

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

_____	)	
<b>In re:</b>	)	<b>Case No. 12-30214</b>
	)	
<b>VALLE FOAM INDUSTRIES (1995)</b>	)	<b>Chapter 15</b>
<b>INC.</b>	)	
	)	<b>Judge Mary Ann Whipple</b>
<b>Foreign Applicant in Foreign</b>	)	
<b>Proceedings</b>	)	
_____	)	
	)	<b>Case No. 12-30215</b>
<b>In re:</b>	)	
	)	<b>Chapter 15</b>
<b>DOMFOAM INTERNATIONAL INC.</b>	)	
	)	<b>Judge Mary Ann Whipple</b>
<b>Foreign Applicant in Foreign</b>	)	
<b>Proceedings</b>	)	
_____	)	
	)	<b>Case No. 12-30218</b>
<b>In re:</b>	)	
	)	<b>Chapter 15</b>
<b>A-Z SPONGE AND FOAM</b>	)	
<b>PRODUCTS LTD.</b>	)	<b>Judge Mary Ann Whipple</b>
	)	
<b>Foreign Applicant in Foreign</b>	)	
<b>Proceedings</b>	)	
_____	)	

**EX PARTE MOTION OF FOREIGN REPRESENTATIVE  
FOR PROVISIONAL RELIEF PURSUANT TO SECTIONS  
1519, 362, AND 105 OF THE BANKRUPTCY CODE**

Deloitte & Touche Inc., the court-appointed monitor (the “**Monitor**”) and foreign representative of Valle Foam Industries (1995) Inc. (“**Valle Foam**”), Domfoam International Inc. (“**Domfoam**”), and A-Z Sponge & Foam Products Ltd. (“**A-Z**” and, together with Valle Foam and Domfoam, the “**Valle Foam Group**”) 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 “**Ontario Court**”), hereby moves this Court (the “**Motion**”) for the entry of an order, pursuant to section 1519 of title 11 of the United States Code,<sup>1</sup> provisionally staying (I) execution against any of the assets of the Valley Foam Group and (II) the commencement or continuation of any actions or proceedings concerning the assets, rights, obligations or liabilities of the Valle Foam Group until such time as these Chapter 15 cases are recognized as “foreign proceedings” or dismissed.

### **Preliminary Statement**

On January 12, 2012, the Ontario Court entered its Initial Order (the “**Canadian Order for Relief**”)² which provides for a stay (the “**Canadian Stay**”) of (i) any proceedings or enforcement process (¶ 13); (ii) all rights and remedies against or in respect of the Monitor and [each member of the Valle Foam Group] and their Business or the Property as defined in ¶ 4 (¶ 14); (iii) any interference with the rights of the [Valle Foam Group] in contracts, agreements, authorizations, licenses or permits (¶ 15); and (iv) the termination of oral or written agreements

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<sup>1</sup> Unless otherwise indicated, all section references are to title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “**Bankruptcy Code**”), all rule references are to the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), all references to “Local Bankruptcy Rules” or “LBR xxxx-x” are to the Local Rules for the United States Bankruptcy Court, Northern District of Ohio, and all references to “Chapter XX” are to chapter xx of the Bankruptcy Code.

<sup>2</sup> A copy of the Canadian Order for Relief is attached as Exhibit A to each of the Chapter 15 Petitions filed by the members of the Valle Foam Group.

with the [Valle Foam Group], such as waste disposal services and information technology services (¶ 16). The Canadian Stay is in effect “until and including February 10, 2012, or such later date as this Court may order” (¶ 13).

The Monitor has filed a Verified Petition for Recognition of Foreign Proceedings and Chapter 15 Relief for each member of the Valle Foam Group (the “**Verified Petitions**”) requesting, *inter alia*, “[a]ll relief afforded foreign main proceedings automatically upon recognition, pursuant to Section 1520 of the Bankruptcy Code, including, but not limited to, imposition of the stay imposed by section 362.”

Because the Verified Petitions were filed pursuant to section 1515 of the Bankruptcy Code the stay of section 362 is not “automatic” upon filing. It is not until “recognition of [the] foreign proceeding that is a foreign main proceeding [that] sections 361 and 362 apply with respect to the debtor and the property of the debtor.” 11 U.S.C. § 1520(a). Therefore, in order to protect and preserve the Settlements (as defined in par. no. 21 of the Verified Petitions) and to maximize the opportunity of the Valle Foam Group to effect their plan of compromise or arrangement, the Monitor respectfully requests that this Court enter the requested order to provisionally implement what would be the “automatic stay of section 362(a)” if the members of the Valle Foam Group were domestic corporations.

### **Jurisdiction and Venue**

1. This Court has jurisdiction over these Chapter 15 proceedings pursuant to 28 U.S.C. §§ 1334 and 157(a) and General Order No. 84 entered on July

16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

2. These cases have been properly commenced pursuant to section 1504 of the Bankruptcy Code by the filing of petitions for recognition of the Canadian Proceedings under section 1515 of the Bankruptcy Code.

3. Venue is proper in this district pursuant to 28 U.S.C. §§ 1410(2).

4. The statutory basis for the relief requested in this motion is sections 1519, 1520, 1521 and 105(a) of the Bankruptcy Code.

### **Background Facts**

#### ***The Role of the Monitor***

5. The Monitor was appointed by the Ontario Court pursuant to the CCAA, to monitor the business and financial affairs of the Valle Foam Group. Canadian Order for Relief ¶ 22.

6. The Ontario Court specifically authorized the Monitor, “as foreign representative of the [Valle Foam Group], to apply for recognition of the Canadian Proceedings as the ‘Foreign Main Proceedings’ in the United States pursuant to Chapter 15 of the *U.S. Bankruptcy Code*.” Canadian Order for Relief ¶ 44.

7. Pursuant to the authority and directive contained in the Canadian Order for Relief, the Monitor filed the three Verified Petitions.

8. These Chapter 15 cases are a critical component of the Settlements; a key step in bringing bring the Settlements to fruition.

### Relief Requested

9. The Monitor seeks to have the stay of section 362(a) of the Bankruptcy Code applied in these Chapter 15 cases on a provisional basis until such time as this Court rules on the Verified Petitions.

### Argument

10. Unless the stay of section 362(a) of the Bankruptcy Code is applied on a provisional basis, (a) the litigation pending in the United States against members of the Valle Foam Group (described at par. nos. 19-20 of the Verified Petitions) will continue unabated, (b) the Settlements will be jeopardized and (c) the ability of the Valley Foam Group to effect their Plan will be compromised.

11. Given the continued threat of new class actions or opt-out lawsuits, as well as the drain of resources in continuing to defend the existing litigation, the Monitor seeks immediate imposition of a stay of all such proceedings.

12. Section 1519(a)(3) of the Bankruptcy Code which authorizes the Court to grant, on a provisional basis, the relief available under section 1521(a)(7). Accordingly, this court may grant, on an *ex parte* and emergency basis, a stay of proceedings against the Valley Foam Group and their assets thereby allowing each of them an opportunity to proceed in Canada with an orderly restructuring or winding down of some or all of their respective businesses. *See, In re KPMG Inc., Foreign Representative of Redcorp Ventures Ltd. and Redfern Resources Ltd.*, No. 09-12019 (Bankr. W.D. Va. March 9, 2009)(applying in a chapter 15 case section 362 of the Bankruptcy Code on a provisional basis pursuant to section 1519 of the

Bankruptcy Code to the actions of all creditors against the petitioners and their property located within the U.S.); *In re Maxx Corporation et. al.*, No. 08-11443 (Bankr. D. Del. July 14, 2008)(applying in a chapter 15 case section 365(e) of the Bankruptcy Code on a provisional basis pursuant to section 1519 of the Bankruptcy Code to protect against contract termination); *In re Pro-Fit Holdings Limited*, No. 08-17043, (Bankr. C.D. Cal., July 10, 2008)(holding in a chapter 15 case that pursuant to section 1519 of the Bankruptcy Code, sections 361 and 362 of the Bankruptcy Code applied to the foreign debtor's U.S. assets pending the court's hearing on recognition of the foreign debtor's foreign proceeding).

13. As can be seen from the cases cited above, it is not necessary for a foreign representative to meet the standards for injunctive relief to receive relief pursuant to section 1519 of the Bankruptcy Code. Even if injunctive relief were the standard, the Monitor would be entitled to relief. In deciding whether to grant injunctive relief, a court must balance four factors, which are: (1) whether there is a substantial likelihood that the plaintiff will prevail on the merits; (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction. *Tumblebus Inc. v. Meredith Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005); *Northeast Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Overstreet*

*v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)  
(citations omitted).

14. There is a substantial likelihood that the Monitor will prevail in having this Court recognize the Canadian Proceedings as foreign main proceedings. The Canadian Order for Relief clearly shows that the Center of Main Interest for the Valle Foam Group is in Canada, and the other requirements for recognition have been met.

15. Unless provisional relief under section 362 is granted, irreparable injury to the Valle Foam Group and to the counterparties to the Settlements will result. A potential civil judgment in any of the U.S. or Canadian antitrust lawsuits pending against any member of the Valle Foam Group would vastly exceed the Valle Foam Group's combined assets and current cash reserves and swamp the efforts of the Monitor to restructure them in an orderly way thereby rewarding the winner of the "rush to the courthouse" and penalizing those who have agreed to the Settlements. Recognizing the need for such a stay, the Canadian Order for Relief imposed a stay until February 10, 2012 and provides "no proceeding or enforcement process in any court or tribunal (each a 'Proceeding') shall be commenced or continued against or in respect of [the Valle Foam Group] or the Monitor, or affecting the Business or the Property . . ."

16. No third party will be harmed, and it is clear that third parties will benefit by the reorganization of the Valle Foam Group with all claimants participating as creditors in these and the Canadian Proceedings. A stay of

litigation has long been the cornerstone of effective, evenhanded administration of assets, stopping the race to dismantle the debtor. The stay will also end the cost of defending the various actions.

17. Failure to stay all litigation in the United States will allow some creditors to end-run the Canadian Order for Relief. One purpose of Chapter 15 is to prevent this type of harm. Courts have held that, “the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury.” *In re Lines*, 81 Bankr. 267, 270 (S.D.N.Y. 1988).

18. Other Courts have found imminent irreparable harm 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 Gerke*, 122 Bankr. 621, 626 (Bankr. D.D.C. 1991).

19. Finally, international comity requires the imposition of the requested provisional relief. These cases were commenced because the Ontario Court, acting through its Monitor, requested the assistance of the U.S. Bankruptcy Court in giving effect to the Canadian Order for Relief.

WHEREFORE, the Monitor respectfully requests the Court to immediately enter an order (I) staying, on a provisional basis, the commencement or continuation of any actions or proceedings against the Valley Foam Group or its assets and the execution against any of their assets, and (II) for such other and further relief as is just in the circumstances.



Dated: January 23, 2012

Respectfully submitted,

/s/ James W. Ehrman

Mary K. Whitmer (0018213)

James W. Ehrman (0011006)

KOHRMAN JACKSON & KRANTZ PLL

1375 E. 9th Street, 20th Floor

One Cleveland Center

Cleveland, Ohio 44114-1793

Telephone: (216) 696-8700

Telecopier: (216) 621-6536

Email: mkw@kjk.com

jwe@kjk.com

*Counsel for Deloitte & Touche, the  
Foreign Representative of Valle Foam  
Industries (1995) Inc., Domfoam  
International Inc., and A-Z Sponge &  
Foam Products Ltd.*