

**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 HORSEHEAD HOLDING
CORP., HORSEHEAD CORPORATION, HORSEHEAD METAL PRODUCTS, LLC,
THE INTERNATIONAL METALS RECLAMATION COMPANY, LLC AND
ZOCHEM INC. (collectively, the "Debtors")**

**APPLICATION OF HORSEHEAD HOLDING CORP.
UNDER SECTION 46 OF THE
*COMPANIES' CREDITORS ARRANGEMENT ACT***

FACTUM OF THE APPLICANT
(Application returnable February 5, 2016)

February 4, 2016

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TO: THE SERVICE LIST

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FACTUM OF ZOCHEM INC.
(Application returnable February 5, 2016)

PART I – NATURE OF THE MOTION

1. This factum is filed in support of an Application brought by Zochem Inc. ("**Zochem**"), in its capacity as foreign representative (the "**Foreign Representative**") of itself as well as Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC ("**Horsehead Metals**"), and The International Metals Reclamation Company, LLC ("**INMETCO**") for Orders pursuant to sections 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for, *inter alia*:
 - (a) Amending the title of these proceedings to reflect Zochem as the Foreign Representative;

- (b) recognition of the proceedings commenced by the Debtors in the United States Bankruptcy Court for the District of Delaware (the “**U.S. Court**”) under chapter 11 of title 11 of the United States Code (the “**Chapter 11 Proceedings**”) as foreign main proceedings pursuant to Part IV of the CCAA;
- (c) a stay of any proceedings against the Debtors and a suspension of any right to terminate any agreement with the Debtors;
- (d) the appointment of Richter Advisory Group Inc. as information officer;
- (e) recognition of the “first day” orders of the U.S. Court in the Chapter 11 Proceedings; and
- (f) the granting of a charge over the Debtors’ assets in Canada to secure debtor-in-possession financing.

PART II – THE FACTS

2. The Debtors operate in the zinc and nickel-bearing waste industries through three business units: Horsehead Corporation and its subsidiaries (collectively, “**Horsehead**”), Zochem, and INMETCO. Horsehead is a prominent recycler of electric arc furnace (“**EAF**”) dust, a zinc-containing waste generated by North American steel “mini-mills”, and in turn uses the recycled EAF dust to produce specialty zinc and zinc-based products. Zochem is a producer of zinc oxide. INMETCO is a recycler of nickel-bearing wastes and nickel-cadmium batteries, and a producer of nickel-chromium-molybdenum-iron remelt alloy for the stainless steel and specialty steel industries. Collectively, the Debtors hold a market-leading position in zinc production in the United States, zinc oxide production in North America, EAF dust recycling in North America, and are a leading environmental service provider to the U.S. steel industry.

Affidavit of James M. Hensler, sworn February 2, 2106 (the “Hensler Affidavit”), at paragraph 8.

The Chapter 11 Proceedings

3. On February 2, 2016, the Debtors commenced the Chapter 11 Proceedings by each filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code in the U.S. Court.

Hensler Affidavit, at paragraph 3.

4. The U.S. Court granted the following first day orders on February 3, 2016 (collectively, the “**First Day Orders**”) each as defined in the Collins Affidavit:

- (a) Joint Administration Order;
- (b) Foreign Representative Order;
- (c) Interim Cash Management Order;
- (d) Interim Wages and Benefits Order;
- (e) Interim Shippers and Lien Claimants Order;
- (f) Interim Utilities Order;
- (g) Interim Insurance Order;
- (h) Interim Prepetition Taxes Order;
- (i) Interim Critical Vendors Order; and
- (j) Interim Financing Order.

Affidavit of Aaron Collins, sworn February 4, 2016 (the “Collins Affidavit”), at paragraph 7.

5. The U.S. Court also granted certain other procedural orders which Zochem is not seeking to have recognized at this time.

The Canadian Zochem Business

6. Zochem is a *Canada Business Corporations Act* corporation with its head office in Pittsburgh, Pennsylvania and its operations located in owned premises at 1 Tilbury Court,

Brampton, Ontario (the “**Ontario Premises**”). Zochem’s registered office address is the Ontario Premises.

Hensler Affidavit, at paragraph 11.

7. Zochem is one of the largest single-site producer of zinc oxide in North America. Zinc oxide is used as an additive in various materials and products, including plastics, ceramics, glass, rubbers, cement, lubricants, pigments, sealants, ointments, fire retardants, and batteries. The Debtors sell zinc oxide to over 250 producers of tire and rubber products, chemicals, paints, plastics, and pharmaceuticals, and have supplied zinc oxide to the majority of their largest customers for over ten years.

Hensler Affidavit, at paragraph 12.

8. As of December 31, 2015, Zochem had 19 salaried personnel and 25 hourly personnel. Approximately 25 of these employees are organized under Unifor and its Local 591-G-850, whose collective labour agreement is set to expire on June 30, 2016. Zochem uses ADP as its payroll service provider.

Hensler Affidavit, at paragraph 13.

9. Zochem maintains separate pension plans for its salaried and hourly personnel, which have been closed to new members since July 1, 2012. Newer employees have joined Zochem’s group RRSP. According to a report prepared by Corporate Benefit Analysis, Inc., the pensions were, collectively, overfunded as at December 31, 2015, though the salaried plan had a small unfunded projected benefit obligation in the amount of \$181,499. Neither plan has been wound up.

Hensler Affidavit, at paragraph 14.

10. On April 29, 2014, Zochem, as borrower, and Horsehead Holding, as guarantor, entered into a U.S. \$20 million secured revolving credit facility (the “**Zochem Facility**”) with PNC Bank, National Association (“**PNC**”), as agent and lender. The Zochem Facility is secured by a first priority lien (subject to certain permitted liens) on substantially all of Zochem’s tangible and intangible personal property, and a charge on Zochem Brampton, Ontario premises. Zochem’s obligations to PNC are guaranteed by its parent, Horsehead Holding. On January 27, 2016, PNC assigned its position as lender under the Zochem Facility to an arm’s length party. PNC remains the agent under Zochem Facility.

Hensler Affidavit, at paragraphs 17, 18.

11. Zochem is operational in its focus. Three out of four of Zochem’s officers and three out of four of its directors are residents of Pennsylvania. Most of Zochem’s officers are also officers of each of the other Debtors. Zochem’s statutorily required one Canadian director (representing 25% of the board) is a partner at the law firm Aird & Berlis LLP (“**A&B**”), the Debtors’ Canadian counsel. The only Zochem officer resident in Canada is the plant’s general manager, who formerly was resident in Pennsylvania and employed by the U.S. Debtors. Otherwise, all local functions associated with managing and operating the Zochem facility are performed from the Debtors’ Pittsburgh, Pennsylvania headquarters in the United States.

Hensler Affidavit, at paragraph 15.

12. Zochem and the U.S. Debtors maintain a highly integrated business. Zochem’s communications decisions, pricing decisions, and business development decisions are made in Pittsburgh. Zochem’s accounts receivable, accounts payable and treasury departments are also located in Pittsburgh.

Hensler Affidavit, at paragraph 16.

13. Zochem operates a cash management system (the “**Zochem Cash Management System**”) is in place whereby:
- (a) all receipts flow into a collection account at PNC in the United States, in part via a lockbox maintained at PNC;
 - (b) funds from the PNC collection account are transferred daily into an operating account at PNC in the United States; and
 - (c) funds are then transferred, as the Debtors’ treasury department (in Pittsburgh) determines is required, to a U.S. dollar operating account and a Canadian dollar operating account at Scotiabank in Canada to pay vendors and payroll, as applicable.

Hensler Affidavit, at paragraph 19.

14. In the above ways, the business and operation of Zochem is part of a larger, U.S.-based enterprise. The Debtors are all managed in the United States as an integrated group from a corporate, strategic, financial and management perspective.

Hensler Affidavit, at paragraph 20.

15. Searches were conducted under the *Personal Property Security Act* reveal only two registrations (other than registrations in favour of PNC), each in respect of specific equipment.

Hensler Affidavit, at paragraph 21.

Need for Proceedings

16. The Debtors in the United States have had limited access to liquidity since January 5, 2016 when their Lender, Macquarie Bank Limited (“**Macquarie**”), issued a notice of default and froze certain of their bank accounts, including their main operating account. On January 6, 2016, Zochem’s lender, PNC Bank National Association (“**PNC**”), also asserted an event of default. On January 13, 2016, PNC froze certain of the Debtors’ bank accounts associated with their Zochem operations, and demanded immediate payment of all outstanding obligations. PNC’s demand was accompanied by a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act* (the “**BIA**”). Although the Debtors entered into forbearance agreements with Macquarie and PNC, the term of those agreements expired on February 1, 2016, and the Debtors are presently operating outside of forbearance with no credit facilities.

Hensler Affidavit, at paragraphs 20 to 26.

17. As the results of a very competitive process run by the Debtors and their advisors, Lazard Middle Market LLC, the Debtors reached agreement for a senior secured super priority debtor-in-possession credit facility in the amount of U.S. \$90 million (the “**DIP Facility**”) from a group of Horsehead Holding secured noteholders (collectively, the “**DIP Lenders**”). The DIP Facility will be used to pay off the Zochem’s obligations to PNC Facility and to finance the Debtors’ operations and the Chapter 11 Proceedings. A condition of advance under the DIP Facility is the granting of a super-priority charge over the assets of the Debtors in Canada in favour of the DIP Lender.

Hensler Affidavit, at paragraph 29.

18. At least until the “second day” hearings in the Chapter 11 Proceedings, Zochem will only be liable under the DIP Facility for U.S. \$25 million, which amount is required to pay off the approximate U.S. \$18.5 million credit facility with PNC and to funds the Debtors’ operation.

Collins Affidavit, at paragraph 14.

PART III – THE ISSUES

19. The issues on this application are:
- (a) Is the Chapter 11 Proceedings a “foreign main proceeding” pursuant to Part IV of the CCAA?
 - (b) If so, are the Debtors entitled to the relief sought in the Initial Recognition Order and Supplemental Order pursuant to sections 46 through 49 of the CCAA including,
 - (i) granting the Stay of Proceedings;
 - (ii) recognition of the First Day Orders; and
 - (iii) granting the DIP Lenders’ Charge?

PART IV – THE LAW

- (a) **The Chapter 11 Proceedings are a Foreign Main Proceeding**
20. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Section 44 of the CCAA 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;

(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.

21. Pursuant to Section 46(1) of the CCAA, 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.

22. Pursuant to Section 47 of the CCAA, two requirements must be met for an order recognizing a foreign proceeding:

(a) the proceeding is a "foreign proceeding"; and

(b) the applicant is a "foreign representative" in respect of that foreign proceeding.

23. Section 45(1) of the CCAA defines a "foreign representative" as one who is authorized in a foreign proceeding in 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.

24. Zochem seeks to be appointed as the foreign representative of the Debtors pursuant to the Foreign Representative Order.

Foreign Representative Order, Collins Affidavit, Exhibit “B”.

25. Section 45(1) of the CCAA defines a “foreign proceeding” as any judicial proceeding, including interim proceedings, in a jurisdiction outside of 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.

26. The courts have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.

Lightsquared LP, Re, (2012) 219 A.C.W.S. (3d) 23, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List], at paragraph 18, Brief of Athorities, Tab 1 [“Lightsquared”])

27. Once it has determined that a proceeding is a “foreign proceeding”, the Court is required, pursuant to Section 47(2) of the CCAA, to specify in its order whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”.

28. A “foreign main proceeding” is defined as a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests” (“**COMI**”).

CCAA, s 45(1).

29. The CCAA does not provide a definition for COMI, but Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its COMI. In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, the following principal factors, considered as a whole, will indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests:

(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.

***Lightsquared*, at paragraph 25, Brief of Athorities, Tab 1.**

30. In *Lightsquared*, the Court further determined:

“26. In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.”

***Lightsquared*, at paragraph 26, Brief of Athorities, Tab 1.**

31. In *Massachusetts Elephant & Castle Group Inc., Re*, this Court suggested that there could be also be a second tier of factors to potentially consider in determining COMI:

- (a) the location where corporate decisions are made;
- (b) the location of employee administrations, including human resource functions;
- (c) the location of the debtor's marketing and communication functions;
- (d) whether the enterprise is managed on a consolidated basis;
- (e) the extent of integration of an enterprise's international operations;
- (f) the centre of an enterprise's corporate, banking, strategic and management functions;
- (g) the existence of shared management within entities and in an organization;

- (h) the location where cash management and accounting functions are overseen;
- (i) the location where pricing decisions and new business development initiatives are created; and
- (j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable. .

***Massachusetts Elephant & Castle Group Inc., Re*, (2011) 205 A.C.W.S. (3d) 25, 81 C.B.R. (5th) 102 (Ont. S.C.J.), at paragraphs 26 to 31, Brief of Authorities, Tab 2 [*“Elephant & Castle”*]**

32. This Court has also held that where a Canadian company was included in a multiple debtor Chapter 11 filing, the fact that all of the other debtors were incorporated in the U.S. was a relevant factor in finding the COMI for the Canadian debtor to be in the U.S.

***Caesars Entertainment Operating Co., Re*, 2015 ONSC 712 (Ont. S.C.J. [Commercial List]), at para 35, Brief of Authorities, Tab 3.**

33. In the present case, the facts proving Zochem’s COMI to be the United States include:
 - (a) all the Debtors other than Zochem, comprising Zochem’s corporate family, are incorporated, and have their registered head office, in the United States;
 - (b) all the Debtors, including, Zochem are managed from Pittsburgh, Pennsylvania;
 - (c) all three of Zochem’s “inside” directors (comprising 75% of the board) are residents of Pennsylvania;
 - (d) all of Zochem’s officers are Pennsylvania residents, with the one exception of its general manager who is a former Pennsylvania resident and employee of the other Debtors;
 - (e) most of Zochem’s officers are also officers of each of the other Debtors;

- (f) Zochem is operational in its focus and all local functions associated with managing and operating the Zochem facility are performed from the Debtors' Pittsburgh headquarters;
- (g) Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh;
- (h) Zochem's accounts receivable, accounts payable and treasury departments are located in Pittsburgh;
- (i) Zochem's Cash Management System is centred in the United States;
- (j) Zochem's existing credit facilities are with a bank in Pittsburgh; and
- (k) the Debtors are all managed in the United States as an integrated group from a corporate, strategic, financial and management perspective.

Hensler Affidavit, at paragraphs 15 to 20.

- 34. The Applicant therefore submits that the COMI of the Debtors is the United States and that the Chapter 11 Proceedings should be recognized as a "foreign main proceeding" in Canada pursuant to the CCAA.

(b) The Debtors are entitled to the Initial Recognition Order and the Supplemental Order

- 35. In addition to recognition of the Chapter 11 Cases as a foreign main proceeding the Initial Order seeks a stay of proceedings against the Debtors.

i) Stay of Proceedings is required and appropriate

- 36. Section 48(1) provides that once the Court has found that a foreign proceeding is a foreign main proceeding, it is required to grant certain mandatory relief, including a stay of proceedings, 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.

CCAA, section 48.

37. In addition to the automatic relief provided for in Section 48, Section 49 of the CCAA provides that the Court may, at its discretion, make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

CCAA, section 48.

38. Furthermore, Section 50 of the CCAA provides that an Order under Part IV “may be made on any terms and conditions that the court considers appropriate in the circumstances.”

CCAA, section 50.

ii) Recognition of First Day Orders is appropriate

39. The Applicant is seeking an order recognizing and giving effect to the First Day Orders as set out above.
40. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness. In particular, courts in Canada and the United States have made efforts to complement, coordinate and accommodate each other’s proceedings.

***Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]), at paragraphs 4 to 13, Brief of Authorities, Tab 4 [“*Babcock*”].**

***Matlack Inc., Re*, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial List]), at para. 9, Brief of Authorities, Tab 5 [“*Matlack*”].**

***Lear Canada, Re*, 2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List]), at paragraph 12, Brief of Authorities, Tab 6.**

41. Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings for the purpose of avoiding multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency

proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their locations.

***Roberts v. Picture Butte Municipal Hospital*, 1998 CarswellAlta 636 (Q.B.) at paragraph 20, Brief of Authorities, Tab 7.**

***Matlack*, at paragraph 3, Brief of Authorities, Tab 5.**

42. In furtherance of the principle of comity, Canadian courts should allow a foreign court to exercise principal control over the insolvency process if that other jurisdiction has the closest connection to the proceeding.

***Matlack*, at paragraph 8, Brief of Authorities, Tab 5.**

iii) The DIP Lenders' Charge should be granted

43. The Supplemental Order requests (i) approval of the U.S. DIP Order and (ii) a DIP Lenders' Charge for the benefit of the DIP Lenders.
44. On February 4, 2016, the U.S. Court entered an order finding, among other things, that (i) good cause had been shown for entry of an interim order and (ii) that the authorization to enter into the DIP Documents was necessary to avoid immediate and irreparable harm to the Debtors and their estates.

US DIP Order at para 7(f)

45. This Court has found that when recognizing a financing order granted by a foreign court, this Court should consider, among other things, "whether there would be any material adverse interest to any Canadian interests...."

Re Xinergy Ltd., 2015 ONSC 2692 (Ont. S.C.J. [Commercial List]), at para 20, Brief of Authorities, Tab 8.

46. While the Court in *Xinergy* was considering a “roll up” debtor in possession facility, the U.S. DIP Order does not contain such a provision.
47. The Debtors are presently operating outside of forbearance with their lenders, with no credit facilities and important bank accounts frozen. They all need financing immediately. The factors in these circumstances militate in favor of both granting the DIP Lenders’ Charge and in allowing for Zochem to act as a co-borrower in connection with the DIP Facility:
 - (a) the DIP Facility furthers the objectives of the CCAA and is commercially reasonable as it was the result of a competitive marketing process and allows the Debtors to continue operations;
 - (b) the DIP Lenders’ Charge is reflective of the priming liens, security interest and pledges granted to the DIP Lenders’ agent in the U.S. DIP Order, and necessary to give effect to the same in Canada;
 - (c) the DIP Lenders’ Charge is a condition precedent to advance under the DIP Facility;
 - (d) the amounts to be secured by the DIP Lenders’ Charges are appropriate and required having regard to the Chapter 11 Debtors’ cash-flow statement;

- (e) until further order of the U.S. Court, Zochem's obligations under the DIP Facility will not exceed U.S.\$25 million, approximately U.S. \$18.5 million of which will be on account of the payoff of Zochem's existing credit facility;
- (f) the DIP Lenders' Charge will not secure any pre-existing obligation;
- (g) the Debtors need immediate access to the DIP Facilities to ensure their continued operations during these proceedings;
- (h) the Debtors conducted a competitive process to find alternative post-petition financing from other third party lenders, who were either unwilling to provide financing or only willing to do so (i) with security over all the assets of all the Debtors, including Zochem, and (ii) with security ranking in priority to the security of the Debtors' existing U.S. lender;
- (i) the DIP Facility will provide the Debtors with sufficient and immediate liquidity which will allow for the preservation of the value of their business during the Chapter 11 Proceedings without the risk of a priority fight, provide key constituents with confidence regarding the state of the Debtors and allow the Debtors to restructure;
- (j) the Debtors have obtained relief from the U.S. Court and intend to continue to pay employee wages and benefits with the proceeds of the DIP facility; and
- (k) the Debtors (including Zochem) do not have significant trade terms with any of their suppliers; without access to cash they will not be able to continue their relationships with existing suppliers.

48. While the DIP Lenders' Charge only covers the Debtors' obligations to the DIP Lenders, the U.S. DIP Order creates additional charges (the "**Protective Liens**") over Zochem's asset in favour of the Debtors' incumbent lenders to secure either any trailing post-payout liabilities (in the case of Zochem's existing lender), or any diminution in value of pre-petition security (in the case of the U.S. Debtors' lender).
49. This Court has found that the following factors are relevant in determining the appropriateness of a guarantee in connection with a debtor-in-possession loan facility:
- (a) the need for additional financing by the Canadian debtor to support a going concern restructuring;
 - (b) the benefit of the breathing space afforded by CCAA protection;
 - (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
 - (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
 - (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
 - (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;

- (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and
- (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.

***Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (Ont. S.C.J. [Commercial List]), at paragraph 8, Brief of Authorities, Tab 9.**

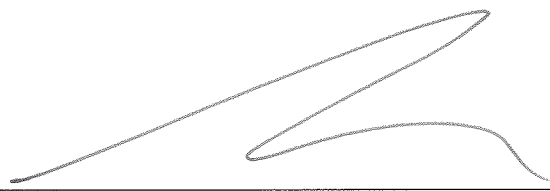
50. The Applicant requests that this Honourable Court recognize the U.S. DIP Order and grant the requested DIP Lender's Charge as to not do so would, as found by the U.S. Court, cause irreparable harm to the Debtors. The Canadian stakeholders of the Debtors would be better served by the continuing operation of the Debtors while they attempt to restructure their business and finances than an abrupt cessation of operations which would result if the U.S. DIP Order is not recognized and the DIP Lenders' Charge is not granted.

PART V – RELIEF REQUESTED

51. The Applicant requests that this Honourable Court grant the Initial Recognition Order and the Supplemental Order, each substantially in the form of the draft Orders contained at tabs 4 and 6 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February 2015.

February 4, 2016



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SCHEDULE “A”

LIST OF AUTHORITIES

Lightsquared LP, Re, (2012) 219 A.C.W.S. (3d) 23, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List])

Massachusetts Elephant & Castle Group Inc., Re, (2011) 205 A.C.W.S. (3d) 25, 81 C.B.R. (5th) 102 (Ont. S.C.J.)

Caesars Entertainment Operating Co., Re, 2015 ONSC 712 (Ont. S.C.J. [Commercial List])

Babcock & Wilcox Canada Ltd., Re, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List])

Matlack Inc., Re, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial List])

Lear Canada, Re, 2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List])

Roberts v. Picture Butte Municipal Hospital, 1998 CarswellAlta 636 (Q.B.)

Re Xinergy Ltd., 2015 ONSC 2692 (Ont. S.C.J. [Commercial List])

Indalex Ltd. (Re), 2009 CarswellOnt 1998 (Ont. S.C.J. [Commercial List])

SCHEDULE “B”
RELEVANT STATUTES

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

Purpose

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

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

(b) greater legal certainty for trade and investment;

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

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

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Definitions

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.

Centre of debtor company’s main interests

(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.

Application for recognition of a foreign proceeding

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.

Documents that must accompany application

(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.

Documents may be considered as proof

(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.

Other evidence

(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.

Translation

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

Order recognizing foreign proceeding

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.

Nature of foreign proceeding to be specified

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

Order relating to recognition of a foreign main proceeding

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

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

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

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

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

Scope of order

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

When subsection (1) does not apply

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

Application of this and other Acts

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

Other orders

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

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

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

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

Restriction

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

Application of this and other Acts

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

Terms and conditions of orders

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

Court not prevented from applying certain rules

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.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

Courts of Justice Act, R.S.O. 1990, Chapter C.43

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Rules of Civil Procedure, R.R.O. 1990, Regulation 194

5.04 . . .

Adding, Deleting or Substituting Parties

(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED,
IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT
TO THE DEBTORS, AND APPLICATION OF HORSEHEAD HOLDING CORP. UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT**

Court File No. CV-16-11271-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

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