but it's not a given that shareholder rights continue. So I think that this whole idea that we should wait and see what the new board wants to do, with respect to all the other professionals, they've withdrawn their objection, there's really no basis to persist in the objection against Global Hunter. Again, it's just a way for them to try to deter Global Hunter from doing the work they need to do to represent the debtors in these cases and delay the process and I don't think that's a good faith objection. Thank you, Your Honor.

THE COURT: Mr. Brown?

MR. BROWN: Your Honor, I absolutely agree with Mr. Hermann's points. We did not have before you a motion today to enforce the stay. We have no motion before you today to deal with extension of the stay and seek certain protections we may need to seek in the future. What we're here today is on Seaport's application. We'll get to some other matters next, but as Mr. Hermann said and I also said earlier, there's been no evidence and no specific objection to the market based nature of Seaport's structured fees. It is in fact how I bankers are retained and the 328 retention subject to the carve-out is appropriate here.

I can't let go the opportunity to at least point out to the Court that what Mr. Califano testified to isn't evidence. He made all kinds of allegations about agreements that don't exist, lots of

allegations about the board did this or didn't do that, those issues aren't relevant to the application to retain Seaport with respect to their investment banking services in this case, so we didn't address a lot of that. There may be an opportunity to address those issues down the road.

Let me also point out what is incorrect in terms of the statement with respect with what happened in Canada and what may happen in the future in Canada. The hearing that involved recognition of your orders involved the recognition of the DIP order and the NOL order and the recognition of the appointment of a foreign representative. That was what was on the docket. There was an opportunity -

THE COURT: On April 23rd?

MR. BROWN: Yes, sir. There was an opportunity provided for counsel for Mr. Nix to make a statement. He made such a statement and the court did not rule on anything with respect to that statement. In fact, made some comments to the effect that he'd like to see what the U. S. Bankruptcy court had to say about these issues. Those are not in orders; those are reflected in transcripts and records. But again, there was no matter before the court at that time. I also want to point out there is no matter pending for the court that's set for May 21st. Mr. Nix's counsel has reserved time on May 21 for a motion that has not been filed at this point. We have no motion pending in Canada. There will be if the Court grants a final order recognizing the DIP. We will be before the court presumably on May 21 asking that that recognition court recognize the final DIP order. That's what we would have on the docket and we can't speculate yet about what may be filed by Mr. Nix if anything. But coming back to Mr. Hermann's point, we can't run this case based on what may get filed, what may get decided, and if the Court were to grant some relief, when a shareholder meeting may or may not occur and what the outcome of that shareholder meeting may be. None of those issues are decided today. And we can't sit around and run a case based on that

kind of speculation.

This case was not filed to avoid corporate governing issues. It was filed as the Court heard based on the proffer at the first day hearings, testimony from Mr. Castle and Mr. Sebastian. This company was running out of money. It needed a DIP and it still needs that DIP today.

Finally, getting back to the issue at hand. We need Global Hunter; we need their services and we'd ask that they be retained today.

THE COURT: Okay. Here's what I'd like to do and then I'm going to take about a ten minute recess. I'd like to have you put Mr. Sebastian on just to walk him through the terms of his engagement, give Mr. Califano the opportunity to examine him if he's got any questions of Mr. Sebastian on that. And I want to have a record before the Court; I've got a lot of people who have gotten up to the podium and have said things as to what they believe the world to be, but I do have the declaration of Mr. Sebastian, but I would like to have some oral evidence here. Go through the terms of his engagement, how he's proposing to be paid, discuss the services that they're proposing to render, what they've done so far and I'll give you some time to gather your thoughts in that regard. So, let's take about a ten minute recess and come back. We're going to have a record here and we'll figure out where we go from there. If you need a little bit more time for any reason -

MR. BROWN: No, sir.

THE COURT: But otherwise, we'll come back at about - we'll come back at five minutes to 12.

MR. BROWN: That's fine. Thank you.

(The Court stood in recess)

THE COURT: Mr. Brown?

MR. BROWN: Yes, sir. Your Honor, we're prepared to call Steve Sebastian to the witness stand.

THE COURT: All right. Mr. Sebastian, come forward and be sworn, please.

WHEREUPON CAME:

STEVE SEBASTIAN

was duly sworn and testified as follows:

EXAMINATION

BY MR. BROWN:

Q Mr. Sebastian, please tell the Judge your name.

A Steve Sebastian.

Q And do you have a job?

A Yes, sir. I'm managing director at Seaport Global Securities.

Q And how long have you been with Seaport Global Securities?

A Since November of 2009, so, approximately six years.

Q Could you describe for the Court what Seaport does?

A Yes, we're a full service investment bank. We have advisory capabilities which I'm in charge of. We have extensive capital raising capabilities. We've got about 13 offices, about 300 employees. And we do the full range of investment banking work. So, similar to Deutsche although we don't write checks like Deutsche Bank does.

Q Mr. Sebastian, how long have you been in the restructuring business?

A Well, I've been in the investment banking or private equity business for over 30 years. Prior to that, I was a lawyer and I was - on the restructuring side, I've done restructurings for much of my career although not a hundred percent of my career. Among the positions I held prior to Seaport Global was with Chanin Capital which was a recognized restructuring boutique. And since I've been at Seaport Global, I've done restructuring for Seaport Global as well. So, I haven't really counted the transactions, but certainly quite a few restructuring transactions.

Q Was Seaport at some point engaged by the debtors prepetition to perform certain services?

A Yes, we were. We were engaged as of December 9th, although we started our work somewhat before that. And that engagement letter, which with an amendment got filed as the letter with the Court, covered a range of services and we have been pursuing it since that date.

MR. BROWN: For the Court's reference, in the application of the debtors which is docket number 108 beginning on page 44 is the engagement letter of Global Hunter services also known as Seaport - does the Court have a copy of that available?

THE COURT: Yes.

BY MR. BROWN:

Q I'm going to ask a few questions, Mr. Sebastian, about this. Was this document -

MR. CALIFANO: Do you have an extra copy?

MR. BROWN: This is the same one again that was filed with the application.

THE COURT: Just one second, Ms. Lee, would you just ask Ms. Carol to print out a copy. Or Ms. Garber, do you have an extra copy? Give it to Mr. Califano.

MR. BROWN: Thank you, Ms. Garber.

THE COURT: Proceed, Mr. Brown.

MR. BROWN: Thank you, Your Honor.

BY MR. BROWN:

Q Mr. Sebastian, you have a copy of this retention agreement, correct?

A I do.

Q Was this a product of some negotiation?

A Yes, it was a product of considerable negotiation. I think the first version of this took about two and a half weeks and probably about ten drafts to get signed off on.

Q Were the rates negotiated?

A Absolutely.

Q Do you believe that the resulting rates that are set forth in this agreement are market fair rates?

A Yes.

Q In fact, you heard Mr. Hermann say earlier they may be on the lower end. Do you share that idea?

A I think they're very reasonable, yes, for an investment banker in this situation.

Q All right. I think your testimony was at the time you signed the agreement, you had actually already been working; correct?

A Correct.

Q Now, did you work or did your group provide any prior work to Global Hunter prior to the

time that you were engaged in or around December?

A To Xinergy?

Q Yes.

A Yeah, in fact I'll credit my colleague, Kay Shields, for a lot of that work. It pre-dates our merger with Seaport. But in 2009, Seaport was the financial advisor to the company when they went public in Canada through a reverse merger and helped identify the placement agents in Canada in 2011. We were a co-manager in the bond issue that is an issue in this case. We did work with the debtor prior to December, November and December of last year to try to buy assets and create a transaction to try to improve the situation with the debtor. We did not have an engagement letter but had that proceeded, we would have hoped to have gotten an engagement letter in place. But we're actively engaged in that effort as well. So, we've had a long association with the debtor.

Q Did the scope of your services under the engagement letter contemplate the possibility of working on a DIP solicitation process?

A They did, yes.

Q All right. And did you in fact undertake a DIP loan solicitation process on behalf of Xinergy?

A Yes. We turned to a DIP loan process on March 5th, when the board decided it needed to go in that direction. And we had been exploring already quite a few lenders that were potentially DIP lenders, but we were looking at them for other transactions. So, we had a head-start from that point of view. We ultimately approached, specifically for the DIP, 25 lenders and I think about ten of them ended up executing non-disclosure agreements. We augmented a data room that we put together previously. We

worked with management to prepare for doing projections. And I can go into more detail on the DIP later, but yes, we were actively involved in the DIP.

Q Did that process run approximately a month?

A It did, yes.

Q Did Global Hunter commit or did Seaport commit quite a bit of man hours to working on that project?

A Yeah, we did. And of course, we had access to our sales and trading relationships with many, many lenders, so we were leveraging off of the organization if you will beyond just the hourly.

Q And did Seaport earn any DIP financing fees in connection with that work?

A Ultimately, we did not get paid anything for any of that work. When we negotiated our letter with the company, they insisted on a carve-out for Whitebox Highbridge because of the fact that Whitebox Highbridge had been involved with the company prior to our engagement in December, and they'd done a lot of work and so, we reluctantly agreed at the time to a complete carve-out for a DIP that they would provide.

Q There are some opportunities to earn fees provided to Seaport in connection with the engagement letter beyond the DIP financing fee; correct?

A That's correct.

Q Describe generally for the Court what the compensation package consists of that is represented by the fee structure in the engagement letter.

A So, there's a monthly fee of 125 thousand dollars, and that fee is creditable against - a hundred percent creditable against many of the potential transactions that we can accomplish, financing and

so forth. It is not creditable against the 1.5 million dollar restructuring fee which is payable upon successful consummation of the restructuring approved by the Court etcetera. Except to the extent that the case goes beyond six months in which case, 25 percent of the monthly after six months is creditable against that particular success fee.

Q Okay. As you perceive where this case may be headed in terms of the outcome, are you contemplating at the present that we may be on a restructuring course or a sale course or what do you think your fee type might be in this case?

A Well, all options are open, but I think the more likely outcome, as you say, is a restructuring. We have the bondholders at the table to do that, and so, in that case, I would anticipate a monthly plus a restructuring fee and success fee at the end.

Q Are you presently working on formulating any restructuring proposals?

A Yes, we are. We've also been supporting the debtor in other matters. So, we've been busy on several fronts.

Q Are you working toward the 75 day milestone that you've heard about earlier today for the filing of the plan? Are you trying to meet that time-line?

A We are.

Q Do you believe that the debtors can meet that time-line with Global Hunter's assistance?

A Yes.

Q What if you had to put your pencils down today? Are you concerned about whether the debtor could meet the deadline?

A Sure. It's a tight time-line. We tried to get more, but were unable.

Q Well, let's talk about, you're familiar with Section 328 and 330 of the bankruptcy code?

A Yes.

Q When Global Hunter or Seaport has been engaged in other engagements, have you typically been engaged under 328? Had your fees reviewed under 328?

A Yes.

Q All right. And the Court has heard earlier today, Seaport has reached an agreement with the U. S. Trustee's office to allow a carve-out based on specific language, to allow 330 review for the U. S. Trustee's office; is that correct?

A That's correct.

Q All right. Are you willing to allow a carve-out for Mr. Jon Nix or any other creditors in this case?

A No, we're not.

MR. BROWN: Your Honor, those are the questions that I have at the moment.

THE COURT: Mr. Califano?

MR. CALIFANO: Thank you.

CROSS EXAMINATION

BY MR. CALIFANO:

Q Good afternoon, Mr. Sebastian.

A Good afternoon.

Q My name is Tom Califano. I represent Jon Nix. I have a few questions. I looked at your engagement letter, the one that was submitted, and you testified that Global Hunter was retained in

December; correct?

A Correct.

Q But the engagement letter was signed on February 6th, I believe?

A Correct. The amendment to it.

Q Okay. What was going on during the period from December to February?

A Well, we had quite a few things going on. Do you mean what was our -

Q Well, were you performing tasks on behalf of the company?

A Yes. We were trying to initially work with the company to find a way to pay the interest payment on the - which was paid on December 15th at the end of the grace period. I would say that the company had much more to do with that than we did. We were engaged somewhat late in that process. After December 15th, we started to do some of the work indicated in the letter in terms of reviewing the company's options, developing a consensus about where to go in terms of a company, working with them on a variety of initiatives, outlined in the letter.

Q But why wasn't the letter signed until February 6th?

A Well, it wasn't. It was signed originally in December. This letter is amended and restated. Okay? And it references at the end of the first paragraph the preceding agreement dated December 7. I miss-spoke, I said December 9, I believe. But December 7th was the agreement that was signed in December.

Q Okay. What are the differences between the two? Do you recall?

A Well, I don't specifically recall. The original letter was intended - I probably shouldn't speculate. I don't recall.

Q Well, let me ask you. The fee provisions, were they at all different in the December letter?

A Again, I don't specifically recall. I believe that we had a retainer in that agreement that was similar to this retainer. It was not paid at the time. But - and we had success fees that were similar to this letter, and the scope of the letter was fairly similar. It was a letter that was terminable on very short notice because the company was hopeful that it was going to close a transaction that it had that would provide quite a bit of running room on capital. And so they wanted an opportunity to - if that deal had closed, to have come back and taken another look at our agreement. So, it had some differences, but I don't honestly specifically remember all the differences.

Q Well, do you know why, if the fees were - you just said they were the same?

A You know, many of the fees were very much the same, yes.

Q Well, the monthly fee; was that the same? The 125 thousand?

A No, no. The monthly fee in the amended restated agreement that you have here kicks in pursuant to the provisions in paragraph 4(b) of that agreement.

Q There wasn't a similar provision in the earlier letter? Was there?

A I don't recall. I could find out. I just don't recall.

Q Well, could you find out very easily? I mean do you have it with you. Did you bring it with you today?

A Well, I could pull it up on the computer and look it up. But I don't have a copy of it with me.

MR. CALIFANO: If it could be done simply, Your Honor, I think it might be helpful.

THE COURT: Well, tell me where you're going with this, Mr. Califano.

MR. CALIFANO: Well, I'm just trying to understand, Your Honor, I'm trying to understand the context of what I'm hearing about - for example, 328 review, what I'm hearing about not being willing to delay the issue of a success fee and things like that. Whether that's consistent with the prior letter. But we don't need to go there, but -

THE COURT: Well, I think you can ask him to the best of his recollection what he remembers. I'm not going to stop the court proceedings to get people to go look up stuff on the computer, but you can ask him to the best of his recollection what he remembers.

MR. CALIFANO: I think I have asked and he has said substantially the same, but he's not sure. So, I don't want to ask him the same question, Your Honor. Let me change the question then.

BY MR. CALIFANO:

Q Do you have any cases in mind that you would say were comparable to this, that the fees are comparable? Do you have any other Chapter 11 cases that you can reference?

A Well, one comes immediately to mind. It was a case in which your firm represented the debtor. It's Trailer Bridge. It was in the middle district of Florida out of the Jacksonville court, and that was a monthly fee of 125 thousand, success fees; I think there we actually got a DIP fee.

Q When was that case filed?

A I think it was filed in 2011.

Q Okay. Do you have any more recent examples of comparable cases?

A Well, again nothing that immediately comes to mind. That one was comparable because of size and the debt was actually somewhat lower in that case than this one, so this one is arguably

larger which would tend to command a bigger fee. But I think our ultimate fees in that case came out in the vicinity of more to what this one is likely to come out.

Q You believe your fees here are market? Right?

A Yes.

Q So, I'm asking what do you base that on?

A General experience of working on transactions such as this and looking at fees charged by investment bankers in other cases. None of which I expected to have to testify to today, so I didn't bring schedules with me showing those fees, but I'm confident we can prove that up if necessary.

Q Well, I'm just asking how you felt confident in that conclusion and you referenced a case from 2011, so that's your recollection on that issue?

A Well, 2011 was a case where we did have a challenge on our fee, so maybe it's seared in my memory a little more. But yeah, as I said, we could provide other cases that are much more recent and are you know to the point. But it's not everyday that we have to defend the fee.

Q You don't have any here today?

A I did not bring anything with me here today for this purpose, no.

Q Now, you referenced a Ms. Shields, I believe, that works for Global Hunter?

A Yes.

Q Do you know if she was consulting with Mr. Nix during the early Spring, the beginning months of this year on possible financing transactions?

MR. BROWN: Objection, Your Honor. This is beyond the scope of direct.

THE COURT: Mr. Califano?

MR. CALIFANO: Well, arguably it's beyond the scope of direct. I think it's relevant. I think it's going to be relevant to some of the other issues. I can call him back if we go into DIP issues if debtor would like. I'm just trying to make things move quicker here.

THE COURT: All right. Well, I'll allow the question for the purposes of this witness.

Why don't you restate your question, Mr. Califano.

BY MR. CALIFANO:

Q Okay. You mentioned Ms. Shields before who works with at Global Hunter.

A Correct, yes.

Q Were you aware that she was discussing various financing alternatives with Mr. Nix during the January, February, March period?

A I'm generally aware that Mr. Nix reached out to her through text messages and what have you. I'm not aware that that arose to the level of a discussion; however, we're always open to information, ideas from shareholders. We get paid based on successful transactions. So we - and the board was open to Mr. Nix as well. So, as someone who was working for the board and trying to get to a result that would benefit the company, I would expect her to listen to what anyone would say on financing and things of that sort.

Q Are you familiar with the sale/lease-back transaction that Mr. Nix introduced her to?

MR. BROWN: Objection, Your Honor. Again, this is beyond the scope of direct. This is far afield on whether or not Seaport should be retained. That's the issue before the Court.

THE COURT: Well, I think I'll allow him to ask questions about what they've done in

advance of today's hearing. I understand your objection and it's noted for the record.

Go ahead, Mr. Califano.

BY MR. CALIFANO:

Q Were you aware of the sale/lease-back transaction that Mr. Nix brought to Ms. Shields' attention?

A I'm not sure I would describe it quite the way you have. There was a sale/lease-back opportunity that Mr. Nix introduced and the board considered it. It was introduced to the board as well. And we did some work around that particular proposal, but more importantly, it didn't get very far. But more importantly, we went much more broadly out into the market to try to determine if such a transaction and its related first lien refinancing could be done.

Q And what was your conclusion?

A It had a number of obstacles to getting it done. Quite a number. I'm not speaking about the specific proposal Mr. Nix introduced which had other issues, but in general, it had quite a number of obstacles to getting it done and we ultimately ran out of time. We reached the point on March 5th where it became apparent that we were not going to be able to delay moving towards filing a DIP.

Q Okay. In your current interactions with the debtor, who does Global Hunter report to?

A We report to the board of directors, and we obviously interface quite often with the management.

Q Who in management do you interface with?

A With Bernie Mason and Mike Castle.

Q Okay. And how often do you report to the board?

A Well, currently twice a week to the restructuring committee of the board and at times, it's been anywhere from once a week to - occasionally less than once a week, sometimes more than once a week. It's been a very intensive process with the board.

Q And I believe you testified before that on or about March 5th, the board determined to file Chapter 11; is that correct?

A They determined that they could not wait any longer to go out and try to raise a DIP.

Q Okay. And what was -

A But they did not determine to file at that point.

Q Well, a DIP would imply a Chapter 11; correct?

A It certainly is a step towards being prepared for Chapter 11.

Q You don't have a debtor in possession facility without a debtor of possession, so the two decisions are linked, aren't they?

A I don't know.

Q Do you or somebody from Global Hunter attend board meetings?

A Yes. Not every board meeting, but ones that our services are relevant to, we generally do attend usually by telephone.

Q Okay. And were you in the board meeting where it was determined that the company should find a DIP facility in event it determined to file?

THE COURT: Will you restate your question, Mr. Califano? You're talking to the witness and I can't see your mouth, so I can't hear very well.

MR. CALIFANO: Oh, I'm sorry.

BY MR. CALIFANO:

Q Were you present or somebody who works under you - were you present at the board meeting when the board determined to go out and find a debtor in possession facility?

A Yes.

Q And do you know when that was?

A March 5th.

Q That was the first they said let's go out and find a facility?

A Yes.

Q Okay. Were you present at the board meeting when the board determined it was highly likely that a Chapter 11 filing had to be made?

A I'm sure I was. I don't remember if that was March 5th or after March 5th.

Q Do you know if they were close together in time?

A They had to be. The filing was made on April 6th.

Q Okay. Do you know which determination came first? Which determination came first? Go and get a DIP or we have to file?

A Go and get a DIP.

Q Okay.

A Go and try to find a DIP. Develop proposals for a DIP.

Q Now, did you provide - did Global Hunter - when I say you, I mean Global Hunter, did Global Hunter provide any reports or analyses to the board in connection with the decision?

A I don't specifically recall. We made a number of presentations, reports to the board. I

think the determination of whether to go out and look for a DIP was made because cash flow had gotten so tight so quickly that the board felt it imperative to start the process for fear of having to file without having financing in place. And we would review the work that management would do on liquidity, but whether that rose to the level of us making a report on the projection or having told the board that we reviewed management's work on the projection, I don't specifically recall.

Q Do you know what other options were considered in the face of the liquidity crisis you describe?

A Well, the company had been in a liquidity crisis if you will probably since November at least when the November 15th interest payment was not paid on November 15th; instead the company went into a grace period. The company had been working - this is publicly disclosed - with a group called Aries that was looking to provide 40 million of junior capital to the company. That transaction did not close, but the company expended a great deal of effort to try to get that done. And we weren't involved in that part of the transaction or that aspect of it. Essentially since then, the company was looking to find liquidity, to find ways to improve its value, to create acquisitions, you know, a sale/lease-back. We considered sales of assets, all with the idea of creating greater enterprise value and/or liquidity for the company.

Q Were you involved in the sizing of the DIP?

A Yes.

Q Okay, what was your involvement?

A We made recommendations to the board with management; helped analyzed what would be necessary to go out and get in the marketplace. And you know we got the feedback from the marketplace as well and transmitted that back to the board.

Q What factors went into determining how much DIP loan service was needed?

A Well, the new money piece of the DIP loan is approximately 20 million dollars and that was driven off of cash flow forecasts over the ensuing 26 weeks roughly that a case might - I mean 26 is beyond the 13 weeks, but we tried to look out further than that and consider what AEP needed to be caught up with in terms of critical vendors which again we were viewing management's recommendations on that, so you know, we weren't primary on that, but we tried to estimate what professional fees might entail, what the results of the company would be which - what capital expenditures were deferred and needed to be taken care of so the company could produce revenue quickly. So, those kinds of cash flow things went into the new money piece of it.

The roll-up of the first lien piece which is another 20 million approximately was really driven by market conditions. We did have a couple of entities and including bondholders at one point that suggested that the roll-up - that they might be interested in doing a 20 million dollar DIP; however, the problem with that - and that ultimately is not what we received from the bondholders I might add, we got a 40 million dollar proposal - but the problem or the opportunity if you will was that the second lien had silent second provisions. They had agreed not to contest the DIP that was proposed by the first lien and that is an advantage that a lot of people preferred to have if you will in providing their DIP and therefore, the roll-up or the 40 million dollar size was viewed to be - market viewed that as an important aspect of the DIP.

Q Now, when you say market conditions dictated the roll-up; what are the market conditions you're referring to?

A I'm saying the market for providing DIP loans was such - the final proposals that we got back on this, which there were really three, were first of all, all for 40 million even though, you know, we

indicated that if and when asked, when discussed, if they wanted to proceed on a 20 million dollar DIP, we'd be happy to entertain that, they all came back at 40, so that expression of the market, if you will, on three proposals received were all on that basis. And in general the market preferred to be in the shoes, if you will, the shoes of the first lien lender providing a DIP as opposed to putting forward something that the second lien could then contest in terms of its level of adequate protection.

Q So, I'm just trying to summarize what you're saying. What you're saying is that everybody that you talked to wanted to replace the first as part of coming in and providing a DIP? Is that what you're saying?

A Everyone who got to the finish line did.

Q Okay.

A You know, there were a couple of parties that we talked to that expressed some interest in a 20 million dollar DIP. We encouraged that of course, but those parties ultimately did not step forward with something that was actionable.

Q I was just trying to summarize what you were saying. Finally, you mentioned that Global Hunter is now taking efforts on behalf of the debtor toward meeting the first of the restructuring milestones; is that correct?

A I'm sorry. Could you restate your question?

Q Yes. You testified before that Global Hunter is now acting to help the debtor meet the first of the restructuring milestones which is from what I understand to file a plan acceptable to the DIP lenders within 75 days of the petition date; is that correct?

A Correct.

Q Okay. What steps is Global Hunter taking?

A So, we are in the process of working with the board to formulate a proposal to be made to the lenders and to the bondholders in order to - and we're working with the board to put forward that proposal in the relatively near future.

Q Okay. To support that proposal, is Global Hunter preparing or performing any valuations?

A We are preparing those; yes.

Q All right. How far along are you with the valuations?

A We're in process.

Q I mean beginning of the process, middle of the process, end of the process?

A I'm not sure how to describe where we are in the process.

Q Well, have you told the board that there'd be a time when you would deliver valuations to the board?

A We're anticipating doing that - well, some other things have come up recently, so I would've said the beginning of next week, but probably the end of next week at the latest.

Q Has Global Hunter come to a conclusion about valuation?

A No, we've not.

Q Okay. When do you anticipate that?

A By the end of next week.

Q Okay. And have you reviewed management's projections of operations going forward?

A We have; although, those are also still influx because you know there's been a lot of work

around what the cash needs are in the DIP and what needs to be paid and that of course establishes the start of your projection in terms of a balance sheet in the longer term forecast. But we've been working with management you know continuously on this and so, we're able to - we should be able to get to a finalized opinion on those in relatively short order.

Q Okay. But that's something that will be constantly evolving; correct?

A Yes. That's constantly evolving, yes.

Q And it'll change based on the feedback you get on the term sheet on the bottom of the list; correct?

A No. The projections won't change.

Q All right. For example, if you're discussing with the bondholders what level of debt there will be on the company post emergence, that would factor into the projections; correct?

MR. BROWN: Your Honor, I'm going to object again. Now we've gone well beyond what the services are to be provided and speculating about what the results of those services might be and what the reaction of the DIP lenders might be. This is well beyond -

THE COURT: I'm going to sustain that objection, Mr. Califano.

MR. CALIFANO: I'm not asking about what the - I'm trying to get an understanding of how they're going to work and where they are in the time frame of their work, because I think the testimony just prior, the direct testimony, was that they're along in the process and they were working to meet the 75 day -

THE COURT: You used the word finally in one of your questions about five minutes ago, so I'm going to ask you to -

MR. CALIFANO: That's fine, Your Honor. I think I have the answer to that. Thank you.

THE COURT: All right. Mr. Hermann, you or Ms. Garber have any questions?

MR. HERMANN: No, Your Honor.

MS. GARBER: No, Your Honor.

THE COURT: Mr. Brown?

MR. BROWN: Just a couple quick follow up questions, Your Honor.

REDIRECT EXAMINATION

BY MR. BROWN:

Q Mr. Sebastian, you mentioned the Trailer Bridge case; was there a similar issue in that case with respect to 328 versus 330?

A Yes. The U. S. Trustee was given 330 review rights and no one else was.

Q Was that resolved with a provision very similar to the one that resulted in the resolution with Ms. Garber earlier today?

A Yes.

Q As part of your engagement, did you look at the fee structure of professionals in the James River cases?

A Yes, we did.

Q Did you look at any other types of bankruptcy cases just to take a snapshot of what the fee structures were in those cases for investment bankers?

A We did. And again, I didn't come prepared today with the analyses, but it's something

we constantly are looking at.

Q Yeah. My only question is whether you had looked at them.

A Yes.

Q And as a result of looking at them, did you draw a conclusion that the fees that you were going to charge in this case were reasonable?

A Yes. In fact, we got pushed down in part of our negotiation on this case.

MR. BROWN: Those are all the questions I have.

THE COURT: Mr. Sebastian, I think you testified a little bit earlier that you were involved in the placement of the bonds or that your company was involved in the placement of the bonds at issue in this case; is that correct?

MR. SEBASTIAN: Yes. One of - I think around six or eight co-managers in that case - we were not the lead co-manager on that.

THE COURT: At the time the bonds were placed, was Mr. Nix on the board at that time to your recollection?

MR. SEBASTIAN: You know I don't know. I wasn't involved with the company at that point. This was April and May of 2011.

THE COURT: Okay. Are you aware of any difficulties that your firm had in the past in working with Mr. Nix or the board for which he was a member at that time? Assuming he was on the board back in 2011.

MR. SEBASTIAN: I'm not aware of any difficulties. I may not be the person to ask that question.

THE COURT: That's right. I'm just asking if you're aware of any.

Any follow up to the Court's questions?

MR. BROWN: No, Your Honor.

MR. CALIFANO: No, Your Honor.

THE COURT: Okay. You can stand down.

(Witness stood aside)

THE COURT: Anything further, Mr. Brown?

MR. BROWN: No, sir. With that, Your Honor, we'd ask that you approve the application.

THE COURT: Okay. Mr. Califano, do you have anything - any evidence to add, anything to bring forth?

MR. CALIFANO: I just want to address one thing that Mr. Brown said before the testimony that I think while it's technically correct, it doesn't tell the whole story. When he said no motion has been file, but we reserved time. The reason why, Your Honor, is it's simple. There can't be a motion filed until they give us the response that is due on May 7th. We're anticipating the response will be consistent with every action that they've taken prior which is why we went out and reserved the date which I understand from Ontario counsel is it's difficult to get on the docket of the Superior Court.

THE COURT: So, there's no counterpart provision in Canadian law like in derivative action here that if the demand would be futile, you're excused from making it?

MR. CALIFANO: I've asked that of Canadian counsel and they said they have to wait until they get the answer on the seventh. So, it's true; no motion has been filed. But we've reserved the date

anticipating the response that every indication leads us to believe we'll get, and then we'll file it shortly thereafter.

THE COURT: All right, sir. The Court's heard the evidence. The Court is satisfied with the reasonableness of the fees in this matter with the caveats that were agreed to with the office of the U. S. Trustee and the Court's concerns about the review that would be sort of what was in James River that I alluded to earlier. The Court thinks this is a proper exercise of the board's business judgement and that the fees are reasonable and appropriate given the circumstances of this case and what's been charged in previous cases. I found Mr. Sebastian to be a credible witness and the Court will grant the application with those caveats and I'll ask Mr. Brown to prepare an appropriate order, get Ms. Garber's endorsement on it, and also note Mr. Califano's objection therein to the extent that he wants to do so.

MR. BROWN: Yes, sir. We'll do that.

Your Honor, there are two more items remaining on the docket and those concern the critical vendor motion and then finally the final DIP approval.

Your Honor, we're certainly prepared to put on Mr. Castle and re-visit putting on testimony with Mr. Sebastian if we need to do that. It's unclear to me whether Mr. Califano is still going to want to argue -

THE COURT: Let me do a housekeeping matter before you get to that while it's in my mind. On the orders on the matters that Mr. Califano said that he did not object to, the clerk's office has reminded me that I need to have something in those orders referencing the withdrawal of his objection as to those items so that we can clean that up on the docket. I wanted to get that out before -

MR. BROWN: Yes, we agree. We'll make sure there's a reference to the withdrawal

of those objections.

THE COURT: Okay. Now, if you can start over on your second point, we can take that up.

MR. BROWN: That's okay. Where I was heading was we're certainly prepared to put on evidence with respect to the approval, the final approval, of the critical vendor motion and the DIP motion. Mr. Castle can testify and Mr. Sebastian can be recalled. I guess the question is are there other arguments beyond what we've already heard from Mr. Califano. I don't want to take up you know a hour and a half of the Court's time if it's really just the same.

THE COURT: I've got all day, Mr. Brown. I'm holding it for everybody here today, so we're available to hear whatever evidence that needs to be put on.

MR. BROWN: Great.

THE COURT: Well, let me hear from Mr. Califano on the critical motion. Let's deal with that first. You want to talk about the DIP motion at the same time?

MR. BROWN: Well, I think they're inter-related, Your Honor, because quite frankly, you know, the critical vendor motion is absolutely important to the estate. The proceeds of the interim DIP loan of course have been used in part to fund that program and we worked very closely with the advisors to the DIP lender to insure that they approve of - or consulted with - regarding each one of those critical vendor agreements. So, they are connected, and the evidence would be connected on that if we need to go ahead and present that, we're certainly prepared to do that.

THE COURT: Mr. Califano?

MR. CALIFANO: Thank you, Your Honor, and I have all day also. My flight is not

until late.

Your Honor, I don't want to take an hour and a half and there are just some discreet issues that I would ask Mr. Castle and I can stipulate that his declaration, first day declaration, would be his direct and then I can cross-examine. I think I'm going to limit cross-examination on that. I just wanted to consult with my client briefly. But on the critical vendor motion, I think our main issue is that we couldn't get information and I understand the concept of the motion and I understand its application. You got to remember my client was the founder of this company, the CEO for a while and chairman of the board, so he understands the issues. Begging the Court's indulgence, if we could have a brief recess or I can just talk to my client about what questions we need to ask and if I could just ask Mr. Brown for certain information, I think if he agrees to give us that information, we'll be able to withdraw the objection.

THE COURT: Mr. Brown?

MR. BROWN: Your Honor, I think the best way to proceed since he does have cross-examination is let me examine my witness and we'll call Mr. Castle to the stand and we can go through the drill. He can ask what he wants to ask. We're not standing on the declaration. I think the Court ought to hear the whole picture.

THE COURT: All right. Well, Mr. Hermann?

MR. HERMANN: Just briefly, Your Honor, I can stay all day as well; although, I probably have to push a flight. I don't know what the issue is with critical vendor; hopefully, that gets worked out. But it's kind of odd for a shareholder to be objecting to a payment to a creditor since the shareholder recovered -

THE COURT: Okay. One of the objections seems to be the concerns of there's no

list of who these critical vendors are. I'm aware of some other cases where very similar motions were filed, but they are listed - I think - it's not the first coal case I've been involved in, so I do recognize the categories that are set forth, the types of services that are being provided and the reason that they are critical. So, I make that observation for all of the parties, that I am somewhat familiar with that, so - I understand your point is taken and understood.

MR. HERMANN: Thank you, Your Honor.

MR. BROWN: Your Honor, with respect to the latter point, I do want to clarify to the Court, we have provided Mr. Nix with the list of the critical vendors, the reasons why they're critical and the amounts that they're owed prepetition and the terms they have provided. We provided that pursuant to the stipulated protective order that this Court has entered -

THE COURT: Okay. I was curious about that because there was a footnote in there, in your motion -

THE BROWN: The reply brief.

THE COURT: - the reply brief, as to why that list was not filed with the Court, and I understand that. I'll tell you what. Before we start with the examination of Mr. Castle, let's take a five minute recess, give Mr. Califano a chance to talk. It may be you have nothing you can agree on and I understand that. That's what I'm here for. So, let's take a five minute recess. We'll come back in about five, ten minutes.

(The Court stood in recess)

THE COURT: All right, Mr. Brown.

MR. BROWN: Yes, sir. Back to item 17, Your Honor, the critical vendor motion.

THE COURT: All right, bear with me. Okay, now I'm set.

MR. BROWN: So, we're back seeking final approval of the motion to approve of the critical vendor program, Your Honor. I'm pleased to report that Mr. Califano has confirmed his client, after review of the materials we provided yesterday as I understand it, is withdrawing any objection to the critical vendor program at this time. We have provided changes to the final order that reflected changing from interim to final to Ms. Garber and I understand we have an agreement regarding form of order. We'll certainly get the endorsement of Ms. Garber on that, but we're prepared to ask for Court approval on a final basis.

THE COURT: Ms. Garber?

MS. GARBER: That's correct. We're prepared to endorse the order.

THE COURT: Mr. Califano?

MR. CALIFANO: Your Honor, I was able to confirm that we did received certain information by email last night. I was able to confirm that that was the information we were seeking, so we no longer have an objection to the critical vendor motion.

THE COURT: All right. Are there any other creditors or parties in interest that wish to be heard on the motion of the debtors, the debtors in possession, for entry of a final order authorizing payment of certain prepetition claims of critical vendors, payment of 503(b)(9) claims to certain critical vendors and financial institutions to honor, process related checks and transfers?

(No response)

THE COURT: Okay, there being none, the Court will approve the motion on a final basis and ask for an order from your office, Mr. Brown.

MR. BROWN: Yes, sir, Your Honor. Your Honor, the final matter on the docket is -

THE COURT: And also if you would note just again to clean up the docket the resolution with Mr. Califano.

MR. BROWN: Yes, sir, we will.

Okay, Your Honor, the final matter on the docket is seeking final approval of the DIP financing facility that this Court approved on an interim basis. We have - with respect to this motion, Your Honor, we have made some proposed changes to the form of the order. The DIP lenders provided changes and we actually had approved of those on behalf of the debtors and filed with the Court yesterday a red line which showed the changes from the interim order to the final order. The only things I would point out beyond just the changes from interim to final were a couple of things. There were changes in how the debtor reports variances from the budget to the lender and that was addressed in paragraph 18(b). There was a specific inclusion of the indentured trustees' fees and professional fees as part of the adequate protection package. The Court may remember that Wells Fargo appeared telephonically at the last hearing. We wanted to be sure that their fees were expressly covered. We have taken care of that. In paragraph 20(b), there's confirmation that there's no DIP financing fee owed to Global Hunter as part of this. And in paragraph 25(b), with the lack of an unsecured creditors' committee, there is a change to the challenge period of the DIP lender's liens to insure there is a termination date because it typically would run from 60 days from the petition date or a certain period of time from the appointment of the unsecured creditors' committee, but we don't have one, so a change to make that a hard date of 60 days from the petition date.

I believe Ms. Garber has had an opportunity to review those changes as well and we're not aware of any objections or concerns to the DIP order. So, all that remains is the objections -

THE COURT: I'm actually looking for this red lined DIP order. Ms. Noe, do you know what docket entry that is?

MR. BROWN: I've got a hard copy.

THE COURT: Okay. I just didn't see that in my -

MR. BROWN: It was filed yesterday afternoon with a notice, Your Honor.

THE COURT: Okay. All right. Just the way it was styled.

If you wouldn't mind, Mr. Brown, if you would just walk back through those changes one more time.

MR. BROWN: Yes, sir. I took them slightly out of order. First, there are a number of changes throughout the draft changing from interim to final reflecting the fact that the interim approval happened in the past.

The first one if you're going from the front is 12(b), and that is expressly including the indentured trustees' fees of Well Fargos fees and professional fees as part of the adequate protection to the lenders.

THE COURT: Bear with me.

MR. BROWN: Twelve (b).

THE COURT: All right. I'm with you. Go ahead.

MR. BROWN: All right, the next one sequentially, Judge, is 18(b), and it's an adjustment of how the debtor reports to the lender with respect to the variances to the budget.

THE COURT: All right.

MR. BROWN: Twenty (b) confirms that no DIP financing fee is owed to Global Hunter

as part of this DIP.

THE COURT: Right.

MR. BROWN: And then 25(b) respects the challenge period that needed to change since we don't have an unsecured creditors' committee. We just needed finality.

THE COURT: Tell me about that. Where are we on - is there going to be a committee in this case?

MS. GARBER: Your Honor, I have filed on behalf of the United States Trustee - I've not yet filed - but I have not yet been able to appoint a committee. There has not been sufficient interest. A committee was solicited shortly after the first day hearings, but I haven't been able to appoint a committee. I expect I'll have to file an inability to appoint this week.

THE COURT: I thought I'd seen somewhere there was proposed counsel for an unsecured creditors' committee, but maybe I was looking at another case.

MS. GARBER: There's been a lot of volunteers to be proposed counsel for the unsecured creditors' committee.

THE COURT: I suspect there have been. So. Okay. All right. Maybe I just miss-read that. Okay. Go ahead.

MS. GARBER: Thank you.

THE COURT: Thank you. Mr. Brown?

MR. BROWN: So, I think, Your Honor, that outlines the changes substantively from the interim to the final and of course, now the remaining issue as I understand it are the objections of - limited objections of Mr. Nix. His counsel has pointed out that he still has a few questions. And so, I don't know

what the questions are, so I suppose we need to call Mr. Castle to the stand. I'd like to do that.

THE COURT: All right. Mr. Califano, do you want to come forward and say anything in advance of this?

MR. CALIFANO: Your Honor, I would think and it will help because I don't want Mr. Castle to go through a lot of testimony we don't need. I'll show the six questions I have. I only have six questions subject to follow-up. So, I mean if it's helpful, I can show to him.

THE COURT: Well, I thought that's what that five minute break was for. It at least got the critical vendor motion resolved, so Mr. Hermann, are you going to have any questions you think?

MR. HERMANN: I do not, Your Honor.

THE COURT: Okay. I'll tell you what, let Mr. Brown put on his own case here. So, I'll let him put it on and let you ask whatever questions you want to ask, Mr. Califano.

MR. CALIFANO: Thank you, Your Honor.

MR. BROWN: I call Mike Castle to the stand.

THE COURT: Would you come forward and be sworn, sir?

WHEREUPON CAME:

MICHAEL R. CASTLE

was duly sworn and testified as follows:

EXAMINATION

BY MR. BROWN:

Q Mr. Castle, please tell the Judge your name.

A Michael R. Castle.

Q Are you employed?

A Yes, sir.

Q With whom?

A Xinergy. I'm the chief financial officer for Xinergy.

Q How long have you been with Xinergy?

A Since January of 2010.

Q Are you the CFO at each of the respective debtors that are under the Xinergy umbrella?

A Yes.

Q And how long have you been working in the coal industry?

A Since 1991.

Q In what capacities?

A As chief financial officer for probably three companies for 16 or 17 of those years and the remainder of those years as a consultant.

Q All right. In the couple months prior to the bankruptcy filing, was Xinergy facing any particular challenges with respect to its liquidity?

A Yes. Liquidity was continuing to decrease drastically. Sales had fallen off from the previous quarter and the outlook - sale prices had fallen off as well. For instance, our receipts the fourth quarter of '14 were I believe around 20 million dollars. The first quarter of this year was roughly 11 or 12 million dollars. So, the revenues were falling off drastically and we were running out of liquidity and we had vendors that were not only cutting us off but had us on a COD. In addition to that, we had our equipment availability was decreasing. We couldn't afford to do the repair work that needed to be done to

the equipment to keep it operating, and we were in danger of missing payroll. And obviously, had an interest payment due I believe April 1st, to the senior lenders of roughly 500 thousand dollars that we were unable to make.

Q Let's back up and cover a little bit of that. So, you were managing your payables the best your could?

A We were managing payables as best we could for the previous months and they were continuing to increase drastically.

Q And you were running out of opportunities to manage them further?

A We were, and the major vendors that - without their services, it can shut the jobs down and they were in the process of doing that.

Q And you mentioned then also the interest payment. Can you remind the Court of the capital structure between the first and second debt here?

A Bayside was the senior lender. They had a 20 million dollar debt with us. The payments were roughly 500 thousand dollars, interest payments were roughly 500 thousand dollars every quarter. They were due April 1st, July 1st, October 1st, and January 1st. The second lien notes were due semi-annual, roughly nine million dollars due in May and in November.

Q All right. Just so we cover a question the Court asked earlier of Mr. Sebastian. Are you familiar with the second lien notes and how they were put in place?

A Excuse me?

Q Are you familiar with the indenture regarding the second lien notes?

A Yes.

Q Was Mr. Nix involved with the company at that time?

A Yes, he was our CEO and chairman.

Q Now, you mentioned a quarterly interest payment. That was on the Bayside loan; correct?

A Correct.

Q And when was that due prior to the petition date?

A It was due April 1st. We had a two day grace period, so it was actually due April 3rd.

Q All right. And prior to the end of the grace period, had that position been acquired by Whitebox Highbridge?

A It had been acquired a day or two prior to April 3rd.

Q Did you file for bankruptcy protection prior to the end of the cure period provided by Whitebox Highbridge?

A With the extension that Whitebox Highbridge gave us, yes, we did.

Q All right. So, was one of the reasons you filed for bankruptcy protection the inability to make the interest payment on the first lien debt?

A That's correct.

Q What were the other reasons, if any?

A We had - we were behind - we were behind with our lessors at both the mines. They'd given us default notices with cure dates. One of them, a cure date was due on the 6th I believe, on a Monday. It was roughly 600 thousand dollars. We didn't have the cash to pay that. In addition to that, we had a payroll due a few days later and we were going to be unable to make that payroll or likely unable to

make that payroll in addition to one of the large vendors had cut us off and refused to work starting that Monday, I believe April 6th, without some assurances that we could pay them.

Q So, in addition to the interest payment, you had a leasehold payment that needed to be made and if it wasn't made, were you at risk of termination of your lease?

A Correct.

Q All right. And you also talked about vendor issues.

A Yes.

Q So, what would filing for bankruptcy do for you for the vendor issues?

A They would obviously get us - if a DIP was in place, it would get us the liquidity to keep those vendors working for us, work out payment terms with those vendors and allow us to continue to keep the mines open and operating.

Q All right. You were in the courtroom when Mr. Sebastian testified about the DIP loan solicitation process, were you not?

A Yes.

Q And he accurately described about when that process started?

A The process started early March, around the end of February, early March.

Q And were you involved in that process talking with prospective lenders?

A Yes, I was.

Q Did you participate in negotiations of confidentiality agreements, MDAs, those kinds of things?

A Yes.

Q And ultimately, were bondholders involved in that process as prospective lenders?

A They were, yes.

Q Was there one group or several?

A Whitebox Highbridge, they were involved as they were involved in November and December on another possible financing which towards the end of that financing, prior to our ability to make that interest payment in the middle of December, we actually started DIP process with them. But yes, Whitebox and Highbridge were involved in that process as was the ad hac bond committee.

Q Were you also talking to prospective lenders who were not bondholders?

A Yes, we were.

Q And in fact, Bayside who held the first lien debt, are they also a bondholder?

A Bayside is a second lien and a first lien holder, too.

Q Were you talking to them in connection -

A We were. We had talked to them during that same time period. Yes.

Q So, is it fair to say from the debtor's perspective, the debtors were willing to talk to any prospective lenders who'd provide financing?

A Excuse me?

Q Were the debtors willing to talk with any prospective lender who would potentially provide financing?

A Yes, we were.

Q And ultimately, did Xinergy receive proposals, expressions of interest or term sheets from prospective lenders?

A Yes, we did.

Q And did Xinergy decide that one or more of those proposals was worth pursuing?

A Yes, we had three or four that were what we considered to be serious proposals and we ended up choosing the Whitebox Highbridge proposal.

Q All right. After Whitebox Highbridge was determined to be the lead candidate, did the company request any changes in its proposal?

A We requested some changes in the fees. We requested changes in I believe some of the terms. We also requested changes in the rate coupon and we may have requested some changes in the timing as well, but definitely the fees, which they actually agreed to lower.

Q After those discussions, did the company conclude it was appropriate to move forward with Whitebox Highbridge?

A Yes, we did.

Q And did you receive a proposed DIP credit agreement from Whitebox Highbridge?

A Yes.

Q Now, was there some existing form of agreement that they were able to work from as a result of prior discussions?

A Yes, we had discussions with them as I stated in mid-December. Most of the documentation was done and prepared at that time for a senior facility in conjunction with a DIP, and we'd already paid the legal fees for that. So, a starting place for that DIP loan that was put in place was actually - those documents were prepared the previous months and we'd already paid for that.

Q Was that a process that Stubbs Alderton we talked about earlier was involved in

prepetition?

A Yes.

Q And they had helped negotiate the form of the credit agreement back in the Fall?

A That's right, yes.

Q And so you started with that provision.

A Yes.

Q Did that draft agreement from back in the Fall contain a change in control provision?

A Yes, it did.

Q And how was that provision developed?

A It mirrored the second lien indenture and there may have been some additional terms in there that were mirrored in the first lien, the Bayside indenture as well.

Q Was it important that the first lien change of control provision and the second lien change of control provision work consistently?

A Yes. The first lien had a few different requirements that the second lien - we had to require for instance consent from the first lien holder - that were extremely tight and extremely different than the second lien holder.

Q Was the language in the change of control provision selected in order to deny the ability of a shareholder to change the board?

A No.

Q Did the company ultimately approve - the debtors, did the debtors approve of proceeding with the DIP loan from Whitebox Highbridge?

A Yes.

Q Do you have - does the company have any other DIP loan options at present?

A No.

Q Are you familiar with Jon Nix?

A Yes.

Q And again, tell the Court who he is in relation to Xinergy.

A Currently, he's the largest shareholder we have.

Q Former founder?

A He's the founder of the company. He was the CEO until probably the middle of 2012 and the chairman. He is still the largest shareholder as far as I know.

Q Mr. Castle, are you a shareholder?

A Yes, I am.

Q How much do you have in the way of shareholder?

A I own 675 thousand shares.

Q And you said Mr. Nix was - I'm sorry. You said Mr. Nix was running the company at the time of the indenture. As part of the DIP loan process, did Xinergy receive any DIP loan proposals from Jon Nix?

A Not that I'm aware of, no.

Q Has Mr. Nix made any DIP loan proposals to Xinergy since the DIP loan was approved on an interim basis?

A No.

Q And you don't have any other DIP loan proposals pending from anyone else other than the existing DIP lenders; do you?

A That's correct.

Q Does Xinergy want to obtain final approval of the DIP loan today?

A Yes, we do.

Q How much money has been advanced under the DIP loan today?

A Seven point five million has been advanced.

Q In addition to the refinancing?

A In addition to the refinancing of the senior; correct.

Q So, how much is left to be advanced then?

A Roughly, 12.5 million.

Q Does Xinergy have a need for the monies yet to be advanced?

A Yes, we do.

Q Would Xinergy be able to continue operating and continue its restructuring efforts without that additional money from the DIP lender?

A Not much longer, no, we would not.

Q As part of the DIP solicitation process, did Xinergy receive any offers to provide funding to the company on an unsecured basis?

A On an unsecured basis, not - no, we did not.

Q Did it receive any offers to provide financing as part of the DIP loan on a subordinated basis?

A Yes. On a subordinated basis?

Q Subordinated to the second or first lien interest?

A No, no, we did not. Not to my knowledge.

Q So, were all proposals that you received premised on the notion that the DIP lender would take a lien on all assets?

A Yes, that is correct and it would take out the senior loan.

Q A lien on the front end basis?

A Correct, yes.

Q In your involvement in the DIP loan process, did you come to the conclusion that Whitebox Highbridge was operating in good faith in the negotiations?

A Yes, we did.

Q Were they negotiated at arms length?

A Yes.

Q Were the parties represented by separate counsel?

A Yes.

Q Do you think that the DIP loan that's currently proposed for final approval is in the best interest of the estate?

A Yes, I do.

Q Do you believe that the company has used its sound business judgement in developing the DIP facility and seeking its approval?

A Yes.

MR. BROWN: No further questions.

THE COURT: Mr. Califano.

CROSS EXAMINATION

BY MR. CALIFANO:

Q Good afternoon.

A Good afternoon.

Q I'll be very brief. Are you familiar with the nominees that Jon Nix had for the board?

A Yes, I am.

MR. BROWN: Objection. Your Honor, the relevance of this. It's outside the scope of direct.

THE COURT: I understand it's outside the scope - without having some context, I don't know whether it's relevant or not. So, I'll let him go for a brief period of time.

MR. CALIFANO: Your Honor, I was only prompted by the question that you asked of Mr. Sebastian about his ability to work with Mr. Nix.

THE COURT: I'll allow it. I understand where we are.

BY MR. CALIFANO:

Q Are you familiar with those nominees that Mr. Nix had?

A Yes.

Q What's your opinion of them?

A Of the two nominees?

Q Yes.

A I don't think they would be good board members.

Q Okay and why is that?

A Well, Jeff Wilson is acting as CEO for a competitor. Debra Powers, she actually worked for the company and was terminated in 2012, and she also I think lacks the experience to be a good board member. She doesn't have any financing experience for instance.

Q Thank you. At what stage are the debtors with their reorganization efforts?

A Excuse me?

Q At what stage are the debtors with their restructuring efforts?

A We're in the process of formulating a plan and presenting that to the board, circling it internally for the next few days.

Q So, you're familiar with the milestones in the DIP agreement? The milestones in the DIP agreement.

A Yes.

Q Okay. And you believe you can meet those milestones; is that correct?

A Yes.

Q Okay. Do you agree with Mr. Sebastian's testimony that a liquidity crisis existed as of November, 2014?

A Yes.

Q Okay. What did the board do between November and March 15th?

A Regarding liquidity?

Q Yes.

A We were actually in the process of preparing a bankruptcy filing in November, between the middle of November and till the interest payment was made in the middle of December. And we were probably within 24 hours, 48 hours of actually making a filing and getting a DIP loan in place. After we made the interest payment, the process, we started formally retaining Global Hunter Securities, going through the process of trying to do a convertible type financing in conjunction of taking out a senior, a new senior piece. We also looked at other financing opportunities such as sale/lease-backs, equity raises and actually had discussions, reached out to a handful of other coal companies about the possibility of either merging or selling some of our assets. And as that process - we went through that process really in December through probably February. The coal sales markets deteriorated. Our liquidity deteriorated and we made a decision to turn towards getting a DIP in place and preparing for a filing, a bankruptcy filing.

Q How long have you been in the coal industry?

A Since 1991.

Q Okay. How many cycles have you seen?

A Three or four cycles, probably. None as bad as this one. But yes, I have seen several.

Q Okay. During the period of time that this liquidity crisis existed, did Mr. Nix make any attempts to assist with the liquidity crisis?

A I'm not aware of any direct ones. I'm aware he was in communication with the board throughout some of that process. I am aware of a proposal that he put to the board regarding a term sheet, an non-binding term sheet for a sale/lease-back.

Q Okay. Were you in attendance at all the board meetings that occurred during that period of time?

A No. I was not.

Q So, there could have been proposals by Mr. Nix to the board that you were not aware of?

A Yes, there could have been.

Q Okay. Do you know what the debtor's inventory level was at filing -

A Excuse me?

Q What the debtor's inventory level was at filing.

A Our coal inventory the day we filed?

Q Yes.

A We probably had two and a half million dollars, I'd say 40, 50, 60 thousand tons on the ground.

THE COURT: I'm sorry, can you repeat that again. I didn't hear you.

THE WITNESS: Probably 40, 50, thousand tons on the ground. Two and a half million dollars or so was the lower cost at market probably at the time we filed.

MR. CALIFANO: All right. Thank you. Your Honor, no further questions.

THE COURT: Mr. Hermann, Ms. Garber, anybody else?

MR. HERMANN: No, Your Honor.

MS. GARBER: No, Your Honor, thank you.

THE COURT: All right, Mr. Brown?

MR. BROWN: Just a quick follow-up.

REDIRECT EXAMINATION

BY MR. BROWN:

Q To make sure I understand your testimony, with respect to the nominees to the board, we're talking about suggested people that Mr. Nix wants to put on the board; you're familiar with those people?

A Correct. Those two people, yes.

Q And you mentioned you knew who Jeff Wilson was?

A Yes, I know Mr. Wilson.

Q Who is he in terms of the coal industry?

A He's actually a former executive at a large coal company and he's been doing consulting work for the last few years. I think he may be an engineer, but he's done consulting work for Bayside for the last couple of years.

Q Done consulting work for Bayside through J. W. Resources or some other entity?

A Yes.

Q And is J. W. Resources one of the companies that bought assets from the debtor?

A They acquired our Kentucky properties. And Bayside also would use Jeff Wilson to send to our jobs periodically when they wanted to send a representative out to take a look at the operations.

Q So, am I correct that you view Mr. Wilson as potentially a competitor to this company?

A He is. I was told he has been acting as CEO for J. W. for the last three or four months, since the former CEO is no longer with the company.

Q And Debra Powers; is that the other one who was suggested?

A Yes.

Q And you said you are familiar with her?

A Yes, I am.

Q Was she there when you were there?

A She was there when I was hired and she continued to work there as primarily the treasurer and the corporate secretary for a couple years.

Q And if I heard your testimony correct, you terminated her services?

A Yeah, we hired a controller shortly after I came on board and really phased Debra out of a lot of the day to day accounting and the reporting and so forth and terminated her after - we gave her an opportunity to find a replacement job which she did and she was let go in probably March or April of '12, I believe.

Q What impact if any do you believe putting Ms. Powers on the board would have on your employees?

A Well, I think the impact would probably be negative through a couple of the folks that work for us, but it's primarily our controller and possibly some others, but I don't know what the impact would be at the board level.

Q How about your controller? How important is she in this process?

A She is extremely important. We only have two financial people other than myself in the company. And our controller, she was at Massey for ten or 12 years and she's been with us about five years now. She's extremely important on preparing all our day-to-day financial information.

Q She's your right-hand man?

A She is, yes.

MR. BROWN: No, further questions for this witness.

THE COURT: All right. Mr. Castle, I don't think I have any questions. You can stand down.

MR. CALIFANO: I have nothing, Your Honor.

THE COURT: All right, you can stand down, Mr. Castle.

(Witness stood aside)

MR. BROWN: I'd like to recall, Your Honor, Mr. Sebastian for brief examination.

THE COURT: All right, Mr. Sebastian, you remain under oath.

WHEREUPON CAME:

STEVE SEBASTIAN

was previously duly sworn and testified as follows:

EXAMINATION

BY MR. BROWN:

Q Mr. Sebastian, you testified earlier regarding your involvement in the sizing of the DIP loan that the company was seeking; to you recall that testimony?

A I do.

Q And you also testified as I recall regarding the importance of the first lien piece in this picture; correct?

A Correct.

Q As you obtained bids or proposals from various prospective lenders, how did you help the company determine which ones you might think they should pursue?

In other words - let me rephrase that. As you gathered expressions of interest, what did

you believe were the important features that the board should consider?

A Well, the board should consider whether the amount is sufficient and not too much because this is not cheap money. The rate that is being charged, the current interest rate. The fees, since it's a fairly short term loan, the fees involved have a disproportionate effect, so working on that. The asset package that's involved, the security to hopefully give the lender enough security and also it has to interface with what the lender needs to charge in regard to the risk. The covenants, so that we can get a loan that we're not going to have a problem with meeting the covenants. And you know being related to that milestone. And some of this given the short process involved, we could try to, with the board's - after consultation with the board, we went back to some of these proposals during the interim and negotiated some things. Availability in one case for example. But you know, others you kind of have to pick a lead horse and negotiate a more detailed proposal with one party because you just can't get three lenders to sit still and do all these in-depth negotiations. The board had to make a choice and we had to make a recommendation.

Q Was the ability of the prospective lenders to close the transaction in a short time frame of importance to the debtors?

A Yeah, I guess - that almost goes without saying that it's probably the most important criteria.

Q And what was the level of confidence of the board with respect to the Whitebox Highbridge facility?

A Yeah, I mean this was - this was absolutely critical. It was far and away the most important thing that we looked at. Whitebox Highbridge had the advantage of having negotiated with the

company already for a very similar facility. They had done diligence; they understood the company specifically, its assets and they spoke with one voice, although they were two firms, they had figured out how to work together and we had a much higher level of confidence in their ability to actually get a loan closed as compared to the two other principal proposals that we were looking at.

Q Did the interest rate vary based on various proposals?

A Some, but the cash interest was fairly close -

THE COURT: The cash what?

THE WITNESS: The cash portion of the interest payment was pretty close between them and the overall IRRs were relatively close as well, but when you factor in fees and everything else and assume that the loan is out for nine months, six months, 15 months as the case may be -there were definitely differences and you know - but they were not radically different.

BY MR. BROWN:

Q So, as I take it, your testimony in sum is there were a number of features to the offers, but you were considering the entirety of the package; is that correct?

A That's correct, yeah.

Q And ability to close was a given that that was important?

A Yeah. Now that turned out to be the important factor.

Q At some point in the discussions with Whitebox Highbridge, did you have an opportunity to talk about or negotiate milestones?

A We did.

Q And tell me about the agreed plan filing milestone.

A As agreed, we have a 75 day milestone to come up with an agreed plan of reorganization and then there are some subsequent milestones beyond that in terms of getting that implemented.

Q Was the initial milestone moved back 15 days to accommodate the debtors?

A Yeah, the original proposal that they made was 60 days. I think we made an attempt to base it off of just a 180 day milestone. In other words, the completion. One thing we attempted to do, and not have an interim milestone. And then after a fair amount of debate at one particular board meeting, we decided to go back with 90 days and compromise was reached.

Q Did you believe that the marketing process that you ran for the loan, the DIP loan process, was sufficient to determine what the market was for this loan?

A Yes.

Q And do you believe that the resulting terms that Whitebox Highbridge offered were market based terms?

A Yes.

Q And is it your opinion in your experience in running DIP loan processes that this is a fair loan for what Xinergy was seeking?

A Yes.

Q Do you support the company's view that it's in the best interest of the estate to seek final approval of this facility?

A Yes.

Q Are you aware of whether the debtor has any other options at this point with respect to DIP financing?

A I'm not aware that they have any other options at this point.

Q And in your judgement, does the debtor need this DIP loan in order to continue the ongoing operations?

A Yes.

MR. BROWN: Those are all the questions I have.

THE COURT: Mr. Califano?

MR. CALIFANO: No questions, Your Honor.

THE COURT: I'm going to ask you the same question I think Mr. Brown asked Mr. Castle.

In your involvement in the DIP loan financing, was there any suggestion that the change in control provision was put in the DIP loan documents to prevent a shareholder fight or change in the board of directors or was it a provision of the financing that is usual and customary that you've seen in the business that you would deal with the senior secured lender or DIP lender?

THE WITNESS: Absolutely nothing I saw indicated it had anything to do with the actual issue over the board if you will. So, the fact that it was in the second lien documents that had already been in existence since 2011 - it would be surprising that you wouldn't have at least that much of a change of control provision in a super-priority first lien DIP document. If anything, tougher than the second lien would be my expectation.

THE COURT: That was the only question I had. I'll give you both an opportunity to follow up on that question because it was asked of another witness.

MR. BROWN: Just a follow-up or two on that point, Judge.

BY MR. BROWN:

Q Were there any other features of the DIP loan that Xinergy and Whitebox Highbridge agreed to that were established or formulated in order to deny a shareholder the right to call any board meetings?

A Not that I'm aware of.

Q Milestones weren't based on that, were they?

A No.

MR. BROWN: Okay. That's all.

THE COURT: Mr. Califano?

MR. CALIFANO: No questions, Your Honor.

THE COURT: All right, you can stand down.

Any further questions of this witness?

(No response)

THE COURT: Okay. You can stand down, Mr. Sebastian.

(Witness stood aside)

THE COURT: Any further evidence, Mr. Brown?

MR. BROWN: No, Your Honor. No further evidence.

THE COURT: All right, Mr. Califano, do you have any evidence that you want to put on?

MR. CALIFANO: No, Your Honor.

THE COURT: Okay. Mr. Brown, argument.

MR. BROWN: Yes, sir. Your Honor, based on the evidence presented, I think the Court can conclude that approval on a final basis of the DIP loan is in the best interest of the estate, that the debtors have exercised their sound business judgement. The debtor needs the facility and the facility was derived based on a market base solicitation process that was run over a reasonable period of time.

So, the Court can also draw the conclusions that the lender acted in good faith, was acting at arms length, and so the protections in the DIP loan are appropriate as well.

So, with that, Your Honor, we'd ask that you approve it on a final basis.

THE COURT: Mr. Califano?

MR. CALIFANO: Your Honor, I don't believe we have an issue with the need for the DIP or the debtor's good faith. I think the issue that we came here today to bring to the Court's attention because this was our forum was that the interest of equity and the rights of equity are being frustrated, are being prejudiced by a situation that is now second place and which this board was aware of prior to the filing, well in advance of the filing.

All that I'm seeking - and if today, I walk away and the Court understands what we believe has happened prepetition and the Court understands that this is not a late arriving issue that's an attempt to frustrate the reorganization process, then my trip down here was worth it and successful.

THE COURT: Well, I understand exactly where you're coming from, Mr. Califano. So, that's not lost on the Court at all. I understand the parties' position. I read Mr. Nix's declaration more than once. So, I understand exactly what's going on here. And it would be an understatement to say that the Court's - it would be a miss-statement to say that the Court is not concerned about where we are in this in connection with the shareholder, potential shareholders' meeting and its effect on the DIP financing. Just

because an event of default occurs down the road - the problem I've got with where we are right now is I don't know what's going to happen and there's got to be a hearing in Canada. The court has got to approve or not approve. We don't know what they're going to do. We don't know when the shareholder might be called to be forthcoming. We don't know what the results of that might be. In the meantime, we're here and there's a business to be run in the meantime. So, I'm aware of the big picture here and I'm not belittling anybody's positions. To the extent you think you came down here in vain and the Court did not understand your position, that's not the case.

MR. CALIFANO: Thank you, Your Honor. And I also understand the constraints that the Court has. These are things that have not yet occurred and you can't make decisions based on what may occur. It's important though that we voice our frustration, that we believe that the current situation is a creation of the board's delay. And perhaps we can find some other way to protect the rights of the shareholders in the interim until a determination is made. But I think we've had our voice heard and I appreciate that, Your Honor.

THE COURT: All right. Mr. Hermann, Ms. Garber?

MR. HERMANN: Nothing further, Your Honor, thank you.

MS. GARBER: Nothing from the United States Trustee, Your Honor.

THE COURT: All right, Mr. Brown?

MR. BROWN: Merely to simply point out again, Your Honor, that the Court has only heard one side of the story and has heard no evidence on this -

THE COURT: Understood completely. I understand that equally as well.

MR. BROWN: Yes, sir.

THE COURT: I tell my law clerks there are always two sides, see what the other side has to say. There are always two sides to every story. But I understand where everybody is. I think I've got a pretty good flavor of this case right now.

So, based on the evidence before the Court, the Court is going to approve the final DIP order as an exercise of the debtor's business judgement, based upon the evidence today from both Mr. Castle and Mr. Sebastian, the Court is comfortable that the DIP is appropriate as drafted and proposed in the final proposed order with the changes that have been negotiated with the U. S. Trustee's office and others involved in the case including Mr. Hermann's clients.

So, the Court will approve that. If you can get a copy - to the extent it has not already been submitted with the changes accepted, we may be able to get that entered for you today. I see the fount from which all knowledge flows in the back of the courtroom, so she'll be handling any certified copies that you may need.

MR. BROWN: Your Honor, I believe it's ready to be entered in the form it was presented to the Court. So, we can certainly -

THE COURT: All right, Ms. Noe, if you could look into that for me and get me the final order.

It's already been tendered; it's in the box now. Okay.

All right. So, we'll do that.

Is there anything else that needs to be taken up today?

MR. BROWN: No, sir.

THE COURT: All right. Ms. Garber, I'll ask all the other counsel, Mr. Califano, Mr.

Barrett, anybody else?

MR. CALIFANO: No, Your Honor.

MS. GARBER: No, Your Honor. Thank you.

THE COURT: All right. Thank you all for some very well presented and argued cases on both sides, and I wish everybody some success going forward. So, that includes all the parties. I hope you're able to work this out, and if not, we'll see you next time, I guess.

Is there anything else that we need to be aware of or mindful of in connection with the next omnibus hearing date that you're aware of?

MR. BROWN: Not that I'm aware of.

THE COURT: We have Mr. Paget up on the 27th and then we'll see everybody back here I guess on the next hearing date if we need it.

MR. BROWN: Yeah, at the moment, Judge, the docket is pretty clear on that day. We're hopeful that we'll continue to have dialogue and not have to be in front of you on a lot of skirmishes.

THE COURT: Well, dialogue is always encouraged. Okay. We'll stand adjourned.

(WHEREUPON, the hearing in the above styled matter was concluded.)

REPORTER'S CERTIFICATE

COMMONWEALTH OF VIRGINIA,

COUNTY OF Franklin, to-wit:

I, the undersigned, Matthew D. Burnette, Notary Public in and for the Commonwealth of Virginia, at large, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of proceedings had and evidence adduced at a hearing held in the above-styled case, on the 5th day of May, 2015.

/S/ Matthew D. Burnette

Notary Registration Number 7518549

My commission expires May 31, 2016.

EXHIBIT "C"

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May 6, 2015

VIA EMAIL AND OVERNIGHT DELIVERY

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Email: Margaret.K.Garber@usdoj.gov

Re: In re Xinergy Ltd., *et al.*, Case No. 15-70444 (PMB)
Request for Appointment of Official Committee of Equity Security Holders

Dear Ms. Garber:

We represent Mr. Jon Nix, the largest shareholder of Xinergy Ltd. ("Xinergy"), in connection with the above-referenced Chapter 11 cases of Xinergy and various of its subsidiaries and affiliates (collectively, the "Debtors") currently pending in the U.S. Bankruptcy Court for the Western District of Virginia (the "Bankruptcy Court"). By this letter, Mr. Nix respectfully requests the appointment of an Official Committee of Equity Security Holders (an "Official Equity Committee") in these Chapter 11 cases pursuant to section 1102(a)(1) of Title 11 of the United States Code (the "Bankruptcy Code"). Mr. Nix, through his counsel, has been in communication with counsel for other holders of a significant percentage of Xinergy's shares, and such holders have advised that they support this request for an Official Equity Committee. For the reasons discussed herein, shareholders are not adequately represented in the Debtors' Chapter 11 cases and the circumstances warrant the appointment of an Official Equity Committee.

I. Background.

Xinergy is a publicly held company traded on the Toronto Stock Exchange. As set forth in Xinergy's most recent consolidated financial statements, available on Xinergy's website at http://www.xinergycorp.com/financialinformationfilings.html, Xinergy has approximately 65.8 million shares issued and outstanding. Mr. Nix is the holder of approximately eighteen and one half percent (18.5%) of these shares, and, together with certain members of Mr. Nix's family and entities owned or controlled thereby, the holder of twenty-seven and one-half percent (27.5%) of such shares.[1]

Prior to the Debtors' bankruptcy filings, Mr. Nix, with the support of a significant percentage of other shareholders, requested that Xinergy call a meeting of shareholders for the purposes of, among other things, removing certain individuals from their positions as directors of Xinergy and electing new directors to serve until successors are duly appointed or elected. Mr. Nix and the other shareholders

[1] Notwithstanding the requirements of Rule 1007(a)(3) of the Federal Rules of Bankruptcy Procedure, as of the date hereof, Xinergy has not filed a list of its equity security holders with the Bankruptcy Court.

maintained that such action was (and is) necessary because of their belief that the directors were not acting in the best interests of all shareholders.[2]

In early March 2015, the current board informed Mr. Nix that it was prepared to make the requested changes to the board's composition provided that Mr. Nix was able to show he had the support of holders of approximately fifty percent (50%) of the outstanding shares. The board, however, only allowed Mr. Nix to approach fifteen (15) shareholders. Despite this restriction, he obtained the support of forty-nine and one half percent (49.5%) of the outstanding shares. Subsequently, in spite of the fact that Mr. Nix secured significant shareholder support, the board reneged on its agreement and informed Mr. Nix and his counsel that none of the current board members were prepared to resign.

On April 16, 2015, Mr. Nix caused to be delivered to Xinergy a requisition (the "Requisition") pursuant to Section 105 of the Business Corporations Act, R.S.O. 1999, c. B.16, requisitioning that the directors of Xinergy call a special meeting of the shareholders for the purposes of, among other things, removing certain of Xinergy's directors and electing new directors to serve in their place. Xinergy has failed to call a special meeting as requested. Accordingly, Mr. Nix and certain other shareholders are pursuing relief in the Superior Court of Justice, Ontario (the "Superior Court") to compel a shareholder meeting to consider a vote on the replacement of certain of Xinergy's board members. Xinergy has until May 7, 2015 to respond to this request, and if the request is refused as expected, a motion to compel will be filed in the Superior Court. A hearing on such a motion to compel has been scheduled for May 21, 2015 in the Superior Court, and Mr. Nix reserves all rights to seek appropriate relief in that forum.

On April 6, 2015 (the "Petition Date"), the Debtors filed with the Bankruptcy Court voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On the Petition Date, the Debtors filed a motion seeking authorization to pay prepetition obligations up to a total of $7.5 million owing to certain vendors that the Debtors deem "critical." Such payments likely will pay in full a substantial majority of the unsecured creditor body. Indeed, the payments requested amount to nearly eighty percent (80%) of the twenty (20) largest general unsecured claims listed by the Debtors in these cases, with the remaining general unsecured creditors listed as holding unsecured claims of no more than $87,000 each.

Accordingly, in light of the substantial payments being made at the outset of these cases to holders of general unsecured claims, no official committee of unsecured creditors has been appointed in the Debtors' Chapter 11 cases, consistent with your representation to the Bankruptcy Court yesterday of your inability to form a creditors' committee due to lack of interest. In addition, no Chapter 11 plan or motion for the sale of any assets has been filed by the Debtors in these cases.

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[2] Additional information regarding the actions and inactions by Xinergy's board that many shareholders believe were detrimental to the company are set forth in the *Limited Objection of Jon Nix to (A) Motion of Debtors and Debtors in Possession for Entry of Final Order (I) Authorizing Debtors to Obtain Postpetition Financing and to Utilize Cash Collateral, and (II) Granting Adequate Protection to Prepetition Secured Lenders, (B) Motion of Debtors and Debtors in Possession for Entry of Final Order Authorizing (I) Payment of Certain Prepetition Claims of Critical Vendors, (II) Payment of 503(b)(9) Claims to Certain Critical Vendors and (III) Financial Institutions to Honor and Process Related Checks And Transfers and (C) Docket Nos. 102 Through 108*, filed on April 28, 2015 [Dkt. No. 124].

II. Applicable Legal Standard.

Section 1102(a)(1) of the Bankruptcy Code authorizes the U.S. Trustee to appoint an official equity committee under appropriate circumstances. *See* 11 U.S.C. § 1102(a)(1) ("the United States trustee . . . may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate."). Section 1102(a)(2) indicates that such an appointment is appropriate when "necessary to assure adequate representation of . . . equity security holders." 11 U.S.C. § 1102(a)(2). An initial inquiry is whether the applicable debtor appears to be "*hopelessly* insolvent." *See In re Wang Labs., Inc.*, 149 B.R. 1, 3 (Bankr. D. Mass. 1992) (emphasis in original); *In re Emons Indus., Inc.*, 50 B.R. 692, 694 (Bankr. S.D.N.Y. 1985). Where a debtor is "hopelessly" insolvent and it is clear there is no value available for shareholders, an official equity committee may be unnecessary. Where, however, the debtor remains in operation and is not hopelessly insolvent, an official equity committee may be appropriate. *See In re Wang Labs.*, 149 B.R. at 3. The evidence should clearly establish hopeless insolvency to warrant a denial of an equity committee's appointment since "only the passage of time and the debtor's attempt to restructure its business will determine whether a recovery will be available for equity." *See* 7 *Collier on Bankruptcy* ¶ 1102.03[2][a] (15th ed. rev.).

The solvency of the debtor is not the only factor in deciding whether to appoint an official equity committee. While no single factor is dispositive, other factors courts consider include (a) the complexity of the case, (b) whether equity is adequately represented and whether there appears to be a substantial likelihood that equity will receive a meaningful distribution, (c) the timing of the proposed appointment relative to the status of the Chapter 11 case, and (d) the likely cost of an additional committee to the estate and whether such cost "significantly outweighs" the concern for adequate representation. *See In re Williams Commc'ns Grp., Inc.*, 281 B.R. 216, 220–21 (Bankr. S.D.N.Y. 2002); *In re Leap Wireless Int'l, Inc.*, 295 B.R. 135, 137 (Bankr. S.D. Cal. 2003); *Albero v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 68 B.R. 155, 159–60 (S.D.N.Y. 1986).

Official equity committees are often appointed in large restructuring cases where equity may receive value or value entitlements cannot be determined at the outset of the cases. *See, e.g., In re Genco Shipping & Trading Ltd.*, Case No. 14-11108 (Bankr. S.D.N.Y.); *In re AgFeed USA, LLC*, Case No. 13-11761 (Bankr. D. Del.); *In re Chemtura Corp.*, Case No. 09-11233 (Bankr. S.D.N.Y.); *In re Gen. Growth Props., Inc.*, Case No. 09-11977 (Bankr. S.D.N.Y.); *In re Spectrum Brands*, Case No. 09-50455 (Bankr. W.D. Tex.); *In re Pilgrim's Pride Corp.*, Case No. 08-45664 (Bankr. N.D. Tex.); *In re Washington Mutual, Inc.*, Case No. 08-12229 (Bankr. D. Del.); *In re Interstate Bakeries Corp.*, 04-45814 (Bankr. W.D. Mo.).

III. An Official Equity Committee Should Be Appointed Under the Circumstances of These Cases.

At this juncture of the Debtors' Chapter 11 cases, it is unclear what value, if any, may be available for shareholders; however, there is no indication that the Debtors are "hopelessly" insolvent. Indeed, the Debtors have indicated that they are pursuing a restructuring as opposed to a liquidation, and have expressed confidence that their operations will grow and operate profitably going forward. *See* Declaration of Michael R. Castle in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings, dated April 6, 2015 [Dkt. No. 18]. Accordingly, the possibility remains that value may be available in these cases for equity, particularly since a majority of unsecured claims are being paid under the Debtors' critical vendor order. Indeed, valuation will be a significant issue in connection with any Chapter 11 plan proposed by the Debtors, which is due to be filed under the Debtors' postpetition financing agreement at

or around the same time as the Debtors are required to file their schedules and statements. It is therefore appropriate for the U.S. Trustee to appoint an Official Equity Committee, and, as discussed below, other relevant factors support such an appointment.

a. These are Large, Complex Chapter 11 Cases.

These Chapter 11 cases involve twenty-six Debtors with consolidated assets and liabilities exceeding $100 million. The Debtors operate in a highly regulated industry, have a complex capital structure, and likely have several hundred or more parties in interest, including creditors, shareholders, customers, and employees. In light of the magnitude of these cases, any Chapter 11 plan will need to be carefully considered and formulated, and is it just and appropriate for a significant constituency—the shareholders—to have an appropriate voice in the Debtors' reorganization efforts.

b. Equity is Not Adequately Represented in These Chapter 11 Cases.

Shareholders are not adequately represented in these cases. A significant percentage of shareholders have voiced their concerns over and disagreement with numerous business decisions made by Xinergy's board of directors, and this stated dissatisfaction with the board is at the forefront of the proceedings in the Superior Court. The shareholders are seeking relief in that court for the precise reason that they do not believe the current board has acted with their interests in mind. Any shareholder meeting, however, whether ordered by the Superior Court or otherwise, likely would not take place for another 45 to 60 days due to requirements under applicable securities law, which date would be after the current deadline under the Debtors' postpetition financing agreement for the Debtors to file a Chapter 11 plan in these cases. Thus, it is critical that shareholders are sufficiently represented in the Bankruptcy Court in time to weigh in on the formulation of a Chapter 11 plan and to be heard on valuation issues in connection therewith. Notably, (a) the existing board members hold little equity in Xinergy, making them inadequate shareholder representatives, (b) a majority of unsecured claims are being paid in full at the outset of these cases, and (c) upon information and belief, the Debtors and holders of the second lien notes have reached an agreement as to the treatment of their claims. Thus, shareholders are the primary parties in these cases whose interests remain unresolved.

The shareholders' lack of representation is further evidenced by Xinergy's actions to undermine the shareholders' efforts to reconstitute the board. The board has ignored the shareholders' requests to replace board members and failed to call a special meeting, despite the support for such actions by holders of approximately 50% of outstanding shares. The reality of these cases is that absent the appointment of an Official Equity Committee, no one will advocate for shareholder interests, and individual shareholders should not have to shoulder that burden alone.

In addition, without any official committee of unsecured creditors in these cases, there is no unified constituency reviewing the Debtors' filings and operations to ensure (a) the Debtors' compliance with relevant bankruptcy procedures, and (b) that the estates are being appropriately protected. Indeed, as noted by one court, "the responsibility for monitoring the operations of the debtor and its compliance with appropriate bankruptcy procedures has fallen largely to the creditors' committee . . . ." *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240 (3d Cir. 1994). Without a creditors' committee, and with most of the significant unsecured creditors being paid off by the Debtors at the outset of these cases, the Debtors' actions may go largely unchecked. It is just and appropriate for a non-debtor constituency—one with a pecuniary interest in the Debtors' cases and in a successful restructuring of the Debtors' operations—to be adequately represented and actively involved in these cases. An Official Equity

Committee would fill the void created by the lack of a creditors' committee, while at the same time ensuring that the particular interests of shareholders—which, thus far, have been largely ignored by the Debtors—are adequately represented.

c. The Appointment of an Official Equity Committee Would Be Timely.

The Debtors' request for final relief on many of their first day motions was just recently heard by the Bankruptcy Court on May 5, 2015, and there has been little additional activity thus far in these Chapter 11 cases. Namely, no plan or disclosure statement has been filed, no requests to sell or otherwise dispose of any material assets have been made, and no other significant reorganization transactions have been consummated or proposed. The Debtors' postpetition financing agreement, however, sets certain milestones to ensure that these cases proceed on a quick time frame, including a mid-June deadline for the Debtors to file a proposed plan. Accordingly, an Official Equity Committee could be appointed in time to actively participate in the major decisions to be made by the Debtors over the next few months in these Chapter 11 cases.

d. The Costs Would Not Significantly Outweigh the Concern for Adequate Representation.

Courts analyzing this factor are concerned with the costs of an "additional" committee, because, in a Chapter 11 case, the estate is typically bearing the costs of an official committee of unsecured creditors. Such a concern is not relevant here since no creditors' committee has been appointed. The Debtors' postpetition financing budget even accounts for the professional fees of an unsecured creditors' committee, and the final order approving the Debtors' postpetition financing includes a carve-out for retained professionals of a creditors' committee. Accordingly, funds are available in these cases for a committee and, without a creditors' committee being appointed, such funds could be allocated to an Official Equity Committee.

In addition, as noted above, there is a significant concern amongst shareholders regarding their lack of representation and in the soundness of the board's decision-making processes. An Official Equity Committee would, among other things, monitor the major business decisions in these cases to ensure they are in the estates' best interests and otherwise seek to maximize value. Accordingly, any costs associated with an Official Equity Committee would inure to the benefit of the estates.

Based on the foregoing, we believe there is sufficient basis for the appointment of an Official Equity Committee to ensure adequate representation for Xinergy's shareholders in the Debtors' Chapter 11 cases. We would very much welcome the opportunity to meet with you to discuss such an appointment and to provide you with any additional information you may request.

Thank you for your consideration.

Very truly yours,

DLA Piper LLP (US)

Thomas R. Califano

cc: Tyler P. Brown, Esq. (By Email)
Andrew N. Rosenberg, Esq. (By Email)
Brian S. Hermann, Esq. (By Email)
Peter J. Barrett, Esq. (By Email)
Mr. Jon Nix (By Email)
Robert S. Westermann, Esq. (By Email)

EXHIBIT "D"

U.S. Department of Justice

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May 11, 2015

Via Electronic Mail

Tyler P. Brown, Esq.
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Richmond, Virginia 23219-4074

Brian S. Hermann
Paul, Weiss, Rifkin, Wharton
& Garrison, LLP
1285 Avenue of the Americas
New York, New York 10019-6064

Re: Xinergy, Ltd., *et al.*

Dear Counsel:

References are made to the attached letters and electronic mails received by the United States Trustee requesting the appointing of an Official Equity Committee. As you are aware, the decision as to whether to appoint an equity committee is within the discretion of the United States Trustee, however, she would appreciate your views regarding this matter. Please provide a written response with regard to the request to form an equity committee by no later than Thursday, May 14, 2015.

As an aside, it is my intention to form an Official Unsecured Creditors' Committee tomorrow as there is now sufficient interest to do so. I look forward to hearing from each of you.

Very truly yours,

JUDY A. ROBBINS
UNITED STATES TRUSTEE

/s/ Margaret K. Garber
Assistant United States Trustee

Enclosures
cc – Thomas R. Califano, Esq. (via electronic mail)
Valerie L. Smith, Esq. (via electronic mail)
Charles W. Kite, Esq. (via electronic mail)
F. Clark Denton (via electronic mail)
Byron H. Rubin (via electronic mail)
Jeanne Nix (via electronic mail)
Mark Nix (via electronic mail)

Garber, Margaret (USTP)

From: Clark Denton <cdenton77@gmail.com>
Sent: Sunday, May 10, 2015 9:32 AM
To: Garber, Margaret (USTP)
Subject: Xingery

Hello Ms. Garber, my name is Franklin Clark Denton and I own 250,000 shares of XRG. I was part of the very recent capital raise in April of 2014 at 45 cents a share. I hold a BS in Accounting and an MBA in marketing. I realize any capital raise in the coal industry is risky at this time, but I did not see bankruptcy in the cards in such a short period of time. I am requesting an equity committee of my peers (at the very least from the private placement in 2014) for our voices to be heard. Thank you for your time.

F. Clark Denton, MBA
865-414-7640 c

Garber, Margaret (USTP)

From: JJ Nix <nixjeanne@gmail.com>
Sent: Sunday, May 10, 2015 9:54 PM
To: Garber, Margaret (USTP)
Subject: Xinergy, LTD

To: Margaret K. Garber, Esq.
Office of the United States Trustee
First Campbell Square Building
210 First Street, Suite 505
Roanoke, Virginia 24011

Dear Ms. Garber,

Please be advised of this formal request to have the court appoint an Official Equity Committee in the matter of Xinergy, Ltd as soon as possible. I am a corporate attorney licensed to practice law in the state of Tennessee, and a holder of 2,000,000 shares of Xinergy common stock.

It is imperative that Xinergy has a shareholder voice going forward as the majority of Xinergy shareholders waits for a shareholder meeting to be held in order to insure the future success of the company. The current action by Xinergy's Board of Directors and legal team to attempt to silence shareholders from exercising their voices is alarming, especially when the current Board of Directors owns approximately 1.02% of the stock as of last filing date. The current Board of Directors negotiated pre and post bankruptcy filings in bad faith. The Board of Directors is acting in complete disregard of its fiduciary duty in this Bankruptcy case as it relates to the shareholder request for a shareholder meeting. It is evident that the company is currently waisting corporate resources to fight a losing battle against the majority of shareholders, much like they did when they negotiated in bad faith to leave the board as shown in court documents. As stated in numerous similar filings, shareholders' rights continue during bankruptcy, irrespective of the perception or degree of insolvency of the company.

Thank you for your consideration,

Regards,

Jeanne Bowen Nix

NST
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May 10, 2015

Margaret K. Garber, Esq.
Office of the United States Trustee
First Campbell Square Building
210 First Street, Suite 505
Roanoke, Virginia 24011
e-mail: Margaret.K.Garber@usdoj.gov

Re: **In re Xinergy Ltd., et al, Case No. 15-70444 (PMB)**
Request for appointment of Equity Security Holders

Dear Ms. Garber,

I write on behalf of John Kalb as an equity shareholder in Xinergy, Ltd. in connection with a Chapter 11 proceeding pending in the United States Bankruptcy Court for the Western District of Virginia. Mr. Kalb respectfully requests that an official committee of equity shareholders be appointed in this matter. Mr. Kalb invested in Xinergy, Ltd. in 2008 at its inception. He and his family hold 1.4 million shares in Xinergy, Ltd.

As an active investor in the coal space for over fifteen years, Mr. Kalb firmly believes the company should have representation through a committee of equity shareholders. The current Board of Directors and management team do not possess an equity position sufficient to represent the vast majority of the shareholders. In addition, a called shareholder meeting has been blocked by the current Board of Directors for months.

In order to protect and adequately represent Mr. Kalb's interest, please allow the appointment of an official committee of equity shareholders as soon as possible.

Sincerely,

Valerie L. Smith

cc: John Kalb (via email)

CHARLES W. KITE
ATTORNEY AT LAW
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KNOXVILLE, TENNESSEE 37922
Telephone: 865-604-7605 **Facsimile: 865-966-5160**
Email: ckite0804@gmail.com

May 10, 2015

Margaret K. Garber, Esq.
Office of the United States Trustee
First Campbell Square Building
210 First Street, Suite 505
Roanoke, Virginia 24011

Via: Email: Margaret.K.Garber@usdoj.gov

Re: In Re Xinergy, Ltd., et al, Case No. 15-70444 (PMB)
Request for appointment of Equity Security Holders

Dear Ms. Garber:

I am an attorney licensed for 42 years in September. I began my practice in 1973 with the Office of Chief Counsel for the Internal Revenue Service in the Philadelphia Regional Counsel's Office for four years and the Nashville District Counsel's Office for six years, during which time I did extensive bankruptcy representation of the IRS. Since that time I have been in private practice for twenty-five years and in house general counsel for two publicly traded coal companies for seven years. I was also outside general counsel for two large, internationally known private companies for nineteen years.

My wife and I own approximately 605,000 shares of the common stock of Xinergy, Ltd. ("Xinergy"), and I am Co-Trustee of the Trust for five of my grandchildren, which owns 3,000,000 shares of Xinergy's common stock. I respectfully request that an official committee be appointed as soon as possible to properly represent the shareholders in this matter.

It is my opinion that the current Board of Directors has not properly represented the best interests of the equity shareholders in their decisions related to the Company. I believe this was very pointedly represented by the refusal of the current Board of Directors to take positive action on the request of a substantial number of the equity shareholders for a called meeting of the shareholders to elect a new Board of Directors.

Sincerely,

/s/ Charles W. Kite

Garber, Margaret (USTP)

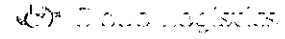
From: Mark Nix <mark@gocloudlogistics.com>
Sent: Monday, May 11, 2015 7:10 AM
To: Garber, Margaret (USTP)
Subject: Subject: In re Xinergy Ltd., et al, Case No. 15-70444 (PMB)

Ms Garber,

I am writing to request that a committee of equity shareholders be appointed in connection with the Chapter 11 proceeding pending in the US Bankruptcy Court for the Western District of Virginia. The current Board of Directors and management team hold a minority share position in Xinergy, LTD and blocked a shareholder call for a meeting prior to the filing.

Our family has been a major shareholder going back to the pre-IPO days and I am a trustee for the children's trust plus own shares myself in XRG. I respectfully request that the existing shareholders have a voice/vote in this proceeding.

Regards,
Mark Nix
CEO
Cloud Logistics, LLC
222 Lakeview Avenue
Suite 1660
West Palm Beach, FL 33401
Direct: 561-800-1212
Fax: 561-800-1208
Mobile: 561-284-2085



www.gocloudlogistics.com

www.facebook.com/cloudlogistics

https://twitter.com/_cloudlogistics

Garber, Margaret (USTP)

From: Byron Rubin <byronrubin@gmail.com>
Sent: Saturday, May 09, 2015 3:29 PM
To: Garber, Margaret (USTP)
Subject: Appointment of Official Equity Committee in the Matter of Xinergy Ltd.

To: Margaret K. Garber, Esq.
Office of the United States Trustee
First Campbell Square Building
210 First Street, Suite 505
Roanoke, Virginia 24011

Dear Ms. Garber.

As a substantial shareholder in Xinergy, Ltd, I request that the Judge in this case appoint an Official Equity Committee in the matter of Xinergy, Ltd.

My family and myself own approximately 600,000 shares of Xinergy, Ltd common shares. We have been active investors in the coal space for over ten years, and believe that Xinergy, Ltd needs to have a shareholder voice heard going forward, in order to insure the future success of the Company. We have been investors in Xinergy since inception through the original Private Placement Memorandum in 2008, as well as in the additional Private Placement Memorandum in 2014.

Thank you for your consideration,

Regards,

Byron H. Rubin

--
Byron H. Rubin, , CLU, ChFC
Insurance Tax Planning
9850 N. Central Expressway
Suite 216
Dallas, Texas 75231-0964

Phone: 972-991-1161

Fax: 972-991-8890

Cell: 214-957-0975

EXHIBIT "E"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In re:	**Chapter 11**
XINERGY LTD., *et al.*,	**Case No. 15-[ ] (__)**
Debtors.[1]	**(Joint Administration Requested)**

CONSOLIDATED LIST OF CREDITORS HOLDING 30 LARGEST UNSECURED CLAIMS OF XINERGY LTD., *et al.*

The following is a consolidated list of the debtors' creditors holding the 30 largest unsecured claims. This list is being filed pursuant to 11 U.S.C. § 521 and Rule 1007(d) of the Federal Rules of Bankruptcy Procedure. The list does not include persons who come within the definition of "insider" set forth in 11 U.S.C. § 101.

Rank	Name of Creditor	Name, Telephone Number and Complete Mailing Address Including Zip Code of Employee, Agent, or Department of Creditor Familiar with Claim Who May be Contracted	Nature of Claim (Trade Debt, Bank Loan, Government Contract, etc.)	Indicate if Claim is Contingent, Unliquidated, Disputed, or Subject to Setoff	Amount of Claim
1	**VIRGINIA DRILLING COMPANY, LLC**	Virginia Drilling PO Box 1198 Vansant, VA 24656 Telephone: 800-258-8583 Facsimile: 276-597-7410 Contact: Virlo Stiltner virlo@vadrillco.com	Trade Debt		$ 3,335,796
2	**CECIL I. WALKER MACHINERY CO.**	Walker Machinery 1400 E. DuPont Ave Belle, WV 25105 Telephone: 304-949-6400 Contact: Sheilah Lowe slowe@walker-cat.com	Trade Debt		$ 2,571,742

[1] The Debtors, along with the last four digits of each Debtor's federal tax identification number, are listed on Schedule 1 attached hereto.

3	**WPP LLC**	WPP LLC 5260 Irwin Road Huntington, WV 25705 Telephone: (304) 654-6887 Contact: Chad Mooney	Lessor		$ 619,201
4	**PENN VIRGINIA OPERATING CO., LLC**	Penn Virginia Operating Co.,LLC One Carbon Center, Suite 100 Chesapeake, WV 25315 Telephone: (304) 949-5619 Contact: Gary Stover	Lessor		$ 424,066
5	**CASSELS BROCK & BLACKWELL LLP**	Cassels Brock & Blackwell LLP Scotia Plaza, Suite 2100 40 King Street West Toronto, ON M5H 3C2 Telephone: (416) 860-6771 Contact: Alexander Pizale apizale@casselsbrock.com	Trade Debt		$ 325,182
6	**C&M GIANT TIRE, LLC**	C & M Giant Tire 980 W. New Circle Rd. Lexington, KY 40511 Telephone: (859)-281-1320 Facsimile: (859) -281-1337 Contact: Cindy Devereux cindy@cmgianttire.com	Trade Debt		$ 282,213
7	**L. ADKINS OIL**	L Adkins Oil PO Box 190 Craigsville, WV 26205 Telephone: (304)742-3049 Contact: Mark Adkins	Trade Debt		$ 258,711
8	**WHAYNE SUPPLY COMPANY**	Whayne Supply Company 2200 South Kentucky Ave. Corbin, KY 40701 USA Telephone: (606) 528-3140 Facsimile: (606) 523-5366 Contact: Amy Brock-Williams	Trade Debt		$ 246,999
9	**BRAKE SUPPLY CO., INC.**	Brake Supply Co, Inc. 4280 Paysphere Circle Chicago, IL 60674 USA Telephone: (304) 673-0462 Facsimile: (304) 255-7503 Contact: Greg Browning	Trade Debt		$ 185,567
10	**SECURITY AMERICA, INC**	Security America PO Box 4525 Charleston, WV 25364 Telephone: 304-925-4747 x101 Contact: Renee Shaffer rshaffer@securityamerica.com	Trade Debt		$ 173,946
11	**HARVEY TRUCKING INC.**	Harvey Trucking, Inc 5383 Ashford Nellis Road Ashford, WV 25009 Telephone: (304) 836-5850 Contact: Wally Harvey	Trade Debt		$ 160,014

12	M.G.C., INCORPORATED	M.G.C. Supply, Inc. PO Box 115 Bolt, WV 25817-0115 USA Telephone: (606) 433-0077 Facsimile: (606) 433-1344 Contact: Christy Meade	Trade Debt		$ 155,921
13	THE DANIELS COMPANY	The Daniels Company PO Box 643951 Pittsburgh, PA 15264-3951 Telephone: (304) 327-8161 Facsimile: (304) 327-5118 Contact: Kay Gilbert	Trade Debt		$ 147,768
14	AMERICAN EXPRESS	American Express PO Box 650448 Dallas, TX 75265 Telephone: (800) 528-2122	Trade Debt		$ 130,763
15	JONES & ASSOCIATES	Jones & Associates PO Box 1989 Charleston, WV 25327 Telephone: (304) 343-9466 Contact: Forrest Jones EFJones@efjones.com	Trade Debt		$ 123,335
16	MECURIA ENERGY TRADING INC.	Mercuria Energy Trading, Inc. 20 East Greenway Plaza, Suite 650 Houston, TX 77046 Office: 832.209.2315 Mobile: 606.585.5110 Contact: Alex Merritt amerritt@mercuria.com	Trade Debt		$ 109,523
17	APPALACHIAN POWER COMPANY	Appalachian Power Company 1 AEP Way Hurricane WV 25526 Telephone: (304) 792-2379 Contact: Jerry Peyton jdpeyton@aep.com	Trade Debt		$ 100,997
18	WISE COUNTY TREASURER	Wise County Treasurer PO Box 1308 Wise, VA 24293-1308 Telephone: (276) 328-3666	Trade Debt	Disputed	$ 96,701
19	MOULDAGRAPH CORPORATION	Mouldagraph Corporation PO Box 99 Nitro, WV 25143 Telephone: (304) 759-2150	Trade Debt		$ 92,449
20	MALLARD ENVIRONMENTAL SERVICES	Mallard Environmental PO Box 1298 Shady Spring, WV 25918-1298 Telephone: (304) 787-5550 Contact: Rhonda Lilly	Trade Debt		$ 86,833

21	EASTERN KY EQUIPMENT SALES & SERVICES LLC	Mining Machinery 1512 North Big Run Road Ashland KY, 41102 Telephone: (606) 928-0490 Contact: Kathy Smith	Trade Debt		$ 86,675
22	SHERIFF OF BOONE COUNTY	Sheriff of Boone County 200 State Street Madison, WV 25130 Telephone: (304) 369-7394	Trade Debt	Disputed	$ 82,529
23	PLUM CREEK TIMBER COMPANY, INC	Plum Creek Timber Company, Inc Five Concourse Parkway, NE, Suite 1650 Atlanta, GA 30328 Telephone: (304) 520-3321 Contact: John Woodrum	Trade Debt		$ 79,774
24	GARLOW INSURANCE AGENCY, INC.	Garlow Insurance Agency, Inc. 1217 Quarrier St Charleston, WV 25301 Telephone: (304) 347-8972 ext. 166 Facsimile: (304) 342-5969 Toll Free: (800) 238-5321 Contact: Mark Clark mclark@garlowinsurance.com	Trade Debt		$ 75,718
25	GOULD'S ELECTRIC MOTOR REPAIR, INC	Gould's Electric Motor Repair, Inc PO Box 100 Indore, WV 25111-0100 Telephone: 304-587-4825 Facsimile: 304-587-4855 Contact: Arbutus Gould	Trade Debt		$ 75,676
26	STUBBS ALDERTON & MARKILES, LLP	Stubbs Alderton 15260 Ventura Blvd. Sherman Oaks, CA 91403 Telephone:: (818) 444-4500 Facsimile: (818) 444-4520 Contact: David Tarica	Trade Debt		$ 75,519
27	JMP COAL HOLDINGS, LLC	JMP Coal Holdings, LLC PO Box 1200 Robinson Creek, KY 41560 Telephone: (606) 639-9675 Facsimile: (606) 639-9685	Trade Debt		$ 72,442
28	COULTER & JUSTUS, PC	Coulter & Justus, PC 9717 Cogdill Rd, Suite 201 Knoxville, TN 37932 Telephone: (865) 637-4161 Facsimile: (865) 524-2952 Contact: Conor O' Donoghue	Trade Debt		$ 72,100

29	**EXIGENT LEASING, LP**	Exigent Leasing, LP 2202 Timberlock PL, #133 Spring, TX 77380 Telephone: (713) 503-5313 Contact: Ed Green	Trade Debt		$ 70,745
30	**HURBERRIES**	Hurberries, Inc PO Box 210 Coeburn, VA 24230 Telephone: (276) 679-9877 Facsimile: (276) 395-8218 Contact: Amanda Hurley	Trade Debt		$ 69,478

EXHIBIT "F"

Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen ouest
Toronto ON M5H 3S8

IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED (THE "ACT")

AND

IN THE MATTER OF

XINERGY LTD.

NOTICE OF ORDER
(Paragraphs 127(1)2)

TAKE NOTICE that the Director made an order under paragraph 2 of subsection 127(1) of the Act that all trading in the securities of

XINERGY LTD.

whether direct or indirect, cease until the order is revoked by the Director.

DATED at Toronto this 20th day of April, 2015.

Ontario Securities Commission

"Kathryn Daniels"

Kathryn Daniels
Deputy Director, Corporate Finance Branch

TO: The Secretary
Xinergy Ltd.
8351 E Walker Springs Lane
Suite 400
Knoxville, Tennessee 37923

CC: TMX Equity Transfer Services

Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19e étage
20, rue queen ouest
Toronto ON M5H 3S8

IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED (THE "ACT")

AND

IN THE MATTER OF

XINERGY LTD.

ORDER
(Paragraphs 127(1)2)

WHEREAS on April 8, 2015,

XINERGY LTD. (the "Reporting Issuer")

and its transfer agent were notified that the Director made an order under paragraph 2 of subsection 127(1) and subsection 127(5) of the Act on the 8th day of April, 2015 that all trading in the securities of the Reporting Issuer, whether direct or indirect, cease immediately for a period of fifteen days from the date of the order (the "Temporary Order");

AND WHEREAS the Temporary Order was made because the Reporting Issuer failed to file the following continuous disclosure materials as required by Ontario securities law (collectively, the "Default"):

a) audited annual financial statements for the year ended December 31, 2014;
b) management's discussion and analysis relating to the audited annual financial statements for the year ended December 31, 2014;
c) annual information form for the year ended December 31, 2014;
d) certification of the foregoing filings as required by National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*;

AND WHEREAS the Reporting Issuer and its transfer agent were notified that a hearing (the "Hearing") would be held to determine if it would be in the public interest to make an order under paragraph 2 of subsection 127(1) of the Act that all trading in the securities of the Reporting Issuer, whether direct or indirect, cease permanently or for such period as is specified in the order;

AND WHEREAS the Reporting Issuer was notified that if it intended to attend at the Hearing, the Reporting Issuer was requested to notify the Director of its intention to attend in writing, in which case the Hearing would be held before the Commission;

AND WHEREAS the Reporting Issuer was further notified that if it failed to notify the Director of its intention to be present at the Hearing, then the Hearing would be held before the Director without the Reporting Issuer present;

AND WHEREAS the Reporting Issuer having failed to notify the Director of its intention to attend at the Hearing, the Hearing was held before the Director on the 20th day of April, 2015;

AND UPON no one appearing at the Hearing on behalf of the Reporting Issuer;

AND UPON hearing the evidence of staff of the Ontario Securities Commission and the Director being satisfied that the Default continues;

IT IS ORDERED pursuant to paragraph 2 of subsection 127(1) of the Act that, effective immediately, all trading in the securities of the Reporting Issuer, whether direct or indirect, shall cease until further order by the Director.

DATED at Toronto this 20th day of April, 2015.

Ontario Securities Commission

"Kathryn Daniels"

Kathryn Daniels
Deputy Director, Corporate Finance Branch

EXHIBIT "G"

WILDEBOER
wildlaw.ca
DELLELCE LLP

DIRECT LINE: 416 361 4766
e-mail: rory@wildlaw.ca

April 16, 2015

BY COURIER & FACSIMILE

Xinergy Ltd.
8351 East Walker Springs Lane
Suite 400
Knoxville, TN
37923

Attention: Bernie Mason, Chief Executive Officer

Re: Jon E. Nix – Conversion of Non-Voting Common Shares of Xinergy Ltd.

Dear Mr. Mason:

We are counsel to Jon E. Nix, who currently holds 7,467,541 non-voting common shares ("**Non-Voting Shares**") in the capital of Xinergy Ltd. ("**Xinergy**"). Pursuant to the articles of Xinergy, we hereby give notice of Mr. Nix's election to convert 7,467,541 of his Non-Voting Shares to 7,467,541 voting common shares of Xinergy, effective immediately.

In accordance with the articles of Xinergy, share certificates representing the Non-Voting Shares will be delivered to the principal address of Xinergy in Knoxville, Tennessee, under a separate cover by Charlie Kite.

Should you have any questions with respect to this matter or require anything further, please do not hesitate to contact me at your convenience.

Yours truly,

Rory Cattanach

EXHIBIT “H”

WILDEBOER
wildlaw.ca
DELLELCE LLP

DIRECT LINE: 416 361-4779
e-mail: spatel@wildlaw.ca

FOR EXPEDITED REVIEW

PRIVATE AND CONFIDENTIAL

May 13, 2015

Ontario Securities Commission
20 Queen Street West
Suite 1900
Toronto, ON M5H 3S8

Attention: Applications Administrator

Dear Sirs/Mesdames:

RE: Xinergy Ltd. ("Xinergy") – Application by Securityholder under Section 144(1) of the *Securities Act* (Ontario) (the "Act") and pursuant to National Policy 12-202 *Revocation of a Compliance-Related Cease Trade Order* for Partial Revocation of Cease Trade Order

We are are counsel to Jon E. Nix (the "**Applicant**"), who is the registered holder and beneficial owner of 7,467,541 non-voting common shares in the capital of Xinergy ("**Non-Voting Shares**") and 4,592,563 common shares in the capital of Xinergy ("**Voting Shares**").

This letter constitutes the application of the Applicant pursuant to National Policy 12-202 *Revocation of a Compliance-Related Cease Trade Order* ("**NP 12-202**") for an order under subsection 144(1) of the Act to partially revoke an order of the Ontario Securities Commission (the "**OSC**") ceasing the trading in securities of Xinergy in order to permit the Applicant to convert the Non-Voting Shares held by him to Voting Common Shares in accordance with the articles of Xinergy (the "**Articles**").

The Applicant has concurrently filed with this letter applications to the British Columbia Securities Commission (the "**BCSC**") and the Manitoba Securities Commission (the "**MSC**") for orders under section 171 of the *Securities Act* (British Columbia) and subsection 148(1) of the *Securities Act* (Manitoba), respectively, that orders ceasing the trading of securities of Xinergy issued by the BCSC and MSC, respectively, be partially revoked on the same basis as set out herein.

FACTS

1. Xinergy is a corporation existing under *Business Corporations Act* (Ontario) (the "**OBCA**").

2. Xinergy is a reporting issuer in the provinces of British Columbia, Alberta, Manitoba and Ontario.

3. The Applicant is resident in Knoxville, Tennessee, United States of America.

4. On April 6, 2015, Xinergy issued a news release announcing, among other things, that Xinergy and twenty-five of its subsidiaries filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Virginia, Roanoke Division (the "**US Bankruptcy Court**").

5. The Voting Shares are listed for trading on the Toronto Stock Exchange (the "**TSX**"). On April 7, 2015, trading in the Voting Shares on the TSX was temporarily suspended by Investment Industry Regulatory Organization of Canada and the TSX commenced a delisting review in respect of the Voting Shares. On April 13, 2015, the TSX announced that it had determined to delist the Voting Shares as of the close of business on May 12, 2015 for Xinergy's failure to meet the continued listing requirements of the TSX and that the Voting Shares would remain suspended from trading.

6. The following orders are in effect with respect to Xinergy as of the date hereof:

   (i) an order issued by the OSC on April 20, 2015 (which order replaced a temporary order issued by the OSC on April 8, 2015) ceasing all trading in the securities of Xinergy as a result of the failure of Xinergy to file the following continuous disclosure materials as required by Ontario securities laws: (a) audited annual financial statements for the year ended December 31, 2014; (b) management's discussion and analysis relating to the audited annual financial statements for the year ended December 31, 2014; (c) annual information form for the year ended December 31, 2014; and (d) certification of the foregoing filings as required by National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the "**OSC Order**");

   (ii) a cease trade order issued by the BCSC on April 14, 2015 ceasing all trading in the securities of Xinergy as a result of the failure of Xinergy to file the following continuous disclosure materials as required by British Columbia securities laws: (a) audited annual financial statements for the year ended December 31, 2014; (b) management's discussion and analysis relating to the audited annual financial statements for the year ended December 31, 2014; and (c) annual information form for the year ended December 31, 2014 (the "**BCSC Order**"); and

   (iii) an order issued by the MSC on April 9, 2015 ceasing all trading in the securities of Xinergy as a result of the failure of Xinergy to file the following continuous disclosure materials as required by Manitoba securities laws: (a) audited annual financial statements for the year ended December 31, 2014; and (b) management's discussion and analysis relating to the audited annual financial statements for the year ended December 31, 2014; (the "**MSC Order**" and together with the OSC Order and BCSC Order, the "**Cease Trade Orders**").

7. Xinergy has represented on the *System for Electronic Document Analysis and Retrieval* that its principal regulator is the OSC.

8. The Applicant is the registered holder and beneficial owner of 7,467,541 Non-Voting Shares and 4,592,563 Voting Shares.

9. Pursuant to the Articles, at the election of the holder of any Non-Voting Shares, such Non-Voting Shares may be converted into Voting Shares, at any time, and without the payment of additional consideration by such holder, on the basis of one Voting Share for one Non-Voting Share.

10. The Articles provide that each Voting Share carries the right to one vote at a meeting of the shareholders of Xinergy and that the Non-Voting Shares do not carry any voting rights except as required by law.

11. On April 16, 2015, the Applicant provided notice to Xinergy of his election to convert all of his Non-Voting Shares into Voting Shares in accordance with the Articles (the "**Conversion**").

12. On April 16, 2015, the Applicant submitted a requisition pursuant to Section 105 of the OBCA requisitioning the directors of Xinergy (the "**Directors**") to call a meeting of shareholders of Xinergy for the purpose of, among other things, the removal from office of certain Directors and the appointment to the board of directors of Xinergy of additional individuals identified by the Applicant (the "**Requisitioned Meeting**").

13. On April 17, 2015, Xinergy's legal counsel advised the undersigned that, as a result of the Cease Trade Orders, Xinergy would not effect the Conversion and would not issue the Applicant the Voting Shares issuable to the Applicant in accordance with the Articles.

14. On May 7, 2015, legal counsel to Xinergy delivered correspondence to the undersigned advising, among other things, that Xinergy did not intend to call the Requisitioned Meeting.

15. Pursuant to an order dated May 8, 2015, the US Bankruptcy Court has ordered, among other things, that certain transfers of Voting Shares and Non-Voting Shares shall be restricted in order to preserve Xinergy's ability to utilize net operating loss carryforwards and certain other tax attributes for U.S. federal income tax purposes (the "**Trading Limitation Order**"). As the Applicant is the beneficial owner of the Non-Voting Shares that are the subject of the proposed Conversion and will be the beneficial owner of the Voting Shares issued in connection with the Conversion, the Conversion does not breach the Trading Limitation Order.

16. Pursuant to subsection 105(4) of the OBCA, the Applicant is entitled to call the Requisitioned Meeting. The Requisitioned Meeting is expected to be held on June 19, 2015. The record date for the Requisitioned Meeting is May 20, 2015.

17. To the knowledge of the Applicant, the 7,467,541 Non-Voting Shares held by the Applicant constitute 100% of the issued and outstanding Non-Voting Shares of Xinergy.

18. The purpose of the Conversion is to ensure that the Applicant may exercise all voting rights that will attach to the Voting Shares to which is he is entitled to receive in accordance with the Articles at the Requisitioned Meeting or at any other proceeding where the holders of Voting Shares are entitled to vote such shares.

19. The Conversion will be exempt from the prospectus requirement pursuant to subsection 2.42(1) of National Instrument 45-106 *Prospectus and Registration Exemptions*.

RELIEF REQUESTED

Based on the foregoing, it is submitted that it is not prejudicial to the public interest that the OSC Order be partially revoked for the sole purpose of the Conversion and accordingly the Applicant seeks an order for a partial revocation of the OSC Order pursuant to subsection 144(1) of the Act for such purpose (the "**Requested Order**").

As the Applicant wishes to exercise all of the voting rights that will attach to the Voting Shares at the Requisitioned Meeting or at any other proceeding where the holders of Voting Shares are entitled to vote such shares, we request on behalf of the Applicant that this application be reviewed on an expedited basis with a view to obtaining the requested relief in advance of the May 20, 2015 record date for the Requisitioned Meeting.

ENCLOSURES

Enclosed herewith, please find the following:

1. a draft Requested Order of the OSC attached as Schedule "A" hereto; and

2. an executed verification certificate of the Applicant confirming the truth of the facts contained herein and our authority to prepare and file this Application attached as Schedule "B" hereto.

Please contact the undersigned if you require any further information at this time. Thank you for your assistance in this matter.

Yours truly,

"Sanjeev Patel"

Sanjeev Patel
Encl.

SCHEDULE "A"

DRAFT ORDER

(please see attached)

IN THE MATTER OF THE SECURITIES ACT, R.S.O. 1990, C. S.5, AS AMENDED (THE "ACT") AND IN THE MATTER OF XINERGY LTD. ("XINERGY") AND JON E. NIX (THE "APPLICANT")

ORDER (SECTION 144(1) OF THE ACT)

WHEREAS the Ontario Securities Commission (the "Commission") issued an order on April 8, 2015, under paragraph 2 of subsection 127(1) and subsection 127(5) of the Act, ordering that trading in the securities of Xinergy, whether direct or indirect, cease temporarily;

AND WHEREAS the Commission issued a further order dated April 20, 2015, pursuant to paragraph 2 of subsection 127(1) ordering that trading in the securities of Xinergy, whether direct or indirect, shall cease until revoked by a further order (the "Cease Trade Order");

AND WHEREAS additional cease trade orders were issued by the British Columbia Securities Commission on or about April 14, 2015 and the Manitoba Securities Commission on or about April 9, 2015 (the "Additional Cease Trade Orders");

AND WHEREAS notwithstanding the Additional Cease Trader Orders, the Applicant has made an application to the Commission pursuant to section 144(1) of the Act to vary the Cease Trade Order;

AND WHEREAS the Applicant has represented to the Commission that:

1. To the knowledge of the Applicant, Xinergy is a reporting issuer under the securities legislation of the provinces of Ontario, British Columbia, Manitoba and Alberta.

2. To the knowledge of the Applicant, the Cease Trade Order and the Additional Cease Trade Orders were issued due to the failure of Xinergy to file its financial statements, management's discussion and analysis, annual information form and certifications of the foregoing filings for the year ended December 31, 2014.

3. On April 6, 2015, Xinergy issued a news release announcing, among other things, that Xinergy and twenty-five of its subsidiaries filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Virginia, Roanoke Division.

4. The Applicant is the registered holder and beneficial owner of 7,467,541 non-voting common shares in the capital of Xinergy ("Non-Voting Shares") and 4,592,563 common shares in the capital of Xinergy ("Voting Shares").

5. Pursuant to the articles of Xinergy (the "Articles"), at the election of the holder of any Non-Voting Shares, such Non-Voting Shares may be converted into Voting Shares, at any time,

and without the payment of additional consideration by such holder, on the basis of one Voting Share for one Non-Voting Share.

6. The Articles provide that each Voting Share carries the right to one vote at a meeting of the shareholders of Xinergy and that the Non-Voting Shares do not carry any voting rights except as required by law.

7. On April 16, 2015, the Applicant provided notice to Xinergy of his election to convert all of his Non-Voting Shares into Voting Shares in accordance with the Articles (the "Conversion").

8. On April 16, 2015, the Applicant submitted a requisition pursuant to Section 105 of the *Business Corporations Act* (Ontario) (the "OBCA") requisitioning the directors of Xinergy (the "Directors") to call a meeting of shareholders of Xinergy for the purpose of, among other things, the removal from office of certain Directors and the appointment to the board of directors of Xinergy of additional individuals identified by the Applicant (the "Requisitioned Meeting").

9. On April 17, 2015, Xinergy's legal counsel advised the Applicant that, as a result of the Cease Trade Order and Additional Cease Trade Orders, Xinergy would not effect the Conversion and would not issue the Applicant the Voting Shares issuable to the Applicant in accordance with the Articles.

10. On May 7, 2015, legal counsel to Xinergy delivered correspondence to the Applicant's legal counsel advising, among other things, that Xinergy did not intend to call the Requisitioned Meeting.

11. Pursuant to subsection 105(4) of the OBCA, the Applicant is entitled to call the Requisitioned Meeting. The Requisitioned Meeting is expected to be held on June 19, 2015. The record date for the Requisitioned Meeting is May 20, 2015.

12. To the Applicant's knowledge, the 7,467,541 Non-Voting Shares held by the Applicant constitute 100% of the issued and outstanding Non-Voting Shares of Xinergy.

13. The purpose of the Conversion is to ensure that the Applicant may exercise all voting rights that will attach to the Voting Shares to which is he is entitled to receive in accordance with the Articles at the Requisitioned Meeting or at any other proceeding where the holders of Voting Shares are entitled to vote such shares.

AND UPON the Commission being satisfied that it is not prejudicial to the public interest to vary the Cease Trade Order under section 144(1) of the Act;

IT IS ORDERED that, pursuant to section 144(1) of the Act, the Cease Trade Order is hereby varied solely to permit the Conversion and provided further that the Cease Trade Order shall otherwise remain in effect, unamended except as expressly provided in this order.

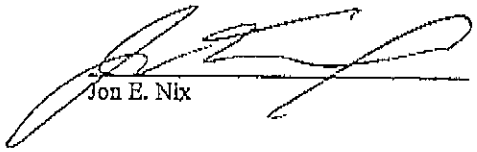
DATED this • day of •, 2015.

SCHEDULE "B"

AUTHORIZATION AND VERIFICATION

The undersigned hereby authorizes the making and filing of the attached application by Wildeboer Dellelce LLP and confirms the truth of the facts contained therein.

DATED at Knoxville, Tennessee, this 12 day of May, 2015.



Jon E. Nix

EXHIBIT "I"

CONFIRMATION

TO: BOARD OF DIRECTORS OF XINERGY LTD.

The undersigned beneficially owns or controls and has the right to vote the number of voting and non-voting shares in the capital of Xinergy Ltd. set out below. The undersigned hereby confirms that he/she/it will vote to approve the election of up to two nominees chosen by Jon Nix and Paul Kessler to the Board of Directors of Xinergy Ltd. if a special meeting of Xinergy Ltd. is called to replace Joseph Groia and Todd Swanson as members of such Board.

Under penalty of perjury, the undersigned confirms that the following information is true and correct as of the date set forth below.

Print Name of Shareholder: Joe D Porter

Signature of Shareholder: Joe D. Porter

Date: March 17, 2015

Number of Voting and Non-Voting Shares beneficially owned or controlled by the Shareholder: 561,555

Name and address of brokerage firm holding shares (if applicable): Merrill by ACA

Shareholder Contact Address: 282 Adams Rd.
Greenfield, TN 38230

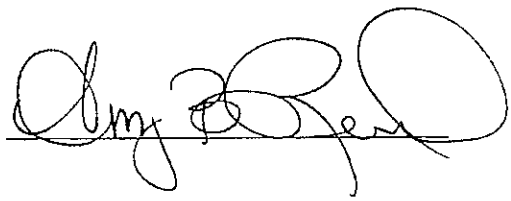
Shareholder Phone Number: 731 423 3551

Shareholder Email Address: jporter@dsinet.com

Instructions: Please attach to this Confirmation either (i) the enclosed Notarial Certificate completed by a notary or (ii) a copy of your driver's licence or passport.

NOTARIAL CERTIFICATE

I, Amy Reid (insert name of notary), a notary in the Tennessee (insert jurisdiction of notary), hereby confirm that the Confirmation addressed to the Board of Directors of Xinergy Ltd. dated 3/17/15 was signed in my presence by Joe Porter (insert name of shareholder) on the 17 day of March, 2015.



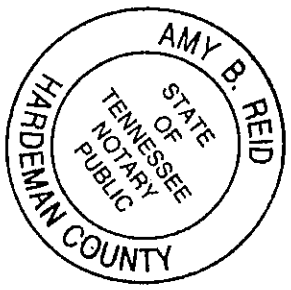


EXHIBIT "J"

Bobbie-Jo Brinkman

Subject: Xinergy Ltd.

From: John McIlvery [mailto:jmcilvery@stubbsalderton.com]
Sent: March-28-15 6:47 PM
To: Rory Cattanach
Cc: Jon Nix (jon.nix@nixventurepartners.com); Sanjeev Patel
Subject: Re: Xinergy Ltd.

Rory,

I'm not in a position to discuss the company's finances, other than to confirm what has been disclosed before. The company is pursuing all available avenues to secure additional financing.

We have invited Jon to speak with Global Hunter about any capital raising transaction he may have. If he has a proposal, please have him contact Global Hunter.

John McIlvery
(626) 705-0758

On Mar 28, 2015, at 7:26 AM, Rory Cattanach <Rory@wildlaw.ca> wrote:

> Hi John. We are very disappointed with the Board's decision. We had understood that the Board was prepared to implement the proposed changes if our client could demonstrate significant shareholder support. In our view, shareholders holding 39% of the shares of a public company calling for a change to its board of directors should, by any standard, be enough to effect that change. It should be noted that the 39% does not include the shares held by Bristol Capital, Bristol Investment Fund and LH who the Board is well aware want to see the proposed Board changes implemented. The inclusion of their shares in the calculation would bring the total to over 49% of the outstanding shares.
>
> We understand that Xinergy has a $500,000 payment due next week on its senior secured indebtedness. Would you please confirm that the company intends to meet this commitment. If Xinergy does not have the funds available to make this payment, please advise as soon as possible as my client may be in a position to assist with this financial obligation subject to certain terms and conditions. Best regards, Rory

Rory Cattanach
WILDEBOER DELLELCE LLP
Suite 800 | Wildeboer Dellelce Place
365 Bay Street, Toronto, ON M5H 2V1
T 416 361 4766 | F 416 361 1790
rory@wildlaw.ca | follow us on Twitter and LinkedIn

Bobbie-Jo Brinkman

Subject: Xinergy - Shareholder Confirmations

From: John McIlvery [mailto:jmcilvery@stubbsalderton.com]
Sent: March-27-15 12:04 PM
To: Rory Cattanach
Subject: RE: Xinergy - Shareholder Confirmations

Rory,

The Board met to consider the materials submitted by Mr. Nix in support of his request to replace Todd Swanson and Joe Groia as directors, and to consider other factors relevant to a mid-term change in the Board's composition. Any decision to replace these two directors absent a shareholder meeting would require each director to voluntarily resign. Both Todd and Joe have determined that their voluntary resignation is not in the best interests of stockholders and inconsistent with their fiduciary duties. Xinergy faces significant challenges, and both directors believe a change at this time would be disruptive and each is thus compelled to serve out the balance of his term.

The Board will consider any nominee Mr. Nix desires to put forth for inclusion on the Board's slate for election at the next shareholder meeting. The Board does appreciate the large percentage of shares that support Mr. Nix and his desire for change on the Board, and has no interest in entrenching itself in the face of shareholder opposition to their service. In submitting nominees, however, we ask Mr. Nix consider the independence and Canadian residency requirements, and that he provide all information about the candidates that is necessary for inclusion in the Company's disclosure documents. In that regard, please note that Bobby Gaylor informed the Board that he is unwilling to serve as a director.

Best regards,
John

From: Rory Cattanach [mailto:Rory@wildlaw.ca]
Sent: Monday, March 23, 2015 8:19 AM
To: Sanjeev Patel; John McIlvery
Cc: jon.nix@nixventurepartners.com
Subject: RE: Xinergy - Shareholder Confirmations

Hi John. Do you have updates as to status on your end? Best regards, Rory

Rory Cattanach
WILDEBOER DELLELCE LLP
Suite 800 | Wildeboer Dellelce Place
365 Bay Street, Toronto, ON M5H 2V1
T 416 361 4766 | F 416 361 1790
rory@wildlaw.ca | follow us on Twitter and LinkedIn

From: Sanjeev Patel
Sent: March-19-15 6:30 PM

To: 'John McIlvery'
Cc: Rory Cattanach; jon.nix@nixventurepartners.com
Subject: Xinergy - Shareholder Confirmations

John,

I am assisting Rory with this matter.

I understand that Xinergy is now has confirmations from shareholders holding 25,908,094 common shares of Xinergy representing approximately 39.4% of the outstanding shares (please see attached from the non-Nix related shareholders which has been forwarded to the company). In our view, the confirmations received to date provide a clear mandate of shareholders in order to support the Board changes as requested by Jon, particularly in light of the limitations on solicitations as the Board has previously recognized. In that regard, we believe that the orderly reconstitution of the Board should occur as soon as possible and we are prepared to move forward immediately and effect a seamless transition in the best interests of Xinergy.

Please advise at your earliest opportunity.

Regards,

Sanjeev

Sanjeev Patel
WILDEBOER DELLELCE LLP
Suite 800 | Wildeboer Dellelce Place
365 Bay Street, Toronto, ON M5H 2V1
T 416 361 4779 | F 416 361 1790
spatel@wildlaw.ca | follow us on Twitter and LinkedIn

Bobbie-Jo Brinkman

Subject: Xinergy - Shareholder Confirmations

From: John McIlvery [mailto:jmcilvery@stubbsalderton.com]
Sent: March-23-15 11:57 AM
To: Jon Nix
Cc: Rory Cattanach; Sanjeev Patel; Todd Swanson; Paul Kessler
Subject: RE: Xinergy - Shareholder Confirmations

Ok. I will inform the Board.

From: Jon Nix [mailto:jon.nix@nixventurepartners.com]
Sent: Monday, March 23, 2015 8:48 AM
To: John McIlvery
Cc: Rory Cattanach; Sanjeev Patel; Todd Swanson; Paul Kessler
Subject: Re: Xinergy - Shareholder Confirmations

John

We have shown more than enough evidence with what we have and it should not be slowed down as we wait for others to get votes in. The 40% number is more than ample proof that vote is a given considering I did not go after other family or friends because of the limitations of 15. This delay is costing additional time and money that Xinergy can ill afford to spend at this time.

Jon

Sent from my iPhone

On Mar 23, 2015, at 11:34 AM, John McIlvery <jmcilvery@stubbsalderton.com> wrote:

> I was left with the impression that we were waiting on additional signatures from Kessler and others to get the number closer to 50%. Will others be coming or is this the final tally the Board should consider?
>
> **From:** Rory Cattanach [mailto:Rory@wildlaw.ca]
> **Sent:** Monday, March 23, 2015 8:19 AM
> **To:** Sanjeev Patel; John McIlvery
> **Cc:** jon.nix@nixventurepartners.com
> **Subject:** RE: Xinergy - Shareholder Confirmations
>
> Hi John. Do you have updates as to status on your end? Best regards, Rory

Rory Cattanach
WILDEBOER DELLELCE LLP
Suite 800 | Wildeboer Dellelce Place
365 Bay Street, Toronto, ON M5H 2V1
T 416 361 4766 | F 416 361 1790
rory@wildlaw.ca | follow us on Twitter and LinkedIn

From: Sanjeev Patel
Sent: March-19-15 6:30 PM
To: 'John McIlvery'
Cc: Rory Cattanach; jon.nix@nixventurepartners.com
Subject: Xinergy - Shareholder Confirmations

John,

I am assisting Rory with this matter.

I understand that Xinergy is now has confirmations from shareholders holding 25,908,094 common shares of Xinergy representing approximately 39.4% of the outstanding shares (please see attached from the non-Nix related shareholders which has been forwarded to the company). In our view, the confirmations received to date provide a clear mandate of shareholders in order to support the Board changes as requested by Jon, particularly in light of the limitations on solicitations as the Board has previously recognized. In that regard, we believe that the orderly reconstitution of the Board should occur as soon as possible and we are prepared to move forward immediately and effect a seamless transition in the best interests of Xinergy.

Please advise at your earliest opportunity.

Regards,

Sanjeev

Sanjeev Patel
WILDEBOER DELLELCE LLP
Suite 800 | Wildeboer Dellelce Place
365 Bay Street, Toronto, ON M5H 2V1
T 416 361 4779 | F 416 361 1790
spatel@wildlaw.ca | follow us on Twitter and LinkedIn

EXHIBIT "K"

WILDEBOER
wildlaw.ca
DELLELCE LLP

DIRECT LINE: 416 361-4779
e-mail: spatel@wildlaw.ca

April 16, 2015

VIA COURIER

Xinergy Ltd.
c/o Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Attention: Each of the Directors of Xinergy Ltd. (the "Corporation")

Dear Sirs/Mesdames:

Re: Requisition of Meeting of Shareholders of the Corporation

We are counsel to Jon Nix (the "**Requisitioner**") in connection with the above noted matter. Further to recent discussions and correspondence among the Requisitioner and Wildeboer Dellelce LLP on the one hand, and the Corporation and its legal counsel on the other hand, please find enclosed a requisition (the "**Requisition**") pursuant to Section 105 of the *Business Corporations Act*, R.S.O. 1999, c. B.16 (the "**OBCA**") requisitioning the directors of the Corporation to call a meeting of the shareholders of the Corporation for the purposes set out in the Requisition (the "**Special Meeting**"). The Requisition is hereby delivered to the Corporation pursuant to Subsection 105(2) of the OBCA.

As you know, the Requisitioner holds not less than 5% of the issued shares of the Corporation that carry the right to vote at the Special Meeting. We confirm on behalf of the Requisitioner that if the Board of Directors of the Corporation determines that it is in the best interests of the Corporation to combine the business set out in the Requisition with the Corporation's annual general meeting to be held no later than June 30, 2015 (the "**Meeting Deadline**") as required by the OBCA, the Requisitioner does not intend to oppose such combination so long as such combined meeting is held prior to the Meeting Deadline.

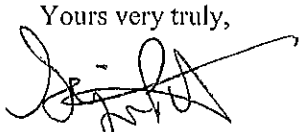
A brief biography of each of the proposed nominees for election as a director of the Corporation as set in the Requisition (other than current directors of the Corporation) has previously been sent to John McIlvery, the Corporation's external legal counsel. The Requisitioner and the newly proposed nominees will work with the Corporation to ensure that the information in respect of the newly proposed nominees that is required to be included in the management information circular to be prepared and mailed in connection with the Special Meeting (or a combined meeting, if applicable) is provided to the Corporation in a timely manner.

Please confirm to the undersigned by no later than **5:00 p.m. (ET) on Monday, April 20, 2015** (the "**Response Deadline**") whether the Corporation intends to combine the business set out in the Requisition with the Corporation's annual general meeting to be held on or before the Meeting Deadline or, if not, the date on which the Corporation intends to hold the Special Meeting. As you know, the Special Meeting must be called within 21 days following the Corporation's receipt of the Requisition. If the Corporation

determines not to combine the business set out in the Requisition with the Corporation's upcoming annual general meeting, or if the Corporation does not intend to hold the Special Meeting in a timeframe that is acceptable to the Requisitioner, or if the Corporation fails to respond to this letter by the Response Deadline, the Requisitioner intends to exercise all his rights under the OBCA to ensure that the Special Meeting is held in a timely manner including, without limitation, making application to the Superior Court of Justice for an order that the Special Meeting be held.

We look forward to the Corporation's timely response.

Yours very truly,



Sanjeev Patel
Enclosure

cc: Jon Nix (via email only)
John McIlvery (via email only)
Rory Cattanach (via email only)
Bernie Mason (via email only)

REQUISITION OF MEETING OF THE SHAREHOLDERS OF XINERGY LTD.

TO: **XINERGY LTD. (the "Corporation")**

AND TO: **EACH OF THE DIRECTORS OF THE CORPORATION**

The undersigned, being a holder of not less than 5% (five percent) of the issued shares of the Corporation that carry the right to vote at the meeting of shareholders sought to be held pursuant to this requisition, hereby requisitions the directors of the Corporation to call a meeting of shareholders of the Corporation (the "**Special Meeting**") for the following purposes:

(a) to consider and, if deemed advisable, to fix the number of directors to be elected at the Special Meeting at four (4);

(b) to consider and, if deemed advisable, pass an ordinary resolution to remove Todd Q. Swanson as a Director of the Corporation;

(c) to consider and, if deemed advisable, pass an ordinary resolution to remove Joseph Grois as a director of the Corporation;

(d) to consider and, if deemed advisable, pass an ordinary resolution to remove Mark Holliday as a director of the Corporation;

(e) to elect Jeffrey A. Wilson as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until his successor is duly elected or appointed;

(f) to elect Debra Powers as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until her successor is duly elected or appointed;

(g) to elect Robert James Metcalfe as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until his successor is duly elected or appointed;

(h) to elect Gregory L. "Dennis" Mason as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until his successor is duly elected or appointed; and

(i) to consider and, if deemed advisable, pass a special resolution empowering the board of directors of the Corporation to determine from time to time the number of directors within the minimum and maximum numbers provided in the articles of the Corporation.

This requisition is made pursuant to Section 103 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

Dated this 16th day of April, 2015.

Witness Charles W. Hite

John Nix

REQUISITION OF MEETING OF THE SHAREHOLDERS OF XINERGY LTD.

TO: **XINERGY LTD. (the "Corporation")**

AND TO: **EACH OF THE DIRECTORS OF THE CORPORATION**

The undersigned, being a holder of not less than 5% (five percent) of the issued shares of the Corporation that carry the right to vote at the meeting of shareholders sought to be held pursuant to this requisition, hereby requisitions the directors of the Corporation to call a meeting of shareholders of the Corporation (the "**Special Meeting**") for the following purposes:

(a) to consider and, if deemed advisable, to fix the number of directors to be elected at the Special Meeting at four (4);

(b) to consider and, if deemed advisable, pass an ordinary resolution to remove Todd Q. Swanson as a director of the Corporation;

(c) to consider and, if deemed advisable, pass an ordinary resolution to remove Joseph Groia as a director of the Corporation;

(d) to consider and, if deemed advisable, pass an ordinary resolution to remove Mark Holliday as a director of the Corporation;

(e) to elect Jeffrey A. Wilson as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until his successor is duly elected or appointed;

(f) to elect Debra Powers as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until her successor is duly elected or appointed;

(g) to elect Robert James Metcalfe as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until his successor is duly elected or appointed;

(h) to elect Gregory L. 'Bernie' Mason as a director of the Corporation to hold office until the close of the next annual meeting of shareholders or until his successor is duly elected or appointed; and

(i) to consider and, if deemed advisable, pass a special resolution empowering the board of directors of the Corporation to determine from time to time the number of directors within the minimum and maximum numbers provided in the articles of the Corporation.

This requisition is made pursuant to Section 105 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

Dated this 16th day of April, 2015.

)
)
)
)

_____ _____

Witness **Jon Nix**

From: INFO@QMS-TOR.COM [mailto:INFO@QMS-TOR.COM]
Sent: April-17-15 9:38 AM
Subject: Your Delivery #7970418 is Completed.

Hello,
Your delivery leaving from
WILDEBOER DELLELCE LLP, 365 BAY ST,TOR
going to
CASSELS BROCK & BLACKWELL LLP, 40 KING ST W,TOR
was delivered at 9:37 and signed for by FRANEK J
Any Questions--> Call 416.368.1623

EXHIBIT "L"

Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, ON Canada M5K 1K7
T 416.304.1616 F 416.304.1313

James H. Grout
T: 416-304-0557
E: jgrout@tgf.ca

April 22, 2015

Via Email

Michael Wunder
Cassels Brock & Blackwell LLP
Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Ryan Jacobs
Cassels Brock & Blackwell LLP
Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane Dietrich
Cassels Brock & Blackwell LLP
Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Dear Counsel:

Re: Xinergy Ltd.

We have been retained as counsel in the proceeding commenced by Xinergy Ltd. (the "Company") pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA Proceeding") by Jon Nix.

Mr. Nix notified the board of directors of the Company that it was his position that two of the directors ought to resign and be replaced well before the Company initiated proceedings under Chapter 11 of the United States Bankruptcy Code (the "Chapter 11 Proceeding"). The Company did not accede to Mr. Nix's position. Mr. Nix was not notified of the commencement of the Chapter 11 Proceeding. The dispute over the composition of the board of directors was not disclosed to the United Stated Bankruptcy Court.

The Company commenced an application under the *Companies' Creditors Arrangement Act* on April 14, 2015 to recognize the orders of the United States Bankruptcy Court. Mr. Castle swore the affidavit filed in support of the Application on April 15, 2015. The dispute over the composition of the board was not disclosed by the Company in those materials to the Ontario Court.

Mr. Nix holds not less than 5% of the issued shares of the Company that carry the right to vote. Mr. Nix requisitioned a meeting of the shareholders of the Company pursuant to Section 105 of the *Business Corporations Act* (Ontario) on April 16, 2015. We enclose a copy of a letter from corporate counsel for Mr. Nix to your firm dated April 16, 2015 enclosing the Requisition and requesting a response by the close of business on April 20, 2015. In its letter to your firm, corporate counsel to Mr. Nix advised you that Mr. Nix would, amongst other things, make application to the Superior Court of Justice for an Order directing that the Special Meeting requisition by Mr. Nix be held if the Company fails or refuses to do so.

The Company has not responded to the Requisition. The dispute over the composition of the board and the issuance of the Requisition was disclosed to the Ontario Court in the Preliminary Report of Deloitte Restructuring Inc. dated April 21, 2015.

Please advise us if the Company will hold the Special Meeting on a timely basis failing which we have been instructed to bring a motion to require the Company to hold the Special Meeting on a timely basis. We will attend upon the return of the Company's application under the CCAA tomorrow for recognition of the Orders of the United States Bankruptcy Court to advise the Court of our instructions and request that our motion be scheduled.

Yours very truly,

Thornton Grout Finnigan LLP

James H. Grout

JHG*pt
Encl.

cc: Jon Nix
Nix Venture Partners

cc: Rory Cattanach
Wilderboer Dellelce LLP

cc: Thomas Califano
DLA Piper LLP (US)

cc: Service List

EXHIBIT “M”

From: "Paget, Justin F." <jpaget@hunton.com>
Date: May 7, 2015 at 11:18:27 PM EDT
To: "'spatel@wildlaw.ca'" <spatel@wildlaw.ca>
Cc: "thomas.califano@dlapiper.com" <thomas.califano@dlapiper.com>, "Brown, Tyler" <tpbrown@hunton.com>, "Wunder, Michael" <mwunder@casselsbrock.com>, "Dietrich, Jane (jdietrich@casselsbrock.com)" <jdietrich@casselsbrock.com>
Subject: Xinergy Ltd.

Please see attached correspondence.

Regards,
Justin

Bio vCard

HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
RIVERFRONT PLAZA, EAST TOWER
951 EAST BYRD STREET
RICHMOND, VIRGINIA 23219-4074

TEL 804 • 788 • 8200
FAX 804 • 788 • 8218

TYLER P. BROWN
DIRECT DIAL: 804-788-8674
EMAIL: tpbrown@hunton.com

FILE NO: 85083.000003

May 7, 2015

VIA EMAIL AND U.S. MAIL

Sanjeev Patel, Esq.
Wildeboer Dellelce, LLP
Wildeboer Dellecle Place
365 Bay Street
Toronto, ON M5H 2V1

Re: Xinergy Ltd.

Dear Mr. Patel:

This firm represents Xinergy Ltd. ("Xinergy"), along with certain of its affiliates (collectively, the "Debtors"), in the chapter 11 bankruptcy proceedings that were commenced on April 6, 2015 (the "Petition Date"), in the United State Bankruptcy Court for the Western District of Virginia, as Case No. 15-70444 (PMB).

We have been provided a copy of your letter, dated April 16, 2015, on behalf of Mr. Jon Nix, that enclosed a requisition (the "Requisition"), pursuant to section 105 of the Business Corporations Act, R.S.O. 1999, c. B.16 (the "Corporations Act"), requisitioning the directors of Xinergy to call a special meeting of shareholders for the purposes of reconstituting the board of directors (the "Requested Special Meeting"). Specifically, the Requisition seeks to remove and/or replace three of the five current directors. The Requisition alternatively demands that the directors hold a combined meeting with its regular annual meeting by no later than June 30, 2015.

Xinergy has carefully reviewed and considered the Requisition and has determined that scheduling the Requested Special Meeting would not be in the best interests of Xinergy and the other Debtors at this time. Scheduling the Requested Special Meeting would be highly disruptive to operations and the restructuring process, costly to the estates and potential recoveries, risk default and termination of the Debtors' post-petition financing, and seriously jeopardize the Debtors' ability to continue as a going concern and reorganize through the chapter 11 cases.

HUNTON&
WILLIAMS

Xinergy also has determined, for the same reasons, not to hold a combined annual meeting and Requested Special Meeting by June 30, 2015.

The Debtors intend to seek relief in the U.S. Bankruptcy Court regarding the Requested Special Meeting.

Sincerely,

Tyler P. Brown

cc: Thomas R. Califano, Esq.
Cassels Brock & Blackwell LLP

EXHIBIT "N"

B104 (FORM 104) (08/07)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
XINERGY LTD., et al.	JON NIX
ATTORNEYS (Firm Name, Address, and Telephone No.) HUNTON & WILLIAMS LLP Riverfront Plaza, East Tower, 951 East Byrd Street Richmond, VA 23219; (804) 788-8200	**ATTORNEYS** (If Known) HIRSCHLER FLEISCHER, P.C. P.O. Box 500 Richmond, VA 23218; (804) 771-9500
PARTY (Check One Box Only) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Seeking declaratory relief under Bankruptcy Code section 362 and injunctive relief under Bankruptcy Code sections 105(a) and 362(a).

NATURE OF SUIT

(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☑ 71-Injunctive relief – imposition of stay
- ☑ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☑ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $ N/A

Other Relief Sought

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR XINERGY LTD., et al.	BANKRUPTCY CASE NO. 15-70444	
DISTRICT IN WHICH CASE IS PENDING Western District of Virginia	DIVISION OFFICE Roanoke	NAME OF JUDGE Judge Paul M. Black
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/ Tyler P. Brown		
DATE May 8, 2015	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Tyler P. Brown	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and **Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In re: **XINERGY LTD., *et al.*,** **Debtors.**[1]	**Chapter 11** **Case No. 15-70444 (PMB)** **(Jointly Administered)**
XINERGY LTD., *et al.*, **Plaintiffs,** **vs.** **JON NIX.** **Defendant.**	Adv. Pro. No. __-_____ (PMB) **Complaint for Injunctive and Declaratory Relief**

COMPLAINT OF DEBTORS AND DEBTORS IN POSSESSION FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER SECTIONS 105 AND 362 OF THE BANKRUPTCY CODE

Xinergy Ltd. and its affiliated debtors (collectively, the "Debtors" or "Plaintiffs"), by and through their undersigned counsel, file this complaint (the "Complaint") seeking an injunction and declaratory relief against Jon Nix (the "Defendant"), and respectfully allege:

[1] The Debtors, along with the last four digits of each Debtor's federal tax identification number, are listed on Schedule 1 attached hereto.

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Counsel to the Debtors
and Debtors in Possession

SUMMARY OF THE ACTION

The Debtors seek a declaration that Xinergy Ltd. has no obligation to hold a special shareholder meeting prior to confirmation of a plan or further order of the Court. This Court should declare that the automatic stay applies, or should be extended under section 105 of Title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (as amended, the "Bankruptcy Code") to apply, to stay any attempt by the Defendant to call and/or hold a special shareholder meeting of Xinergy Ltd. in order to change the composition of the board of directors of Xinergy Ltd (the "Board of Directors"). The Debtors seek an injunction, pursuant to section 105, prohibiting the Defendant from taking further actions to call or hold a special shareholder meeting.

The Board of Directors is duly constituted and acting in accordance with its fiduciary duties to guide the Debtors in their attempts to maximize value for the benefit of all stakeholders of the Debtors' estate. To fulfill its fiduciary duties, the Board of Directors is pursuing a bankruptcy reorganization strategy for the Debtors that will attempt to preserve the business as a going concern and reach an agreed restructuring plan with the major constituencies involved. The dynamics of the Debtors' business make it absolutely essential that the reorganization process move swiftly to minimize costs and business risk, and thereby provide the best chance to maximize the recoveries for all interested parties. Interference that delays the restructuring efforts will impose an unacceptable risk to the estates' stakeholders through increased restructuring costs, operational disruptions and uncertainty around its post-petition financing, thereby jeopardizing the Debtors' ability to reorganize as a going concern and exit bankruptcy.

The Defendant's self-serving agenda—manifested through a campaign of misinformation, interference and threats designed to reshape the Board of Directors to his personal preferences—presents exactly the type of risk that the Debtors' estates cannot

withstand. The Defendant has launched libelous accusations regarding the Board of Directors's alleged actions or inaction in the months leading up to the Debtors' bankruptcy filings and misrepresented the facts in pleadings filed with this Court and in oral argument at the hearing held on May 5, 2015. Upon information and belief, the Defendant has inappropriately sought and gained access to material non-public information of the Debtors, and misrepresented to the marketplace that he is acting for the Debtors when he has not held office since resigning in 2012 amidst allegations of mismanagement and unethical conduct. The Defendant seeks to inject conflicts of interests into the Debtors' corporate decision making by proposing to replace directors with a representative of a competitor and with a terminated employee of the Debtors. At the same time, upon information and belief, the Defendant is pursuing transactions with one or more of the Debtors' critical customers that may harm the Debtors' business. Each of these actions by the Defendant has disrupted, or is intended to disrupt, the Debtors' restructuring efforts. In sum, it is apparent that the Defendant's actions are misguided, contrary to the interests of the Debtors' estates, and not aimed simply at leveraging equity's bargaining position in these cases.

The Defendant has threatened to seek judicial relief in Canada if he does not get his way and cause further interruption by replacing the Debtors' professionals and management if and when he gains control of the Board of Directors. Those actions seek to derail or delay the Debtors' legal efforts to reorganize in a timely manner through the U.S. bankruptcy system. The Defendant's actions and threats not only will drive up the costs of the restructuring, but have interfered with and will significantly jeopardize the business operations and legitimate efforts of the Debtors to de-lever their balance sheet from the significant debt incurred while the Defendant

managed the company. Absent protection from the Defendant's interference, the Debtors' estates will suffer irreparable injury for which there is no adequate remedy at law.

JURISDICTION AND VENUE

1. On April 6, 2015 (the "Petition Date"), each of the Debtors filed with the Court their respective voluntary petitions for relief under chapter 11 of the Bankruptcy Code, commencing the above-captioned chapter 11 cases (the "Bankruptcy Cases").

2. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. No official committee of unsecured creditors has been appointed in the Bankruptcy Cases.

4. The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334(b).

5. This matter is a core proceeding pursuant to 28 U.S.C. §157 (b)(2)(A), (G) and (O).

6. The predicates for the relief requested herein are sections 362(a) and 105(a) of the Bankruptcy Code and Rule 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

7. The Debtors consent to entry of final orders and judgments by the Court in this adversary proceeding.

8. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL AND FACTUAL BACKGROUND

A. The Parties

9. Plaintiffs Xinergy Ltd. and its subsidiaries listed on Schedule 1 attached hereto are debtors and debtors in possession in the jointly administered Bankruptcy Cases.

10. A full description of the Debtors' business operations, corporate structures, capital structures, and reasons for commencing these cases, along with a corporate organizational chart, is set forth in full in the Declaration of Michael R. Castle in Support of Chapter 11 Petitions and Related Motions (the "Castle Declaration") [Doc. No. 18], which is attached hereto as Exhibit A.

11. The Defendant, an individual, is a resident of the state of Tennessee.

12. The Defendant founded Xinergy Corp. in March 2008 and served as the Chairman and Chief Executive Officer of Xinergy Ltd. from March 2008 until May 14, 2012.

13. Upon information and belief, the Defendant owns approximately eighteen percent (18%) of Xinergy Ltd.'s outstanding voting common shares.

14. On May 10, 2012, during the Defendant's tenure as Chairman and Chief Executive Officer of Xinergy Ltd., the Board of Directors of Xinergy Ltd. received a letter (the "FrontFour Letter"), attached hereto as Exhibit B, from a significant long-term shareholder, which also then held over $15 million of the Debtors' second-lien debt, alleging that "Xinergy has lost credibility with a significant portion of its investor base. It is our strong belief that [the Defendant] is the root cause of the mistrust … causing the Company to be viewed negatively and [the Defendant] to be characterized as an overzealous stock promoter…. We are also deeply troubled by the events at the board level that can only be described as a total disregard for corporate governance."

15. On May 14, 2012, four days after receipt of the FrontFour Letter by the Board of Directors, the Defendant resigned his position as Chairman and Chief Executive Officer.

16. Despite his resignation, the Defendant continues to this day to represent to the marketplace that he has authority to act for the Debtors, causing confusion or the potential for confusion concerning the direction of the companies, their intentions in the reorganization process, and with vendors and customers alike. The Defendant has attempted to negotiate with the Debtors' lenders and prospective lenders when he has no such authority to act for the Debtors. In addition, the Defendant somehow continues to acquire information concerning the Debtors' business operations, loan proposals and strategy that is not public information, thus giving him an unfair advantage, but also creating great risk to the Debtors' reorganization efforts.

B. The Board of Directors

17. The Board of Directors is duly constituted, and the Defendant has not alleged any deficiency in the appointment of any of its current members.

18. The Board of Directors has the fiduciary duty to advocate for all of the Debtors' stakeholders, not solely equity holders.

19. In satisfaction of its fiduciary duties, the Board of Directors is currently attempting to pursue a restructuring that de-levers the Debtors' balance sheet and allows the enterprise to continue as a going concern for the benefit of all of the Debtors' stakeholders.

20. In the *Limited Objection* [Doc. No. 124] filed by the Defendant to opposed final approval of the Debtors' DIP Facility, the Defendant libelously accused the Board of Directors of making business decisions that caused the deterioration in the Debtors' financial condition, which false accusations were reported in the press.

21. In open court at the hearing on May 5, 2015, the Defendant again asserted falsely that the Board of Directors failed to take action leading up to the bankruptcy filing to preserve the Debtors' liquidity.

B. The Debtors' Postpetition Financing

22. Knowing that they faced serious prepetition liquidity constraints, the Debtors sought a DIP Facility that would provide adequate liquidity for the Debtors to finance the costs of these Bankruptcy Cases and to provide the Debtors with sufficient operating liquidity to complete a quick restructuring and avoid the substantial costs associated with a prolonged restructuring process that likely would give rise to further liquidity issues.

23. On April 8, 2015, Xinergy Corp., and certain of the Debtors as guarantors, entered into that certain Superpriority Secured Debtor-In-Possession Credit Agreement (the "DIP Credit Agreement," a copy of which is attached hereto as Exhibit C and together with all agreements, documents, guarantees, certificates and instruments delivered or executed from time to time in connection therewith, as may be subsequently amended, restated, amended and restated, supplemented, or otherwise modified from time to time, collectively, the "DIP Documents") with affiliates of Whitebox Advisors LLC and Highbridge Capital Management, LLC, other lenders party thereto from time to time (collectively, the "DIP Lenders") and WBOX 2014-4 Ltd. (the "DIP Agent").

24. On May 5, 2015, this Court entered its *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€ and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363 and (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§*

361, 362, 363 and 364 [Doc. No. 43] (the "Final DIP Order"). A copy of the Final DIP Order is attached hereto as Exhibit D.

25. The Final DIP Order authorized and approved on a final basis, *inter alia*, the Debtors' entry into a postpetition credit facility up to an aggregate principal amount of $40,000,000 (the "DIP Facility") provided by the DIP Lenders, as further described in the DIP Documents, the Debtors' execution and delivery of the DIP Documents, the Debtors' immediate use of the proceeds of the DIP Facility as set forth in the Final DIP Order, and the DIP Agent's termination of the applicable DIP Documents upon the occurrence and continuance of an Event of Default (as defined in the Final DIP Order).

26. The DIP Credit Agreement provides that as a condition to providing the DIP Facility the DIP Lenders require the Debtors to meet certain milestones, *to wit*:

- by no later than seventy-five (75) days following the Petition Date, the Debtors shall file with the Bankruptcy Court in the Cases a proposed Acceptable Reorganization Plan[2] and a motion seeking approval of a disclosure statement for such Acceptable Reorganization Plan and solicitation procedures contemplating completion of a confirmation hearing which disclosure statement and solicitation procedures must otherwise be in form and substance reasonably acceptable to the DIP Agent and Majority Lenders;

- by no later than one hundred and twenty (120) days following the Petition Date, the Bankruptcy Court shall have entered an order approving a disclosure statement for an Acceptable Reorganization Plan and solicitation procedures contemplating completion of a confirmation hearing, which disclosure statement and solicitation procedures must otherwise be in form and substance reasonably acceptable to the DIP Agent and Majority Lenders, and the Bankruptcy Court's approval of such disclosure statement and solicitation procedures shall not have been amended, modified or supplemented (or any portions thereof reversed, stayed or vacated) other than as agreed in writing by Majority Lenders;

- by no later than one hundred and eighty (180) days following the Petition Date, the Bankruptcy Court shall have entered an order confirming an Acceptable Reorganization Plan, which order shall be in form and substance acceptable to DIP Agent and Majority Lenders in their sole discretion and shall not have been

[2] Capitalized terms used but not defined herein have the meaning ascribed to such terms in the DIP Credit Agreement. A complete list of milestones is set forth in Section 6.25 of the DIP Credit Agreement.

amended, modified or supplemented (or any portions thereof reversed, stayed or vacated) other than as agreed in writing by DIP Agent and Majority Lenders; and

- by no later than two hundred and ten (210) days following the Petition Date, the effective date of an Acceptable Reorganization Plan shall have occurred, and the order confirming the Acceptable Reorganization Plan.

Section 9.1(t) of the DIP Credit Agreement provides that if the Debtors fail to meet any of the milestones, it is an Event of Default.

27. Absent unanticipated improvements in the coal market, the Debtors do not believe that the current DIP Facility would provide sufficient liquidity to maintain operations for a lengthy period of time after the expiration of the milestones.

28. Section 9.1(f) of the DIP Credit Agreement provides that a Change in Control is an Event of Default. The DIP Credit Agreement defines a "Change in Control" as, *inter alia*:

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

29. The Change in Control provision is consistent with the change of control provision included in the Indenture governing the Second Lien Notes, a provision that was negotiated while the Defendant was Chairman and Chief Executive Officer of Xinergy Ltd.

30. Section 9.1(n) of the DIP Credit Agreement provides that it is an Event of Default if either Gregory L. "Bernie" Mason, the Chief Executive Officer of Xinergy Ltd., or Michael R. Castle, the Chief Financial Officer, cease to hold their current positions.

31. None of the foregoing provisions of the DIP Credit Agreement were agreed to by the Debtors for the purpose of denying the Defendant the right to exercise shareholder rights.

C. The Shareholder Requisition Notice

32. On or about April 16, 2015, the Debtors received a letter from counsel to the Defendant that enclosed a requisition (the "Requisition"). A copy of the Requisition is attached hereto as Exhibit E.

33. The Requisition demands that the Board of Directors call a meeting of shareholders for the purpose of reconstituting the Board of Directors.

34. The Requisition specifically seeks to remove and/or replace three of the five current board members.

35. Counsel to the Defendant indicated to special counsel to the Debtors that the Defendant has not decided whether to attempt to replace additional board members.

36. The Requisition proposes to elect two new members, Mr. Jeffrey A. Wilson and Ms. Debra Powers, to the Board of Directors.

37. Upon information and belief, Mr. Wilson currently serves as the top executive of a competitor of the Debtors.

38. As such, in the unlikely event Mr. Wilson would even agree to serve, he would have numerous conflicts of interest in attempting to discharge his duties as a member of the Board of Directors, which would cast a shadow of doubt over corporate decisions made by a reconstituted Board of Directors.

39. Ms. Powers served the Debtors previously as acting interim Chief Financial Officer beginning in January 2009, and then as Vice-President of Finance, and Corporate Treasurer and Controller until her employment was terminated by the Debtors in February 2012.

40. If Ms. Powers is appointed to the Board of Directors, the Debtors' current Controller has indicated to the Debtors' Chief Financial Officer that she would resign, which would cause significant disruption to the Debtors' business.

41. The Debtors believe other personnel also may leave the employ of the Debtors if Ms. Powers is appointed, or if the Defendant otherwise controls the Board of Directors, further damaging the Debtors' business.

42. The Requisition demands that the Board of Directors call the special meeting or hold a combined meeting with its regular annual meeting by June 30, 2015.

43. The Requisition further states that in the event the Board of Directors determines it would not be advisable to hold a special meeting prior to the June 30 deadline, the Defendant intends to exercise all of his rights under applicable Canadian corporate law to ensure that a special meeting is held in a timely manner, including, without limitation, by making an application to the Ontario Superior Court of Justice (the "Superior Court") for an order that the special meeting be held.

44. Upon information and belief, Canadian laws require a minimum notice period for establishing a record date and providing notice of a shareholder meeting.

45. Separately, counsel to the Defendant indicated to counsel to the Debtors on a telephone call on or about April 27, 2015 that, following the shareholder meeting requested in the Requisition, the Defendant intends to replace the professionals retained by the Debtors in the Bankruptcy Cases.

46. On May 7, 2015, the Debtors responded to the Requisition through a letter (the "Response Letter") from their counsel to the Defendant's Canadian counsel, indicating that the Board of Directors had reviewed and considered the Requisition, but declined to call a special shareholder meeting of Xinergy Ltd. because, among other reasons, it would seriously jeopardize the Debtors' prospects for successfully reorganizing through these Bankruptcy Cases to the

detriment of all of the estates' stakeholders. A copy of the Response Letter is attached hereto as Exhibit F.

D. The Canadian Recognition Proceedings

47. Following the Petition Date, the Debtors filed an application with the Superior Court under the Companies' Creditors Arrangement Act (CCAA) (the "CCAA Application") seeking recognition of the Interim DIP Order and certain other orders entered by this Court.

48. The Superior Court held a hearing on the CCAA Application on April 23, 2015.

49. The Superior Court entered an Initial Recognition Order (Foreign Main Proceeding), dated April 23, 2015 (the "Initial Recognition Order"), recognizing these Bankruptcy Cases as a "foreign main proceeding" as defined in section 45 of the CCAA. A copy of the Initial Recognition Order is attached hereto as Exhibit G.

50. The Superior Court entered a Supplemental Order (Foreign Main Proceeding), dated as of April 23, 2015 (the "Supplemental Recognition Order"), recognizing the Interim DIP Order and certain other orders entered in these Bankruptcy Cases. A copy of the Supplemental Recognition Order is attached hereto as Exhibit H.

51. The Superior Court entered its Reasons for Judgment on April 24, 2015 (the "Reasons for Judgment"), providing its reasons for signing the Initial Recognition Order and the Supplemental Recognition Order. A copy of the Reasons for Judgment is attached hereto as Exhibit I.

52. The Defendant appeared by counsel at the CCAA recognition hearing before the Superior Court and advised the Judge that the Defendant may be raising issues with respect to governance and a shareholders meeting under the corporate statute.

53. Neither the Initial Recognition Order, the Supplemental Recognition Order, nor the Reasons for Judgment grant any relief to the Defendant or make any reference to the dispute.

54. The next hearing in the CCAA recognition proceeding is scheduled for May 21, 2015, when the Debtors will seek an order from the Superior Court recognizing the Final DIP Order, among other orders entered by this Court following the hearing on May 5, 2015.

55. The Defendant has reserved time at the upcoming May 21 hearing in the CCAA proceeding, but as of the date of this Complaint, the Debtors have not received service of any motion from the Defendant and no evidence has been put before the Superior Court by the Defendant.

56. Upon information and belief, if the Defendant were successful in obtaining an order from the Superior Court at the May 21 hearing permitting the Defendant to hold a special shareholder meeting, the meeting could not be held until at least late June or early July—likely after the Debtors file a chapter 11 plan—in order to comply with the notice requirements imposed by Canadian law.

E. The Debtors' Equity Interests and Debt

57. Just prior to the commencement of the Bankruptcy Cases, Xinergy Ltd.'s share price was quoted at C$0.02.[3]

58. The Toronto Stock Exchange listed outstanding common shares of 58,304,482. The total market cap of Xinergy Ltd. as of the Petition Date was approximately C$1.17 million (approximately $971,100 in U.S. Dollars at current exchange rates).

59. Currently, there is approximately $195 million outstanding under the Second Lien Notes, which debt was incurred while the Defendant served as Chairman and Chief Executive Officer of Xinergy Ltd.

60. There is approximately $40 million currently outstanding on the DIP Facility.

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[3] A stock quotation can be viewed at http://web.tmxmoney.com/quote.php?locale=en&qm_symbol=XRG.

F. The Debtors' Reorganization Efforts

61. The Debtors' primary objective in the Bankruptcy Cases is to maximize the value of their estates for the benefit of the Debtors' creditors and other stakeholders, including preserving the Debtors' business as a going concern through a short, efficient restructuring process.

62. Due to the fragility of the Debtors' business while in bankruptcy, these cases must proceed on a fast track. The Debtors faced a liquidity crisis prior to the bankruptcy filings due to a rapid deterioration in the price commanded for coal of the types produced by the Debtors. The Debtors were able to secure postpetition financing that will allow them to restructure the companies provided they can proceed in a timely manner. Any delay in the reorganization process will cause the incurrence of significant additional costs, expose the Debtors to greater market risk, and could lead to another liquidity crisis. The Debtors believe they currently are situated to complete a successful restructuring in the time projected, but any delays expose these estates to great risk.

63. The Debtors must file a chapter 11 plan acceptable to the DIP Agent and majority of the DIP Lenders in less than forty-five (45) days in order to comply with the milestones set forth in the DIP Credit Agreement.

64. To comply with the milestones in the DIP Credit Agreement, the plan must be confirmed less than three months later and the plan must become effective by October 2015.

65. Under the direction of the current Board of Directors, the Debtors have made significant progress in these Bankruptcy Cases, including, without limitation, (i) successfully obtaining approval of the DIP Facility on a final basis, (ii) negotiating and obtaining consent from the majority of the Debtors' critical vendors to payment plans and the continued provision

of goods and services to the Debtors on ordinary terms, (iii) successfully negotiating with utility providers over deposits and the continued provision of utility services, and (iv) obtaining approval on a final basis of motions allowing the Debtors to continue critical aspects of their business, including the payment of employee wages and taxes, maintenance of insurance and surety programs, continuation of their cash management system and the employment of professionals.

66. With the assistance of the Debtors' professionals, the Debtors are in the midst of preparing a restructuring proposal to submit to the bondholders and DIP Lenders for their consideration. Negotiation of the restructuring proposal will have occurred long before any special shareholder meeting could be held. The Debtors also anticipate filing the plan before shareholder meeting could be held.

67. Upon information and belief, in an effort to disrupt the Debtors' restructuring efforts, since the Petition Date, the Defendant has inappropriately obtained material, non-public information of the Debtors. The Defendant has had conversations with the Debtors' lenders and prospective lenders and attempted to negotiate terms of loans to the Debtors and terms of a restructuring plan, even though the Defendant has no authority from the Debtors to do so.

68. Upon information and belief, in further effort to disrupt the Debtors' restructuring efforts, since the Petition Date, the Defendant has contacted one or more of the Debtors' most important customers in an attempt to raise financing for a transaction for himself, which risks harm to the Debtors' business interests.

CLAIMS FOR RELIEF

COUNT I
(Declaratory Relief – Bankruptcy Code Section 362)

69. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 68 above as if fully set forth herein.

70. This is a claim for declaratory relief and there exists a substantial controversy between the Debtors and the Defendant of sufficient immediacy and reality to warrant the issuance of declaratory judgment under 28 U.S.C. § 2201.

71. The Debtors seek a declaration that the Requisition and any further attempt by the Defendant to call and/or hold a special shareholder meeting of Xinergy Ltd. is subject to the automatic stay of section 362(a)(1) and/or (a)(3) of the Bankruptcy Code.

72. Section 362(a)(1) of the Bankruptcy Code operates as a stay, "applicable to all entities," of "the commencement or continuation . . . 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." 11 U.S.C. § 362(a)(1).

73. Section 362(a)(3) of the Bankruptcy Code prohibits "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." 11 U.S.C. § 362(a)(3).

74. Pursuant to the automatic stay imposed by the Bankruptcy Code, the Defendant was and is prohibited from taking any actions that improperly interfere with the property of the Debtors' estates.

75. Any motion or other judicial proceeding filed in Canada against the Debtors, including the anticipated motion to be filed by the Defendant in advance of the May 21, 2015 hearing before the Superior Court, is subject to section 362(a)(1) of the Bankruptcy Code.

76. Xinergy Ltd. is the parent company of each of the other Debtors.

77. Xinergy Ltd., through itself or one of its wholly owned subsidiaries, is the 100% owner of each of the other Debtors.

78. Xinergy Ltd. does not have any operating assets.

79. The Defendant is a shareholder of Xinergy Ltd., but does not have any ownership interest in any of the other Debtors.

80. The Requisition and the calling of a special shareholder meeting is an attempt by the Defendant to reconstitute the Board of Directors in order to direct and control the Debtors' operating assets owned by the Debtor subsidiaries of Xinergy Ltd.

81. If successful in reconstituting the Board of Directors, the Defendant intends to cause Xinergy Ltd. to exercise its rights to replace directors, members and/or managers of the Debtor subsidiaries of Xinergy Ltd. and to replace key members of the Debtors' management team and its professional advisors.

82. These actions by the Defendant are attempts to exercise control over property of the Debtors' estates.

83. Accordingly, the Debtors are entitled to a declaration that the automatic stay of section 362(a) of the Bankruptcy applies to any attempt by the Defendant to call a special shareholder meeting of Xinergy Ltd., including through any motion or other judicial proceeding filed in the Superior Court.

COUNT II
(Declaratory Relief – Bankruptcy Code Sections 105(a) and 362(a))

84. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 68 above as if fully set forth herein.

85. This is a claim for declaratory relief and there exists a substantial controversy between the Debtors and the Defendant of sufficient immediacy and reality to warrant the issuance of declaratory judgment under 28 U.S.C. § 2201.

86. Section 105(a) of the Bankruptcy Code authorizes the Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

87. Section 362(a) operates as a stay that protects the Debtors and property of the estate.

88. Relief under sections 105(a) and 362(a) is particularly appropriate in this case where the Debtors require relief that is necessary in order to preserve the Debtors' reorganization prospects.

89. The actions that the Defendant proposes in the Requisition will cause real and significant harm to the Debtors' estate because they interfere with and pose a substantial risk to the Debtors' ability to pursue a successful restructuring.

90. A calling of a special shareholder meeting of Xinergy Ltd. as set out in the Requisition and the follow-through by the Defendant in his stated intentions may, among other things, (i) disrupt the Debtors' operations so as to cause a deterioration in the financial performance of the Debtors, (ii) require the Debtors to incur unnecessary costs, (iii) trigger a "Change in Control," (iv) cause the resignation or replacement of certain members of the Debtors' senior management, (v) distract the Debtors and their professionals from successfully

pursuing a restructuring plan in a timely manner, (vi) cause the Debtors to miss the milestones contained in the DIP Credit Agreement, (vii) cause uncertainty with the Debtors' vendors and creditors over the direction of the business and reorganization efforts, and (viii) otherwise diminish the value of the Debtors to the detriment of all constituencies of the estates.

91. Each of the circumstances listed in the preceding paragraph also could give rise to or constitute an Event of Default under the DIP Credit Agreement.

92. The occurrence of an Event of Default could cause the termination of the DIP Facility, which would seriously jeopardize the Debtors' ability to continue as a going concern and reorganize through the chapter 11 cases.

93. Appointment of the Defendants' proposed nominees, Mr. Wilson and Ms. Powers, to the Board of Directors would impair the Board of Directors' ability to conduct responsible corporate governance and the ability of the Debtors' management to continue operations uninterrupted due to the introduction of potential conflicts of interest and distrust, and the potential resignation of one or more key members of the Debtors' management, thereby causing substantial harm to the value of the Debtors' estates.

94. The costs of calling and noticing a special shareholder meeting of Xinergy Ltd., including without limitation, associated attorneys' fees and costs of U.S. and Canadian counsel will be significant, thereby depleting the estates' property.

95. The Debtors also lack authority under the DIP Credit Agreement to incur the costs associated with calling a special shareholder meeting.

96. It would be a significant burden on senior management to prepare for and participate in a special shareholder meeting of Xinergy Ltd. while the Debtors are in the midst of

addressing critical issues imperative to a successful restructuring and continued operation of the business as a going concern.

97. Even if the Defendant were able to call a special shareholder meeting of Xinergy Ltd., the advance notice required to call the meeting would mean that a reconstituted board of directors would have insufficient time to propose an amended or new restructuring plan and still satisfy the milestones set forth in the DIP Credit Agreement.

98. Previous actions by the Defendant have indicated that he is motivated to serve his own personal interests without regard to the interests of other stakeholders, which would present serious risks to the success of the Debtors' restructuring efforts if the Debtors are required to comply with the Requisition.

99. Accordingly, the Debtors are entitled to a declaration that the Debtors shall not be required to hold a special meeting of shareholders of Xinergy Ltd. to consider a change to the members of the Board of Directors until a reorganization plan becomes effective or upon further order of this Court.

COUNT III
(Injunctive Relief – Bankruptcy Code Sections 105(a) and 362(a))

100. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 68 above as if fully set forth herein.

101. Section 105(a) of the Bankruptcy Code authorizes the Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

102. Section 362(a) operates as a stay that protects the Debtors and property of the estate.

103. Relief under sections 105(a) and 362(a) is particularly appropriate in this case where the Debtors require relief that is necessary in order to preserve the Debtors' reorganization prospects.

104. Absent an order enjoining the Requisition, the Debtors will suffer irreparable harm due to any attempt to call a special meeting of shareholders to change the members of the Board of Directors,

105. A calling of a special shareholder meeting of Xinergy Ltd. as set out in the Requisition and the follow-through by the Defendant in his stated intentions may, among other things, (i) disrupt the Debtors' operations so as to cause a deterioration in the financial performance of the Debtors, (ii) require the Debtors to incur unnecessary costs, (iii) trigger a "Change in Control," (iv) cause the resignation or replacement of certain members of the Debtors' senior management, (v) distract the Debtors and their professionals from successfully pursuing a restructuring plan in a timely manner, (vi) cause the Debtors to miss the milestones contained in the DIP Credit Agreement, (vii) cause uncertainty with the Debtors' vendors and creditors over the direction of the business and reorganization efforts, and (viii) otherwise diminish the value of the Debtors to the detriment of all constituencies of the estates.

106. Each of the circumstances listed in the preceding paragraph also could give rise to or constitute an Event of Default under the DIP Credit Agreement.

107. The occurrence of an Event of Default could cause the termination of the DIP Facility, which would seriously jeopardize the Debtors' ability to continue as a going concern and reorganize through the chapter 11 cases.

108. Appointment of the Defendants' proposed nominees, Mr. Wilson and Ms. Powers, to the Board of Directors would impair the Board of Directors' ability to conduct responsible

corporate governance and the ability of the Debtors' management to continue operations uninterrupted due to the introduction of potential conflicts of interest and distrust, and the potential resignation of one or more key members of the Debtors' management, thereby causing substantial harm to the value of the Debtors' estates.

109. The costs of calling and noticing a special shareholder meeting of Xinergy Ltd., including without limitation, associated attorneys' fees and costs of U.S. and Canadian counsel will be significant, thereby depleting the estates' property.

110. It would be a significant burden on senior management to prepare for and participate in a special shareholder meeting while the Debtors are in the midst of addressing critical issues imperative to a successful restructuring and continued operation of the business as a going concern.

111. Even if the Defendant were able to call a special shareholder meeting of Xinergy Ltd., the advance notice required to call the meeting would mean that a reconstituted board of directors would have insufficient time to propose an amended or new restructuring plan and still satisfy the milestones set forth in the DIP Credit Agreement.

112. Previous actions by the Defendant have indicated that he is motivated to serve his own personal interests without regard to the interests of other stakeholders, which would present serious risks to the success of the Debtors' restructuring efforts if the Debtors are required to comply with the Requisition.

113. The likelihood of the irreparable harm to the Debtors' estates outweighs any harm to the Defendant, who will only be enjoined temporarily from exercising these limited shareholder rights and will still be able to participate in the restructuring process, including appearing and being heard at any hearings.

114. Granting the requested injunction is in the public's best interest because it will preserve the resources and interests of the Debtors, give effect to the automatic stay, and facilitate the Debtors' successful reorganization.

115. Allowing the Defendant to call a special shareholder meeting of Xinergy Ltd. to change the members of the Board of Directors, on the other hand, will risk causing significant harm to the value of the Debtors' estate at the expense of all stakeholders in the Bankruptcy Cases.

116. The Debtors lack an adequate remedy at law.

117. Accordingly, good cause exists for entry of injunctive relief under sections 105(a) and 362(a) of the Bankruptcy Code and Bankruptcy Rule 7065 against the Defendant enjoining the Requisition and the calling of a special shareholder meeting until confirmation of the Debtors' restructuring plan or further order of this Court.

WHEREFORE, the Debtors respectfully request relief as follows:

1) For a determination and judgment on Count I of this Complaint declaring that the automatic stay of section 362(a) of the Bankruptcy Code is applicable to stay the Requisition and any attempt to call a special shareholder meeting of Xinergy Ltd. to change the member of the Board of Directors or for any other matters, including through the filing of a motion or other judicial proceeding with the Superior Court;

2) For a determination and judgment on Count II of this Complaint pursuant to sections 105(a) and 362(a) declaring (i) that the Debtors shall not be required to hold a special shareholder meeting of Xinergy Ltd. until a reorganization plan is confirmed or upon further order of the Court, (ii) that if called by the Defendant, the meeting does not have to be held, and (iii) that if held notwithstanding the foregoing, such meeting would have no effect;

3) For a determination and judgment on Count III of this Complaint that the Debtors are entitled to temporary and/or preliminary and permanent injunctive relief under sections 105(a) and 362(a) of the Bankruptcy Code and Bankruptcy Rule 7065 enjoining the Requisition and the Defendant from taking any further action to call or hold a special shareholder meeting

of Xinergy Ltd. until a reorganization plan is confirmed or upon further order of the Court;

4) For costs of suit incurred herein; and

5) That such order and further relief be awarded as this Court deems just and appropriate

DATED: May 8, 2015

Respectfully submitted,

/s/ Tyler P. Brown

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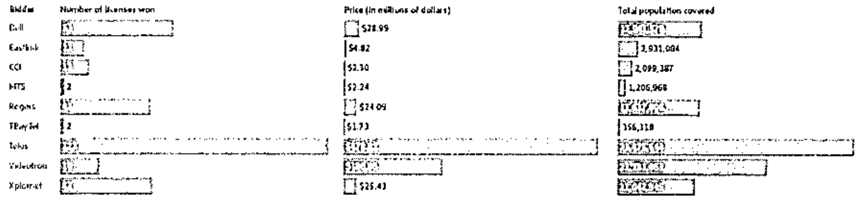
SCHEDULE 1

Debtor Entities

1. Xinergy Ltd. (3697)
2. Xinergy Corp. (3865)
3. Xinergy Finance (US), Inc. (5692)
4. Pinnacle Insurance Group LLC (6851)
5. Xinergy of West Virginia, Inc. (2401)
6. Xinergy Straight Creek, Inc. (0071)
7. Xinergy Sales, Inc. (8180)
8. Xinergy Land, Inc. (8121)
9. Middle Fork Mining, Inc. (1593)
10. Big Run Mining, Inc. (1585)
11. Xinergy of Virginia, Inc. (8046)
12. South Fork Coal Company, LLC (3113)
13. Sewell Mountain Coal Co., LLC (9737)
14. Whitewater Contracting, LLC (7740)
15. Whitewater Resources, LLC (9929)
16. Shenandoah Energy, LLC (6770)
17. High MAF, LLC (5418)
18. Wise Loading Services, LLC (7154)
19. Strata Fuels, LLC (1559)
20. True Energy, LLC (2894)
21. Raven Crest Mining, LLC (0122)
22. Brier Creek Coal Company, LLC (9999)
23. Bull Creek Processing Company, LLC (0894)
24. Raven Crest Minerals, LLC (7746)
25. Raven Crest Leasing, LLC (7844)
26. Raven Crest Contracting, LLC (7796)

EXHIBIT "O"

Provisional results for 2500 MHz auction



THE GLOBE AND MAIL » SOURCE: INDUSTRY CANADA

FROM PAGE 1

Wireless: 'It isn't easy to do rural broadband'

» "The more growth we want to do, the more access to capital we evaluate. And there's certainly private and public options today," he said when asked whether the private company would consider an initial public offering. "We haven't declared we'll do anything, because we've had very supportive private investors to this point."

Xplornet's investors – which include the Barrett family from New Brunswick, New York-based Sandler Capital Management and McKenna Gale Capital Inc. in Toronto – have committed or spent more than $1-billion since the company launched in 2004, he said.

Even as Xplornet works to upgrade to higher speed services, it has faced criticism in recent months from New Brunswick resident Brooke DeCosta Young, who is behind grassroots lobby group Citizens for Rural Wire-Line Broadband Internet. In dozens of e-mails to federal and provincial politicians and policymakers, the group has expressed concerns about Canadians in rural areas not having access to the higher Internet speeds and capacities offered by fibre-optic-cable-based systems.

Not including satellite services, 84 per cent of rural households had access to Internet service with download speeds of between 1.5 Mbps and 5 Mbps in 2013.

Mr. Lenehan said he supports "anybody interested in furthering rural broadband," but added that "it isn't easy to do rural broadband."

"We've been at it a long time, we think we've done some good things, but we also know that broadband continues to evolve and we need to keep pace with it. That's why we're making this investment today," he said.

Through the Industry Canada Twitter account and a press release Tuesday, the government said the auction results would mean better and cheaper service for Canadians "especially those in rural areas."

In another sign that more cellular competition could be on the horizon, Quebecor Inc.'s Videotron acquired licences across in Quebec as well as Toronto, Edmonton, Calgary and Vancouver, adding to speculation that it could partner with fellow upstart Wind Mobile to challenge the Big Three. Videotron has been considering an expansion outside of Quebec since it purchased spectrum in Ontario, British Columbia and Alberta in an auction last year, and said Tuesday it is still "analyzing various options."

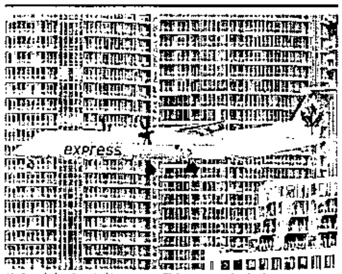
Wind founder and former CEO Anthony Lacavera said he believes "it continues to be important, from my perspective, that new entrants continue to co-operate." Wind did not win any 2,500 MHz spectrum licences.

Barclays Capital analyst Phillip Huang suggested the outcome could encourage renewed discussions between the companies. "By acquiring more key spectrum across Canada, Videotron is effectively increasing its bargaining chips to negotiate a partnership with Wind in the future," he wrote in a research note.

WHAT'S THE WORD

Wireless - spectrum

Definition : *Spectrum* refers to the mostly invisible waves of the electromagnetic spectrum – a range of frequencies that spans radio and cellphone signals, infrared and ultraviolet light, and X-rays and gamma rays. Spectrum is a public resource and as demand for mobile data soars, wireless operators are willing to spend extensively on usage licences for the valuable airwaves.


Air Canada has boosted its summer flights as a result of U.S. cuts to capacity on routes flying to Canada and elsewhere. MARK NACHBERUTTES

FROM PAGE 1

Air Canada: Drop in oil prices has reduced demand in Houston

» Among the airlines that have cut routes to Canada is United, which has discontinued service to several Canadian cities, including Houston and Chicago to Halifax and Newark, N.J., to Edmonton, Chicago to Thunder Bay, Ont., and Regina, as well as Denver to Saskatoon.

Jim Compton, chief revenue officer of United Continental Holdings Inc., parent of United, said on that airline's conference call last month that it's cutting back flights out of Houston in part because the drop in oil prices has reduced demand. Revenue per available seat mile dropped 5 per cent in the first quarter out of Houston, Mr. Compton said, so the airline is reducing flights to Canada and North Dakota, a key centre of Bakken oil field production.

U.S. airlines cut capacity in the first quarter by 11 per cent overall, Air Canada said. United cut by 22 per cent, Alaska Airlines 21 per cent and American Airlines 8 per cent.

Air Canada has boosted its summer flights as a result. It's adding four flights a week between Montreal and Los Angeles and upgrading one of its seven daily Toronto-Los Angeles flights to a larger Boeing 777 plane from a 767.

"We're going to put a 767 on Vancouver-Los Angeles, a lot of great lift out of California, all over Florida, over Texas, out of New York, Chicago, all looking good for us right now," Mr. Smith said.

"Our geography is in a great position to take advantage of this."

That increase may be a mistake, said one airline industry analyst, who wondered how Air Canada, which has higher costs and higher break-even points than U.S. carriers, will be able to when the U.S. airlines did not.

"In the first quarter of 2015, passenger demand on U.S. sun routes and from Western Canada to the Western U.S. was particularly strong," Air Canada said in regulatory filings made Tuesday.

Air Canada's transborder revenue grew 17 per cent in the first quarter, compared with a 7 per cent increase overall.

That contributed to record first-quarter adjusted profit of $122-million or 41 cents a share, compared with a loss of $12-million or 46 cents a year earlier.

The airline narrowed its net loss to $309 million or $1.08 from $321-million or $1.10.

Greg Taylor, portfolio manager at Avalon Capital Management in Toronto, believes the Air Canada narrative has shifted from low fuel costs to a much healthier cost structure.

The airline is also boosting capacity without reducing fares and is not engaged in a price war with domestic rival WestJet Airlines Ltd., Mr. Taylor said.

"Now much of the growth is coming from higher margin international markets," he said.

> **We're going to put a 767 on Vancouver-Los Angeles, a lot of great lift out of California, all over Florida, over Texas, out of New York, Chicago**
>
> **Ben Smith**
> *President of passenger airlines Air Canada*

With files from reporter Bertrand Marotte in Montreal.

Air Canada (AC)

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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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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(COMMERCIAL LIST)

Proceedings commenced at **Toronto**

MOTION RECORD
(Re: Shareholder Meeting)
(returnable on May 21, 2015)

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