IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: **BOS SOLUTIONS LTD.** **Debtor in a foreign proceeding.**	§ § § § § § §	**Case No. 20-32465** **Chapter 15** **Joint Administration Requested**
In re: **BOS SOLUTIONS INC.** **Debtor in a foreign proceeding.**	§ § § § § § §	**Case No. 20-32467** **Chapter 15** **Joint Administration Requested**
In re: **BOS LEASECO LLC** **Debtor in a foreign proceeding.**	§ § § § § § §	**Case No. 20-32468** **Chapter 15** **Joint Administration Requested**
In re: **BOS SOLUTIONS REAL ESTATE INC.** **Debtor in a foreign proceeding.**	§ § § § § § §	**Case No. 20-32469** **Chapter 15** **Joint Administration Requested**
In re: **BOS USHOLDCO INC.** **Debtor in a foreign proceeding.**	§ § § § § § §	**Case No. 20-32470** **Chapter 15** **Joint Administration Requested**

RECEIVER'S <u>EMERGENCY</u> EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND RELIEF PURSUANT TO SECTIONS 105(A) AND 1519 <u>OF THE BANKRUPTCY CODE</u>

THIS APPLICATION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE APPLICATION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE APPLICATION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE APPLICATION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE APPLICATION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE APPLICATION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR YOU BELIEVE THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.

Ernst & Young Inc. ("EY") solely in its capacity as court-appointed receiver (the "Receiver") of (1) BOS Solutions Ltd. ("BOS Ltd."), (2) BOS Solutions Inc. ("BOS Inc."), (3) BOS Leaseco LLC ("BOS Leaseco"), (4) BOS Solutions Real Estate Inc. ("BOS Real Estate"), and (5) BOS USHoldco Inc. ("BOS Holdco") (collectively, "BOS" or the "Debtors") based upon the Receivership Order dated May 4, 2020 (the "Receivership Order"), entered by the Court of Queen's Bench of Alberta in the Judicial Centre of Calgary, Canada, Court File No. 2001-05949 (the "Canadian Court" and the "Canadian Proceedings"), and as authorized foreign representative of the above-captioned Debtors, by and through its undersigned counsel, files this *Receiver's Emergency Ex Parte Application for Temporary Restraining Order and Relief Pursuant to Sections 105(a) and 1519 of the Bankruptcy Code* (the "Application"), and respectfully states:

<u>JURISDICTION, VENUE, AND CORE ALLEGATIONS</u>

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and (b) and sections 109 and 1501 of the Bankruptcy Code. Venue is proper in this district pursuant to 28 U.S.C. § 1410(3). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

SUPPORT FOR THIS APPLICATION

2. The Receiver attaches the following Exhibits to this Application.

Table 1:

Exhibit	Description	Comment
A	Form of Order Granting Emergency Ex Parte Application for Provisional Relief Pursuant to Sections 105(a) and 1519 of the Bankruptcy Code	

3. The Receiver also requests that the Court take judicial notice of its files in this case, and relies upon the *Witness and Exhibit List in Support of First Day Motions* (the "Exhibits List"),[1] and the *Declaration of Receiver in Support of (A) Receiver's Emergency Ex Parte Application for Temporary Restraining Order and Relief Pursuant to Sections 105(a) and 1519 of the Bankruptcy Code, and (B) Emergency Petition for Recognition as Foreign Main Proceedings, or Alternatively as Foreign Nonmain Proceedings, Pursuant to Sections 1515 and 1517 of the United States Bankruptcy Code and Related Relief*, both filed contemporaneously herewith.

BACKGROUND

A. The Structure of the Debtors

4. There are five (5) entities that are chapter 15 debtors, one (1) of which is a Canadian entity, and four (4) of which are either a direct or indirect subsidiary of the Canadian entity. The Debtors are described below.

[1] The Exhibits List and all exhibits thereto are incorporated into this Petition by reference for all purposes as if fully set forth at length.

B. Canadian Entity

5. BOS Ltd., which is the ultimate direct or indirect parent entity of the other Debtors, is a corporation incorporated pursuant to the provisions of the Business Corporations Act (British Columbia) with a registered office located in the City of Vancouver. BOS Ltd. carries on business in Alberta and is extra-provincially in the Province of Alberta.

C. U.S. Subsidiaries

6. BOS Real Estate is a corporation incorporated pursuant to the laws of the State of Colorado, United States, with an office in Houston, Texas. BOS Real Estate is a wholly owned subsidiary of BOS Ltd.

7. BOS Holdco is a corporation incorporated pursuant to the laws of the State of Delaware, United States, with a registered office located in the State of Delaware. BOS Holdco is a wholly owned subsidiary of BOS Ltd.

8. BOS Inc. is a corporation incorporated pursuant to the laws of the State of Colorado, United States, with an office in Houston, Texas. BOS Inc. is a wholly owned subsidiary of BOS Holdco.

9. BOS Leaseco is a corporation incorporated pursuant to the laws of the State of Delaware, United States, with a registered office located in the State of Delaware. BOS Leaseco is a wholly owned subsidiary of BOS Inc.

D. Business Operations of the Debtors

10. The Debtors are engaged in the business of providing customizable and scalable liquids-solids separation in western Canada and the United States. Such services are provided to the oilfield services industry and to other industrial undertakings including construction. In the

energy industry, the Debtors provide a proprietary process that is designed to significantly reduce the costs associated with drilling oil and gas wells by recycling the drilling fluid that is continuously used in the drilling process and reducing the volume of drilling waste for disposal. Additionally, the liquids-solids separation process yields a higher quality drilling fluid with less solids suspended in the liquid, which allows for faster drilling and reduces the abrasive wear on downhole equipment. The environmental solutions division of the business provides a similar solution for industries such as construction, horizontal directional drilling, remediation, industrial, agricultural and municipal. Many of the same cost-saving benefits and efficiencies realized by oilfield customers are also captured by customers in industrial applications where fluid recycling, reduced waste disposal and environmental factors are important.

11. The Debtors' operations are conducted in (A) two (2) offices in Alberta, Canada and (B) five (5) offices in the United States (two (2) field offices in Texas, one (1) field office in each of North Dakota and Pennsylvania, and a corporate office in Houston, Texas). The Debtors have approximately 21employees in Canada (who are employed by BOS Ltd.) and approximately 181 employees in the United States (who are employed by BOS Inc.).

12. Until October 2019, BOS Ltd.'s treasury and finance operations including its Chief Financial Officer were located in Calgary, Alberta. In October 2019, the treasury and finance operations were relocated to Houston, Texas. The U.S. operations are conducted through BOS Inc., which is headquartered in Houston, Texas. All the Debtors' equipment is owned by BOS Ltd. (the Canadian parent company), and each Debtor maintains one or more bank accounts in Canada.

13. While the Debtors have some unsecured trade debt, the majority of the Debtors' debt was incurred under the Canadian Credit Agreement (as defined below). The Canadian Credit

Agreement is governed by the laws of the Province of Alberta and the laws of Canada applicable therein. *See* Canadian Credit Agreement, section 12.4 (governed by Alberta law).

E. Events Leading to the Commencement of the Canadian Proceedings

14. The Applicant for the Receivership Order is National Bank of Canada ("NBC").. NBC is the administrative agent (in such capacity, the "Agent") on behalf of itself and for and on behalf of a group of corporate entities, including National Bank of Canada, HSBC Bank Canada, ATB Financial, and The Toronto-Dominion Bank (collectively, and in such capacity, the "Lenders") pursuant to that certain Amended and Restated Credit Agreement, dated as of September 14, 2018 between BOS Ltd. and BOS Solutions Inc. (collectively, the "Borrowers"), as borrowers, BOS Leaseco, BOS Real Estate, and BOS Holdco (collectively, the "Guarantors"), as guarantors, NBC acting as Agent, and the Lenders, as lenders (the "Canadian Credit Agreement"). The Agent alleges that, as of April 24, 2020, the total indebtedness of the Borrowers to the Agent and the Lenders under the Canadian Credit Agreement is (a) USD $37,964,646.22 and CAD $6,136,261.11 plus (b) all legal and other costs and expenses incurred by the Agent (both prior to and following the date of the Originating Application) pursuant to the terms of the Canadian Credit Agreement, (collectively, the "Indebtedness"). The Agent claims that the Indebtedness is secured by essentially all property of the Debtors.

F. The Canadian Proceedings

15. After multiple events of default by the Debtors under the Canadian Credit Agreement, on May 4, 2020, NBC filed an Originating Application (Appointment of Receiver) in the Canadian Proceedings seeking the appointment of EY as receiver under section 243 of the Bankruptcy and Insolvency Act (the "BIA") and section 13(2) of the Judicature Act, RSA 2000 c J-2..

16. The applicable Canadian laws are discussed in the Declaration of Foreign Counsel attached to the Exhibit Lists. The BIA is one of two pieces of federal legislation in Canada applicable to bankruptcies and insolvencies.[2] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (Can.). The BIA governs both voluntary and involuntary bankruptcy liquidations and provides for debtor reorganizations.

17. The BIA also authorizes a court to appoint a receiver upon a secured creditor's application. *Id*. § 243(1). Such court-appointed receivers are given a mandate and specific powers as set out in the order appointing the receiver. These duties typically include: (1) taking possession and control of the property and assets of the debtor; (2) marketing and selling such property and assets in a commercially reasonable manner (whether as a going concern, en-bloc, or otherwise) and under the supervision and approval of the appointing court; and (3) distributing the proceeds of such sales to the stakeholders in accordance with the legal entitlement. The appointing court has broad discretion to authorize the receiver to "take any other action that the court considers advisable." *Id*. § 243(1)(c).

[2] The second federal legislation in Canada concerning bankruptcies and insolvencies is the Companies' Creditors Arrangement Act ("CCAA"), which affords financially troubled corporations the opportunity to restructure their financial affairs through a "Plan of Arrangement." Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Can.). The CCAA process is akin to chapter 11 of the Bankruptcy Code, affording companies an opportunity to restructure operations rather than liquidate. *See In re Fracmaster*, Ltd., 237 B.R. 627, 629 n.3 (Bankr. E.D. Tex. 1999).

18. A court-appointed receiver under the BIA is a "national" receiver, meaning that a receiver administers assets in each of Canada's ten (10) provinces and three (3) territories, typically without further order of provincial courts. The BIA and its related legislation (the Companies' Creditors Arrangement Act) are federal legislation. Provincial legislative jurisdiction governs property and civil rights, potentially affecting some insolvency-related matters, similar to the interplay between state and federal law in the United States. Nonetheless, the BIA provides a statutory framework for a court-appointed receiver to carry out its mandate on a national basis rather than relying on the various provincial statutes or courts for its authority.

19. The Judicature Act authorizes the Canadian Courts to appoint a receiver when it is "just and convenient" on any terms and conditions the Canadian Court determines are just. Generally, the Judicature Act codifies broad equitable powers of the Court which allows it to provide for certain remedies where equitable, including the appointment of a receiver. The powers and duties of a receiver appointed by the Court pursuant to section 13(2) of the Judicature Act is set out in the order appointing the receiver and may be tailored to the specific circumstances. Generally, such powers and/or duties will be the same or similar to a receiver appointed under the BIA as noted above.

20. On May 4, 2020, the Canadian Court, Honorable Justice P. R. Jeffrey, entered the Receivership Order pursuant to section 243 of the BIA and section 13(2) of the Judicature Act, RSA 2000 c J-2. The Receivership Order specifically authorizes the Receiver to act "as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada." (Receivership Order ¶ 31). It empowers and authorizes the Receiver to take numerous steps involving the property of the entities subject to the Canadian Proceeding. (Receivership Order ¶ 3). Likewise, the Receivership Order grants the

Receiver access to all of the Debtors' books, records, contracts, securities, and information. (Receivership Order ¶¶ 4-6). Additionally, the Receivership Order imposes a stay of proceedings against the Receiver, the Debtors, or the Debtors' property similar to the protections available under 11 U.S.C. § 362(a). (Receivership Order ¶¶ 7-11).

21. In the Receivership Order, the Canadian Court granted the Receiver a charge (the "Receiver's Charge") on all of the Debtors' current and future assets, undertakings, and properties of every nature or kind whatsoever, and wherever located, including all proceeds thereof (collectively, the "Property") to secure payment of the reasonable fees and expenses of the Receiver and its counsel, not to exceed $1,000,000 (or such greater amount as the Canadian Court may by further order authorize). (Receivership Order ¶ 18). The Receiver's Charge has the priority set forth in paragraph 18 of the Receivership Order.

22. The Canadian Court also authorized the Receiver to borrow, by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed CAD$2,500,000 (or such greater amount as the Canadian Court may by further order authorize) on the terms set forth in paragraph 21 of the Receivership Order. (Receivership Order ¶ 21). The Canadian Court granted a charge (the "Receiver's Borrowings Charge") on the Property to secure payment of the monies borrowed, together with interest and charges thereon, by the Receiver pursuant to the Receivership Order. The Receiver's Borrowings Charge has the priority set forth in paragraph 21 of the Receivership Order.

23. Consistent with section 14.06(1.2) of the BIA, the Receivership Order provides that "[t]he Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities . . . , other than such amounts as the Receiver may specifically agree in writing

to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act* . . . ." (the "Receiver's Protections"). (Receivership Order ¶ 14).[3]

24. The Receivership Order includes a request by the Canadian Court for "aid and recognition of any court . . . having jurisdiction in Canada or in any foreign jurisdiction . . . , to give effect to [the Receivership Order] and to assist the Receiver and its agents in carrying out the terms of [the Receivership Order]." (Receivership Order ¶ 30).

G. The Chapter 15 Cases

25. On May 4, 2020, the Receiver filed Official Form No. 401 Chapter 15 petitions for each of the Debtors pursuant to 11 U.S.C. § 1504, 1509(a) and 1515(a).

26. Pursuant to the Receivership Order, the Receiver is a foreign representative in a foreign proceeding and hereby seeks relief under Chapter 15 of the Bankruptcy Code.

ARGUMENT AND AUTHORITIES

A. Provisional Relief Authorized by Bankruptcy Code Section 1519

27. The Receiver has contemporaneously filed an emergency petition for recognition for each Debtor, seeking a recognition and a ruling that the Canadian Proceedings are foreign main proceedings (or alternatively, non-main proceedings) under 11 U.S.C. §§ 1515 and 1517. Although "[a] petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time,"[4] there is necessarily a gap between the time the petition for recognition is filed and the time

[3] Section 14.06(1.2) of the BIA provides:

> Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,
>
> (a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
>
> (b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

[4] 11 U.S.C. § 1517(c).

the Court makes a decision on whether a proceeding should be recognized, and if so, whether such proceeding is a foreign main proceeding or a foreign nonmain proceeding. Accordingly, the Receiver seeks emergency provisional relief under 11 U.S.C. § 1519 and 11 U.S.C. § 105(a).[5]

28. The standard for such provisional relief is "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1519(a). Pending a determination by the Court on the petition for recognition, the following provisional relief under 11 U.S.C. § 1519(a) is available:

> (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), or (7) of section 1521(a).

11 U.S.C. § 1519(a). In turn, sections 1521(a)(3)-(7) of the Bankruptcy Code permits the Court to provisionally grant the following relief:

> (3) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities [11 U.S.C. § 1521(a)(4)]; [and]
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724 (a) [11 U.S.C. § 1521(a)(7)].

[5] Section 105(a) provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

11 U.S.C. § 1521(a).

B. Provisional Relief Sought by the Receiver

29. Consistent with section 1519 of the Bankruptcy Code, the Receivership Order, and principles of comity, the Receiver requests the following provisional relief pending a determination on the Receiver's Emergency Petition for Recognition (collectively, the "Provisional Relief"):

(a) The terms of the Receivership Order be given full force and effect in the United States. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7); 1525(a).

(b) The commencement or continuation of any action or proceeding concerning the assets, rights, obligations or liabilities of the Debtors, including any action or proceeding against EY in its capacity as Receiver of the Debtors, be stayed. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7).

(c) Execution against the assets of the Debtors be stayed. 11 U.S.C. § 1519(a)(1).

(d) The administration or realization of all or part of the assets of the Debtors within the territorial jurisdiction of the United States be entrusted to the Receiver, and the terms of the Receivership Order shall apply to the Debtors, its creditors, the Receiver, and any other parties-in-interest. 11 U.S.C. § 1519(a)(2).

(e) The right of any person or entity, other than the Receiver, to transfer or otherwise dispose of any assets of the Debtors be suspended unless authorized in writing by the Receiver or by Order of this Court. 11 U.S.C. §§ 1519(a)(3); 1521(a)(3).

(f) As provisional relief in aid of the Receivership Order, the Receiver's Charge and the Receiver's Borrowing Charge and priorities as set forth in the Receivership Order, including paragraphs 18 and 21 of the Receivership Order, be enforced against the Property (as defined in the Receivership Order) in accordance with the terms of the Receivership Order. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7); 1525(a).

(g) Subject to the terms and conditions of the Receivership Order, the Receiver be authorized to execute all necessary documentation related to Receiver's Borrowings Charge and to pay and perform all indebtedness, interest, fees, liabilities, and obligations when the same become due and are to be performed. The Receiver, in its discretion, may (but is not required to in order for the Receiver's Borrowings Charge and priorities to be enforceable) file a photocopy of this Order and/or the Receivership Order as a financing statement, notice of lien, or similar document with any recording officer designated to file financing statements, notices of lien or similar documents in any U.S. jurisdiction, and in such event, the subject filing or recording officer shall be authorized to file or record such copy of this Order and/or the Receivership Order. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7); 1525(a).

(h) If any of the provisions of the Order granting this Application related to the Receiver's Borrowings Charge shall subsequently be stayed, modified, amended, reversed or vacated in whole or in part (collectively, a "Modification") whether by subsequent order of this Court or on appeal from the Order, such Modification shall not impair, limit or diminish the Receiver's Borrowings Charge, whether under the Order granting this Application (as entered prior to the Modification), under the Receivership Order, or under any of the documentation delivered pursuant thereto or hereto, including with respect to any advances made prior to entry of the Modification. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7); 1525(a).

(i) As provisional relief in aid of the Receivership Order, the Receiver's Protections be given full force and effect in the United States. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7); 1525(a).

(j) The Receiver may undertake the examination of witnesses, the taking of evidence, the production of documents, or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the Debtors. 11 U.S.C. §§ 1519(a)(3); 1521(a)(4).

(k) Notwithstanding Rule 7062 of the Bankruptcy Rules, made applicable to this case by Rule 1018 of the Bankruptcy Rules, the terms and conditions of the Order granting the Application be immediately effective and enforceable upon its entry and, upon its entry, become final and appealable. 11 U.S.C. §§ 1519(a)(3); 1521(a)(7); 1525(a).

(l) The Receiver be authorized and empowered, but not obligated to (i) maintain and continue to use, with the same account numbers, all of the Debtors' existing bank accounts at depository institutions in the United States (the "Bank Accounts"); (ii) treat the Bank Accounts for all purposes as debtor-in-possession accounts; (iii) maintain and continue to use the Debtors' existing business forms, stationery and checks, all without the appellation "debtor-in-possession"; and (iv) preserve the reporting and accounting mechanisms used by the Debtors in respect of the Bank Accounts. 11 U.S.C. §§ 1519(a)(3); 1521(a)(5), (7).

(m) The Receiver be authorized to maintain the Debtors' existing cash management system, to allow receipt and sending of transfers via the ACH or automatic clearing house system and by wire transfer (collectively, the

"Cash Management System"), all subject to the terms and conditions of the Debtors' prepetition agreements with their depository institutions (including the right to pay all pre-petition and post-petition administrative fees associated with such Bank Accounts and Cash Management System), provided however, that no prepetition obligations of any kind to be paid except as authorized hereby. 11 U.S.C. §§ 1519(a)(3); 1521(a)(5), (7).

(n) This Court retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any request for additional relief or any adversary proceeding brought in and through these Chapter 15 foreign proceedings, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

(o) The security provision provided in Rule 65(c) of the Federal Rules of Civil Procedure, made applicable through Rule 7065 of the Bankruptcy Rules, is unnecessary in this case be waived.

C. Standard Applicable to Provisional Relief

30. The standard for issuance of provisional relief under section 1519 of the Bankruptcy Code is the same as that which is required for an injunction. 11 U.S.C. § 1519(e).[6] Accordingly, the following factors applicable to the issuance of an injunction apply to this Application:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs any damage the injunction might cause the opponent; and (4) that the injunction will not disserve the public interest.

Blue Bell Bio-Medical v. Cin-Bad, Inc., 864 F.2d 1253, 1256 (5th Cir. 1989); *see also Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979). The Receiver contends that these four factors are met.

[6] However, an adversary proceeding need not be filed in order to obtain relief under section 1519. *In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 858-59 (Bankr. C.D. Cal. 2008); *In re Ho Seok Lee*, 348 B.R. 799, 801 (Bankr. W.D. Wash. 2006).

(1) The Receiver has a substantial likelihood of success on the merits

31. There is no serious dispute that the Canadian Proceedings will be recognized, as other courts have consistently recognized Canadian insolvency proceedings, including receiverships under the BIA, as foreign proceedings. *See* 11 U.S.C. § 1515(b); *In re Calmena Energy Servs. Inc.*, No 15-30786 (Bankr. S.D. Tex. March 5, 2015) ECF No. 17 (Brown, J.) (recognizing Canadian receivership proceeding as foreign proceeding); *In re Nortel Networks, Inc.*, 469 B.R. 478, 487 (Bankr. D. Del. 2012) (the Court entered an Order recognizing the proceeding under the CCAA was a foreign main proceeding under chapter 15 of the Bankruptcy Code); *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685, 688 (Bankr. S.D.N.Y. 2010) ("It is clear that the Canadian Proceedings should be recognized as a foreign main proceeding."); *In re Gandi Innovations Holdings, LLC*, 09-51782-C, 2009 WL 2916908 (Bankr. W.D. Tex. June 5, 2009) (unpublished disposition) (the "CCAA Proceeding is a foreign proceeding entitled to recognition under Chapter 15 of the Code.").[7] The United States Bankruptcy Court for the Northern District of Texas recently found that a Canadian receivership proceeding under section 243 of the BIA, RSC 1985 c B-3 and section 13(2) of the Judicature Act, RSA 2000 c J-2 was a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code. *See In re Eagle Energy Inc.*, No. 19-33868-15, ECF No. 35, ¶ J (Bankr. N.D. Tex. Dec. 5, 2019).

32. Further, the Receiver is a proper "foreign representative" because it constitutes a "person or body" as defined under section 101(41) of the Bankruptcy Code. The Receiver has also

[7] For numerous other examples of U.S. courts recognizing Canadian insolvency proceedings a "foreign proceedings," see *In re GasFrac Energy Servs., Inc.*, No. 15-50161 (Bankr. W.D. Tex. Feb. 2, 2014), ECF No. 46; *In re Angiotech Pharm., Inc.*, No. 11-10269 (Bankr. D. Del. Feb. 22, 2011), ECF No. 83; *In re Canwest Global Communications Corp., et al.*, No. 09-15994 (Bankr. S.D.N.Y. Nov. 3, 2009), ECF No. 30; *In re SemCanada Crude Co.*, No. 09-12637 (Bankr. D. Del. Aug. 27, 2009), ECF No. 30; *In re Quebecor World Inc.*, No. 08-13814 (Bankr. S.D.N.Y. July 1, 2009), ECF No. 12; *In re Biltrite Rubber (1984) Inc., et al.*, No. 09-31423 (Bankr. N.D. Ohio Apr. 2, 2009), ECF No. 58; *In re MAAX Corp.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008), ECF No. 37; *In re Destinator Techs., Inc.*, No. 08-11003 (Bankr. D. Del. June 6, 2008), ECF No. 43; *In re Innova Global Ltd.*, No. 19-10653, ECF 54 (Bankr. N.D. Okla. April 19, 2019).

been authorized in the Canadian Proceedings to act as the Debtors' foreign representative. *See* Receivership Order, ¶ 31 ("The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order. . . ."). The Court is therefore entitled to presume that the Receiver is a proper "foreign representative." *See* 11 U.S.C. § 1516(b).[8]

33. The Receiver also contends that the center of main interests for the Debtors is in Canada, since, among other things, the nerve center for the Debtors is in Canada and other factors as described in the contemporaneously filed the *Emergency Petition For Recognition As Foreign Main Proceedings, Or Alternatively As Foreign Nonmain Proceedings, Pursuant to Sections 1515 And 1517 Of The United States Bankruptcy Code And Related Relief*, which is hereby incorporated as if set forth fully herein.

34. Upon recognition as foreign main proceedings, most of the Provisional Relief is granted automatically under section 1520, including:

> (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
>
> (2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
>
> (3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
>
> (4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

[8] Various courts have previously considered a receiver appointed pursuant to BIA § 243(1) to be a duly authorized "foreign representative." *See, e.g.*, *In re Eagle Energy Inc.*, No. 19-33868-15, (Bankr. N.D. Tex. Dec. 5, 2019), ECF No. 35 (recognizing Canadian receivership proceeding as foreign proceeding); *In re Baronet U.S.A. Inc.*, No. 07-13821 (Bankr. S.D.N.Y. Jan. 1, 2008), ECF No. 15 (same).

11 U.S.C. § 1520(a).

35. Even if the Court were to determine that the Canadian Proceeding was a foreign nonmain proceeding for one or both of the Debtors, the Court could still order protective relief to the Receiver during the pendency of the Chapter 15 cases. The Court has the discretion to grant "any appropriate relief," immaterial of whether the Canadian Proceedings are foreign main proceedings or foreign nonmain proceedings. 11 U.S.C. § 1521(a). Such relief includes:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets located within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> (6) extending relief granted under section 1519(a); and
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a). Additionally, a court may "entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative." 11 U.S.C. § 1521(b).

36. Here, the Provisional Relief requested is consistent with the Receivership Order and is authorized by this Court's discretionary authority under section 1519 and principles of comity.

37. Comity is a central tenet of Chapter 15. *Firefighters' Retirement Sys. v. Citco Grp. Ltd.*, 796 F.3d 520, 525 (5th Cir. 2015); *Ad Hoc Group of Vitro Noteholders v. Vitro SAB de CV* (*In re Vitro SAB de CV*), 701 F.3d 1031, 1053 (5th Cir. 2012). The U.S. Supreme Court defines comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 143 (1895).

38. Exceptions to comity are construed particularly narrowly when the foreign jurisdiction is one such as Canada, a fellow common law jurisdiction with procedures akin to those in the United States. *See, e.g.*, *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685, 698-99 (Bankr. S.D.N.Y. 2010); *In re Blackwell*, 270 B.R. 814, 823 (Bankr. W.D. Tex. 2001); *In re Singer*, 205 B.R. 355, 357 (Bankr. S.D.N.Y. 1997).

39. The extension of comity to orders issued in Canadian insolvency proceedings is exceedingly common. *See, e.g.*, *In re Nortel Networks, Inc.*, 469 B.R. 478, 487 (Bankr. D. Del. 2012); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 688 (Bankr. S.D.N.Y. 2010); *In re Gandi Innovations Holdings, LLC*, No. 09-51782, 2009 WL 2916908, at *1 (Bankr. W.D. Tex. June 5, 2009); *In re Petition of Ernst & Young, Inc.*, 383 B.R. 773, 777 (Bankr. D. Colo. 2008).[9] Indeed, the BIA is similar to chapter 7 of the Bankruptcy Code, as both are statutory regimes intended to facilitate the liquidation of a debtor, provide a "breathing spell" from creditors' collection efforts and a centralized process to assert and resolve claims against the debtor's estate,

[9] For numerous other examples, *see, e.g.*, *In re Calmena Energy Svcs., Inc.*, No. 15-30786 (Bankr. S.D. Tex. Mar. 5, 2015), ECF No. 17; *In re Poseidon Concepts Corp.*, No. 13-15893 (Bankr. D. Colo. May 15, 2013), ECF No. 60; *In re GASFRAC Energy Svcs., Inc.*, No. 15-50161 (Bankr. W.D. Tex. Feb. 2, 2014), ECF No. 46; *In re Angiotech Pharm., Inc.*, No. 11-10269 (Bankr. D. Del. Feb. 22, 2011), ECF No. 83; *In re Canwest Global Comms. Corp.*, No. 09-15994 (Bankr. S.D.N.Y. Nov. 3, 2009), ECF No. 30; *In re SemCanada Crude Co.*, No. 09-12637 (Bankr. D. Del. Aug. 27, 2009), ECF No. 30; *In re Innova Global Ltd.*, No. 19-10653, ECF 54 (Bankr. N.D. Okla. April 19, 2019).

and provide a fair and equitable process for distribution to creditors in order of priority. *Metcalfe & Mansfield Alternative Investments*, 421 B.R. at 698 ("The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.").

40. Courts within the Fifth Circuit have granted provisional and final relief substantially similar to the Provisional Relief sought by this Application. *See In re Eagle Energy Inc.*, No. 19-33868-15 (Bankr. N.D. Tex. Nov. 22, 2019), ECF No. 18; *In re Argent Energy (Canada) Holdings, Inc.*, No. 16-20060 (Bankr. S.D. Tex. Feb. 24, 2016), ECF No. 30; *In re Calmena Drilling Services, LLC et al.*, Case NO. 15-30786, ECF No. 17 (Bankr. S.D. Tex. Mar. 5, 2015); *In re GASFRAC Energy Svcs., Inc.*, No. 15-50161 (Bankr. W.D. Tex. Jan. 30, 2015).

41. Moreover, the Bankruptcy Court for the Southern District of Texas has recognized the importance of comity in chapter 15 proceedings. *See* Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, General Order 2019-2 (the "Cross-Border Guidelines"). For example, the Cross-Border Guidelines provide that: "The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency. . .by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted." The Cross-Border Guidelines then include a non-exhaustive list of guidelines to promote efficient coordination with the foreign court, protect stakeholders' interests, preserve the debtor's assets, and to share information to reduce costs, among others.

(2) There is a substantial threat of irreparable injury if the interim relief is not granted

42. The Receivership Order provides for a stay against seizure of assets and litigation akin to the automatic stay embodied in section 362(a) of the Bankruptcy Code. It is the Receiver's intention to continue operations of the Debtors for a period of time so that the assets may ultimately be sold as a going concern. As such, the Receiver needs to stabilize operations and operate in the normal course, including paying employees and ongoing expenses. If the Receiver's authority is not honored in the U.S., or if creditors or parties in interest take collection actions or exercise self-help, the ordinary course operations of the Debtors and the Receiver's ability to conduct and effectuate the sale of assets could be jeopardized. *See, e.g., In re Netia Holdings S.A.*, 278 B.R. 344, 352 (Bankr. S.D.N.Y. 2002) ("It is well established . . . that the dissipation of the finite resources of an insolvent estate constitutes irreparable injury."); *In re MMG, LLC*, 256 B.R. 544, 555 (Bankr. S.D.N.Y. 2000) ("[I]rreparable harm exists whenever local creditors of the foreign debtor seek to collect their claims or obtain preferred positions to the detriment of other creditors.").

43. Furthermore, the Receiver's Charge, the Receiver's Borrowings Charge, and the Receiver's Protections that were approved by the Canadian Court are necessary to the Receiver's uninterrupted operation of the Debtors' business. Absent these protections, the Receiver will be unable to fund the Debtors' operations and maintain the Debtors' employees, resulting in a shutdown of the Debtors' business. Thus, the Provisional Relief is necessary on an immediate basis to protect against potential destruction of asset value, disruption to business operations, and interference with the Receiver's sale efforts that would result from the Debtors' liquidity constraints and the exercise of remedies by lenders, contract counterparties, and others pending entry of a final order; absent this relief, the Debtors' estates will suffer irreparable harm.

(3) The threatened injury to the Debtors outweighs any damage the interim relief would cause to an opponent

44. The Provisional Relief will benefit the Debtors' creditors by ensuring an equitable and orderly distribution of assets and facilitate the Canadian Proceeding. *See, e.g.*, *In re Basis Yield Alpha Fund (Master)*, Case No. 07-12762 (Bankr. S.D.N.Y. Aug. 29, 2007), ECF No. 5 (stating that failing to issue a restraining order against creditors could, *inter alia*, "undermine the Foreign Representative's efforts to achieve an equitable result for the benefit of all of the Foreign Debtor's creditors.").

(4) The Provisional Relief will not disserve the public interest

45. The Provisional Relief will not disserve the public interest because it is *in* the public interest for the Provisional Relief to be granted. *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F.Supp. 1255, 1259 (S.D.N.Y. 1979), *aff'd* 614 F.2d 1286 (2d Cir. 1979) ("American public policy would be furthered, for 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."); *see also Rehabworks, Inc. v. Lee* (*In re Integrated Health Servs., Inc.*), 281 B.R. 231, 239 (Bankr. D. Del. 2002) ("In the context of a bankruptcy case, promoting a successful reorganization is one of the most important public interests."); *In re Lazarus Burman Assocs.*, 161 B.R. 891, 901 (Bankr. E.D.N.Y. 1993) ("The public interest, in the context of a bankruptcy proceeding, is in promoting a successful reorganization."). The Provisional Relief will facilitate a cross-border liquidation that will provide a benefit to the Debtors' creditors and other stakeholders. *See, e.g., Cunard S.S. Co. Ltd. v. Salen Reefer Svcs. A.B.*, 773 F.2d 452, 458 (2d Cir. 1985) ("The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.").

D. No Bond

46. The Receiver respectfully suggests that no bond be required under Fed. R. Bankr. P. 7065 and Fed. R. Civ. P. 7065(c). A temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor in possession without compliance with Rule 65(c). Fed. R. Bankr. P. 7065. The Receiver, who is carrying out his duties under the BIA and the Receivership Order, is akin to a trustee, and any bond would necessarily come from the Debtors' assets.

BASIS FOR EMERGENCY RELIEF

47. Pursuant to Bankruptcy Rule 6003, which empowers a court to grant relief within the first twenty-one (21) days after the commencement of a chapter 11 case "to the extent that relief is necessary to avoid immediate and irreparable harm," and Local Rule 9013-1(i), the Receiver respectfully requests emergency consideration of this Application. The Receiver seeks emergency provisional relief under Bankruptcy Code sections 1519 and 105(a), staying execution against the Debtors' assets until and through the Court's consideration of the Receiver's *Emergency Petition for Recognition as a Foreign Main Proceeding, or in the Alternative, Foreign Nonmain Proceeding, Pursuant to Sections 1515 and 1517 of the Bankruptcy Code and Related Relief* (the "Petition"), filed contemporaneously with this Application. Prior to entry of a recognition order, the Debtors do not have the protections of the Bankruptcy Code, including the automatic stay provisions. Accordingly, emergency provisional relief is necessary to prevent creditors and other parties from continuing litigation or taking action against the Debtors' U.S. assets that could prejudice and disrupt the Canadian Proceedings (defined below), thereby interfering with the Receiver's ability to conduct operations and the ultimate sale of assets.

Wherefore, the Receiver respectfully requests entry of an Order, substantially similar to the attached proposed order, granting the requested Provisional Relief, and for all other and further relief to which the Receiver is justly entitled.

Dated: May 5, 2020
Houston, Texas

Respectfully submitted,

HAYNES AND BOONE, LLP

By: */s/ Charles A. Beckham, Jr.*

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ATTORNEYS FOR CANADIAN RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that contemporaneously with the filing of the foregoing, I directed noticing agent Stretto to serve a copy of the foregoing on parties in interest in this case. The Receiver will supplement this certificate of service with proof of service and a copy of such service list.

/s/ Charles A. Beckham, Jr.
Charles A. Beckham, Jr.