

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

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

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE  
UNITED STATES BANKRUPTCY COURT WITH RESPECT TO XINERGY LTD.

APPLICATION OF XINERGY LTD.  
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C 36, AS AMENDED

FACTUM OF THE APPLICANT

April 21, 2015

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FACTUM OF THE APPLICANT

PART I – OVERVIEW

1. On April 6, 2015, Xinergy Ltd. ("**Xinergy**" or the "**Applicant**") commenced a voluntary reorganization proceeding (the "**Chapter 11 Proceeding**") in the United States Bankruptcy Court for the Western District of Virginia (the "**U.S. Court**") by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**").<sup>1</sup>
2. On the same date, 25 of Xinergy's U.S. subsidiaries also filed voluntary petitions under chapter 11 of the Bankruptcy Code with the U.S. Court (the "**U.S. Subsidiaries**" and, collectively with Xinergy, the "**Chapter 11 Debtors**").
3. Xinergy has certain assets in Ontario and sought an order from the U.S. Court authorizing Xinergy to act as the foreign representative for the Chapter 11 Debtors, pursuant to section 1505 the Bankruptcy Code, in any judicial or other proceeding, including these proceedings. The order was granted by the U.S. Court on April 7, 2015.<sup>2</sup> Xinergy is the only applicant in this proceeding and the remaining Chapter 11 Debtors are not seeking relief from this Court at this time.

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<sup>1</sup> A copy of the petition filed by Xinergy is attached to the Affidavit of Michael R. Castle sworn April 15, 2015, in support of the Application [*Castle Affidavit*].

<sup>2</sup> A copy of the order appointing the foreign representative is attached to the Castle Affidavit.

4. In order to ensure: (i) the protection of the Xinergy's Canadian assets during the course of the Chapter 11 Proceeding; and (ii) that this Court and the Canadian stakeholders are kept properly informed of the Chapter 11 Proceeding, Xinergy has brought an Application before this Court pursuant to Part IV of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"), seeking the following orders:

- (a) An "Initial Recognition Order" *inter alia*: (i) declaring that Xinergy is a "foreign representative" as defined in section 45 of the CCAA; (ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and (iii) granting a stay of proceedings against Xinergy; and
- (b) A "Supplemental Order" pursuant to section 49 of the CCAA, *inter alia*: (i) recognizing in Canada and enforcing certain orders of the U.S. Court made in the Chapter 11 Proceeding; (ii) appointing Deloitte Restructuring Inc. ("**Deloitte**") as the information officer in respect of this proceeding (in such capacity, the "**Information Officer**"); (iii) staying any claims, rights, liens or proceedings against or in respect of Xinergy, the business and property of Xinergy and the directors and officers of Xinergy; (iv) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to Xinergy; (v) granting a super-priority charge up to the maximum amount of \$100,000, over the Canadian assets of Xinergy, in favour of the Information Officer and its counsel, as security for their professional fees and disbursements incurred in respect of these proceedings (the "**Administration Charge**"); and (vi) granting a super-priority charge (subordinate only to the Administration Charge) in favour of the postpetition lender under the postpetition credit facility (the "**DIP Facility**") approved by the U.S. Court.

## **PART II - BACKGROUND**

### **Business of the Applicant**

5. The Chapter 11 Debtors are a U.S.-based producer of metallurgical and thermal coal with mineral reserves, mining operations and coal properties located in the Central Appalachian ("**CAPP**") regions of West Virginia and Virginia. The Chapter 11 Debtors' principal operations include two active mining complexes known as South Fork and

Raven Crest located in Greenbrier and Boone Counties, West Virginia. The Chapter 11 Debtors also lease or own the mineral rights to properties located in Fayette, Nicholas and Greenbrier Counties, West Virginia and Wise County, Virginia. Collectively, the Chapter 11 Debtors lease or own mineral rights to approximately 72,000 acres with proven and probable coal reserves of approximately 77 million tons and additional estimated reserves of 40 million tons.<sup>3</sup>

6. The Chapter 11 Debtors currently produce and ship coal from the South Fork mid-volatile metallurgical mine and the Raven Crest thermal operations. The Chapter 11 Debtors' primary customers for metallurgical coal—used in a chemical process that yields coke for the manufacture of steel—are steel producers, commodities brokers and industrial customers throughout North America, Europe and South America. Electric utilities and industrial companies in the southeastern United States and Europe are the principal customers for the Chapter 11 Debtors' thermal coal.<sup>4</sup>
7. Xinergy is incorporated pursuant to the laws of the Province of Ontario. The U.S. Subsidiaries are incorporated under the laws of various U.S. states including Tennessee, Kentucky, Virginia, West Virginia and Delaware.<sup>5</sup>
8. The corporate headquarters and head office of Xinergy is located at 8351 E. Walker Springs Lane, suite 400, Knoxville, Tennessee and the registered office is located at 2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3C2, which is the office of Xinergy's Canadian solicitors, Cassels Brock & Blackwell LLP.<sup>6</sup>
9. Xinergy has issued US\$200 million in 9.25% Senior Secured Notes (the "**Second Lien Notes**"), of which approximately US\$195 million (principal amount) is outstanding. As of the Petition Date, Xinergy was also obligated under two term loans totalling US\$20 million in principal amount (the "**First Lien Loans**"). On April 1, 2015, the First Lien Loans were validly assigned to the DIP Lenders (as defined in the Castle Affidavit). As described in the Castle Affidavit, the First Lien Loans have been refinanced in

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<sup>3</sup> *Castle Affidavit*, *supra* note 1 at para 6.

<sup>4</sup> *Ibid* at para 7.

<sup>5</sup> *Ibid* at para 8, Exhibit "C".

<sup>6</sup> *Ibid* at para 8.

connection with the postpetition financing and subject to the terms of the order granted by the U.S. Court.<sup>7</sup>

10. Xinergy maintains a bank account with The Toronto Dominion Bank (the “**Canadian Account**”) in Ontario. The Chapter 11 Debtors use the Canadian Account to make Canadian denominated deposits and to pay for Canadian services. When additional funds are required, a transfer is made from the U.S. operating account at Xinergy Corp. Xinergy is dependent on the U.S. Subsidiaries for substantially all of its funding requirements.<sup>8</sup>
11. The Chapter 11 Debtors operate on an integrated basis, with corporate and other major decision-making occurring from the consolidated offices in Knoxville, Tennessee. In particular:
  - (a) Corporate and other major decision-making occurs from the consolidated offices in Knoxville, Tennessee, although administrative employees frequently work remotely or from the Chapter 11 Debtors’ mines in the United States;
  - (b) All of the senior executives of the Chapter 11 Debtors, including Xinergy, are residents of the United States;
  - (c) In order to fulfil the Canadian residency requirements of Ontario corporations, Xinergy has two Canadian directors;
  - (d) The majority of the management of the Chapter 11 Debtors, including Xinergy, is shared;
  - (e) Employee administration, human resource functions, marketing and communications decisions are made, and related actions taken, on behalf of all of the Chapter 11 Debtors, including Xinergy, in the United States;

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<sup>7</sup> *Castle Affidavit*, *supra* note 1 at para 10.

<sup>8</sup> *Ibid* at para 11.

(f) The Chapter 11 Debtors, including Xinergy, share a cash management system that is largely funded by the U.S. Subsidiaries, overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and

(g) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.<sup>9</sup>

12. In essence, there are no employees in Canada and the Chapter 11 Debtors are managed in the United States as an integrated group from a corporate, strategic and management perspective.<sup>10</sup>

### Financial Troubles

13. Recently, U.S. demand for thermal coal has fallen sharply in large part due to (i) increasingly attractive alternative sources of energy, such as natural gas, and (ii) burdensome environmental and governmental regulations impacting end users. Simultaneously, the increasingly stringent regulatory environment in which coal companies operate has driven up the cost of mining and processing coal. Continued weakness in the market for metallurgical and thermal coal, combined with an extremely cold and snowy winter that impacted the mining and shipment of coal, has continued to erode Xinergy's cash position. Prior to approval by the U.S. Court of the postpetition financing (the "**DIP Financing**"), Xinergy lacked the liquidity needed to maintain operations in the near term and to sustain its current capital structure. The confluence of these factors and Xinergy's substantial debt burden has taken Xinergy to the point of unsustainability absent the relief provided by the Chapter 11 Proceeding.<sup>11</sup>

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<sup>9</sup> *Castle Affidavit*, *supra* note 1 at para 12.

<sup>10</sup> *Ibid* at paras 12-13.

<sup>11</sup> *Ibid* at para 14.

14. Michael R. Castle has filed a declaration in the Chapter 11 Proceeding (the "**Declaration**"), which provides further background on the Chapter 11 Debtors, the nature of their financial troubles and outlines the various types of relief sought from the U.S. Court in certain first day motions (collectively, the "**First Day Motions**").<sup>12</sup>

### Security Search Results

15. Cassels Brock & Blackwell LLP ("**CBB**"), Canadian counsel to the Chapter 11 Debtors including Xinergy, conducted the following searches against Xinergy on April 10, 2015 pursuant to the:

- (a) *Bankruptcy and Insolvency Act* (Office of the Superintendent of Bankruptcy) (Canada);
- (b) *Bank Act* – section 427 (Ontario);
- (c) *Execution Act* – section 10 (Writs of Execution, Orders or Certificates of Liens) (City of Toronto); and
- (d) *Personal Property Security Act* in Ontario (the "**PPSA Search**").

The PPSA Search revealed a registration in favour of Wells Fargo Bank, National Association, as collateral trustee.<sup>13</sup> The other searches were clear.

### Chapter 11 Proceedings

16. By operation of the Bankruptcy Code, Xinergy obtained the benefit of a stay upon filing a voluntary petition with the U.S. Court. A stay of proceedings in Canada is essential to protect the efforts of Xinergy to proceed in the Chapter 11 Proceeding with, and formulate, a restructuring plan.<sup>14</sup>

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<sup>12</sup> *Castle Affidavit*, *supra* note 1 at para 3, Exhibit "C".

<sup>13</sup> *Ibid* at para 15.

<sup>14</sup> *Ibid* at para 16.

17. Beginning on April 6, 2015 and continuing until April 7, 2015, the Chapter 11 Debtors filed 17 First Day Motions with the U.S. Court. On April 7, 2015, the U.S. Court held a hearing and on April 7 and 8, 2015, entered the orders requested.<sup>15</sup> At this time, Xinergy is seeking recognition of four of the orders granted by the U.S. Court.<sup>16</sup> The orders are:<sup>17</sup>

- (a) *Order Authorizing Xinergy Ltd. to Act as a Foreign Representative Pursuant to 11 U.S.C. § 1505 (the “**Foreign Representative Order**”);*
- (b) *Interim Order (I) Authorizing Debtors (A) to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. §363, (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c) (the “**Interim DIP Order**”);*
- (c) *Interim Trading Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Equity Interests in the Debtors’ Estates (the “**Interim NOL Order**”); and*
- (d) *Interim 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 (the “**Interim Cash Management Order**”)*

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<sup>15</sup> *Castle Affidavit, supra* note 1 at paras 17-26.

<sup>16</sup> *Ibid* at para 17.

<sup>17</sup> Copies of the four orders and the related motions are appended to the *Castle Affidavit*.

### **PART III - THE ISSUES**

18. Should this Court:
- (a) Recognize the Chapter 11 Proceeding as a foreign main proceeding pursuant to Part IV of the CCAA and grant the Initial Recognition Order sought by the Applicant?
  - (b) Grant the Supplemental Order sought by the Applicant under section 49 of the CCAA?

### **PART IV - THE LAW AND ARGUMENT**

#### **Issue 1: The Initial Order is Appropriate Pursuant to Part IV of the CCAA**

##### *The Court has Jurisdiction to Hear this Application*

19. Pursuant to section 9 of the CCAA, the Court has the jurisdiction to hear an application in the “province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any of the assets of the company are situated”.<sup>18</sup>
20. The registered office of Xinergy is in Toronto, Ontario at offices of its Canadian counsel. In addition, Xinergy has a bank account in Ontario. Accordingly, this Court has jurisdiction to hear this Application.

##### *The Chapter 11 Proceedings Should be Recognized as a Foreign Proceeding*

21. The purpose of Part IV of the CCAA and the provisions dealing with cross-border insolvencies are set out in section 44 of the CCAA, which provides as follows:
- 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
    - (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

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<sup>18</sup> *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 s 9 [CCAA].

- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.<sup>19</sup>

22. Subsection 46(1) of the CCAA provides that a foreign representative may apply to the Court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.<sup>20</sup>

23. A "foreign representative" for the purpose of subsection 46(1) of the CCAA is defined by subsection 45(1) of the CCAA, which provides:

"Foreign Representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

- (a) monitor the debtor company's business and financial affairs or the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.<sup>21</sup>

24. In the Chapter 11 Proceedings, the Chapter 11 Debtors sought the appointment of Xinergy as the foreign representative of the Chapter 11 Debtors, within the meaning of subsection 45(1) of the CCAA. The Foreign Representative Order was granted by the U.S. Court on April 7, 2015.<sup>22</sup>

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<sup>19</sup> CCAA *supra* note 18, s 44.

<sup>20</sup> *Ibid*, s 46(1).

<sup>21</sup> *Ibid*, s 45(1).

<sup>22</sup> *Castle Affidavit*, *supra* note 1 at para 18.

25. In response to an application brought by a foreign representative under subsection 46(1) of the CCAA, subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding; and (ii) the applicant is a foreign representative in respect of that proceeding.<sup>23</sup>
26. The definition of a “foreign proceeding” for the purpose of subsection 47(1) of the CCAA is set out in subsection 45(1) of the CCAA, which provides:
- "Foreign Proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.<sup>24</sup>
27. Proceedings under Chapter 11 of the Bankruptcy Code have consistently been found by this Court to be “foreign proceedings” for the purposes of the CCAA.<sup>25</sup>
28. Pursuant to the foregoing, as Xinergy has been declared a “foreign representative” in the Chapter 11 Proceeding by the U.S. Court, it is the Applicant's submission that this Court should recognize the Chapter 11 Proceeding of Xinergy as a foreign proceeding pursuant to subsection 47(1) of the CCAA.

*The Chapter 11 Proceeding should be declared a Foreign Main Proceeding*

29. If the Court grants an order under subsection 47(1) of the CCAA, subsection 47(2) of the CCAA requires that the Court specify whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.”<sup>26</sup>

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<sup>23</sup> CCAA, *supra* note 18, s 47(1).

<sup>24</sup> *Ibid*, s 45(1).

<sup>25</sup> *Caesars Entertainment Operating Company, Co. (Re)*, 2015 ONSC 712 at para 28, 2015 CarswellOnt 3284 [Caesars]; *LightSquared LP (Re)*, 2012 ONSC 2994 at paras 18-19, 92 C.B.R. (5th) 321 (Sup Ct J) [LightSquared]; *Re Massachusetts Elephant & Castle Group Inc.*, 2011 ONSC 4201 at para 13, 81 CBR (5th) 102 (Sup Ct J); and *Re Lear Canada* (2009), 55 CBR (5th) 57 at para 12, 2009 CarswellOnt 4232 (Sup Ct J) [Lear Canada].

<sup>26</sup> CCAA, *supra* note 18, s 47(2).

30. Subsection 45(1) of the CCAA provides that a “foreign main proceeding” is a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.”<sup>27</sup>
31. For the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests (“COMI”).<sup>28</sup> The registered office of Xinergy is in Toronto, Ontario at its counsel's office. All management functions of Xinergy take place in the United States, where all of the other Chapter 11 Debtors are managed.<sup>29</sup> As such, the Applicant submits that the COMI of Xinergy, is the United States.
32. In order to rebut the presumption set out in subsection 45(2) of the CCAA, the Court has set out the following three principal factors to aid the determination of the location of the COMI of a debtor company:
- (a) the location is readily ascertainable by creditors;
  - (b) the location is one in which the debtor's principal assets or operations are found; and
  - (c) the location is where the management of the debtor takes place.<sup>30</sup>
33. The Court has held that the three factors should be considered as a whole and that the Court may need to give greater or less weight to a given factor depending on the circumstances of the particular case.<sup>31</sup>
34. Although Xinergy's registered office is in Ontario, it has no operations in Canada. Additionally, Xinergy has no employees in Canada and no offices (other than its registered office) in Canada. The Chapter 11 Debtors operate on an integrated basis, with corporate and other major decision-making occurring from the consolidated offices in Knoxville, Tennessee. In particular:

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<sup>27</sup> CCAA, *supra* note 18, s 45(1).

<sup>28</sup> *Ibid*, s 45(2).

<sup>29</sup> *Castle Affidavit*, *supra* note 1 at paras 8 and 12-13.

<sup>30</sup> *LightSquared*, *supra* note 25 at para 25.

<sup>31</sup> *Ibid* at paras 26-27.

- (a) Corporate and other major decision-making occurs from the consolidated offices in Knoxville, Tennessee, although administrative employees frequently work remotely or from the Chapter 11 Debtors' mines in the United States;
- (b) All of the senior executives of the Chapter 11 Debtors, including Xinergy, are residents of the United States;
- (c) In order to fulfil the Canadian residency requirements of Ontario corporations, Xinergy has two Canadian directors;
- (d) The majority of the management of the Chapter 11 Debtors, including Xinergy, is shared;
- (e) Employee administration, human resource functions, marketing and communications decisions are made, and related actions taken, on behalf of all of the Chapter 11 Debtors, including Xinergy, in the United States;
- (f) The Chapter 11 Debtors, including Xinergy, share a cash management system that is largely funded by the U.S. Subsidiaries, overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and
- (g) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.<sup>32</sup>

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<sup>32</sup> *Castle Affidavit*, *supra* note 1 at para 12.

35. Pursuant to the foregoing, the United States is (i) the location of the Xinergy's business readily ascertainable by creditors, (ii) the location in which Xinergy's principal assets and operations are found; and (iii) is the location in which Xinergy's management takes place.
36. Accordingly, Xinergy's COMI is the United States and Xinergy's Chapter 11 Proceeding should be recognized by this Court as a foreign main proceeding.

*The Additional Relief Sought Under the Initial Recognition Order Should Be Granted*

37. Where the Court specifies that a proceeding is a "foreign main proceeding" pursuant to subsection 47(2) of the CCAA, subsection 48(1) of the CCAA requires the Court to grant certain relief, subject to any terms and conditions it considers appropriate. Section 48 provides as follows:

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company

from selling or otherwise disposing of any of its other property in Canada.<sup>33</sup>

38. The additional relief sought in the Initial Recognition Order is consistent with that required pursuant to subsection 48(1) of the CCAA and is otherwise appropriate in the circumstances.

## **ISSUE 2: The Court Should Grant the Supplemental Order Sought by the Applicant under Section 49 of the CCAA**

### *The Court Has the Authority to Grant the Supplemental Order*

39. Once an order recognizing a foreign proceeding has been made (main or non-main), subsection 49(1) of the CCAA provides the Court with the authority to make any order that it considers appropriate, if it is satisfied that the relief sought is necessary for the protection of the debtor company's property or the interest of a creditor or creditors. The Court may make any such order on the terms and conditions it considers appropriate.<sup>34</sup>
40. The Court also has the authority to apply any legal or equitable rules necessary, provided that they are not inconsistent with the provisions of the CCAA.<sup>35</sup>
41. Further, subsection 52(1) of the CCAA provides that if an order recognizing a foreign proceeding is made, the Court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court.<sup>36</sup> This Court has held that approval of a U.S. Court is "[a] significant factor to take into account" when determining whether to grant recognition.<sup>37</sup>

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<sup>33</sup> CCAA, *supra* note 18, s 48(1).

<sup>34</sup> *Ibid.*, ss 49(1) and 50.

<sup>35</sup> *Ibid.*, s 61(1).

<sup>36</sup> *Ibid.*, s 52(1).

<sup>37</sup> *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964 at para 14, 2012 CarswellOnt 2143 [*Hartford*].

The Court Should Exercise Its Authority and Grant the Relief Sought in the Supplemental Order

42. In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis.<sup>38</sup>
43. In *Babcock*, the court set out a list of certain factors that should be considered, among others, by the Court when recognizing a foreign order.<sup>39</sup> The factors include:
- (e) The role of the Court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the Court's nexus to that enterprise; in considering the appropriate level of its involvement, the Court would consider:
    - (i) the location of the debtor's principal operations, undertaking and assets;
    - (ii) the location of the debtor's stakeholders;
    - (iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;
    - (iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed; and
    - (v) such other factors as may be appropriate in the instant circumstances.
  - (f) Where one jurisdiction has an ancillary role,
    - (vi) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction; and

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<sup>38</sup> *Ceasars*, *supra* note 25 at para 38; *Lear Canada*, *supra* note 25 at paras 11 and 17; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 CBR (4th) 157, 2000 CarswellOnt 704 (Sup Ct J) at para 9 [*Babcock*].

<sup>39</sup> *Babcock*, *ibid* at para 21.

- (vii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.<sup>40</sup>

44. The Court has more recently held that the factors set out in *Babcock*, should be considered when recognizing further orders of United States courts once a chapter 11 proceeding has been recognized as a foreign proceeding.<sup>41</sup>

The Information Officer's Appointment is Appropriate under the Circumstances

45. The Supplemental Order provides for the appointment of the Information Officer.
46. Consistent with the case, where one jurisdiction has an ancillary role to another jurisdiction, the court in the ancillary jurisdiction should be kept apprised of the status of the foreign proceedings.<sup>42</sup>
47. The appointment of Deloitte as Information Officer will help facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceeding. The Information Officer will: (i) act as a resource to the foreign representative in the performance of its duties; (ii) act as an officer to the Court, reporting to the Court on the proceedings, as required by the Court; and (iii) provide stakeholders of Xinergy with material information on the Chapter 11 Proceeding.
48. Moreover, the proposed role of Deloitte as Information Officer and the granting of the Administration charge to secure such services is consistent with the terms of appointment of information officers in other recognition proceedings under the CCAA.<sup>43</sup>

The DIP Financing and DIP Charge are appropriate in the circumstances

49. The Supplemental Order requests (i) approval of the DIP Order granted by the U.S. Court and (ii) a DIP Charge for the benefit of the DIP Lenders.

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<sup>40</sup> *Babcock*, *ibid* at para 21.

<sup>41</sup> *Re Xerium Technologies Inc.*, 2010 ONSC 3974 at paras 26-27, 71 CBR (5th) 300 (Sup Ct J).

<sup>42</sup> *Lear Canada*, *supra* note 25 at para 23.

<sup>43</sup> *Supplemental Order in the Application of LightSquared LP* (18 May 2012), Toronto CV-12-9719-00CL (Ont Sup Ct J) [*Supplemental LightSquared*]; *Supplemental Order in the Application of Hartford Computer Hardware, Inc.* (21 December 2011), Toronto CV-11-9514-00CL (Ont Sup Ct).

50. On April 7, 2015, the U.S. Court granted the Interim DIP Order, finding, among other things, that (i) good cause had been shown for entry of an interim order; (ii) access to the DIP Facility was vital to the preservation and maintenance of the going concern value of the business and the Chapter 11 Debtors' successful reorganization; and (iii) a majority of the holders of the Second Lien Notes have consented to the terms of the DIP Order.
51. Section 8 of the Interim DIP Order permits the Chapter 11 Debtors, including Xinergy, to borrow approximately US\$20 million on a first priority basis in order to refinance the prepetition First Lien Loans (the "**Refinancing**").
52. Although the Refinancing may not be permissible under section 11.2 of the CCAA, the Refinancing is permissible in this recognition proceeding and has been approved by this Court in similar circumstances.<sup>44</sup>
53. In *Hartford*, the Court reasoned:

10 The Information Officer and Chapter 11 Debtors recognize that in CCAA proceedings, a partial "roll up" provision would not be permissible as a result of s. 11.2 of the CCAA, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

11 Section 49 of the CCAA provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.

12 It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"....

14 A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these

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<sup>44</sup> *Hartford*, *supra* note 37 at paras 18-19.

circumstances, I see no basis for this court to second guess the decision of the U.S. Court.<sup>45</sup>

54. An analysis similar to that set out in *Hartford* applies here. The Chapter 11 Proceeding is a foreign main proceeding, the proposed Information Officer is of the view that the recognition is appropriate under the circumstances and the U.S. Court has granted the order. The relief requested is necessary for the protection of Xinergy's property and for the interests of creditors.
55. The charge in favour of the DIP Lenders (the "**DIP Lenders' Charge**") is consistent with the charge granted by the U.S. Court. Additionally, all secured creditors of Xinergy that could be impacted by the DIP Lenders' Charge have been served with the Application Record.

The additional relief should be approved as requested

56. The additional relief requested in the Supplemental Order includes both operational relief that is consistent with the model order and recognition of additional orders of the U.S. Court.
57. The Applicant submits that additional relief sought under the Supplemental Order is appropriate in the circumstances and will enable the U.S. Subsidiaries to continue to operate in the ordinary course during the Chapter 11 Proceedings by protecting Xinergy's property located in Canada, thereby helping to maximize realizations for the stakeholders of the Chapter 11 Debtors.
58. Xinergy's stock is traded on the Toronto Stock Exchange. In light of the rules under the Internal Revenue Code in the United States, transfers of the stock may, through no fault of the Chapter 11 Debtors, deprive the Chapter 11 Debtors of important tax benefits.<sup>46</sup> The Interim NOL Motion is a well established method for protecting against this potential harm to debtors in chapter 11 proceedings.<sup>47</sup> Consistent with the standard set out in section 49 of the CCAA, to preserve the assets of Xinergy, this Court should recognize

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<sup>45</sup> *Hartford*, *supra* note 37 at paras 10-12 and 14.

<sup>46</sup> *Castle Affidavit*, *supra* note 1 at para 23.

<sup>47</sup> *Ibid.*

the Interim NOL Order. The requested relief is similar to relief previously granted by this Court in *LightSquared*.<sup>48</sup>

59. Similarly, the relief granted by the U.S. Court in the Interim Cash Management will permit Xinergy and the other Chapter 11 Debtors to continue to operate in ordinary course, thereby preserving value for creditors. This relief too, is similar to the relief granted by this Court in *LightSquared*.<sup>49</sup>
60. In sum, the relief requested in the Supplemental Order is necessary for the protection of Xinergy's property and for the protection of its creditors.

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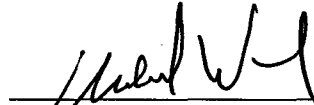
<sup>48</sup> *Supplemental LightSquared*, *supra* note 43 at para 4.

<sup>49</sup> *Ibid*.

**PART V – RELIEF REQUESTED**

61. The Applicant requests that this Court grant the Initial Recognition Order and the Supplemental Order, each substantially in the form of the draft orders contained in the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of April, 2015.**



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**TAB A**

## **SCHEDULE "A"**

### **LIST OF AUTHORITIES**

1. *Caesars Entertainment Operating Company, Co. (Re)*, 2015 ONSC 712, 2015 CarswellOnt 3284
2. *LightSquared LP (Re)*, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (Sup Ct J)
3. *Re Massachusetts Elephant & Castle Group Inc.*, 2011 ONSC 4201, 81 CBR (5th) 102 (Sup Ct J)
4. *Re Lear Canada* (2009), 55 CBR (5th) 57, 2009 CarswellOnt 4232 (Sup Ct J)
5. *Hartford Computer Hardware Inc., Re* 2012 ONSC 964, 2012 CarswellOnt 2143
6. *Re Babcock & Wilcox Canada Ltd.*, 18 CBR (4th) 157, 2000 CarswellOnt 704 (Sup Ct J)
7. *Re Xerium Technologies Inc.*, 2010 ONSC 3974, 71 C.B.R. (5th) 300 (Sup Ct J)
8. *Supplemental Order in the Application of LightSquared LP* (18 May 2012), Toronto CV-12-9719-00CL (Ont Sup Ct J)
9. *Supplemental Order in the Application of Hartford Computer Hardware, Inc.* (21 December 2011), Toronto CV-11-9514-00CL (Ont Sup Ct)

**TAB B**

## SCHEDULE "B"

### RELEVANT STATUTES

#### ***COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C 36, AS AMENDED***

S. 9: (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

#### PART IV

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

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

S. 45: (1) The following definitions apply in this Part.

"foreign court"

« tribunal étranger »

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding"

« principale »

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding"

« secondaire »

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding"

« instance étrangère »

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

"foreign representative"

« représentant étranger »

"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

S. 46: (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

(2) Subject to subsection (3), the application must be accompanied by

- (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
- (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

(5) The court may require a translation of any document accompanying the application.

S. 47: (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

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

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

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

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

- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
  - (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
  - (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.
- (2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.
- (3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

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

S. 51: If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

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

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

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

S. 53: If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- (a) without delay, inform the court of
  - (i) any substantial change in the status of the recognized foreign proceeding,
  - (ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and
  - (iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and
- (b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

S. 54: If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with

any orders made in the proceedings under this Act, the court shall amend or revoke the order.

- S. 55: (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.
- (2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.
- S. 56: The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.
- S. 57: An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.
- S. 58: A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.
- S. 59: For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

- S. 60: (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:
- (a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and
  - (b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.
- (2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.
- S. 61: (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
- (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

Court File No.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT*, R.S.C. 1985, c. C36, AS AMENDED AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO XINERGY LTD.

APPLICATION OF XINERGY LTD. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C36, AS AMENDED

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM**

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