IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 15
	)	
FRASER PAPERS INC., et al.,[1]	)	Case No. 09-12123 (KJC)
	)	
Debtors in Foreign Proceedings.	)	Joint Administration Proposed
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEBTORS' MOTION FOR (A) ENTRY OF AN ORDER GRANTING RECOGNITION AND RELIEF IN AID OF FOREIGN MAIN PROCEEDING PURSUANT TO 11 U.S.C. §§ 1515, 1517 AND 1520 AND (B) A TEMPORARY RESTRAINING ORDER AND, AFTER NOTICE AND A HEARING, A PRELIMINARY INJUNCTION GRANTING PROVISIONAL RELIEF UNDER 11 U.S.C. § 1519(A)

Dated: June 18, 2009
Wilmington, Delaware

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[1] These jointly administered cases are those of the following debtors: Fraser Papers Inc., FPS Canada Inc., Fraser Papers Holdings Inc., Fraser Timber Ltd., Fraser Papers Limited, and Fraser N.H. LLC.

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Fraser Papers Inc. ("Fraser"), in its capacity as foreign representative of Fraser and its affiliated captioned debtors and participants (collectively with Fraser, the "Debtors") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), pending before the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court"), respectfully submits this Memorandum of Points And Authorities In Support Of Debtors' Motion For (A) Entry Of An Order Granting Recognition And Relief In Aid Of Foreign Main Proceeding Pursuant To 11 U.S.C. §§ 1515, 1517 And 1520 And (B) A Temporary Restraining Order And, After Notice And A Hearing, A Preliminary Injunction Granting Provisional Relief Under 11 U.S.C. § 1519(a) (the "Memorandum") pursuant to Local Bankruptcy Rule 9013-1(b), and respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors seek ancillary relief under chapter 15 of the Bankruptcy Code ("Chapter 15") as part of the Debtors' comprehensive cross-border reorganization. Specifically, the Canadian Court issued an order (the "CCAA Order") commencing the Canadian Proceeding and, among other things, (a) staying further prosecution of any and all potential or outstanding actions against the Debtors and their former, current and future directors and officers and prohibiting execution against all assets of the Debtors to allow the Debtors an opportunity to explore all restructuring alternatives and to preserve and enhance the value of the Debtors' assets in the interim, (b) appointing Fraser as the foreign representative of the Debtors for the purposes of these proceedings, and (c) expressly authorizing Fraser to commence these chapter 15 cases for the Debtors and seek relief for the Debtors in the United States consistent with the relief granted under the CCAA Order.

Accordingly, the Debtors have commenced their chapter 15 cases seeking recognition of the Canadian Proceeding as a "foreign main proceeding" for the purposes of obtaining relief in aid of the Canadian Proceeding and so that the Debtors may be afforded the relief attendant to recognition of the Canadian Proceeding, including the automatic stay under section 362 of the Bankruptcy Code. In the interim, however, the Debtors require immediate protection in the United States consistent with the relief provided for in the CCAA Order under sections 105(a), 1519(a)(1), 1519(a)(2), and 1519(a)(3) of the Bankruptcy Code to prevent suppliers, creditors and other parties in interest who may take steps to deplete the Debtors' estates to the detriment of all stakeholders, or may institute or continue actions or claims against the Debtors or their former, current or future directors or officers with respect to any claim against such directors or officers alleging liability in their capacity as director or officers, as set forth in the CCAA Order. The Canadian Court has already granted this relief in Canada and has authorized and empowered Fraser to seek co-extensive relief in the United States in aid of the Canadian Court and the Canadian Proceeding. The effectiveness of the Canadian Proceeding and the restructuring contemplated thereby depends on the type of coordination and cooperation inherent in chapter 15 of the Bankruptcy Code and the policy behind it. See 11 U.S.C. § 1501.

The Debtors' aim in commencing the Canadian Proceeding and these chapter 15 cases, and in seeking the injunctive relief requested, is to maximize recoveries to, and provide for an equitable distribution of value among, all creditors. Without the provisional injunctive relief sought in these cases under sections 105(a) and 1519(a)(1), (2), and (3) of the Bankruptcy Code, suppliers, creditors and other stakeholders may have the ability to disrupt the Debtors' operations, potentially deplete the Debtors' estates to the detriment of all stakeholders, and irreparably jeopardize the Debtors' ongoing efforts to restructure. Moreover, without the debtor-

in-possession financing sought by the Debtors, the Debtors may be forced to cease operations, thereby severely damaging the value of the Debtors' estates.

The relief requested in these chapter 15 cases is well-justified under the circumstances. A stay, in both Canada and the United States, will provide the limited breathing period that is crucial to the Debtors' ability to negotiate with the numerous claimants that will emerge in response to an anticipated call for claims in the Canadian Proceeding, with a view to formulating a plan under the CCAA. Given the Debtors' current circumstances, development and approval of a plan that includes an international, equitable resolution of all creditors' claims is in the best interests of all creditors.

FACTUAL BACKGROUND

The necessity for relief and the pertinent facts, including, without limitation, facts cited below are set forth in the *Debtors' Motion For (A) Entry Of An Order Granting Recognition And Relief In Aid Of Foreign Main Proceeding Pursuant To 11 U.S.C. §§ 1515, 1517 And 1520 And (B) A Temporary Restraining Order And, After Notice And A Hearing, A Preliminary Injunction Granting Provisional Relief Under 11 U.S.C. § 1519(a)* (the "Motion for Relief") and the *Declaration of J. Peter Gordon of Fraser Papers Inc. in Support of (I) Petitions for Recognition of Canadian Proceeding Under 11 U.S.C. § 1515; (II) Debtors' Motion for Order Directing Joint Administration of Chapter 15 Bankruptcy Cases Under Fed. R. Bankr. P. 1015(b); and (III) Debtors' Motion for (A) Entry Of An Order Granting Recognition And Relief In Aid Of Foreign Main Proceeding Pursuant To 11 U.S.C. §§ 1515, 1517 And 1520 And (B) Temporary Restraining Order and, After Notice and a Hearing, a Preliminary Injunction Granting Provisional Relief Under 11 U.S.C. § 1519(a)* (the "Gordon Declaration"). The Gordon

Declaration and its exhibits describe in detail the Debtors, their operations, and the Canadian Proceeding.

ARGUMENT

I. THE COURT SHOULD RECOGNIZE THE CANADIAN PROCEEDING AS A FOREIGN MAIN PROCEEDING

This Court has jurisdiction to hear and determine cases commenced under the Bankruptcy Code and all core proceedings arising thereunder pursuant to 28 U.S.C. §§ 157 and 1334. A case under chapter 15 is considered 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).

Venue is proper in this District. The principal assets in the United States of the Debtors—Fraser's equity interests in its various subsidiaries—are located within the District of Delaware. Accordingly, venue is proper in this District pursuant to 28 U.S.C. § 1410(1).

The Canadian Proceeding is entitled to recognition as a foreign main proceeding under chapter 15 of the Bankruptcy Code because, among other things:

(A) the Canadian Proceeding is a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code, and is a foreign main proceeding within the meaning of section 1502(4) of the Bankruptcy Code (Gordon Decl., ¶¶ 14-16);

(B) Fraser is a foreign representative within the meaning of section 101(24) of the Bankruptcy Code and expressly authorized by the Canadian Court to seek recognition of the Canadian Proceeding (Gordon Decl., ¶ 20); and

(C) the documents accompanying the Chapter 15 Petitions meet the requirements of sections 1514 and 1515 of the Bankruptcy Code with respect to the Debtors. (Gordon Decl., ¶ 21).

Section 1517(a) of the Bankruptcy Code ***requires*** recognition of a foreign proceeding if:

> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a).[1]

A. These Cases Concern a Foreign Proceeding

Bankruptcy Code section 101(23) provides, in pertinent part, as follows:

> The term "foreign proceeding" means 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 restructuring or liquidation.

11 U.S.C. § 101(23). As more fully described in the Chapter 15 Petitions and the Gordon Declaration, the Canadian Proceeding and the potential plan of arrangement for the Debtors to be developed constitute a statutory means of comprehensively restructuring the Debtors' liabilities under the supervision of the Canadian Court. (Gordon Decl., ¶ 14). Indeed, as is readily apparent from review of the CCAA Order, the Canadian Proceeding is a collective judicial proceeding in a foreign country (Canada) under a law (the CCAA) relating to adjustment of debt

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[1] According to the legislative history of this section, "[T]he decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code. The requirements of this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition." H.R. Rep. 109-31(1), 109th Cong., Sess. 2005, *reprinted in 2005* U.S.C.C.A.N. 88, 169 at 175.

in which the assets and affairs of the Debtors are subject to control or supervision by a court (the Canadian Court) for the purpose of restructuring such debts. Accordingly, these chapter 15 cases concern a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code and the Court is entitled to so presume under section 1516(b) of the Bankruptcy Code.

Moreover, courts routinely recognize Canadian proceedings as foreign proceedings under Chapter 15. *See, e.g., Nortel Networks Corp.,* Case No. 09-10164 (Bankr. D. Del. Feb. 27, 2009); *Pope & Talbot, Inc.,* Case No. 08-11933 (Bankr. D. Del. Sept. 8, 2008); *Destinator Technologies Inc.,* Case No. 08-11003 (Bankr. D. Del. June 6, 2008); *Mount Real Corp.,* No. 06-41636 (Bankr. D. Minn. Sept. 6, 2006); *Quebec, Inc.,* No. 06-07875 (Bankr. N.D. Ill. Aug. 8, 2006); *Norshield Asset Mgmt.,* No. 06-40997 (Bankr. D. Minn. June 28, 2006); *MuscleTech Research & Dev.,* No. 06-10992 (Bankr. S.D.N.Y. Mar. 3, 2006). Further, under former section 304 of the Bankruptcy Code, the statutory predecessor to chapter 15, Canadian proceedings, including insolvency proceedings, were regularly granted comity. *See Smith v. Dominion Bridge Corp.*, 1999 WL 111465, at *3 (E.D. Pa. March 2, 1999) ("As a sister common law jurisdiction, courts have consistently extended comity to Canadian Bankruptcy proceedings."); *In re Davis*, 191 B.R. 577, 587 (Bankr. S.D.N.Y. 1996) ("Courts in the United States uniformly grant comity to Canadian proceedings"); *Comfeld v. Investors Overseas Servs. Ltd.*, 471 F. Supp. 1255, 1260-62 (S.D.N.Y. 1979), aff'd, 614 F.2d 1286 (2d Cir. 1979); *Caddel v. Clairton Corp.*, 105 B.R. 366, 366 (N.D. Tex. 1989).

B. These Cases were Commenced by a Foreign Representative

Similarly, the face of the CCAA Order indicates that Fraser is the "foreign representative" of the Debtors within the meaning of section 101(24) of the Bankruptcy Code, which defines a "foreign representative" in pertinent part as a "person or body . . . 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." Under section 1516(b) of the Bankruptcy Code, this Court is entitled to presume the CCAA Order is authentic. Indeed, the express language of the CCAA Order authorizes and empowers Fraser, as foreign representative, to commence these chapter 15 cases in aid of the Canadian Proceeding. (CCAA Order, ¶ 55).

C. These Cases were Properly Commenced

These chapter 15 cases were duly and properly commenced in accordance with sections 1504 and 1515 of the Bankruptcy Code by the filing of the Chapter 15 Petitions for recognition of a foreign proceeding under section 1515(a) accompanied by all documents and information required by 11 U.S.C. §§ 1515(b) and (c), including: (i) a copy of the CCAA Order affirming the existence of the Canadian Proceeding and expressly appointing Fraser as the foreign representative, (ii) a statement identifying all foreign proceedings with respect to the Debtors that are known to Fraser. Having filed the above-referenced documents and because the Court is entitled under section 1516(b) of the Bankruptcy Code to presume the authenticity of the CCAA Order, the requirements of section 1515 of the Bankruptcy Code have been met.

D. The Canadian Proceeding Should be Recognized as a Foreign Main Proceeding

The Bankruptcy Code provides that a foreign proceeding for which chapter 15 recognition is sought must be recognized as 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). Canada is the center of the Debtors' main interests because, *inter alia*: (a) the Debtors' primary corporate, management, banking, and strategic functions are undertaken from the Debtors' head office in Ontario; (b) the Debtors operate a centralized cash management system and all centralized banking arrangements are conducted in Ontario; (c) budgeting for each facility is approved at Fraser's head office in Toronto; (d) all corporate decision-making for the Debtors occurs at Fraser's head office; (e) financial reporting of the Debtors is done on a consolidated basis and the

audited financial statements are prepared in Ontario; and (f) with one exception, all credit facilities of the Debtors are with secured lenders who manage such facilities in Toronto, Ontario. (Gordon Decl., ¶ 16). Accordingly, the Canadian Proceeding is pending in the center of the Debtors' main interests and constitutes a "foreign main proceeding" as defined in section 1502(4) of the Bankruptcy Code.

As set forth above, the Canadian Proceeding for which recognition is sought is a "foreign main proceeding" within the meaning of section 1502 of the Bankruptcy Code; Fraser, applying for recognition on behalf of the Debtors, is a "foreign representative" within the meaning ofsection 101(24) of the Bankruptcy Code; and the Chapter 15 Petitions meet the requirements of section § 1515 of the Bankruptcy Code with respect to the Debtors. Accordingly, the Court is required to enter an Order recognizing the Canadian Proceeding. 11 U.S.C. § 1517.

In addition, recognizing the Canadian Proceeding would not be manifestly contrary to the public policy of the United States under 11 U.S.C. § 1506.[2] Indeed, granting such recognition gives effect to the United States public policy respecting foreign proceedings through the objectives set forth in11 U.S.C. §§ 1501(a) and 1508.

II. THE COURT SHOULD GRANT THE REQUESTED PROVISIONAL INJUNCTIVE RELIEF

Upon recognition of the Canadian Proceeding as a "foreign main proceeding," the Debtors shall have the benefit of the relief conferred under section 1520(a) of the Bankruptcy

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[2] As the legislative history explains, "11 U.S.C. § 1506 follows of the [UNCITRAL] Model Law [on Cross-Border Insolvency (1997)] article 5 exactly, [which] is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." HR. Rep. 109-31(1), 109 Cong., 1st Sess. 2005, *reprinted in 2005* U.S.C.C.A.N. 88, 169 at 172.

Code, including the automatic stay under section 362. Despite having obtained a stay in Canada pursuant to the CCAA Order, the Debtors also require immediate, interim protection staying execution on the Debtors' assets located in the United States and entrusting administration of the Debtors' assets located in the United States to Fraser until the Canadian Proceeding is recognized. Accordingly, the Debtors request immediate, provisional relief from this Court pursuant to section 1519 of the Bankruptcy Code.

A. The Relief Requested is Authorized by Section 1519(a)

Section 1519(a) provides, in pertinent part,

> From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including —
>
> (1) staying execution against the debtor's assets;
>
> (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy ; and
>
> (3) any relief referred to in paragraph (3), (4) and (7) of section 1521(a).

As an additional basis upon which relief can be granted, section 105(a) of the Bankruptcy Code also allows the Court to "issue any order . . . necessary or appropriate to carry out the provisions of [title 11]." Section 105(a) assures "the bankruptcy courts' power to take whatever action is appropriate and necessary in aid of the exercise of their jurisdiction." 2 Collier on Bankruptcy ¶ 105.01 (Alan N. Resnick et al. eds., 15th ed. rev. 2006).

Consistent with the CCAA Order (CCAA Order, ¶ 55), Fraser has asked this Court to immediately provide the Debtors with the relief authorized in section 1519 of the Bankruptcy Code. Section 1519(a)(3), by incorporating section 1521(a)(7), authorizes this Court, subject to exceptions not relevant here, to grant "any additional relief" that may be available to a chapter 11 debtor or trustee. 11 U.S.C. § 1519(a)(3). The relief sought herein is consistent with and in furtherance of the injunctive relief that has been granted in the Canadian Proceeding.

Moreover, the requested relief is fully consistent with the relief granted in past cases in which bankruptcy courts in the Third Circuit and elsewhere have cooperated with foreign proceedings under former section 304, the statutory predecessor to chapter 15. *See, e.g., In re YMB Magnex Intern., Inc.*, 249 B.R. 402, 407 (Bankr. E.D. Pa. 2000) ("Pursuant to § 304(b), the Court has the power to enjoin the commencement or continuation of any action against a debtor in a foreign proceeding or any property involved in that proceeding. The injunctive relief available under § 304(b) is not unlike the injunction which is automatic in a chapter 7 or 11 case pursuant to Section 362 of the Code."); *In re North America Steamships, Ltd.*, No. 06-13077 (Bankr. S.D.N.Y. Dec. 29, 2006); *In re Creative Building Maintenance Inc.*, No. 06-03586 (Bankr. W.D.N.Y. Nov. 22, 2006).

Further, the injunctive relief requested is necessary "to prevent individual American creditors from arrogating to themselves property belonging to the creditors as a group." *In re Banco Nacional de Obras v Servicios Publico, S N C.*, 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988); *see also In re Bird*, 222 B.R. 229, 233 (Bankr. S.D.N.Y. 1998) (finding that the purpose of filing under former section 304 is to prevent local creditors from dismembering assets located in the United States). Unilateral action by suppliers, creditors or other entities in the

United States could potentially seriously disrupt the Debtors' businesses, undermine the Debtors' reorganization efforts, and impair the value of the Debtors' assets. Such individual action would be detrimental to all creditors, and is precisely the kind of harm that provisional relief under section 1519 of the Bankruptcy Code seeks to prevent.

This Court also has the authority under sections 1519(a)(3) and 105(a) of the Bankruptcy Code to enjoin actions against the Debtors' former, current and future directors and officers protected by the CCAA Order, consistent with relief granted by the Canadian Court. Such injunctive relief is necessary to protect the Debtors' estates and creditors. As stated above, sections 1519(a)(1) and (3) of the Bankruptcy Code allow a court to grant relief on the filing of a chapter 15 petition in the form of relief provided for in paragraph (7) of section 1521(a), which in turn allows the Court to grant any relief under chapter 15 that would be available to a trustee, subject to certain limitations not applicable here. Relief available to a trustee includes that under section 105(a) of the Bankruptcy Code, which allows "[t]he court [to] issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

Courts in the Third Circuit and elsewhere have recognized that a section 105 injunction to protect a third party is sometimes appropriate. Under section 105, a court may "stay litigation against non-debtors ... when a failure to do so will work irreparable harm on the debtor's estates and creditors." *In re Davis*, 191 B.R. 577, 586 (Bankr. S.D.N.Y. 1996); *In re Contintental Airlines*, 177 B.R. 475, 479 (D. Del. 1993) (staying litigation that would adversely affect the debtor's "ability to pursue a successful plan of reorganization"); *W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.)*, 386 B.R. 17, 30-32 (Bankr. D. Del. 2008) (extending the automatic stay to lawsuits against nondebtors where indemnity agreements indicate an identity of

interests between the nondebtors and the debtors); *In re Rickel Home Ctrs., Inc.*, 199 B.R. 498, 500-01 (Bankr. D. Del. 1996) (extending the automatic stay to lawsuits against non-debtors where non-debtor and debtor parties share an identity of interests and third-party action will have an adverse impact on debtor's ability to reorganize).

Courts have found that prosecution of a claim against third-party defendants, where their liability is essentially derivative of the liability of the debtor, may be enjoined. *In re Ionosphere Clubs, Inc.*, 111 B.R. 423, 434 (Bankr. S.D.N.Y. 1990) (finding that where debtors' and non-debtors' proceedings are "inextricably interwoven" such that non-debtors' proceedings could have an adverse impact on the debtors' estates, section 105(a) can be used to enjoin the non-debtors' proceedings). Indeed, two factors that courts typically consider to determine the propriety of extending an injunction seeking to expand the protections of the automatic stay to non-debtor parties under section 105(a) of the Bankruptcy Code are: (1) whether the non-debtor and debtor share an identity of interest such that a suit against the non-debtor is essentially a suit against the debtor and (2) whether the third-party action will have an adverse impact on the debtor's reorganization effort. *W.R. Grace*, 386 B.R. at 30; *Rickel Home Ctrs.*, 199 B.R. at 500-01. Courts have consistently held that a unity of interests exists between the non-debtor and debtor where an action against third parties, such as directors and officers of the debtor, would trigger indemnity obligations on the part of the debtor and adversely affect the debtor's ability to reorganize. *See id.*; *see also A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1003 (4th Cir. 1986); *Am. Film Techs., Inc. v. Taritero (In re Am. Film Techs., Inc.)*, 175 B.R. 847, 853-55 (Bankr. D. Del. 1994) (finding that entitlement to indemnification between debtor and its officers is sufficient to show identity of interests necessary to extend 105(a) injunctive relief to debtor's officers).

Here, the CCAA Order requires the Debtors to indemnify their former, current and future directors and officers for actions taken on behalf of the Debtors as set forth in the CCAA Order, and provides that the directors and officers will be granted a charge on the Debtors' property as security for such indemnity obligations. CCAA Order, ¶¶ 24-26. Thus, there is a clear unity of interest between the Debtors and their former, current and future directors and officers. Additionally, allowing actions to proceed against the Debtors' directors and officers in the United States will multiply defense costs of the Debtor and, where a plaintiff prevails, will increase claims against the Debtors' estates, to the detriment of the Debtors' other creditors. Accordingly, the Debtors' ability to reorganize will undoubtedly be negatively impacted if claims against directors and officers are not stayed pursuant to sections 105(a) and 1519(a)(3) of the Bankruptcy Code until the conclusion of the Debtors' reorganization efforts in Canada and the United States.

B. The Debtors Satisfy the Requirements for a TRO

The Debtors meet the requirements for a temporary restraining order under rule 65(b) of the Federal Rules, which is made applicable hereto by rule 7065 of the Bankruptcy Rules. Pursuant to rule 65 of the Federal Rules, in order to obtain an ex parte temporary restraining order, the applicant must show that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." *See, e.g., TKR Cable v. Cable City Corp.*, 267 F.3d 196, 198 (3d Cir. 2001) (granting *ex parte* temporary restraining order against defendant to enjoin further sale of cable television descramblers).

The Debtors will face irreparable harm absent the TRO. Without enforcing the stay of proceedings in the United States, the Debtors' United States assets may be seized, attached or otherwise stripped for the benefit of individual creditors rather than the Debtors' estates *in*

toto. Courts have consistently held that "the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury." *See, e.g., In re Lines,* 81 B.R. 267, 270 (Bankr. S.D.N.Y. 1988). The disruption of the orderly determination of claims and the fair distribution of assets has also been held to harm a debtor's estate. *See Victrix S.S. Co. S.A.* v. *Salen Dry Cargo A.B.,* 825 F.2d 709, 714 (2d Cir. 1987); *In re MMG LLC,* 256 B.R. 544, 555 (Bankr. S.D.N.Y. 2000) (finding that the guiding principle of bankruptcy is equality of distribution and that irreparable harm exists whenever local creditors of the foreign debtor seek to collect on claims or obtain preferred positions to the detriment of other creditors). Moreover, unless a TRO is issued in this case, there is a risk that parties in interest may commence actions against Fraser, the other Debtors, their business or assets, or their former, current or future directors and officers, thereby interfering with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, and interfering with the Debtors' attempts to restructure pursuant to the Canadian Proceeding. Such actions would also increase the claims against the Debtors' estates as they incur defense costs and expenses, and would undermine the Debtors' attempts to achieve a maximum distribution to their creditors.

Indeed, upon commencement the Canadian Proceeding, a dire situation has developed for one of the Debtors' U.S. paper mills, because critical suppliers have stopped all of their shipments. Without immediate injunctive relief from this Court, these operations, essential to the Debtors' existence, will shut down nearly immediately. Gordon Decl. ¶ 25.

In addition, the Debtors are insolvent, and their financial situation is dire. Without interim approval by this Court of the financing authorized by the Canadian Court in the CCAA Order, the Debtors will not have access to the financial resources necessary to fund their capital requirements to continue operations uninterrupted, thereby preserving the value of the Debtors'

assets. Simply put, without approval of the relief requested in the Motion for Relief, it is likely that the Debtors will be forced to stop operations, thereby greatly diminishing the value of their estates. As a result, the Debtors will suffer irreparable harm for which they will have no adequate remedy at law.

The successful administration of the Debtors' estates here requires that the claims of all creditors, wherever situated, be resolved in the Canadian Proceeding. If the relief sought herein is not granted, suppliers, creditors and other stakeholders may take steps that will disrupt the Debtors' businesses and derail their ability to reorganize. An immediate stay would maintain the status quo and keep creditors from racing to the courthouse and dismembering the Debtors by attaching or exercising control over their U.S. assets in a piecemeal fashion. Those unilateral actions would fly in the face of the CCAA Order, thwart the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, and interfere with and harm the Debtors' efforts to administer the estates pursuant to the Canadian Proceeding. Therefore, it is necessary that this Court grant the relief requested without prior notice to parties in interest or their counsel.

Moreover, a hearing on actual notice to identified parties in interest would be scheduled within ten days of entry of the order, and thus the period in which parties would be subject to the ex parte restraining order would be minimal before they have an opportunity to be heard. Moreover, the Order accompanying the *Debtors' Motion For (A) Entry Of An Order Granting Recognition And Relief In Aid Of Foreign Main Proceeding Pursuant To 11 U.S.C. §§ 1515, 1517 And 1520 And (B) A Temporary Restraining Order And, After Notice And A Hearing, A Preliminary Injunction Granting Provisional Relief Under 11 U.S.C. § 1519(a)* as proposed by the Debtors provides that parties have a right to request relief from the temporary restraining order prior to the date scheduled for the hearing on ten (10) days written notice.

C. The Debtors Satisfy the Requirements of Section 1519(e)

To obtain relief under sections 1519(a)(1) and (2) of the Bankruptcy Code, section 1519(e) requires a foreign representative to satisfy the general standards for injunctive relief. 11 U.S.C. § 1519(e).

When considering granting injunctive relief in the Third Circuit, courts must consider: "(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." *U.S. v. Bell*, 414 F.3d 474, 478 n.2 (3d Cir. 2005); *see also, e.g., Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000) (requiring (i) irreparable harm absent an injunction and (ii) a reasonable likelihood of success on the merits and "if relevant, the Court should also examine the likelihood of irreparable harm to the non-moving party and whether the injunction serves the public interest."); *In re Uniflex, Inc.*, 319 B.R. 101, 104 (Bankr. D. Del. 2005) (same); *In re Lentz Furniture, Inc.*, 267 B.R. 516 (Bankr. D. Del. 2000) ("To obtain a preliminary injunction, the Debtor must establish four elements: (i) a likelihood of success on the merits of the underlying action, (ii) that it will suffer irreparable harm absent injunctive relief, (iii) that the injunction will not cause substantial harm to the defendant, and (iv) that public policy does not militate against an injunction.").

The Debtors are likely to succeed on the merits. In this context, "[t]o establish a likelihood of success on the merits, the Debtor[s] must show that [they] would be entitled to relief under the law on which the claims are based." *Uniflex*, 319 B.R. at 104. Based on the facts of the Debtors' cases, it is beyond dispute that the Debtors are involved in a "foreign main proceeding" with respect to which Fraser is the "foreign representative." As all proper supporting documentation was filed contemporaneously with the Chapter 15 Petitions and

section 1516(b) allows the Court to make significant presumptions, there is a high likelihood that recognition of the Chapter 15 Petitions will be granted. Further, upon recognition, a stay against execution on the Debtors' assets will automatically apply under section 362 of the Bankruptcy Code, made applicable hereto by section 1520(a)(1) of the Bankruptcy Code. As the Canadian Proceeding should be recognized as a foreign main proceeding and, as upon recognition, section 362 of the Bankruptcy Code will apply, the Debtors are likely to succeed on the merits.

Further, as stated above, the Debtors will face irreparable harm absent injunctive relief. Courts have consistently held that "the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury," and irreparable harm exists when local creditors of a foreign debtor seek to advantage themselves to the detriment of other creditors. *See Lines*, 81 B.R. at 270; *MMG LLC*, 256 B.R. at 555. The successful administration of the Debtors' estates requires that the claims of all creditors, wherever situated, be resolved in the foreign proceeding. If the relief sought herein is not granted, the value of the principal assets of the Debtors' estates will likely be substantially diminished, and creditors could unilaterally attempt to strip the Debtors' estates of their U.S. assets. Additionally, without approval of the debtor-in-possession financing approved in the CCAA Order, the Debtors will likely be forced to halt operations, thereby destroying the value of the Debtors' businesses as a going concern. Such diminution of value constitutes irreparable harm.

Third, there is no likelihood of irreparable harm to nonmoving parties. By granting the relief requested herein, the Court will not fashion a form of relief that would otherwise not be provided. The Court will simply be providing essentially the same relief that (i) will be granted upon recognition of the foreign proceeding pursuant to section 1520(a)(1) of the Bankruptcy Code, albeit provisionally and several weeks in advance and (ii) the Canadian Court

has already granted. Clearly, no nonmoving party will be irreparably harmed by granting the relief requested herein.

Finally, recognizing the Canadian Proceeding and granting the relief requested herein will not be manifestly opposed to the public policy of the United States. *See, e.g., Smith*, 1999 WL 11465, at *3 ("As a sister common law jurisdiction, courts have consistently extended comity to Canadian bankruptcy proceedings."); *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999) ("And, when the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings."). On the contrary, "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." *Comfeld*, 471 F. Supp. at 1259. That policy, embodied in section 304, continues in chapter 15 of the Bankruptcy Code.

CONCLUSION

The Canadian Proceeding qualifies for recognition as a foreign main proceeding and its attendant automatic relief provided for under section 1520 of the Bankruptcy Code. Further, Fraser is the appropriate foreign representative and has satisfied the requirements for the additional interim injunctive relief requested pursuant to sections 1519(a)(1), (2), and (3) of the Bankruptcy Code. Without recognition and the requested interim relief, there exists a material threat of imminent, irreparable diminution of the value of the Debtors' U.S. assets. Losing that value would impair the Debtors' ability to obtain the best recoveries possible for all stakeholders under the Canadian Proceeding. For the foregoing reasons, Fraser respectfully requests that this Court grant the relief requested.

Dated: June 18, 2009
Wilmington, Delaware

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Docket Text:
Memorandum of Law \\ *Memorandum Of Points And Authorities In Support Of Debtors' Motion For (A) Entry Of An Order Granting Recognition And Relief In Aid Of Foreign Main Proceeding Pursuant To 11 U.S.C. §§ 1515, 1517 And 1520 And (B) A Temporary Restraining Order And, After Notice And A Hearing, A Preliminary Injunction Granting Provisional Relief Under 11 U.S.C. § 1519(a)* (related document(s)[7]) Filed by Fraser Papers Inc.. (Sensing, John)

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