IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 15**
	:	
CINRAM INTERNATIONAL INC., *et al.*,[1]	:	**Case No. 12-11882 (__)**
	:	
Debtors in a Foreign Proceeding.	:	**(Joint Administration Pending)**
	:	

FOREIGN REPRESENTATIVE'S MEMORANDUM OF LAW IN SUPPORT OF (I) VERIFIED CHAPTER 15 PETITIONS AND (II) MOTION FOR ORDERS GRANTING PROVISIONAL AND FINAL RELIEF IN AID OF FOREIGN CCAA PROCEEDING

[1] The last four digits of the United States Tax Identification Number or Canadian Business Number, as applicable, of each of the Debtors follow in parentheses: (a) Cinram International Inc. (4583); (b) Cinram (U.S.) Holding's Inc. (4792); (c) Cinram, Inc. (7621); (d) Cinram Distribution LLC (3854); (e) Cinram Manufacturing LLC (2945); (f) Cinram Retail Services LLC (1741); (g) Cinram Wireless LLC (5915); (h) IHC Corporation (4225); and (i) One K Studios, LLC (2132). The Debtors' executive headquarters is located at 2255 Markham Road, Toronto, Ontario, M1B 2W3, Canada.

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Cinram International ULC (the "**Foreign Representative**") is the authorized foreign representative of the above-captioned debtors (collectively, the "**Debtors**") in a proceeding (the "**CCAA Proceeding**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), pending before the Ontario Superior Court of Justice (the "**Canadian Court**"). On the date hereof, the Foreign Representative commenced these chapter 15 cases and filed verified petitions and the *Foreign Representative's Motion for Orders Granting Provisional and Final Relief in Aid of Foreign CCAA Proceeding* (the "**Recognition Motion**," and, together with the petitions, the "**Petitions for Recognition**"),[2] seeking (a) entry of a provisional order in the form attached thereto as Exhibit A (the "**Provisional Order**"): (i) recognizing and enforcing in the United States, on an interim basis, the Initial Order (the "**Initial CCAA Order**") issued on June 25, 2012 by the Canadian Court, including, without limitation, the Canadian Court's decision to (A) authorize the Debtors to enter into and perform under that certain DIP Facility, and (B) grant the DIP Charge to the DIP Lenders under the DIP Facility, (ii) granting, on an interim basis, to and for the benefit of the DIP Lenders and, to the extent of their adequate protection rights, the Prepetition Secured Lenders, certain protections afforded by title 11 of the United States Code, as amended from time to time (the "**Bankruptcy Code**"), including those protections provided by sections 364(c), 364(d), and 364(e) of the Bankruptcy Code, (iii) granting an interim stay of execution against the Debtors' assets and applying sections 362 and 365(e) of the Bankruptcy Code in these chapter 15 cases on an interim basis pursuant to sections 1519(a)(3), 1521(a)(7), and 105(a) of the Bankruptcy Code, and (iv) granting such other and further relief as the Court deems just and proper; and (b) entry of a final order, after notice and a hearing, in the form attached thereto as Exhibit B

[2] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Recognition Motion.

(the "**Final Order**") (i) granting the petitions in these cases and recognizing the CCAA Proceeding as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code, (ii) giving full force and effect in the United States to the Initial CCAA Order, including any extensions or amendments thereof authorized by the Canadian Court and extending the protections of the Provisional Order to the Debtors on a final basis, (iii) granting the DIP Lenders and, to the extent of their adequate protection rights, the Prepetition Secured Lenders, certain protections afforded by the Bankruptcy Code, and (iv) granting such other and further relief as the Court deems just and proper. The Foreign Representative respectfully submits this Memorandum of Law in support of the Petitions for Recognition.

Preliminary Statement

The Foreign Representative is authorized by the Debtors and approved by the Canadian Court to, among other things, assist the Debtors in these proceedings, report to the Canadian Court, and take such actions as may be necessary or appropriate in furtherance of the recognition of the CCAA Proceedings. In furtherance of its duties, the Foreign Representative seeks (a) entry of the Provisional Order granting certain provisional relief to preserve the Debtors' assets in the United States and to protect against termination of executory contracts and leases based upon *ipso facto* bankruptcy provisions, as well as granting certain protections to the Debtors' DIP Lenders, and to the extent of their adequate protection rights, the Prepetition Secured Lenders, and (b) entry of the Recognition Order, after notice and a hearing, granting recognition of the CCAA Proceeding as a foreign main proceeding and granting relief similar to that requested in the Provisional Order on a final basis. Absent the relief requested, the CCAA Proceeding could be undermined, the Debtors' restructuring and sale efforts could be

jeopardized, and the Debtors, their creditors, and other parties in interest could suffer irreparable harm.

The ultimate purpose of the CCAA Proceeding is to facilitate the Proposed Sale (as defined in the Bell Affidavit (defined below)) pursuant to an order of the Canadian Court, with the aid of the U.S. Court. The Foreign Representative believes that granting the additional relief sought herein will best assure the fair and efficient administration of the CCAA Proceeding, facilitate the rescue of the salvageable assets of a financially troubled business, maximize the value of the Debtors' business for the benefit of creditors, and preserve many jobs, all of which is consistent with the principles set forth in chapter 15 of the Bankruptcy Code and the public policy of the United States of America.

Chapter 15 of the Bankruptcy Code authorizes the Court to recognize a "foreign proceeding," as defined by section 101(23) of the Bankruptcy Code, upon the proper commencement of a case under chapter 15 by a "foreign representative," as defined by section 101(24) of the Bankruptcy Code. Chapter 15 further authorizes the Court to grant assistance in the United States to a foreign representative in connection with a foreign proceeding, including by granting injunctive and other relief pursuant to sections 1519, 1520, and 1521 of the Bankruptcy Code.

The Petitions for Recognition satisfy all of the requirements set forth in sections 1515, 1517, 1519, 1520, and 1521 of the Bankruptcy Code, as applicable. Moreover, the relief requested therein is necessary and appropriate under chapter 15 of the Bankruptcy Code. Finally, granting recognition of the CCAA Proceeding and the related relief requested by the Foreign Representative is consistent with the goals of international cooperation with and assistance to foreign courts recognized by section 1501(a) of the Bankruptcy Code.

Factual Background

The Court is respectfully referred to the Petitions for Recognition and the *Declaration of John Bell in Support of (I) Verified Chapter 15 Petitions, (II) Foreign Representative's Motion for Orders Granting Provisional and Final Relief in Aid of Foreign CCAA Proceeding, and (III) Certain Related Relief* (the "**Bell Declaration**"), which contains the facts relied on in this Memorandum of Law, and is incorporated herein by reference.

Argument

A. The CCAA Proceeding is Entitled to Recognition as a Foreign Main Proceeding

1. The Court has Jurisdiction to Recognize the CCAA Proceeding and Grant the Relief Requested

The Court has jurisdiction to hear and determine cases commencing under the Bankruptcy Code and all core proceedings arising thereunder pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code, as well as the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012. A case under chapter 15 is a "case" under the Bankruptcy Code. Recognition of foreign proceedings and other matters under chapter 15 of the Bankruptcy Code have expressly been designated as core proceedings pursuant to 28 U.S.C. § 157(b)(2)(P).

Furthermore, venue is proper in this District. Cinram International Inc.'s principal asset in the United States is the stock of Cinram (U.S.) Holding's Inc., whose principal assets, in turn, are the stock and membership interests of the other Debtors, which are each organized under the laws of Delaware. Under Delaware general corporate law, these equity interests are all located in the State of Delaware.[3] Additionally, given the relative proximity of

[3] Del. Gen. Corp. Law § 169 provides: "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this

this District to Ontario, Canada, the convenience of traveling to and from this District to Ontario, Canada, and the administrative savings of jointly administering each of the related Debtors' ancillary proceedings before one court, it is respectfully submitted that venue in this District is consistent with the interests of justice and the convenience of the parties. For these reasons, venue of these cases in this District is proper pursuant to 28 U.S.C. §§ 1410(1) and (3).

2. These Cases Are Proper Under Chapter 15

Chapter 15 of the Bankruptcy Code applies where a foreign representative seeks the assistance of a United States bankruptcy court in connection with a foreign proceeding. 11 U.S.C. § 1501(b)(1). The Debtors' cases are proper under chapter 15 because (a) these cases concern a "foreign proceeding," (b) these cases were commenced by Cinram International ULC, a duly authorized "foreign representative," (c) the Petitions for Recognition, and all required supporting documentation, were properly filed, and (d) the relief sought by the Petitions for Recognition is consistent with the objectives of chapter 15.

(a) **The CCAA Proceeding is a "Foreign Proceeding"**

Section 101(23) of the Bankruptcy Code defines a "foreign proceeding" as:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23). The CCAA Proceeding fits squarely within the Bankruptcy Code's definition of a "foreign proceeding" as it is an insolvency action brought under the CCAA and supervised by the Canadian Court. The CCAA provides for a controlled reorganization

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chapter or otherwise, shall be regarded as in this State." *See also Castro v. ITT Corp.*, 598 A.2d 674, 681 (Del. Ch. Ct. 1991) (holding that section 169 "continues to fix the situs of all stock of a Delaware corporation in [Delaware] for all purposes other than taxation.").

procedure designed to enable financially distressed companies to avoid foreclosure or seizure of assets while maximizing going concern value for the benefit of creditors and other parties in interest. *See, e.g., In re Arctic Glacier Int'l Inc.*, No. 12-10605 (Bankr. D. Del. Mar. 16, 2012) (order granting recognition of CCAA proceeding as a "foreign proceeding"); *In re Angiotech Pharm., Inc.*, No. 11-10269 (Bankr. D. Del. Feb. 22, 2011) (granting recognition of CCAA proceeding as a "foreign proceeding"); *In re Grant Forest Prod. Inc.*, No. 10-11132 (Bankr. D. Del. Apr. 26, 2010) (granting recognition of CCAA proceeding as a "foreign proceeding"); *In re Fraser Papers*., No. 09-12123 (Bankr. D. Del. July 13, 2009) (granting recognition of CCAA proceeding as a "foreign proceeding"); *In re W.C. Wood Corp., Ltd.*, No. 09-11893(Bankr. D. Del. June 18, 2009) (granting recognition of CCAA proceeding as a "foreign proceeding"); *In re MAAX Corp.*, No. 08-11443 (Bankr. D. Del. August 5, 2008) (granting recognition of CCAA proceeding as a "foreign proceeding"). Pursuant to the CCAA, the Debtors have obtained from the Canadian Court the Initial CCAA Order, a certified copy of which is attached to the Bell Declaration as Exhibit A.

(b) **Cinram International ULC is a Proper "Foreign Representative"**

Section 101(24) of the Bankruptcy Code provides that:

> The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

11 U.S.C. § 101(24). The Initial CCAA Order specifically contemplates the commencement of these cases by Cinram International ULC, a "person" within the meaning of section 101(41) of the Bankruptcy Code, to assist the Debtors and the Canadian Court in the Debtors' reorganization efforts, and Cinram International ULC was duly appointed by the Canadian Court

to act as foreign representative pursuant to paragraphs 63 and 64 of the Initial CCAA Order, which provide as follows:

> THIS COURT ORDERS that Cinram International ULC is hereby authorized and empowered to act as the foreign representative in respect of the within proceedings for the purposes of having these proceedings recognized in a jurisdiction outside Canada.
>
> THIS COURT ORDERS that Cinram International ULC is hereby authorized, as the foreign representative of the CCAA Parties and of the within proceedings, to apply for foreign recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to Chapter 15 of the *U.S. Bankruptcy Code*, and to take such actions necessary or appropriate in furtherance of the recognition of these proceedings or the prosecution of any sale transaction (including the Proposed Transaction) in any such jurisdiction.

Accordingly, Cinram International ULC is a "foreign representative" as defined in the Bankruptcy Code.

(c) **The Foreign Representative Properly Filed These Cases**

These cases were duly and properly commenced as required by sections 1504 and 1509(a) of the Bankruptcy Code by the filing of the Petitions for Recognition pursuant to section 1515(a) of the Bankruptcy Code, which was accompanied by all documents and information required by sections 1515(b) and (c). *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 127 (Bankr. S.D.N.Y. 2007) ("A case under chapter 15 is commenced by a foreign representative filing a petition for recognition of a foreign proceeding pursuant to section 1515 of the Bankruptcy Code"), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008). Because the Foreign Representative has satisfied the requirements set forth in section 1515 of the Bankruptcy Code, these cases have been properly commenced.

(d) **The Petitions for Recognition are Consistent with the Purpose of Chapter 15**

One of the stated objectives of chapter 15 is the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor." 11 U.S.C. § 1501(a)(3). These cases have been commenced for the purpose of obtaining the assistance of the Court to ensure the effective and economical administration of the CCAA Proceeding by, among other things, restricting the Debtors' creditors from taking certain actions in the United States that would undermine the unified, collective, and equitable resolution of the Debtors' liabilities in the CCAA Proceeding before the Canadian Court through the Proposed Sale or otherwise. As such, the Petitions for Recognition are consistent with the purpose of chapter 15 and the cross-border coordination it promotes.

3. The CCAA Proceeding is a "Foreign Main Proceeding" Under Section 1502(4) and 1517(b)(1) of the Bankruptcy Code

The Foreign Representative respectfully submits that the Court should grant recognition of the CCAA Proceeding as a "foreign main proceeding" as defined in section 1502(4) of the Bankruptcy Code. The Bankruptcy Code provides that a foreign proceeding is a "foreign main proceeding" if it is pending in the country where the debtor has the center of its main interests. 11 U.S.C. § 1517(b)(1). Absent evidence to the contrary, a debtor's registered office is presumed to be the center of its main interests. 11 U.S.C. § 1516(c). *See In re Bear Stearns*, 374 B.R. at 127, 130 (noting that presumption that a debtor's center of main interests is the place of its registered office may be "rebutted by evidence to the contrary"). While the location of the debtor's registered office is indicative, many factors weigh into the center of main interests analysis, including "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law

would apply to most disputes." *Bear Stearns*, 374 B.R. at 128 (citing *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. July 5, 2007)).

The center of main interests for the Debtors' enterprise is Toronto, Ontario, Canada. The Debtors and their non-debtor affiliates are operationally and functionally integrated in many significant respects, largely organized under centralized senior management, and subject to combined cash management and accounting functions, all of which are based in Toronto, Ontario, Canada. Indeed, among others, the following critical functions are mostly or entirely performed for the Debtors and their non-debtor affiliates out of the Toronto office:

a. all of the Debtors and their non-debtor affiliates (collectively "**Cinram**") report to Cinram International Income Fund ("**CIIF**"), the ultimate parent company of Cinram, which is organized under the laws of Ontario;

b. the operations of all of the Debtors are managed and directed from their head office in Toronto;

c. corporate governance for all of the Debtors is directed from Canada;

d. in-person meetings of the Board of Trustees of CIIF are typically held in Toronto;

e. a majority of the members of the Boards of Directors or Managers of CII and each of the other Debtors maintain their offices in Ontario, Canada;

f. strategic and key operating decisions and key policy decisions for all of the Debtors are made by staff located in Toronto;

g. the Debtors' corporate accounting, accounts payable, insurance procurement, accounts receivable, financial planning, internal auditing, marketing, treasury, real estate, research & development, and tax services are provided from Toronto;

h. the Debtors' finance, legal, human resources, payroll, billing, freight management, procurement, and engineering services are shared among themselves and with CII in Toronto;

i. the Debtors' cash management functions are maintained and directed from Toronto;

j. although the Debtors and CII are separate entities and maintain distinct, complete books and records, funds are transferred between the Debtors' and

the Toronto office to settle inter-company balances, meet liquidity requirements and to concentrate surplus cash for investment in the Debtors' cash management system;

k. key information technology and systems used by certain of the Debtors and by certain of CII's European subsidiaries are provided from Toronto;

l. management and senior staff of the Debtors regularly attend meetings in Toronto;

m. all public company reporting and investor relations for the global Cinram enterprise are directed from Toronto by CIIF on a consolidated basis;

n. the chief executive officer that oversees financial management of the global Cinram enterprise is based in Toronto;

o. with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the global Cinram enterprise are managed in Toronto, Ontario;

p. new business development initiatives are centralized and managed from Toronto, Ontario; and

q. each of the Debtors maintains a bank account in Canada with a balance of at least $1,000 in each account.

Thus, based on the facts present in these cases, the Foreign Representative respectfully submits that Toronto, Ontario, Canada should be found to be the center of the Debtors' main interests. *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006) (noting that a debtor's center of main interests is the "place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties"); *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 66 (Bankr. S.D.N.Y. 2010).

Further, at least one court has equated a company's principal place of business to the center of its main interests. *Id.*; *In re Bear Stearns*, 374 B.R. at 127. As described above, nearly all of the Debtors' corporate business is conducted from Canada. As such, Canada is "ascertainable by third parties" as the Debtors' center of main interests. *In re Bear Stearns*, 374 B.R. at 130. Accordingly, given that the CCAA Proceeding is pending in Ontario, Canada,

which is the Debtors' center of main interests, the CCAA Proceeding should be recognized as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

An order recognizing a foreign proceeding shall be entered if all of the requirements for recognition have been met. 11 U.S.C. § 1517. As set forth above, the CCAA Proceeding is a "foreign main proceeding" within the meaning of section 1502(4) of the Bankruptcy Code, Cinram International ULC qualifies as a "foreign representative" under the Bankruptcy Code, and the Petitions for Recognition meet the requirements of Bankruptcy Code section 1515. Accordingly, based on the submissions contained herein and in the Bell Declaration, pursuant to section 1517(a) of the Bankruptcy Code, the Foreign Representative is entitled to entry of an order granting recognition to the CCAA Proceeding. 11 U.S.C. § 1517 (an order recognizing a foreign proceeding "shall be entered" if all of the requirements for recognition have been met).

4. Recognizing the CCAA Proceeding as a Foreign Main Proceeding is Consistent with the Purpose of Chapter 15 and Public Policy

Section 1506 of the Bankruptcy Code provides that nothing in chapter 15 shall prevent the court from refusing to take an action otherwise required therein if such action would be manifestly contrary to the public policy of the United States. 11 U.S.C. § 1506. The Foreign Representative submits that the relief requested is not manifestly contrary to, and is consistent with, public policy of the United States.

It is well established that one of the fundamental goals of the Bankruptcy Code is the centralization of disputes involving the debtor. *See, e.g., In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990) ("The Bankruptcy Code 'provides for centralized jurisdiction and administration of the debtor, its estate and its reorganization in the Bankruptcy Court . . . .'") (internal citations omitted). Indeed, as one court has noted, "the firm policy of American courts

is the staying of actions against a corporation which is the subject of a bankruptcy proceeding in another jurisdiction." *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979) (recognizing that Canadian liquidation proceeding would not violate laws or public policy of New York or the United States).

The CCAA Proceeding is similar to cases under chapter 11 of the Bankruptcy Code because it provides for a centralized process to assert and resolve claims against an estate and to provide distributions to creditors in order of priority. Recognizing the CCAA Proceeding and enjoining certain actions or proceedings with respect to the Debtors and their assets will assist the orderly administration of the Debtors' assets. Such orderly administration is consistent with the public policy of the United States, as embodied in the Bankruptcy Code. Absent the relief requested, there is a possibility that the assets of the Debtors in the United States could be subject to attachments and/or post-judgment enforcement proceedings brought by individual creditors in the U.S. notwithstanding any stay order issued by the Canadian Court. This could result in unnecessary enforcement costs or the piecemeal disposition of assets to the detriment of the CCAA Proceeding and the Debtors' creditors. Avoiding such potential outcomes through the recognition of the CCAA Proceeding and enforcement of the Initial CCAA Order in the United States is consistent with United States public policy and promotes the public policies embodied in the Bankruptcy Code.

Further, recognition of the CCAA Proceeding is consistent with the purpose of chapter 15 and the UNCITRAL Model Law on Cross Border Insolvency. Section 1501(a) of the Bankruptcy Code provides, in pertinent part, that:

> The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of -
>
> (1) cooperation between -

* * *

> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

* * *

> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor; [and]
>
> (4) protection and maximization of the value of the debtor's assets.

11 U.S.C. § 1501.

The relief requested by the Foreign Representative is consistent with the objectives of chapter 15. First, recognition of the CCAA Proceeding would foster cooperation between courts in Canada and the United States in the Debtors' restructuring proceedings. By granting recognition to the CCAA Proceeding and enforcing the Initial CCAA Order in the United States, the Court can effectively assist the Canadian Court in the orderly administration of the Debtors' assets. The Debtors' creditors would be enjoined from commencing or continuing actions against the Debtors and the assets of the Debtors, thereby assisting in the uniform resolution of claims against the Debtors.

Second, recognition of the CCAA Proceeding would promote the fair and efficient administration of a cross-border reorganization procedure that protects the interests of all creditors and interested entities. By recognizing the CCAA Proceeding and granting the relief requested, the process of resolving claims against the Debtors would be centralized in Canada. Claims would be treated in accordance with a plan of arrangement that comports with Canadian law, which is substantially similar to United States law, and any disputes would be subject to the uniform jurisdiction of one tribunal, the Canadian Court. If creditors' actions with respect to the Debtors' United States assets are not effectively stayed, the uniform and orderly voluntary administration of the Debtors in the CCAA Proceeding will be jeopardized.

Finally, the relief requested would protect the Debtors' assets located in the United States. Absent such relief, significant assets of the Debtors may be depleted and available resources may be expended unnecessarily to defend collection and other actions brought in the United States. Accordingly, the relief requested would further the objectives of chapter 15 by assisting the orderly voluntary administration of the Debtors in the CCAA Proceeding.

5. Specific Request for Relief Pursuant to Section 1521 of the Bankruptcy Code is Warranted and Appropriate

In addition to the relief automatically provided by section 1520 of the Bankruptcy Code upon recognition of a foreign main proceeding,[4] the Foreign Representative requests, in the event recognition of the CCAA Proceeding is granted, additional relief pursuant to section 1521 of the Bankruptcy Code to assist in the orderly administration of the Debtors' assets, including the extension of the provisional relief described in Section B below pursuant to section 1521(a)(6). Furthermore, upon recognition of a foreign proceeding and at the request of a foreign representative, the Court may grant, with certain express exceptions not applicable here, "any appropriate relief," including any injunctive relief and "any additional relief that may be available to a trustee," provided that the Court determines that doing so is necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of the creditors. 11 U.S.C. § 1521(a). Accordingly, pursuant to section 1521(a)(7) of the Bankruptcy Code, the Foreign Representative requests that the Court extend the protections afforded by sections 364(c), 364(d), 364(e), and 365(e) of the Bankruptcy Code to the Debtors, the DIP

[4] Upon recognition of the CCAA Proceeding as a foreign main proceeding, certain relief is automatically granted as a matter of right, including a stay that enjoins actions against the Debtors and otherwise protects the Debtors. *See* 11 U.S.C. § 1520. In particular, upon the Court's recognition of the CCAA Proceeding as a foreign main proceeding, section 1520(a)(1) of the Bankruptcy Code triggers the automatic stay provisions of section 362 of the Bankruptcy Code with respect to the Debtors.

Lenders and the Prepetition Secured Lenders, as applicable, on a final basis after notice and a hearing.

(a) **Application of the Protections of Section 365(e) of the Bankruptcy Code is Appropriate**

As described in detail in Section B below, the Debtors rely on numerous leases and contracts in the United States to facilitate the manufacture, storage, and shipment of their products. Many of these contracts contain provisions that purportedly give counterparties the right to terminate the agreement and cease performance if the Debtors become insolvent or file bankruptcy proceedings. If lease and contract counterparties use *ipso facto* bankruptcy provisions to terminate those agreements, then the going concern value of the Debtors' business would be decimated. The Foreign Representative therefore submits that application of section 365(e) of the Bankruptcy Code through operation of section 1521(a)(7) of the Bankruptcy Code is necessary and appropriate in these cases.

(b) **Application of the Protections of Section 364 of the Bankruptcy Code is Appropriate**

As set forth more fully in the Bell Declaration, the Debtors commenced the CCAA Proceeding and the Foreign Representative commenced these cases to, among other things, assist the Debtors in consummating the Proposed Sale. To maintain sufficient operating liquidity and fund the administrative costs associated with the CCAA Proceeding and these cases while operating in the ordinary course prior to consummation of the Proposed Sale, the Debtors have made a good-faith business decision, after extensive arm's-length negotiations, to enter into an agreement with certain of their Prepetition Secured Lenders (the "**DIP Lenders**") to obtain access to a USD $15 million post-petition credit facility (the "**DIP Facility**").

The DIP Facility provides, among other things, as follows:[5]

1. Borrower: Cinram (U.S.) Holding's Inc.

2. Guarantors: Each of the Debtors that are not Borrowers have guaranteed the DIP Facility.

3. Lender: JPMorgan Chase Bank, N.A., as Administrative Agent, on behalf of certain of the Debtors' Prepetition Secured Lenders.

4. Availability: $15,000,000.00 in a single draw on a date to be selected by the Borrowers, which shall be a date occurring on or after the Draw Date and prior to the Outside Date. For the avoidance of doubt, the Debtors believe that they will need to, and expect to, draw the entire amount available prior to entry of the Final Order.

5. Use of Proceeds: The Borrowers will use the proceeds of the Loans to finance the working capital needs and other general corporate purposes of the Obligors.

6. Interest Rate: (a) during such periods as such Loan is a U.S. Base Rate Loan, a rate per annum equal at all times to the sum of (i) the U.S. Base Rate in effect from time to time *plus* (ii) 9.00%, and (b) during such periods as such loan is a Eurocurrency Rate Loan, a rate per annum equal at all times during each Interest Period for such Loan to the sum of (i) the Eurocurrency Rate for such Interest Period for such Loan *plus* (ii) 10.00%.

7. Default Interest: Upon the occurrence and during the continuance of any Event of Default, interest shall accrue on the unpaid (a) principal amount of each Loan at 2% per annum above the rate per annum required to be paid on such Loan and (b) amount of all outstanding interest, fees, and other amounts at 2% per annum above the U.S. Base Rate.

8. Term: The DIP Facility's Maturity Date is the earliest to occur of the following dates: (a) September 30, 2012, (b) the closing date of the Sale, (c) the effective date of any plan of compromise and arrangement approved by the creditors of the Obligors, sanctioned by the CCAA Court, and recognized by the U.S. Bankruptcy Court, (d) the date on which the stay under the Initial Order or the Interim or Final Recognition Order expires without being extended, (e) the date on which the CCAA Proceedings shall be dismissed or terminated or converted to a proceeding under the BIA, and (f) the date on which the U.S. Bankruptcy Court refuses to enter an order to recognize any order in the CCAA Proceedings, which the Administrative Agent determines in its reasonable discretion is material and which adversely effects the Lenders.

[5] Capitalized terms used in the following summary have the meanings given to them in the DIP Facility, which is attached as Exhibit D to the Bell Declaration. This summary is qualified in its entirety by reference to the provisions of the DIP Facility.

9. Security/Priority: Upon entry thereof, the DIP Financing Orders and the Loan Documents will create a valid and perfected super-priority priming security interest in favor of the Administrative Agent on behalf of the Lenders in the Obligors' Property, subordinate only to the Carve-Out.

10. Carve-Out: The Administration Charge and any validly perfected security interest in favor of a "secured creditor" as defined in the CCAA existing as of the CCAA Filing Date, other than Liens in favor of the lenders under the Prepetition Credit Agreement and the Second Lien Credit Agreement.

11. Events of Default: The DIP Facility includes such events of default as are usual and customary for comparable financings, including, without limitation, (a) failure to make payments or prepayments of principal when such payments are due, (b) if any representation or warranty proves to have been incorrect in any material respect when made, (c) failure to observe or perform any applicable covenant, condition, or agreement, including failure to comply with the DIP Budget, (d) if (i) any Proceeding is dismissed or terminated, (ii) any insolvency proceeding or case is commenced by or in respect of any Obligor, other than these Proceedings (iii) a bankruptcy order is made under the BIA against any Obligor, (iv) any Obligor seeks to dismiss or terminate any of the Proceedings, (v) a responsible officer is appointed in respect of any Obligor or its assets in any of the Proceedings, or (vi) an application is filed by any Obligor for approval of any superpriority claim in any of the Proceedings which is *pari passu* with or senior to the claims of the Administrative Agent and the Lenders against the Obligors, unless otherwise permitted in the DIP Financing Order, or if such motion is granted, (e) if any Obligor or any of its Subsidiaries is prevented from continuing to conduct all or any material part of its business affairs, (f) if any DIP Financing Order or other Bankruptcy Court Order material to the Administrative Agent or the Lenders is modified without the Administrative Agent's prior written consent, (g) if any expenditures are made by the Obligors without the consent of the Administrative Agent, (h) the issuance of a court order (i) lifting the Stay of Proceedings, (ii) discontinuing the Proceedings, or (iii) modifying the terms of the DIP Facility or the DIP Charge, (i) if an Initial Order is not entered within two days of the CCAA Filing Date, the Interim Recognition Order is not entered within seven days of the CCAA Filing Date, or the Final Recognition Order is not entered within 35 days of the CCAA Filing Date, (j) if there is any materially negative effect to the DIP Charge, (k) if any Obligor proposes or supports any plan of compromise and arrangement, or draft thereof that does not provide for the payment of the Obligations, (l) a Change of Control occurs, (m) a materially adverse event with respect to the Liens occurs, or (n) the Majority Consenting Lenders (as defined in the Support Agreement) have the right to terminate the Support Agreement or there is an automatic termination of the Support Agreement.

12. Use of Funds Limitations: The DIP Facility includes such use of funds limitations as are usual and customary for comparable financings, including, without limitation, certain limitations on Investments, Restricted Payments, the

> payment of debts other than in accordance with the DIP Budget or as approved by the Administrative Agent, contributions to any Defined Benefit Plans, and cash disbursements on Capital Expenditures.

None of the extraordinary provisions required to be highlighted pursuant to Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware are included in the Recognition and Relief Motion, the Interim Order, or the DIP Facility.

Due to the Debtors' liquidity constraints, and as discussed further below, the Debtors require access to the DIP Facility prior to entry of the Final Order. The DIP Lenders have conditioned availability thereunder upon the Court's grant of certain protections under section 364 of the Bankruptcy Code. In addition to section 364 protections, the DIP Lenders have conditioned the continuing effectiveness of the DIP Facility upon the Court's recognition in full of the Initial CCAA Order.

The Foreign Representative submits that the DIP Lenders and the Prepetition Secured Lenders are entitled to the protections of section 364 of the Bankruptcy Code as described herein and to the extent set forth in the Provisional Order and the Final Order. Pursuant to section 364(c) of the Bankruptcy Code:

> If the trustee is unable to obtain unsecured credit allowable under section 503(b)(l) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt . . .
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

Courts have articulated a three-part test to determine if a debtor is entitled to obtain financing pursuant to section 364(c) of the Bankruptcy Code: whether (a) the debtor is unable to obtain unsecured credit under section 364(b); (b) the credit transaction is necessary to preserve the assets of the estate; and (c) the terms of the transaction are fair, reasonable, and adequate under the circumstances. *See, e.g.*, *In re Aqua Assocs.*, 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991); *In re Ames Dep't Stores. Inc.*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990); *In re Crouse Group, Inc.*, 71 BR. 544, 546 (Bankr. E.D. Pa. 1987).

Given their overleveraged capital structure and current liquidity constraints, the Debtors have been unable to obtain (a) unsecured credit as an administrative expense, (b) credit secured solely by a lien on property of the estate that is not otherwise subject to a lien (because substantially all of their property has already been granted as collateral), or (c) credit secured by a junior lien on property of the estate which is already subject to a lien. Indeed, the Debtors are unable to obtain any credit for borrowed money on more favorable terms and conditions than those provided in the DIP Facility, or without granting to the DIP Lenders the protections afforded by section 364 of the Bankruptcy Code.

Given the Debtors' current financial situation, in the absence of financing from the DIP Lenders, the Debtors could face a shuttering of certain or all of their operations during the pendency of these cases. Accordingly, the Debtors have demonstrated "by a good faith effort that credit was not available without" the protections afforded by section 364(c) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. and Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986) ("[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable"); *see also In re Plabell Rubber Prods., Inc.*, 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992); *In re Sky Valley, Inc.*, 100 B.R. 107,

113 (Bankr. N.D. Ga. 1988) (where there are few lenders likely to be able and/or willing to extend the necessary credit to the debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct an exhaustive search for financing."), aff'd sub nom., *Anchor Say. Bank FSB v. Sky Valley, Inc.*, 99 B R. 117, 120 n.4 (N.D. Ga. 1989).

Without the DIP Facility, the Debtors will not be able to fund the continued operation of the their business in a manner that will permit their pursuit of the Proposed Sale and avoid irreparable harm to the Debtors and their estates. The availability to the Debtors of sufficient working capital and liquidity through the incurrence of new indebtedness and other financial accommodations from the DIP Lenders and the Prepetition Secured Lenders is necessary to bolster the confidence of the Debtors' vendors and suppliers of other goods and services, as well as their customers and employees. Indeed, the preservation and maintenance of the going concern value of the Debtors' business is dependent on access to the DIP Facility, which was already approved on a final basis by the Canadian Court in the CCAA Proceeding.

i. The DIP Financing Represents an Exercise of the Debtors' Sound Business Judgment and was Negotiated in Good Faith

Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money. *See Grp. of Inst. Inv. v. Chicago Mil. St. P. & Pac. Ry.*, 318 U.S. 523, 550 (1943); *In re Lifeguard Indus., Inc.*, 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983); *In re Hamilton Square Associates*, No. 9l-14720S, 1992 WL 98294, at *1 (Bankr. E.D. Pa. May 51992) (holding that a "debtor in possession's business judgment must be accepted if reasonable"). In general, a bankruptcy court should defer to a debtor in possession's business judgment regarding both the need for and the proposed use of funds unless such decision is arbitrary and capricious. *See In re Wheeling-Pittsburgh Steel Cow*, 72 BR. 845, 849 (Bankr. W.D. Pa. 1987) (holding that "the court should not interfere with or second-guess

the debtor's sound business judgment unless and until evidence is presented that establishes that the debtor's decision was one taken in bad faith or in gross abuse of its retained business discretion"). Courts generally will not second-guess a debtor in possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code" *Curlew Valley*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (footnotes omitted); *In re Lynx Transport, Inc.*, No. 98-36433DAS, 1999 WL 615366. at *3 (Bankr. E.D. Pa. Aug. 11, 1999) (holding that "a debtor in possession (DIP) is authorized to make its own independent business judgments").

The Debtors, in the exercise of their prudent business judgment and consistent with their fiduciary duties, have concluded that the terms and conditions of the DIP Facility are fair, reasonable, and the best available under the circumstances and are supported by reasonably equivalent value and consideration. Among other reasons, obtaining the DIP Facility from the DIP Lenders will assure the Debtors of the support of their Prepetition Secured Lenders throughout this restructuring process. That support is critical to achieving the Proposed Sale, preserving the Debtors' business as a going-concern, and maximizing value for all of the Debtors' creditors.

Furthermore, the Debtors submit that the DIP Facility was negotiated in good faith and at arm's-length by all parties involved and, accordingly, the Debtors believe that any credit extended and loans made to the Debtors under the DIP Facility should be deemed to have been extended in good faith, within the meaning of section 364(e) of the Bankruptcy Code. The Debtors further submit that the proceeds to be extended under the DIP Facility will be so extended in good faith, and for valid business purposes and uses, as a consequence of which the DIP Lenders are entitled to the protection and benefits of section 364(e) of the Bankruptcy Code.

ii. Use of Cash Collateral and Grant of Adequate Protection is Warranted Under the Circumstances

Pursuant to the Motion and as set forth in the Provisional Order, the Debtors also seek authority to use the Prepetition Secured Lenders' cash collateral (the "**Cash Collateral**") and approval to grant adequate protection to the Prepetition Secured Lenders. Section 363(c)(2) of the Bankruptcy Code permits a debtor to use, sell, or lease cash collateral if the entity with an interest in such cash collateral consents or the court authorizes such use. 11 U.S.C. § 363(c)(2). The Court should authorize the use of the Cash Collateral in these cases because the Debtors need the Cash Collateral to meet their ongoing payroll-related obligations and obligations to other essential providers of goods and services and because the Prepetition Secured Lenders have consented to the use of their Cash Collateral, subject to (among other things) entry of the Provisional Order and the Final Order in the forms attached to the Motion. *See, e.g., Mbank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1397-98 (10th Cir. 1987); *accord Hoffman v. Portland Bank (In re Hoffman)*, 51 B.R. 42, 47 (Bankr. W.D. Ark. 1985); *Chrysler Creditor Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.)*, 727 F.2d 1017, 1019 (11th Cir. 1984).

As adequate protection for the interests of the Prepetition Secured Lenders in their prepetition collateral (including Cash Collateral) on account of the granting of priming liens under the DIP Facility, subordination to the Carve-Out (as defined in the DIP Facility), the Debtors' use of the Cash Collateral, and any other decline in value arising out of the automatic stay or the Debtors' use, sale, disposition, or other depreciation of the prepetition collateral, the Debtors request authority, pursuant to section 364(d) of the Bankruptcy Code, to provide the Prepetition Secured Lenders the adequate protections described below. The Debtors submit that the terms of the proposed adequate protection arrangements and the use of Cash Collateral are

fair and reasonable, reflect the Debtors' prudent exercise of business judgment, and constitute reasonably equivalent value and fair consideration for the consent of the Prepetition Secured Lenders to the DIP Facility and support of the Proposed Sale.

Specifically, the Debtors request authority to protect the interest of the Prepetition Secured Lenders by granting to the Prepetition Agent for the benefit of each Prepetition Secured Lender a replacement lien on the post-petition assets of the Debtors to the same extent held prepetition and superpriority administrative expense claims. Accordingly, to the extent of the diminution of value of the interests of the Prepetition Secured Lenders in their prepetition collateral, the Debtors seek authority to grant the Prepetition Secured Lenders pursuant to section 364(d) of the Bankruptcy Code, valid, binding, enforceable, and automatically perfected post-petition security interests in and liens on the Collateral (as defined in the DIP Facility) (the "**Replacement Liens**"). The Replacement Liens shall be junior only to (a) the Carve Out, (b) the DIP Lenders' liens on the Collateral, and (c) certain Permitted Priority Liens (as defined in the DIP Facility). The Debtors further seek authority to grant the Prepetition Secured Lenders an allowed administrative expense claim under section 364(c)(1) of the Bankruptcy Code with priority, subject and subordinate only to the Carve Out and the obligations under the DIP Facility, and otherwise over all administrative expense claims and unsecured claims against the Debtors, whether now existing or hereafter arising, in each case as set forth in the Provisional Order and the Final Order

In addition, the Debtors request authority to provide adequate protection to their Prepetition Secured Lenders in the form of ongoing payment of the reasonable and documented professional fees and expenses of legal and financial advisors to the Prepetition Lenders under

the Pre-Petition Credit Agreement (as defined in the DIP Facility) in accordance with the DIP Budget (as defined in the DIP Facility).

For all of the reasons set forth in this Section A, the Foreign Representative is requesting that the Court, pursuant to sections 1520, 1521(a)(7), and 105(a) of the Bankruptcy Code, give full force and effect to the Initial CCAA Order of the Canadian Court in the United States, afford the Debtors the protections of section 1520 of the Bankruptcy Code, afford the protections of the Bankruptcy Code's *ipso facto* provisions to the Debtors, approve the DIP Facility, and grant to the DIP Lenders and, to the extent provided in the DIP Facility and the Motion, the Prepetition Secured Lenders, the protections of sections 364(c), 364(d), and 364(e) of the Bankruptcy Code. The Foreign Representative submits that the relief requested herein and in the Petitions for Recognition is consistent with well-established practice under the Bankruptcy Code, and that similar relief is routinely granted to trustees in domestic proceedings.

B. The Provisional Relief Requested by the Foreign Representative is Within the Scope of Section 1519 of the Bankruptcy Code and Appropriate Under the Circumstances

Pursuant to the Recognition Motion, the Foreign Representative also seeks entry of an order making sections 362, 364(c), 364(d), 364(e), and 365(e) of the Bankruptcy Code applicable in these ancillary cases on a provisional basis pending entry of the Final Order pursuant to sections 1519(a)(3), 1521(a)(7), and 105(a) of the Bankruptcy Code. As noted, the Foreign Representative believes that application of these provisions in these cases is crucial to prevent irreparable injury to the value of the Debtors' assets by not subjecting them to diminution in value resulting from the collection, enforcement, or termination efforts of creditors or contract counterparties prior to the disposition of the Petitions for Recognition and by ensuring the Debtors' continued access to the necessary liquidity to consummate the Proposed Sale and maximize value for all creditors in these cases.

1. The Relief Requested is Authorized by Sections 1519(a)(3), 1521(a)(7), and 105(a)

Section 1519(a)(3) of the Bankruptcy Code authorizes the Court to grant, on a provisional basis, any relief available pursuant to section 1521(a)(7). Section 1521(a)(7) provides that the Court may grant any relief available to a trustee, subject to certain exceptions not relevant here. The automatic stay of section 362 is an essential feature of the Bankruptcy Code. Section 365(e) of the Bankruptcy Code provides similarly invaluable protection to Debtors against the termination of contracts or leases based solely on so-called *ipso facto* bankruptcy provisions. Although not automatic upon filing, the Court has discretion to grant section 362 and 365(e) relief on a provisional basis pursuant to sections 1519(a)(3) and 1521(a)(7) of the Bankruptcy Code. In addition, section 105(a) of the Bankruptcy Code further allows the Court to "issue any order . . . necessary or appropriate to carry out the provisions of [title 11]."

The provisional application of sections 362 and 365(e) of the Bankruptcy Code, among others, has been approved in several cases, both within and outside of this jurisdiction. *See, e.g.*, *In re Elpida Memory, Inc.*, No. 12-10947 (Bankr. D. Del. Mar. 21, 2012) (applying section 362 of the Bankruptcy Code on a provisional basis to the actions of all creditors against the debtors and their property located within the United States, pursuant to section 1519 of the Bankruptcy Code); *In re Arctic Glacier Int'l Inc.*, No. 12-10605 (Bankr. D. Del. Feb. 23, 2012) (granting provisional relief, through sections 1519 and 1521 of the Bankruptcy Code, sections 108, 362, and 365(e)); *In re Catalyst Paper Corp.*, No. 12-10221 (Bankr. D. Del. Feb. 8, 2012) (granting provisional DIP relief, through sections 1519 and 1521 of the Bankruptcy Code); *In re Angiotech Pharm. Inc.*, No. 11-10269 (Bankr. D. Del. Jan. 31, 2011) (granting provisional relief, including protections of automatic stay and section 365(e)); *In re Nortel Networks UK Ltd.*, No.

09-11972 (Bankr. D. Del. Oct. 27, 2010) (granting provisional relief, including protections of automatic stay and section 365(e); *In re Innua Canada Ltd.*, No. 09-16362 (Bankr. D.N.J. Mar 25, 2009) (granting provisional relief, including protections of automatic stay); *In re MAAX Corp.*, No. 08-11443 (Bankr. D. Del. July 14, 2008) (applying section 1519 of the Bankruptcy Code and section 365(e) to protect against contract termination); *In re Destinator Techs. Inc.*, No. 08-11003 (Bankr. D. Del. May 23, 2008) (incorporating sections 363 and 364 in the interim period). As further set forth below, provisional application of sections 362 and 365(e) of the Bankruptcy Code is appropriate here, and in the best interests of the Debtors and their creditors.

Similarly, as discussed in Section A above, access to the Debtors' DIP Facility has been conditioned upon, among other things, the extension to the DIP Lenders, and to the extent of their adequate protection, the Prepetition Secured Lenders, of the protections afforded pursuant to sections 364(c), 364(d), and 364(e) of the Bankruptcy Code. The provisional application of section 364 of the Bankruptcy Code has been approved by the Court in other chapter 15 cases. *See In re Arctic Glacier Int'l Inc.*, No. 12-10605 (Bankr. D. Del. Feb. 23, 2012) (granting provisional relief, through sections 1519 and 1521 of the Bankruptcy Code, of section 364(e)). Further, relief pertaining to post-petition financing has been granted by the Court and courts in other districts in chapter 15 proceedings. *See e.g., In re Arctic Glacier Int'l Inc.*, No. 12-10605 (Bankr. D. Del. Feb. 23, 2012) (order granting provisional DIP relief); *In re Fraser Papers Inc.*, No. 09-12123 (Bankr. D. Del. June 19, 2009); *In re W.C. Wood Corp., Ltd.*, No. 09-11893 (Bankr. D. Del. June 1, 2009); *In re Destinator Techs. Inc.*, No. 08-11003 (Bankr D. Del. May 20, 2008). In addition, similar adequate protection rights have been granted to prepetition secured lenders in at least one chapter 15 case in this District. *In re Catalyst Paper Corp.*, No. 12-10221 (Bankr. D. Del. Mar. 5, 2012).

2. The Relief Requested is Necessary and Appropriate to Prevent Irreparable Harm

Relief pursuant to section 1519 of the Bankruptcy Code is available where the foreign representative can satisfy the standard for injunctive relief. 11 U.S.C. § 1519(e); *In re Innua Canada Ltd.*, No. 09-16362, 2009 WL 1025088, at *3 (Bankr. D.N.J. Mar. 25, 2009). In the Third Circuit, the factors considered for injunctive relief include "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." *United States v. Bell*, 414 F.3d 474, 478 n.4 (3d Cir. 2005) (citing *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996)). *See also Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006) (citations omitted); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (citations omitted).

The greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). In the cross-border restructuring context, courts have consistently recognized that "the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury." *In re Lines*, 81 B.R. 267, 270 (Bankr. S.D.N.Y 1988). The Foreign Representative submits that this standard is satisfied here and that it is therefore entitled to the requested provisional relief pursuant to section 1519 of the Bankruptcy Code, including the entry of the Provisional Order.

(a) There is a Substantial Likelihood of Foreign Recognition

As set forth in Section A above, the Foreign Representative has provided a solid basis for recognition of the CCAA Proceeding, and has thereby more than demonstrated a

reasonable probability that such proceeding will be recognized as a foreign main proceeding. Based on the facts that (a) the CCAA Proceeding is pending in Canada, the location of the Debtors' center of main interests, (b) all proper supporting documentation was filed contemporaneously with the Verified Petitions, and (c) these cases were properly commenced by a duly appointed foreign representative, there is a high likelihood that recognition of the CCAA Proceeding as a foreign main proceeding will be granted.

(b) **The Debtors Will Suffer Irreparable Injury if the Provisional Order is Not Entered**

The Foreign Representative believes that application of provisional relief pursuant to sections 362 and 365 of the Bankruptcy Code in these cases is critical to the prevention of irreparable damage to the value of the Debtors' assets and business. These cases were commenced for the purpose of obtaining the assistance of the Court in respect of the CCAA Proceeding and to give effect in the United States to the Initial CCAA Order of the Canadian Court. Unless the Provisional Order is entered, the Debtors face the real possibility of immediate and irreparable harm from (a) individual creditors' collection and enforcement actions, (b) the termination of certain valuable contracts and critical leases as a result of the filing of these cases and the CCAA Proceeding, (c) prejudice that could result from decentralized administration of the Debtors' assets, and (d) the decreased value of the Debtors' business in the event of administrative insolvency, or potential administrative insolvency.

With respect to the potential for collection activity on a piecemeal basis, a number of courts have recognized the need for provisional relief to prevent individual creditors from taking extrajudicial advantage of the recognition process. *See Victrix S.S. Co., S.A. v. Salen Dry Cargo, A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) (harm to an estate exists where the orderly determination of claims and the fair distribution of assets are disrupted); *In re Banco Nacional de*

Obras y Servicios Publicos, S.N.C., 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988) (stating that injunctive relief is necessary "to prevent individual American creditors from arrogating to themselves property belonging to the creditors as a group"); *In re Lines*, 81 B.R. at 270 (stating that "the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury").

If all creditors are not enjoined, the assets of the Debtors located in the United States may be prematurely seized and the orderly determination of claims in the foreign proceeding will be rendered impossible. If creditors unilaterally pursue collection or enforcement efforts, contract termination, or application of setoff, it could diminish the value of the Debtors' assets and cause significant delay and disruption to the Debtors' restructuring process and the Proposed Sale.

Further, the Debtors rely on a number of critical leased properties and contracts in the United States to manufacture, store, and ship their products to their customers. If lease and contract counterparties used *ipso facto* bankruptcy provisions to terminate those agreements, then the going concern value of the Debtors' business would be decimated. Without the protections afforded by section 365(e) of the Bankruptcy Code, should such leases and other contracts be terminated, the Debtors would lose important rights and benefits thereunder, to the detriment of the Debtors' business and, in turn, their creditors. Thus, absent the provisional relief requested, the Debtors and their creditors may suffer irreparable harm.

Without the certainty that the automatic stay and section 365(e) protection can provide, the Debtors would be at risk of facing collection proceedings, termination of valuable contracts and leases, and other harmful actions by creditors resulting in major disruptions of the

Debtors' reorganization through the CCAA Proceeding. The purpose of chapter 15 is to prevent such harm. *See* 11 U.S.C. § 1501.

Similarly, as set forth above, without access to working capital and liquidity prior to entry of the Final Order, the Debtors cannot effectively operate their business and will face increased risk that suppliers and other critical parties will cease doing business with them. Lack of liquidity, or perceived lack of liquidity, could thus quickly result in administrative insolvency and a significantly diminished recovery for all of the Debtors' creditors. Therefore, the Debtors submit that entry of the Provisional Order and the approval granted therein of the DIP Facility, the incurrence of indebtedness thereunder, and other financial accommodations associated therewith, including the use of Cash Collateral and granting of related adequate protection rights to the Prepetition Secured Lenders are each necessary to avoid immediate and irreparable harm to the Debtors and their estates pending the hearing on the Final Order. In the Debtors' sound business judgment, entry of the Provisional Order is in the best interests of the Debtors and their creditors as it will, among other things, allow for the continued operation and ultimate preservation of the Debtors' existing business while providing the greatest recovery possible to all of the Debtors' creditors.

Accordingly, the Debtors respectfully request that, pending the hearing on the Final Order, the Provisional Order be approved in all respects and that the terms and provisions of the Provisional Order be implemented and that, after the Final Hearing, the Final Order be approved in all respects and the terms and provision of the Final Order be implemented.

(c) **There Will Be No Greater Harm to Others if the Relief is Granted**

In contrast to the hardships described above, preservation of the *status quo* through imposition of the automatic stay, approval of the necessary protections of 364(c), 364(d), and 364(e) that are a prerequisite to the Debtors' access to the DIP Facility, and application of

section 365(e) of the Bankruptcy Code while the Foreign Representative and the Debtors undertake the reorganization process in the CCAA Proceeding will not prejudice creditors. The relief requested in the Recognition Motion is intended to be temporary, extending only through the disposition of the Petitions for Recognition. If recognition of the CCAA Proceeding is granted, some of the same relief being requested on a provisional basis would come into effect automatically. Moreover, the Provisional Order specifically provides that any creditor that believes it has been harmed by the provisional relief granted therein may file a motion with the Court seeking relief therefrom. Accordingly, the balance of the hardships tips decidedly in favor of the Debtors, as there will be negligible, if any, harm to others if the relief is granted.

(d) **Granting the Requested Relief is Consistent with U.S. Public Policy**

Granting the provisional relief requested in the Recognition Motion will help advance the purpose of chapter 15, "to provide effective mechanisms for dealing with cases of cross-border insolvency," with the express objectives of cooperation between United States courts, trustees, examiners, debtors, the courts, and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501(a)(1)-(5). *See In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007); *In re Bear Stearns*, 374 B.R. at 126. If the provisional relief sought is not granted, the Debtors will be exposed to the risks detailed above, including potential enforcement actions by creditors in the United States. Such actions on the part of creditors would violate the stay provisions of the Initial CCAA Order and thereby interfere with the orderly administration of the CCAA

Proceeding, which is exactly the type of harm chapter 15 is intended to prevent. *See* 11 U.S.C. § 1501. Further, if the relief requested herein pursuant to section 364 of the Bankruptcy Code is not granted on a provisional basis, the Debtors believe that the DIP Lenders could refuse to grant the Debtors or their Canadian affiliates access to the DIP Facility, which has already been reviewed and approved by the Canadian Court in the CCAA Proceeding. Accordingly, the provisional relief requested is consistent with the public policy embodied in chapter 15 of the Bankruptcy Code and will promote the fair and efficient administration of this cross-border insolvency proceeding.

In addition, and as set forth above with respect to final recognition of the CCAA Proceeding, the provisional relief promotes cooperation between foreign jurisdictions and comity among tribunals. By its Initial CCAA Order, the Canadian Court has requested the assistance of the Court to effectuate its orders in the United States. *See* Initial CCAA Order ¶ 65. Accordingly, providing the requested assistance would effectuate the public policy considerations underpinning section 1525 of the Bankruptcy Code which mandates cooperation "to the maximum extent possible" between the Court and a foreign court. *See* 11 U.S.C. § 1525.

Conclusion

WHEREFORE, the Foreign Representative respectfully requests that the Court grant the relief requested in the Petitions for Recognition, and such other and further relief as may be just and proper.

Dated: Wilmington, Delaware
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Respectfully submitted,

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