

ALLEN & OVERY LLP
Attorneys for RSM Richter Inc.,
as Plaintiff and Foreign Representative of the Foreign Applicants
Ken Coleman (KC 9750)
Daniel Guyder (DG 6515)
Kelle Gagné (KG 9205)
1221 Avenue of the Americas
New York, New York 10020
Telephone (212) 610-6300

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

MuscleTech Research and Development Inc.;
HC Formulations Ltd.;
CELL Formulations Ltd.;
NITRO Formulations Ltd.;
MESO Formulations Ltd.;
ACE Formulations Ltd.;
MISC Formulations Ltd.;
GENERAL Formulations Ltd.;
ACE US Trademark Ltd.;
MT Canadian Supplement Trademark Ltd.;
MT Foreign Supplement Trademark Ltd.;
HC Trademark Holdings Ltd.;
HC US Trademark Ltd.;
1619005 Ontario Ltd. (f/k/a NEW HC US
Trademark Ltd.);
HC Canadian Trademark Ltd.; and
HC Foreign Trademark Ltd.,

Foreign Applicants in Foreign Proceedings.

In Cases Under
Chapter 15 of the
Bankruptcy Code

Case No. 06-_____

RSM RICHTER INC., AS FOREIGN
REPRESENTATIVE OF MUSCLETECH
RESEARCH AND DEVELOPMENT INC.
AND ITS SUBSIDIARIES

Plaintiff,

v.

SHARON AGUILAR, an individual; *et al.*;

Defendants.

Adversary Proceeding

No. ____ — ____ (____)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
(I) CHAPTER 15 PETITIONS AND RECOGNITION OF FOREIGN
MAIN PROCEEDINGS AND (II) APPLICATION FOR ORDER TO SHOW
CAUSE WITH TEMPORARY RESTRAINING ORDER AND, AFTER NOTICE
AND A HEARING, PRELIMINARY INJUNCTION, ENJOINING THE
COMMENCEMENT OR CONTINUATION OF PRODUCT LIABILITY ACTIONS
AGAINST FOREIGN APPLICANTS AND OTHERS**

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1619005 Ontario Ltd. (f/k/a NEW HC US
Trademark Ltd.);
HC Canadian Trademark Ltd.; and
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Foreign Applicants in Foreign Proceedings.

RSM RICHTER INC., AS FOREIGN
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Adversary Proceeding
No. ____—____ (____)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF (I) CHAPTER 15 PETITIONS AND RECOGNITION OF FOREIGN MAIN PROCEEDINGS AND (II) APPLICATION FOR ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER AND, AFTER NOTICE AND A HEARING, PRELIMINARY INJUNCTION, ENJOINING THE COMMENCEMENT OR CONTINUATION OF PRODUCT LIABILITY ACTIONS AGAINST FOREIGN APPLICANTS AND OTHERS

RSM Richter Inc., in its capacity as the court-appointed monitor (the “Monitor”) and foreign representative of MuscleTech Research and Development Inc. (“MDI”) and its above-captioned subsidiaries (together with MDI, the “Foreign Applicants”) in proceedings (the “Canadian Proceedings”) 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”), through its United States counsel, Allen & Overy LLP, respectfully submits this Memorandum of Points and Authorities pursuant to Local Bankruptcy Rule 9013-1(B) in support of (i) the chapter 15 petitions of each of the Foreign Applicants (collectively, the “Chapter 15 Petitions”) commencing these chapter 15 cases ancillary to the Canadian Proceedings and seeking recognition of such proceedings as “foreign main proceedings” and the Monitor as the appointed “foreign representative” in respect of the Canadian Proceedings and granting certain injunctive relief in aid thereof; and (ii) the Monitor’s application for an order to show cause with a temporary restraining order and, after notice and a hearing, preliminary injunction (the “TRO Application”) pursuant to sections 105(a) and 1519 of title 11 of the United States Code (the “Bankruptcy Code”), Rule 7065 of the Federal Rules of Bankruptcy Procedure and Rule 65 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The Foreign Applicants are Canadian companies that, like many of their competitors, now find themselves defending devastating product liability litigation throughout the United States based on allegations relating to the research, marketing, manufacture, sale and distribution primarily of products containing ephedra and prohormones (such product liability lawsuits, the "Product Liability Actions"). As a result of the Product Liability Actions and other factors, the Foreign Applicants are now insolvent and in proceedings under the CCAA, Canada's main corporate restructuring statute.

Recognizing the need for a global resolution to the Product Liability Actions, the Canadian Court issued an order (the "Initial CCAA Order") commencing the Canadian Proceedings and thereby, *inter alia*, (a) staying further prosecution of the Product Liability Actions against the Foreign Applicants, as well as against a number of third parties, including affiliates of the Foreign Applicants and certain wholesalers and retailers that were involved in the sale and distribution of products sold by MDI (as set forth in detail below, the "Non-Applicant Defendants"), to allow the Foreign Applicants an opportunity to pursue a restructuring plan and to preserve the Foreign Applicants' assets in the interim, (b) appointing the Monitor as the foreign representative of the Foreign Applicants, and (c) expressly directing the Monitor to commence these chapter 15 cases and seek relief in the United States consistent with the relief granted under the Initial CCAA Order.

The Monitor has commenced these chapter 15 cases seeking recognition of the Canadian Proceedings as "foreign main proceedings" for the purposes of obtaining relief in aid of the Canadian Court and so that the Foreign Applicants may be afforded the accompanying

relief, including the automatic stay under 11 U.S.C. § 362, upon recognition pursuant to 11 U.S.C. § 1520. In the interim, however, the Foreign Applicants require immediate protection in the U.S. from further prosecution of the Product Liability Actions and from commencement of additional product liability litigation based on products sold by MDI. The Canadian Court has already granted this injunctive relief in Canada, and has directed the Monitor to seek co-extensive relief in the U.S. in aid of the Canadian Court and the Canadian Proceedings. The effectiveness of the Canadian Proceedings and the restructuring contemplated thereby depends on the type of coordination and cooperation that is the goal of chapter 15 of the Bankruptcy Code.

The Foreign Applicants' aim in commencing the Canadian Proceedings 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. Continued prosecution of the Product Liability Actions against the Foreign Applicants and the Non-Applicant Defendants threatens the ability of the Foreign Applicants to formulate, negotiate and propose a plan under the CCAA that embodies a global and equitable resolution of their liabilities, including those arising as a result of the Product Liability Actions.

The relief requested in these chapter 15 cases and in the TRO Application is justified under the circumstances, and is fully consistent with many years of Second Circuit authority, with past relief afforded in mass tort litigation and with relief recently granted by U.S. bankruptcy courts in plenary proceedings involving defendants in ephedra litigation.

A stay, in both Canada and the U.S., of the Product Liability Actions will provide the limited breathing period that is crucial to the Foreign Applicants' ability to negotiate with the Non-Applicant Defendants and the Product Liability Plaintiffs (defined herein), as well as any

additional claimants that may emerge in response to an anticipated call for claims in the Canadian Proceedings, with a view to formulating a plan under the CCAA. Given the Foreign Applicants' current circumstances, development and approval of a plan that includes a global, equitable resolution of all creditors' claims, including those arising out of the Product Liability Actions, is in the best interests of all creditors.

FACTUAL BACKGROUND

The affidavit of Barry Kadoch sworn to on January 13, 2006 (the “Kadoch Affidavit”) and filed with the Canadian Court in support of the Canadian Proceedings, and the exhibits thereto, describe in detail the Foreign Applicants, their operations, and the Canadian Proceedings. A true and correct copy of the Kadoch Affidavit is set forth as Exhibit 4 to each of the Chapter 15 Petitions and incorporated by reference as if fully set forth herein.

As set forth more fully in the Kadoch Affidavit, the Chapter 15 Petitions, the TRO Application and the complaint (the "Complaint") commencing an adversary proceeding, the Foreign Applicants are all Canadian companies, with registered offices and places of business in Canada. The Foreign Applicants are all direct or indirect subsidiaries of Iovate Health Sciences Group Inc., a company incorporated pursuant to the laws of Ontario, Canada on November 30, 1998. Certain of Iovate Health Sciences Group Inc.'s direct and indirect subsidiaries, other than the Foreign Applicants (collectively, the “Iovate Group Companies”), are involved in the development and sale of health supplements and weight-loss and sports nutrition products and carry on business in many countries around the world, although primarily in Canada and the United States. Certain of the foregoing business activities were formerly carried on by MDI. The Foreign Applicants have no physical place of business in the United States.

The Foreign Applicants face significant challenges as a result of being named as defendants, together with many of their competitors and customers, in a large number of Product Liability Actions pending throughout the United States. The vast majority of the Product Liability Actions arise from allegations relating to the ingestion of ephedra in a product formerly sold by MDI. Two of the Product Liability Actions are purported class actions that arise out of allegations relating to the marketing and advertising of the ephedra product formerly sold by MDI. Two other of the Product Liability Actions are purported class actions that arise out of allegations that the sale by MDI of products containing prohormones violated various state and federal consumer protection statutes. One pending individual action contains similar allegations. Additionally, two of the Product Liability Actions arise out of allegations related to contamination by a third party manufacturer that has indemnified MDI.

MDI ceased the production and sale of products containing ephedra and prohormones in December 2002. None of the Iovate Group Companies has produced or sold product formulations that are the subject of the product liability litigation in the U.S., nor has any of the Iovate Group Companies owned any of the intellectual property pertaining to such product formulations.

Nevertheless, a number of the plaintiffs in the Product Liability Actions (collectively, the "Product Liability Plaintiffs"), have named as defendants the following parties ((A)-(G), collectively the "Non-Applicant Defendants"):

(A) Paul Gardiner, the sole director of the Foreign Applicants, and Terence Begley, an officer of MDI (collectively, the "Principals");

(B) the Paul Gardiner Family Trust which owns 100% of the common shares of Iovate Group Inc.;

(C) Iovate Health Sciences Group Inc., Iovate Health Sciences Inc., Iovate Health Sciences Research Inc., Iovate Health Sciences International Inc., Iovate Health Sciences U.S.A. Inc., Iovate Health Sciences Capital Inc. and Iovate Copyright Ltd., all of which are affiliated with the Foreign Applicants and form part of the group of Iovate Group Companies previously described;

(D) HVL, Inc., a company located in Pittsburgh, Pennsylvania retained by MDI to manufacture the Hydroxycut product for MDI (the “Manufacturer”) and Douglas Laboratories Inc. under whose label HVL, Inc. sells its own in-house products;

(E) certain independent contract research organizations, being Peak Wellness, Inc. and Miami Research Associates Inc., that conducted a total of five clinical trials assessing the safety and/or efficacy of the Hydroxycut product (that is the subject of the majority of the Product Liability Actions), Carlon Colker, M.D., the principal of Peak Wellness, Inc. and Douglas Kalman of Miami Research Associates Inc., both of whom oversaw such clinical trials (collectively, the “Researchers”);

(F) Stuart Lowther, the former Research & Development Manager of MDI (the “Former Employee”); and

(G) certain of the Foreign Applicants’ customers, being various wholesalers and retailers in the U.S. that sold MDI’s products to the general public (collectively, the “Retailers”): namely: Walgreen Co.; Wal-Mart Stores, Inc.; General Nutrition Corporation, General Nutrition Corporation, n/k/a GN Oldco Corporation, General Nutrition Companies Inc., n/k/a GNCI Oldco, Inc., General Nutrition, Inc. n/k/a GNI Oldco, Inc., GN Oldco Corporation, f/k/a General Nutrition Corporation, General Nutrition, Inc., GNC Franchising, LLC, General Nutrition Distribution, L.P., General

Nutrition Distribution Corporation, General Nutrition Sales Corporation, General Nutrition Centers, Inc., General Nutrition Centers, Inc., n/k/a Oldco Corporation, General Nutrition Companies, Inc., General Nutrition Center, Store 100122, General Nutrition Center, Store 101603, GNC Corporation, General Nutrition Center International, Inc., Raaj Singh, individually and t/a GNC/General Nutrition Center #0948, Vitamin World, Inc., GNC Franchising, Inc., Mandeville GNC (a/k/a Mackie Shilstone's GNC), CVS Corporation, James R. Wilson, Jackie Kneifel; and Rite Aid Corporation.

The Product Liability Plaintiffs generally allege that the Non-Applicant Defendants acted in concert with the Foreign Applicants in the research, marketing, manufacturing, sale and distribution of products containing ephedra or prohormones.

The Product Liability Actions pertain only to products formerly sold by MDI; they do not pertain to any of the product formulations sold by the Iovate Group Companies. Accordingly, the liability of the Non-Applicant Defendants for the Product Liability Actions, including liability of the Iovate Group Companies, is derivative of, and inextricably linked to, any liability of the Foreign Applicants in those actions. As a result, the Canadian Court stayed all actions against the Foreign Applicants and all Product Liability Actions against the Non-Applicant Defendants.

In addition, the Principals have the benefit of contractual indemnities and indemnities in the by-laws of the Foreign Applicants. The Retailers and/or their parent companies and affiliates have the benefit of an indemnity clause in their respective contracts with MDI pertaining to the sale of the subject products. The Manufacturer has the benefit of an indemnity clause in its contracts with MDI for the manufacture of the Hydroxycut product. The Researchers have the benefit of an indemnity claim in their respective contracts with MDI

pertaining to the research and development of the subject products. The Former Employee has the benefit of an indemnity clause in his termination contract with MDI. Each of these indemnification obligations of the Foreign Applicants might give rise to further claims against the Foreign Applicants if the Non-Applicant Defendants incur any loss or liability in connection with any of the Product Liability Actions.

The Court is also respectfully referred to the Chapter 15 Petitions, the TRO Application, the Affidavit of Ken Coleman, a member of the firm of Allen & Overy LLP, in Support of the TRO Application and the Complaint (the "Coleman Affidavit"), and the Declaration of Peter Farkas in Support of the TRO Application (the "Monitor's Declaration"), each dated January 18, 2006, which further outline the background of these cases.

ARGUMENT

The purpose of the Canadian Foreign Proceedings is to maximize the value to be distributed to all creditors of the Foreign Applicants, and to establish procedures that will result in an efficient and equitable disposition of that value, under the auspices of the Canadian Court and with the aid of this Court. As proceedings under the CCAA in the Canadian Court, the Canadian Proceedings are entitled to the recognition and relief provided by chapter 15 of the Bankruptcy Code. Further, the Monitor is informed and believes that granting the additional relief sought herein will best assure an efficient and equitable resolution of the Product Liability Actions in particular and provide just treatment for all holders of claims against and interests in the Foreign Applicants' and their property, protection of claim holders in the U.S. against prejudice, distribution of proceeds of the Foreign Applicants' property substantially in accordance with the order prescribed by the Bankruptcy Code, and economically and

expeditiously administer the Foreign Applicants' affairs, consistent with the principles set forth in section 1507(b) of the Bankruptcy Code.

**POINT I: THE COURT HAS JURISDICTION TO HEAR THESE
PETITIONS UNDER CHAPTER 15 OF THE BANKRUPTCY CODE**

The Canadian Proceedings are entitled to recognition as foreign main proceedings under chapter 15 of the Bankruptcy Code because, among other things:

(A) the Canadian Proceedings are foreign proceedings within the meaning of 11 U.S.C. § 101(23), and are foreign main proceedings within the meaning of 11 U.S.C. §§ 1502(4);

(B) the Monitor is a foreign representative within the meaning of 11 U.S.C. § 101(24);

(C) the Chapter 15 Petitions seeking recognition under chapter 15 of the Bankruptcy Code were filed in accordance with section 1504 of the Bankruptcy Code with respect to each of the Foreign Applicants; and

(D) the Chapter 15 Petitions meet the requirements of 11 U.S.C. § 1515 with respect to each of the Foreign Applicants.

A. The Court has Jurisdiction to Recognize the Canadian Proceedings and Grant the Relief Requested

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 and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.), dated July 10, 1984. 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).

Venue is proper in this District. Many of the Product Liability Actions against the Foreign Applicants are pending in this District (pursuant to the Multidistrict Litigation discussed below), Kadoch Affidavit ¶65, and the Foreign Applicants do not have places of business or principal assets in any other District of the United States. Kadoch Affidavit ¶ 31. Accordingly, venue is proper in this District pursuant to 28 U.S.C. § 1410(2). In addition, it is respectfully submitted that venue in this District is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the Chapter 15 Petition, as provided by 28 U.S.C. § 1410(3).

B. These Cases are Properly Cases under Chapter 15

Chapter 15 applies where, as here, assistance is sought in the United States by a foreign representative in connection with a foreign proceeding. 11 U.S.C. § 1501(b)(1). These chapter 15 cases have been commenced for the purpose of obtaining the assistance of this Court to ensure the effective and economical implementation and administration of a plan of arrangement under the CCAA by, among other things, protecting the Foreign Applicants from the continued and significant costs of responding to the litigation asserted by the Product Liability Plaintiffs.

C. 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.

As more fully described in the Chapter 15 Petitions and the Monitor's Declaration, the Canadian Proceedings and the potential plan of arrangement for the Foreign Applicants to be developed constitute a statutory means of comprehensively restructuring the Foreign Applicants' liabilities under the supervision of the Canadian Court. As such, the Canadian Proceedings are a collective judicial proceeding in a foreign country under a law (the CCAA) relating to adjustment of debt in which the assets and affairs of the Foreign Applicants are subject to control or supervision by the Canadian Court for the purpose of restructuring of such debts. Accordingly, the chapter 15 cases concern a foreign proceeding within the meaning of 11 U.S.C. § 101(23). Further, under former section 304, the statutory predecessor to chapter 15, Canadian proceedings, including insolvency proceedings, were regularly granted comity. See 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.”); see also Cornfeld v. Investors Overseas Svs. 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 Bankr. 366, 366 (N.D. Tex. 1989).

D. These Cases were Commenced by a Foreign Representative

These chapter 15 cases were commenced by the duly appointed and authorized “foreign representative” of the Foreign Applicants and the Canadian Proceedings within the meaning of 11 U.S.C. § 101(24), 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.”

The Initial CCAA Order evidences that the Monitor was appointed and is duly authorized to act as foreign representative with respect to the Foreign Applicants and the Canadian Proceedings. Kadoch Affidavit, ¶ 2(d). By virtue of its appointment under the Initial CCAA Order, the Monitor is also a “foreign representative” within the meaning of section 101(24) of the Bankruptcy Code.

Further, under former section 304 of the Bankruptcy Code, monitors appointed under the CCAA by the Canadian Court in CCAA proceedings were considered "foreign representatives." See In re Air Canada, Case No. 03-11971 (PCB) (Order dated September 28, 2004 (Bankr. S.D.N.Y.)) (recognizing CCAA proceeding as a “foreign proceeding” and court-appointed monitor as “foreign representative” under the Bankruptcy Code.”).

E. The Chapter 15 Cases were Properly Commenced

These chapter 15 cases were duly and properly commenced as required by 11 U.S.C. §§ 1504 and 1509 by the filing of the Chapter 15 Petitions for recognition of foreign proceedings under 11 U.S.C. § 1515(a) accompanied by all documents and information required by 11 U.S.C. §§ 1515(b) and (c), including: (i) a copy of the Initial CCAA Order, and (ii) a statement identifying all foreign proceedings with respect to the Foreign Applicants that are known to the foreign representative. The Monitor is not aware of any other foreign proceedings pending with respect to the Foreign Applicants. Monitor's Declaration at ¶ 4. 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 Initial CCAA Order, the requirements of section 1515 have been met.

F. The Canadian Proceedings Should be Recognized as Foreign Main Proceedings

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). The Bankruptcy Code further provides that, in the absence of evidence to the contrary, the debtor’s registered office is presumed to be the center of the debtor’s main interests. 11 U.S.C. § 1516(c).

Canada is the center of each Foreign Applicant’s main interests as: (i) the registered office of each Foreign Applicant is in Canada; (ii) the principal place of business of each Foreign Applicant is in Canada; and (iii) the Foreign Applicants do not have any places of business or assets outside of Canada. Kadoch Affidavit ¶ 31. Accordingly, the Canadian Proceedings are pending in the center of the Foreign Applicants’ main interests and constitute “foreign main proceedings” as defined in 11 U.S.C. § 1502(4).

G. The Monitor is Entitled to an Order Granting Recognition

As evidenced above, the foreign proceedings for which recognition is sought are “foreign main proceedings” within the meaning of 11 U.S.C. § 1502, the Monitor applying for recognition is a “foreign representative” within the meaning of 11 U.S.C. § 101(24), and the Chapter 15 Petitions meet the requirements of 11 U.S.C. § 1515 with respect to each of the Foreign Applicants. Accordingly, the Court is required to enter an Order recognizing the Canadian Proceedings. 11 U.S.C. § 1517.¹

¹ § 1517. Order granting recognition

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding **shall** be entered 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.

Recognizing the Canadian Proceedings would not be manifestly contrary to the public policy of the United States under 11 U.S.C. § 1506.² Indeed, granting such recognition effects the U.S. public policy respecting foreign proceedings as articulated, among other ways, through the objectives set forth in 11 U.S.C. §§ 1501(a) and 1508.

**POINT II: THE INTERIM RELIEF REQUESTED BY THE
MONITOR IS WITHIN THE SCOPE OF SECTION 1519**

Upon recognition of the Canadian Proceedings as “foreign main proceedings”, the Foreign Applicants shall have the benefit of the relief conferred under section 1520 of the Bankruptcy Code, including the automatic stay under section 362 which applies as a matter of right with respect to the Foreign Applicants and the property of the Foreign Applicants in the United States pursuant to section 1520(a)(1). However, the Foreign Applicants require immediate, interim protection from the continuation of the Product Liability Actions and commencement of additional product liability litigation based on products sold by MDI, against them and the Non-Applicant Defendants – as they have obtained in Canada pursuant to the stay of proceedings imposed under the Initial CCAA Order. Accordingly, the Monitor, through the Complaint and the TRO Application, also requests immediate, interim relief from this Court pursuant to section 1519 of the Bankruptcy Code.

11 U.S.C. § 1517 (emphasis added).

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.

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(I), 109 Cong., 1st Sess. 2005, *reprinted in* 2005 U.S.C.C.A.N. 88, 169 at 172.

A. The Relief Requested is Authorized by Section 1519(a)(3)

Section 1519(a)(3) authorizes the Court to grant on an interim basis the relief available under section 1521(a)(7), which in turns provides for any relief available to a trustee, subject to certain exceptions not relevant here. 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) has been cited in conjunction with former section 304 of the Bankruptcy Code to allow bankruptcy courts to mold relief in near blank check fashion. In re Culmer, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982). The relief sought by the Monitor is within the broad power of this Court as clearly contemplated in sections 1519, 1521 and 105 of the Bankruptcy Code. See Davis, 272 B.R. at 586 (Finding that pursuant to section 105 a stay preventing action against a non-debtor may be appropriate "when a failure to do so will work irreparable harm on the debtor's estate and creditors", and pointing out that one such appropriate situation is when "the estate will bear the cost of any judgment taken against the non-debtor.").

In the Complaint and the TRO Application, and in compliance with the instructions of the Canadian Court, the Monitor has asked this Court to immediately stay continuation of the Product Liability Actions and commencement of additional product liability litigation based on products sold by MDI, against the Foreign Applicants and the Non-Applicant Defendants. The relief sought herein is consistent with and in furtherance of the injunctive relief that has been granted in the Canadian Proceedings. See In re Artimm, 278 B.R. 832, 837 (Bankr. C.D. Cal. 2002) (holding that it was appropriate to stay litigation in the U.S. because "one of the principal functions of a domestic court in an 11 U.S.C. § 304 case is to assist in the efficient administration of the foreign proceeding by preventing domestic creditors from pursuing or executing on assets in the U.S."); In re Singer (United Standard Insur. Co. Ltd.), 205 B.R. 355

(S.D.N.Y. 1997). In In re Singer, the United States District Court for the Southern District of New York found that it should recognize a stay issued in the U.K. (like Canada, a sister common law jurisdiction) which stay became effective without notice. Accordingly, the Court can, pursuant to sections 1521(a)(7) and 105(a) and principles of international comity, enjoin creditors of the Foreign Applicants from continuing Product Liability Actions and commencing additional product liability litigation based on products sold by MDI. As discussed below (*see* Point III), such an injunction has also been extended to non-debtors in extraordinary circumstances such as those present in these cases.

Moreover, the requested relief is fully consistent with the relief granted in past cases in which bankruptcy courts in the Southern District of New York have cooperated with foreign proceedings, albeit under former section 304, the statutory predecessor to chapter 15. *See, e.g., North Atlantic Ins. Co. (In re Bird)*, Case No. 97-B-41602 (TLB) (Bankr. S.D.N.Y.); Anglo American Ins. Co. (In re McMahon), Case No. 97-B-41556 (PCB) (Bankr. S.D.N.Y.); Pan Atlantic Ins. Co. (In re Jacob), Case No. 96-B-44542 (BRL) (Bankr. S.D.N.Y.); Stockholm Re (Bermuda) (In re Morgan), Case No. 95-B-40543 (PBA) (Bankr. S.D.N.Y.); The Orion Ins. Co., et al. (In re Evans), Case Nos. 94-B-44968 (SMB) and 94-B-44969 (SMB) (Bankr. S.D.N.Y.); Municipal General Ins. Co. In re Hughes, Case No. 94-B-41329 (CB) (Bankr. S.D.N.Y.); Kingscroft Ins. Co., et al. (In re Hughes), Case Nos. 92-B-41974-77 (PBA) (Bankr. S.D.N.Y.); Walbrook Ins. Co. (In re Hughes), Case No. 92-B-44623 (PBA) (Bankr. S.D.N.Y.); Trinity Ins. Co., et al. (In re Boys-Stones), Case Nos. 92-B-43498 and 92-B-43499 (JLG) (Bankr. S.D.N.Y.); Andrew Weir Ins. Co. (In re Boys-Stones), Case No. 92-B-46894 (PBA) (Bankr. S.D.N.Y.); English & American Ins. Co. (In re McMahon), Case No. 93-B-42685 (CB) (Bankr. S.D.N.Y.);

Bermuda Fire & Marine Ins. Co. (In re Hughes), Case No. 92-B-46013 (PBA) (Bankr. S.D.N.Y.); Chancellor Ins. Co. (In re Morgan), Case No. 93-B-41539 (PBA) (Bankr. S.D.N.Y.).

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). It is also necessary so that the Foreign Applicants’ affairs can be centralized in a single forum in order to maximize the creditors’ interests. See Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2d Cir. 1976), cert. denied, 429 U.S. 1093, reh’g denied, 430 U.S. 976 (1977); Bennett v. Mfrs. & Traders Trust Co., 2000 U.S. Dist. Lexis 15316 (N.D.N.Y. 2000).

B. The Monitor Satisfies the Requirements of Section 1519(e)

Section 1519(e) expressly requires a foreign representative to satisfy the general standards for injunctive relief. The standard in the Second Circuit requires a showing of irreparable harm and either (i) probability of success on the merits or (ii) the presence of sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in favor of the party requesting the injunctive relief. See In re Flores Caldas, 274 B.R. 583, 597-598 (Bankr. S.D.N.Y. 2002); In re Lines, 81 B.R. 267, 270 (Bankr. S.D.N.Y. 1988) (citing Green v. Drexler (In re Feit & Drexler, Inc.), 760 F.2d 406, 415 (2d Cir. 1985)).

Based on the facts of the Foreign Applicants' cases, it is beyond dispute that the Foreign Applicants are in "foreign main proceedings" with respect to which the Monitor is the "foreign representative." As all proper supporting documentation was filed contemporaneously

with the Chapter 15 Petitions, there is an extremely high likelihood that recognition of the Chapter 15 Petitions will be granted.

Further, upon recognition, the interim relief requested herein will automatically apply to each of the Foreign Applicants under section 362 of the Bankruptcy Code, applicable by operation of 11 U.S.C. § 1520(a)(1). Again, proceedings under the CCAA have been recognized as "foreign proceedings" under old section 304. See, e.g., In re Air Canada, supra, Case No. 03-11971 (PCB). Finally, the stay of litigation against the Non-Applicant Defendants where such litigation is derivative of the Foreign Applicants' liabilities is not repugnant to U.S. public policy and is in fact consistent with relief granted in plenary cases under the Bankruptcy Code. In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992) (citing In re A.H. Robins Co. Inc., 880 F.2d 694, 701 (4th Cir. 1989)), cert. dismissed sub nom. Hart Holding Co. v. Drexel Burnham Lambert Group, Inc., 506 U.S. 1088 (1993) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."). See also, In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002), (citing A.H. Robins, supra), cert. denied, 537 U.S. 816 (2002); and MacArthur v. Johns-Manville, Corp., 837 F.2d 89, 92-94 (2d Cir. 1988), cert. denied, MacArthur Co. v. Johns-Manville Corp., 488 U.S. 868 (1988).

(i) The Foreign Applicants Face Irreparable Harm

It has been consistently held that "the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury." In re Lines, 81 B.R. at 270. It has also been held that harm to an estate exists where the orderly determination of claims and the fair distribution of assets are disrupted. See Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987); see also 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). Finally, irreparable harm has been found where allowing litigation to go forward would (i) threaten the assets of a foreign estate, (ii) subject a foreign representative to a default judgment, and (iii) divert funds needed for the purpose of maximizing value for the estate's creditors. In re MMG LLC, 256 B.R. at 555; In re Gercke, 122 B.R. 621, 626 (Bankr. D.D.C. 1991). The Monitor satisfies each of these criteria. The successful administration of the Foreign Applicants' estates requires that the claims of all creditors, wherever situated, be resolved in the foreign proceedings. If all creditors are not enjoined, assets of the Foreign Applicants, namely insurance proceeds, may be prematurely "pieced out" and "the orderly determination of claims and the fair distribution of assets" in the foreign proceedings will be severely disrupted.

Moreover, the issuance of an ex parte temporary restraining order is appropriate when, as here, the applicant is in need of immediate relief. The United States Supreme Court has held that ex parte temporary restraining orders, "should be limited to preserving the status quo only for so long as is necessary to hold a hearing." Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 439 (1974). Federal Rule of Civil Procedure 65(b), made applicable in these cases by Bankruptcy Rule 7065, requires that 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., 167 F.3d 196, 198 (3d. Cir. 2001) (granting ex parte temporary restraining order against defendants to enjoin further sales of cable television descramblers); Gorman v. Coogan, 273 F. Supp.2d 131, 134 (D. Maine 2003) (issuing ex parte

temporary restraining order to prevent corporation from indemnifying current directors' expenses in defending legal action because company faced imminent bankruptcy if temporary restraining order was not entered). Unless a restraining order is issued, there is a material risk that one or more parties in interest will continue the prosecution of a Product Liability Action (including scheduled discovery) or commence similar product liability litigation based on products sold by MDI, involving one or more of the Foreign Applicants or the Non-Applicant Defendants, thereby potentially interfering with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, and interfering and causing harm to, the Monitor's efforts to administer the Foreign Applicants' estates pursuant to the Canadian Proceedings. Such action would also increase the claims against the Foreign Applicants' estates as they and the Non-Applicant Defendants incur further defense costs and expenses, undermining the Foreign Applicant's effort to achieve an equitable distribution for the benefit of all their creditors. As a result, the Foreign Applicants will suffer immediate and irreparable injury for which they will have no adequate remedy at law. Therefore, it is necessary that this Court grant the relief requested without prior notice to the Product Liability Plaintiffs and other parties in interest or their counsel.

(ii) The Balance Of The Hardships Tips Decidedly In Favor Of The Monitor

In contrast to the hardships described above, preservation of the status quo while the Monitor seeks a determination as to the course of the foreign proceedings will not prejudice creditors. Indeed, all of the Foreign Applicants' creditors will benefit from the Monitor's efforts to preserve and maximize the value of the Foreign Applicants' estates and achieve a global, equitable resolution of claims, including the Product Liability Actions, against the estates. Without injunctive relief, there can be no equitable and orderly distribution of the Foreign

Applicants' assets pursuant to a single, comprehensive plan. Thus, the balance of the hardships tips decidedly in favor of the Monitor.

In addition, as described above (*see* Point I), the Monitor has clearly shown that the Foreign Applicants are the subject of foreign proceedings, that the Monitor is the foreign representative of each of the Foreign Applicants, and that the relief requested herein pursuant to section chapter 15 of the Bankruptcy Code will permit the orderly resolution of claims in the Canadian Proceedings.

Third, recognizing the Canadian Proceedings and granting the relief requested herein will not be manifestly opposed to the public policy of the United States. *See, e.g., 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" (*Cornfeld*, 471 F. Supp. at 1259), a policy is embodied in the old section 304 that continues in chapter 15 of the Bankruptcy Code.

**POINT III: THE STAY OF PRODUCT LIABILITY ACTIONS
AGAINST THE NON-APPLICANT DEFENDANTS
IS APPROPRIATE UNDER THE CIRCUMSTANCES**

A. The Court's Authority under 11 U.S.C. §§ 105(a) and 1519(a)(3)

This Court also has the authority under sections 1519(a)(3) and 105(a) of the Bankruptcy Code to enjoin continuation of the Product Liability Actions against the Non-Applicant Defendants. Such injunctive relief is necessary under the circumstances to protect the Foreign Applicants' estates and creditors, as well as to provide an opportunity for all parties in

interest to negotiate a global settlement of the Product Liability Actions and ultimately formulate a plan under the CCAA. As discussed above, section 1519(a)(3) allows a court to grant relief on the filing of a chapter 15 petition in the form of the relief provided for in paragraph (7) of section 1521(a). Section 1521(a), in turn, allows the court to grant any relief under chapter 15 that would be available to a trustee, subject to certain limitations not relevant here. Relief available to a trustee includes that under section 105(a), which allows “[t]he court [to] issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11].”

Courts in the Second Circuit have specifically 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 estate and creditors.” In re Davis, 191 B.R. at 586; see also Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.), 26 B.R. 420, 436 (Bankr. S.D.N.Y. 1983) (“pursuant to section 105(a) the Bankruptcy Court may extend the automatic stay under section 362 of the Code and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of [the debtor’s] estates or which would frustrate the statutory scheme of chapter 11 or diminish [the debtor’s] ability to formulate a plan of reorganization.”); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992) (“In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important role in the debtor’s reorganization plan.”). Here, the argument for such a third-party injunction in these cases is overwhelming.

At least two other bankruptcy courts have recognized the extraordinary difficulties that ephedra litigation poses and have granted injunctive relief with respect to non-debtors similar to the relief requested here. In In re Twinlab Corporation, Case. No. 03-15564

(RDD) (Bankr. S.D.N.Y.), the debtors filed a complaint seeking to enjoin plaintiffs in a large number of ephedra and other personal injury actions from continuing the prosecution of those actions against certain third-party defendants – including several of the retailers of the debtor's products. On October 10, 2003, the Twinlab Court issued a temporary restraining order prohibiting further prosecution of the ephedra lawsuits against these third-party defendant-retailers (among other non-debtor parties). On October 23, 2003, the Twinlab Court issued a preliminary injunction enjoining the continued prosecution or defense of these lawsuits, and further restraining the filing of any other lawsuit against these third-party defendant-retailers based on the same or similar factual allegations or occurrences alleged in the ephedra lawsuits. By an order dated November 6, 2003, the Twinlab Court subsequently extended the preliminary injunction, and has further extended this injunction by further orders entered at later dates. A copy of the Twinlab preliminary injunction order is annexed hereto as Exhibit A.

Similarly, in In re N.V.E., Inc., the bankruptcy court enjoined ephedra-related litigation against numerous non-debtor defendant retailers for the purpose of negotiating a global settlement of the actions. Order of Oct. 25, 2005, In re N.V.E., Inc., Case No. 05-35692 (NLW) (Bankr. D.N.J.). A copy of the foregoing order and annexed hereto as Exhibit B. The bases for issuing the injunction were essentially the same as those outlined in this Memorandum.

As noted in the Chapter 15 Petitions, several of the Product Liability Actions against the Foreign Applicants are pending before the United States District Court for this District (before The Honorable Judge Jeb S. Rakoff) as part of a Multidistrict Litigation (MDL) proceeding. In In re Metabolife International Inc., Case No. 05-6040 (H11) (Bankr. S.D.Cal.), the debtors, who were also defendants in protracted ephedra litigation included in MDL proceedings, filed a complaint seeking relief in the MDL and its respective chapter 11 cases

requesting, *inter alia*, a stay of the litigation to allow the parties in interest to attempt negotiating a global resolution. Judge Rakoff entered a stipulation and order granting the requested injunctive relief Order of July 25, 2005, In re Metabolife International Inc., Case No. 04 MD 1598 (JSR) (S.D.N.Y.), as did the bankruptcy court. Order Aug. 23, 2005, In re Metabolife International Inc., Case No. 05-6040 (H11) (Bankr. S.D.Cal.). A copy of the District Court Order is annexed hereto as Exhibit **C**, and a copy of the Bankruptcy Court Order is annexed hereto as Exhibit **D**.

Without a breathing spell from litigation, it will be all but impossible for the parties, including the Non-Applicant Defendants, to participate in negotiations and work towards a global resolution of the Product Liability Actions. Kadoch Affidavit ¶ 77. Such a resolution will not be reached without a collective chance for the parties to focus on negotiations without the distraction of the Product Liability Actions. TRO Declaration ¶ 4.

B. Liability of the Non-Applicant Defendants under the Product Liability Actions is Derivative of the Foreign Applicants' Liability and Will Adversely Affect the Foreign Applicants' Estates

Some 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. See In re Ionosphere Clubs, Inc., 111 B.R. 423, 434 (Bankr. S.D.N.Y. 1990), aff'd in part and rev'd in part on other grounds, 124 B.R. 635 (S.D.N.Y. 1991); (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); See also A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1003 (4th Cir. 1986), cert. denied, 479 U.S. 876 (1986); Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 761 (5th Cir. 1995) (Suits against third parties may be preliminarily enjoined "when the

nondebtor and the debtor enjoy such an identity of interests that the suit against the nondebtor is essentially a suit against the debtor.”). Such a concern is especially relevant here, where the Product Liability Actions inevitably focus on MDI and the Foreign Applicants and the ephedra-containing products formerly sold by MDI.

Further, the Non-Applicant Defendants generally have indemnity rights against the Foreign Applicants for any liability arising out of the Product Liability Actions. Kadoch Affidavit ¶ 72. Thus, allowing the Product Liability Actions to proceed will multiply defense costs of the Foreign Applicants and, where a plaintiff in the Product Liability Actions prevails, likely increase claims against the Foreign Applicants’ estates, to the detriment of the Product Liability Plaintiffs as a group and other creditors. In addition, continuing prosecution of the Product Liability Actions against the Non-Applicant Defendants raises concerns about the preclusive effect of any judgment on the Foreign Applicants.

Finally, certain liability in relation to the Product Liability Actions may be covered by insurance procured by MDI and the other Foreign Applicants. Costs associated with defending the Product Liability Actions may also deplete the Foreign Applicants’ assets, affecting their ability to pursue claims under the insurance policies. Even if the effect on the insurance coverage is not a direct attempt to exercise control over assets of the estate, the damage to the estate is palpable. See Megliola v. Maxwell, 293 B.R. 443, 448-49 (N.D. Ill. 2003) (affirming Bankruptcy Court’s order, pursuant to section 105, enjoining a shareholders’ class action suit against officers and directors, even where the debtor was not named, but where the suit competed for a limited pool of insurance proceeds); see also Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.), 33 B.R. 254, 261 (Bankr. S.D.N.Y. 1983); A.H. Robins, 788 F.2d at 1002.

CONCLUSION

The Canadian Proceedings qualify for recognition as foreign main proceedings and the enjoyment of the accompanying statutorily provided relief. Further, the Monitor is the appropriate foreign representative and has satisfied the requirements for the additional interim injunctive relief requested. Without recognition and the requested interim relief, there are virtually no prospects for the Foreign Applicants to arrange their affairs in an orderly fashion so as to seek the best recoveries possible for all creditors, including the Product Liability Plaintiffs in the Product Liability Actions, under the Canadian Proceedings. For the foregoing reasons, the Monitor respectfully request that this Court grant the relief requested.

New York, New York
Dated: January 18, 2006

ALLEN & OVERY LLP

By: /s/ Ken Coleman
Ken Coleman (KC 9750)
Daniel Guyder (DG 6515)
Kelle Gagné (KG 9025)
1221 Avenue of the Americas
New York, New York 10020
Telephone (212) 610-6300
Facsimile (212) 610-6399

Attorneys for RSM Richter, Inc.,
as Plaintiff and Foreign Representative of the Foreign
Applicants