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

In re:  
  
CALEDONIAN BANK LIMITED,  
  
Debtor in a Foreign Proceeding.

Chapter 15  
  
Case No. 15-\_\_\_\_ (\_\_\_\_)  
  
(Joint Administration Pending)

**EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND, AFTER  
NOTICE AND A HEARING, A PRELIMINARY INJUNCTION, PURSUANT TO  
SECTIONS 1519 AND 105(A) OF THE BANKRUPTCY CODE**

Keiran Hutchison and Claire Loebell of Ernst & Young Ltd., as the duly authorized joint controllers (together, the “Petitioners”) of Caledonian Bank Limited (the “Debtor”), by its undersigned counsel, Proskauer Rose LLP, respectfully make this application (the “Application”), pursuant to sections 1519 and 105(a) of title 11 of the United States Code (the “Bankruptcy Code”), for (i) entry, on an *ex parte* basis, of a temporary restraining order, substantially in the form attached hereto as Exhibit A, staying execution against the assets of the Debtor, applying section 362 of the Bankruptcy Code in this chapter 15 case on a provisional basis, and scheduling a hearing on the Petitioners’ request for a preliminary injunction; and (ii) after such hearing, the entry of the preliminary injunction order, substantially in the form attached hereto as Exhibit B, extending the relief in the temporary

restraining order until the disposition of the chapter 15 petition. In support hereof, the Petitioners respectfully state as follows:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

2. This case has been properly commenced pursuant to section 1504 of the Bankruptcy Code by filing the Petition for recognition of the controllership of the Debtor (the “Cayman Proceeding”) as confirmed by the Grand Court of the Cayman Islands in accordance with section 1515 of the Bankruptcy Code.<sup>1</sup>

3. The Debtor has assets and accounts located in this district, and thus venue is proper pursuant to 28 U.S.C. § 1410.

4. The statutory bases for relief are sections 1519, 1521, and 105(a) of the Bankruptcy Code.

### **BACKGROUND**

#### **I. The Debtor’s Business**

5. The Debtor is a wholly-owned subsidiary of Caledonian Global Financial Services, Inc. (“CGFSI”), a well-known specialized financial services provider in the Cayman Islands. The Debtor was incorporated in the Cayman Islands in 2007, and its registered office and headquarters is located in Georgetown, Grand Cayman, Cayman Islands. Caledonian Global Financial Services, Inc. is the sole shareholder of the Debtor. All of the Debtor’s offices and employees are located in the Cayman Islands, the members of its board of directors (the

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<sup>1</sup> The Debtor is a foreign bank without a branch or agency in the United States. Thus, the Debtor is eligible to be a debtor pursuant to section 109 of the Bankruptcy Code.

“Board”) reside in the Cayman Islands and have historically held their meetings in the Cayman Islands.

6. The Debtor’s principal business activities included issuing financial instruments and providing fiduciary and administrative services, including custody services to customers of its non-debtor broker-dealer affiliate, Caledonian Securities Limited.<sup>2</sup> More specifically, the Debtor accepted deposits from customers<sup>3</sup> at fixed rates for various periods and sought to earn an interest margin by placing these funds with creditworthy counterparties at higher rates. The Debtor has approximately 1,550 customers and nearly 1,900 active accounts. The Debtor’s assets (*i.e.*, customer deposits) are principally held in two United States accounts: a cash account with The Northern Trust International Banking Corp. (the “Northern Trust Account”) and a securities account with Morgan Stanley Smith Barney LLC (the “Morgan Stanley Account”). The Debtor does not have a branch in the United States but arranges transfers through The Northern Trust International Banking Corp. which acts as a correspondent bank.

7. As of January 31, 2015, the Debtor had total assets of approximately \$585 million, approximately \$388 million of which was cash on deposit with other financial institutions or liquid fixed income investments, and total liabilities of approximately \$560 million, approximately \$520 million of which was repayable to depositors on demand. Based upon the best information available as of the filing of the Application, approximately 51 percent of the Debtor’s assets are located in the United States, with approximately \$132 million located in the Northern Trust Account and approximately \$169 million of securities in the Morgan Stanley Account.

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<sup>2</sup> The Petitioners have also been appointed as joint controllers of Caledonian Securities Limited.

<sup>3</sup> The Debtor’s customers include customers in the Cayman Islands, the United States, and elsewhere.

8. The Debtor is a class “A” licensed bank in the Cayman Islands and is licensed to conduct banking business in the Cayman Islands pursuant to the Banks and Trust Companies Law (2013 Revision) (the “BTC Law”). The Debtor is subject to regulatory oversight by the Cayman Islands Monetary Authority (“CIMA”).

## **II. Events Leading to Cayman Proceeding**

9. On Friday, February 6, 2015, the Securities and Exchange Commission (the “SEC”) commenced an action, captioned *Securities and Exchange Commission v. Caledonian Bank Ltd., et al.*, against the Debtor, Caledonian Securities Ltd., and three other entities in the United States District Court for the Southern District of New York. *See* Civ. A. No. 15-894 (WHP) (the “SEC Action”). The complaint alleges violations of Section 5 of the Securities Act of 1933 (15 U.S.C. § 77e) and suggests that, from January 2013 to August 2013, the Debtor profited from the sale of common stock in four shell companies that did not have a valid registration statement on file or in effect, as required by Section 5. The Debtor disputes the complaint’s allegations.

10. Later that same day, Judge William H. Pauley III of the United States District Court for the Southern District of New York (the “District Court”) granted the SEC’s application for a temporary restraining order freezing all of the Debtor’s United States-based assets, including all amounts held in the Northern Trust Account and the Morgan Stanley Account, and ordering repatriation of proceeds from the Debtor’s stock sales to the United States (the “TRO”).<sup>4</sup>

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<sup>4</sup> As of the filing of the Petition, a hearing on the SEC’s request for a preliminary injunction with respect to the relief granted in the TRO is scheduled for 10:00 a.m. (EST) on February 20, 2015. Based upon discussions with the SEC, the Debtor expects to file a stipulation that will adjourn the preliminary injunction hearing and extend the certain terms of the TRO beyond February 20, 2015.

11. The freezing of such a large percentage of the Debtor's assets had a crippling effect on the Debtor's liquidity. Upon learning that the Debtor's United States assets were frozen, the Debtor's customers began making requests to withdraw funds from their accounts with the Debtor. The withdrawal requests began the evening of February 6, 2015, and continued throughout the weekend. The Debtor, recognizing its only hope to continue as a going concern was to free up liquidity to meet its customers' requests, immediately engaged in negotiations with the SEC to modify the TRO. The Debtor and SEC negotiated through the weekend of February 7<sup>th</sup> and 8<sup>th</sup>, 2015, ultimately reaching an agreement to modify the TRO, which was entered as an order by the District Court. The TRO was further modified on Monday, February 9, 2015, and the District Court entered an agreed order that waived the asset freeze and repatriation provisions, subject to the limitation that the Debtor must maintain a balance of at least \$10 million in cash in the Northern Trust Account and \$66,677,852 in securities in the Morgan Stanley Account. The Debtor hoped that the unfreezing of its United States assets would calm its depositors and allow it to meet the withdrawal demands of its customers.

12. While the Debtor was negotiating with the SEC over the February 7<sup>th</sup> and 8<sup>th</sup>, it also reviewed (i) all withdrawal requests that had been received since the close of business on February 6, 2015; (ii) the Debtor's cash, cash-equivalents and readily realizable assets, including those assets that would be made available pursuant to the modified TRO; and (iii) projected the likely number of withdrawal requests the Debtor would receive when it opened for business on Monday, February 9, 2015. Based upon its review and the expectation that the SEC would agree to modify the TRO, the Debtor determined that it should be able to meet withdrawal requests, and concluded that the Debtor should open for business as normal on February 9, 2015.

13. However, on February 9, 2015, the Debtor received a substantially larger number of withdrawal requests than expected, rendering the Debtor cash flow insolvent. As a result of the Debtor's depositors' demands, the Debtor suspended operation of all services, including accepting deposits and processing withdrawals, on February 9, 2015.

14. In response to the Debtor's suspension of services, CIMA exercised its regulatory powers under the BTC Law. Pursuant to section 18(1)(v) of the BTC Law, CIMA has the authority to appoint a controller that has all the powers of a receiver or manager of a business appointed under section 18 of the Bankruptcy Law (1997 Revision) (the "Bankruptcy Law").<sup>5</sup> On February 10, 2015, CIMA appointed the Petitioners as the Debtor's joint controllers pursuant to the BTC Law.

15. Also on February 10, 2015, and after the Petitioners were appointed as the Debtor's joint controllers, the sole shareholder of the Debtor, CGFSI, passed resolutions placing the Debtor into voluntary liquidation under the Companies Law (2013 Revision) (the "Companies Law") and appointing Gordon MacRae and Eleanor Fisher of Zolfo Cooper (Cayman) Limited as the joint voluntary liquidators ("JVLs") of the Debtor.

16. On February 11, 2015, the JVLs filed a petition with the Cayman Court seeking, among other relief, court authorization to control the affairs of, and court supervised liquidation of, the Debtor. The Petitioners objected to the JVLs' petition on the grounds that they are charged with the administration of the Debtor's estate and made an oral application to the Cayman Court to confirm their powers under section 18 of the BTC Law.

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<sup>5</sup> The Bankruptcy Law provides for the bankruptcy and adjustment of debts of a Cayman person. As described by one commentator, the effect of a Cayman Court ordering the appointment of a receiver or manager under the Bankruptcy Law "vest[s] the debtor's assets in the trustee in bankruptcy who is responsible for transferring the assets and administering the estate. However, at the court's discretion, the debtor may be discharged, suspended, or have conditions imposed upon the discharge of his assets depending upon the surrounding circumstances and the conduct of the debtor." See Lee, Stacey, *Piercing Offshore Asset Protection Trusts In the Cayman Islands: The Creditors' View*, 11 *Transnat'l Law*. 463 (Fall 1998).

17. On February 12, 2015, the Cayman Court dismissed the JVLs' petition and granted the Petitioners' oral application (the "Cayman Order"). The Cayman Order makes clear that the JVLs have no power or control over the Debtor and that all powers over the Debtor rest with the Petitioners.

18. The Cayman Order empowers the Petitioners to take necessary actions to protect the Debtor's assets and prevent any further diminution in value while they wind down and liquidate the affairs of the Debtor. The Cayman Order confirms the Petitioners' powers granted to them under section 18 of the BTC Law and section 18 of the Bankruptcy Law and authorizes the Petitioners to act in accordance with such powers. Specifically, the Petitioners may, among other things:

- assume control of and collect all property and assets of the Debtor;
- locate and recover all debts due to the Debtor;
- make such compromise or other arrangement with creditors of the Debtor in respect of any debts of the debtor, including the proposal of a scheme of arrangement;
- commence a proceeding under chapter 15 of the Bankruptcy Code; and
- apply to the Cayman Court for relief or direction in connection with their powers.

*See Order at §§ 1(a), (c)(ii), (d)(iii), (e), (m).*

19. The Petitioners seek chapter 15 recognition in order to aid in the orderly administration of the Cayman Proceeding. Absent recognition of the Cayman Proceeding under chapter 15 and imposition of an automatic stay, depositors of the Debtor may attempt to seize the Debtor's unprotected assets located in the United States. Indeed, the Petitioners are aware that certain depositors of the Debtor have already retained Cayman counsel. The Petitioners fear a "race to the courthouse" scenario, whereby certain creditors are able to seize the Debtor's United

States assets for such creditors' exclusive benefit. Such a result would harm the Debtor's creditors as a whole.

**RELIEF REQUESTED**

20. By this Application, the Petitioners respectfully request, pursuant to sections 1519 and 105(a) of the Bankruptcy Code: (a) entry, on an *ex parte* basis, of a temporary restraining order:

- i. pursuant to sections 1519(a)(1) and 105(a) of the Bankruptcy Code, enjoining all persons and entities from seizing, attaching, possessing, executing, and/or enforcing liens against the assets of the Debtor;
- ii. pursuant to sections 1519 and 105(a) of the Bankruptcy Code, applying section 362 of the Bankruptcy Code in this chapter 15 case within the territorial jurisdiction of the United States to stay, among other things, actions against the Debtor; provided, however, the automatic stay made applicable by section 1520(a)(1) of the Bankruptcy Code shall (a) be subject to the TRO, as or as may be modified;<sup>6</sup> and (b) not enjoin a police or regulatory act of a governmental unit to the extent provided in section 362(b)(4) of the Bankruptcy Code; and
- iii. scheduling a hearing for a preliminary injunction; and after notice and hearing, entry of a preliminary injunction extending the relief set forth above until such time as this Court enters an order disposing of the chapter 15 Petition.

**BASIS FOR RELIEF**

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

21. Upon this Court's final recognition of the Cayman Proceeding as a "foreign main proceeding," the automatic stay provided by section 362 of the Bankruptcy Code will

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<sup>6</sup> By recognizing the effect of the TRO, the Debtor is not making any admission with respect to the SEC Action.



immediately apply with respect to all of the Debtor's property that is within the territorial jurisdiction of the United States. *See* 11 U.S.C. § 1520(a)(1). However, unlike in a typical corporate reorganization case under chapter 11 of the Bankruptcy Code, in an ancillary proceeding commenced under chapter 15, the automatic stay will not protect the Debtor's assets in the United States during the period between the petition date and the date on which the Court enters an order recognizing the Cayman Proceeding as a foreign proceeding.

22. In recognition of the fact that a foreign debtor may suffer irreparable harm during the period between commencement of a chapter 15 proceeding and entry of an order recognizing the foreign proceeding, section 1519(a) of the Bankruptcy Code authorizes courts to grant "relief of a provisional nature" from the time of filing a petition for recognition until the court rules on the petition where such relief is "urgently needed to protect the assets of the debtor or the interests of the creditors," including "staying execution against the debtor's assets." 11 U.S.C. § 1519(a)(1). In addition, pursuant to section 1519(a)(3) of the Bankruptcy Code, courts are authorized to grant, on a provisional basis, the relief available under section 1521(a)(7) of the Bankruptcy Code, which in turn provides for any relief available to a trustee in a case under the Bankruptcy Code, subject to certain statutory exceptions not relevant here. *See* 11 U.S.C. §§ 1519(a)(3) and 1521(a)(7). Further, section 105(a) of the Bankruptcy Code allows courts to "issue any order . . . necessary or appropriate to carry out the provisions of [title 11]." The Court may therefore apply section 362 of the Bankruptcy Code in this chapter 15 case as the protections afforded by that section constitute "relief that may be available to a trustee." 11 U.S.C. §§ 1519(a)(3) and 1521(a)(7). Section 362 of the Bankruptcy Code provides relief to a trustee by, among other things, enjoining creditor actions against debtors and their property, and is an essential feature of the Bankruptcy Code.

23. Provisional relief similar to that requested here has been granted in numerous chapter 15 cases, including cases involving banking institution debtors. *See, e.g., In re SIFCO S.A.*, No. 14-11179 (REG) (Bankr. S.D.N.Y. May 7, 2014); *In re Syncapse Corp.*, No. 13-12410 (SMB) (Bankr. S.D.N.Y. July 25, 2013) (granting provisional relief, including protections of section 362); *In re Japan Airlines Corp., et al.*, No. 10-10198 (JMP) (Bankr. S.D.N.Y. Jan. 28, 2010) (applying section 362 on a provisional basis); *In re Kaupthing Bank hf.*, No. 08-14789 (MG) (Bankr. S.D.N.Y. Dec. 1, 2008) (granting provisional relief to debtor bank); *In re Irish Bank Resolution Corp.*, No. 13-12159 (CSS) (Bankr. D. Del. Sept. 23, 2013) (applying section 362 on a provisional basis to debtor bank); *In re Valle Foam Indus. (1995) Inc.*, No. 12-30214 (MAW) (Bankr. N.D. Ohio Jan. 27, 2012); *In re Satisfied Brake Prods., Inc.*, No. 11-51427 (JMS) (Bankr. E.D. Ky. May 19, 2011).

B. The Circumstances Satisfy the Standards for Injunctive Relief

24. Relief under section 1519 of the Bankruptcy Code is available where the foreign representative can satisfy the standard for injunctive relief. 11 U.S.C. §1519(e). In the Second Circuit, the standard that must be met in order to obtain injunctive relief is that a movant must make a showing of (i) irreparable harm absent relief and (ii) either (a) probability of success on the merits or (b) if there is doubt as to the merits, that the balance of hardships weighs in favor of the party seeking injunctive relief. *See e.g., Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014); *Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 51-52 (2d Cir. 1998), *cert. denied* 525 U.S. 923 (1998). This standard is easily satisfied here.

(i) **Irreparable Harm**

25. The Debtor will face irreparable harm if this Court were not to grant the provisional relief requested. The Debtor has approximately 1,550 depositors and absent this relief, depositors and other creditors of the Debtor may attempt to seize the Debtor's assets located in the United States. Indeed, the Petitioners are aware that certain depositors of the Debtor have already retained Cayman counsel. *See Exhibit C* (Article from website of law firm Solomon & Harris, claiming to "represent[] Caledonian Bank Depositors in Aftermath of SEC Claims"). The Petitioners fear a "race to the courthouse" scenario, whereby certain creditors will be able to seize the Debtor's United States assets for such creditors' exclusive benefit. This would interfere with the orderly determination of claims and fair distribution of assets. Avoiding this type of harm is a principal purpose of chapter 15, *see* 11 U.S.C. § 1501(a)(3) (the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor) & (a)(4) (to protect and maximize the value of the debtor's assets) and the automatic stay under the Bankruptcy Code. *See* H.R. Rep. No. 95-595, pt. 1 at 362 (1977) (noting that without a stay, "certain creditors would be able to pursue their own remedies against the Debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally."). Provisional relief should be granted where, as here, "the Foreign Debtors' assets located in the United States are in danger without provisional relief. . .[because this] is precisely the harm Chapter 15 is designed to prevent." *In re Innua Can. Ltd.*, No. 09-16362, 2009 Bankr. LEXIS 994 at \*11-12 (Bankr. D.N.J. Mar. 25, 2009).

26. This chapter 15 proceeding has been commenced for the purpose of obtaining the assistance of this Court to grant recognition in the United States of the Cayman Proceeding and

to facilitate the conduct of a single, centralized, and coordinated restructuring process for the Debtor. Without the protection provided by an order provisionally staying execution against the Debtor's assets and applying section 362 of the Bankruptcy Code, creditors in the United States could gain an advantage over other creditors by initiating lawsuits to collect upon debts owed and seizing assets, resulting in a piecemeal depletion of the Debtor's estate. Indeed, it has been held that "the premature piecing out of property involved in a foreign liquidation proceeding constitutes irreparable injury." *In re Lines*, 81 B.R. 267, 270 (Bankr. S.D.N.Y. 1988). Such a result would violate basic tenants of both Cayman Islands and United States bankruptcy law that similarly situated creditors are to share ratably in the debtor's assets. Further, 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); *In re MMG LLC*, 256 B.R. 544, 555 (Bankr. S.D.N.Y. 2000). The successful administration of the Debtor's estate requires that the claims of all creditors be resolved in a single proceeding.

27. Because of the irreparable harm that would otherwise result, courts have granted similar provisional relief in chapter 15 cases involving foreign banking institutions. *See, e.g., In re Kaupthing Bank hf.*, No. 08-14789 (MG) (Bankr. S.D.N.Y. Dec. 1, 2008); *In re Irish Bank Resolution Corp.*, No. 13-12159 (CSS) (Bankr. D. Del. Sept. 23, 2013).

28. Thus, for all the foregoing reasons, the Petitioners have demonstrated the Debtor would face irreparable harm in the absence of the provisional relief sought being granted.

**(ii) Likelihood of Success on the Merits**

29. The Petitioners will be entitled to relief identical to the provisional relief requested in this Application upon recognition of the Cayman Proceeding as a foreign main

proceeding. *See* 11 U.S.C. §§ 1520 (setting forth the effects of recognition of a foreign main proceeding, including, the applicability of the automatic stay under section 362 of the Bankruptcy Code) and 1521 (setting forth relief that may be granted upon recognition of a foreign proceeding whether main or nonmain, including a stay of actions or execution concerning or against the debtor's assets). Thus, in order to show a likelihood of success on the merits, the Petitioners must show that the Court is likely to grant recognition as such.

30. To qualify as a foreign main proceeding, the Petitioners must demonstrate: (i) that the Cayman Proceeding is a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code; and (ii) that the Cayman Proceeding is pending in the country where the Debtor has its center of main interests ("COMI"). *See* 11 U.S.C. § 1517 (setting forth the requirements for an order granting recognition as a foreign main or foreign nonmain proceeding).

a. The Cayman Proceeding Satisfies the Requirements of Section 101(23)

31. Section 101(23) of the Bankruptcy Code defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign country ... under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23).

32. An analysis of the definition of the term "foreign proceeding" demonstrates that the Cayman Proceeding, which is governed by the BTC Law and the Bankruptcy Law, without question satisfies the requirements of section 101(23) of the Bankruptcy Code. The Cayman Proceeding is a "collective judicial proceeding" as the Petitioners have the power to resolve claims, refer claims to an arbitrator, control and collect assets, and take actions to safeguard the

interests of the Debtor's depositors and creditors. *See* Cayman Order §§ 1(d), (e), (f)<sup>7</sup>. As demonstrated by these powers, the Cayman Proceeding is a collective judicial proceeding because included among the purposes of such proceeding is to resolve and determine the rights of all claimants and stakeholders, *i.e.*, the creditor body as a whole.

33. Further, each of the Bankruptcy Law and the BTC Law is a “law relating to insolvency or adjustment of debt” as (i) the Bankruptcy Law is a law that relates to the adjustment of debts; and (ii) the BTC Law grants a controller with all the powers a receiver has under the Bankruptcy Law. In addition, the Cayman Order grants the Petitioners the power to resolve claims and propose a scheme of arrangement which is the legal vehicle by which distributions are made to creditors. *See* Cayman Order § 1(d).

34. Next, the Cayman Proceeding is subject to “control or supervision by a foreign court” as the Petitioners had to apply and obtain an order authorizing their powers to control the affairs of the Debtor and, under the Cayman Order, the Petitioners may seek relief from the Cayman Court regarding the Cayman Proceeding. *See* Cayman Order § 1(m).

35. Moreover, in interpreting section 101(23) of the Bankruptcy Code, courts have held that a regulatory body qualifies as a “foreign court” when it supervises or controls the assets of a debtor. *See In re Tradex Swiss AG*, 384 B.R. 34, 42 (Bankr. D. Mass. 2008) (“Even if the decree of the SFBC [Swiss Federal Banking Commission] were not subject to appeal to the Swiss Federal Administrative Court, and then the Swiss Federal Supreme Court, the SFBC itself comes within the definition of a foreign court”); *In re Betcorp Ltd.*, 400 B.R. 266, 284 (Bankr. D. Nev. 2009) (Australian Securities and Investment Commission is an authority competent to control and supervise a voluntary wind-up proceeding within the meaning of sections 101(23) and 1502)). These courts rely on section 1502 of the Bankruptcy Code, which defines “foreign

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<sup>7</sup> The Cayman Order is attached as Exhibits A and B to the Chapter 15 Petition.

court” for the purpose of chapter 15 as a “judicial *or other authority* competent to control or supervise a foreign proceeding.” 11 U.S.C. § 1502(3) (emphasis added).

36. In this case, even if the Cayman Proceeding was not subject to the control of the Cayman Court, which it is, CIMA would qualify as a “foreign court” for purposes of chapter 15 recognition as CIMA retains a supervisory role over the Cayman Proceeding. Pursuant to section 18(3) of the BTC Law and section 6 of the Cayman Order, CIMA receives reports regarding the administration of the Debtor and, under section 18(4)(c) of the BTC Law and section 1(d) of the Cayman Order, can influence how the Debtor’s wind down and liquidation is to proceed. Further, under section 19 of the BTC Law, CIMA can apply to the Cayman Court to ensure the winding up of the Debtor is being conducted in the best interest of its stakeholders. Thus, since CIMA initially appointed the Petitioners as joint controllers and retains supervisory powers, the Cayman Proceeding is controlled or supervised by a foreign court. *See In re Tradex Swiss AG*, 384 B.R. at 42 (proceeding initiated by an administrative agency with authority to regulate banks and brokers constituted foreign proceeding); *Betcorp Ltd.*, 400 B.R. at 284 (entity that can appoint and revoke liquidators and can control actions in a proceeding falls within the meaning of sections 101(23) and 1502).

37. Although the typical Cayman insolvency proceeding is conducted under the Companies Law,<sup>8</sup> courts in this and other districts have held insolvency proceedings under the Bankruptcy Law and other similar laws satisfy the requirements of section 101(23). *See, e.g., In re Millard, et al.*, No. 13-11625 (REG) (S.D.N.Y. Nov. 4, 2014) (recognizing as a foreign main proceeding a proceeding conducted under the Bankruptcy Law); *In re The Int’l Banking Corp.*,

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<sup>8</sup> Although the Cayman Proceeding is currently proceeding under the BTC Law and the Bankruptcy Law, the Petitioners are contemplating filing a petition to initiate a liquidation under the Companies Law. The Debtor will immediately advise the Court should the Cayman Court appoint the Petitioners as Joint Official Liquidators. Accordingly, the Petitioners reserve their right to seek relief as a foreign proceeding in the form of a liquidation under Cayman law.

09-17318 (SMB) (Bankr. S.D.N.Y. Jan. 15, 2010) (recognizing an administration under the Bahrain Central Banking Law as a foreign main proceeding); *In re Stanford Int'l Bank, Ltd.*, No. 09-0721 (DCG) (N.D. Tex. July 30, 2012) (proceeding under the Antigua and Barbuda International Business Corporations Act, which contained a similar winding up provision as the BTC Law, was a foreign main proceeding).

b. The Cayman Proceeding Qualifies as a Foreign “Main” Proceeding

38. Once it is determined that the Cayman Proceeding is a foreign proceeding, the question becomes whether the foreign proceeding is entitled to recognition, and if so, whether as a foreign “main” or “nonmain” proceeding.

39. Section 1502(4) of the Bankruptcy Code defines a foreign “main” proceeding as “a foreign proceeding pending in the country where the debtor has the center of its main interests.” 11 U.S.C. § 1502(4). Thus, it must be shown that the Cayman Proceeding is pending where the center of the Debtor’s main interests are located in order for the Cayman Proceeding to be considered a foreign “main” proceeding.

40. Section 1516(c) of the Bankruptcy Code provides “absen[t] evidence to the contrary, the debtor’s registered office ... is presumed to be the center of the debtor’s main interests.” The Bankruptcy Code does not define “center of ... main interests” (“COMI”) but courts have held the term “generally equates with the concept of ‘principal place of business’ in the United States.” *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011) (quoting *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (E.D. Cal. 2006)); *see also In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008) (using the terms COMI and “principal place of business” interchangeably).



41. In undertaking a COMI analysis, courts may consider “any relevant activities, including liquidation activities and administrative functions ... the location of the debtor’s headquarters; the location of those who actually manage the debtor ... the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.” See *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 416 (citing *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013)).

42. As noted above, the Debtor’s registered office is located in the Cayman Islands, which is therefore its presumptive COMI under section 1516(c) of the Bankruptcy Code. This presumption of COMI is confirmed by the following additional facts: the Petitioners are conducting the controllership of the Debtor in the Cayman Islands; the Debtor is, and always has been, headquartered in the Cayman Islands; all of the Debtor’s employees are located in the Cayman Islands; the Debtor has always held itself out as a Cayman Islands bank; and Cayman Islands law governs the Debtor’s internal affairs and many critical agreements relating to its business.

43. Accordingly, the Cayman Proceeding constitutes a foreign main proceeding. As such, the Petitioners will be entitled to the relief requested upon entry of the order for relief. Therefore, the Petitioners are likely to succeed on the merits.

**(iii) Balance of Hardships**

44. The balancing of hardships tips decidedly in favor of the Petitioners on this Application. Enjoining the attachment, seizure, transfer and lien and/or judgment enforcement of any parties with respect to assets located within the United States will prevent

their permanent loss to the estate. Such parties will be able to participate, as creditors in the reorganization of the Debtor, on an equitable basis with other creditors similarly situated. Accordingly, the Petitioners are entitled to the requested provisional relief.

**NOTICE**

The Petitioners propose to serve copies of the order to show cause in accordance with the notice procedures set forth in the proposed order attached hereto as Exhibit A. The Petitioners further propose to provide copies of the Application and the Hutchison Declaration upon request by any party in interest to Proskauer Rose LLP, Eleven Times Square, New York, New York 10036 to the attention of Geoffrey Raicht.

**NO PRIOR REQUEST**

45. No prior request for the relief requested herein has been made to this or any other court.

**WAIVER OF FEDERAL RULE OF CIVIL PROCEDURE 65(c)**

46. Bankruptcy Rule 7065 expressly provides that “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).” To the extent Rule 65 of the Federal Rules of Civil Procedure applies, the Petitioners believe that the security requirements imposed by Rule 65(c) are unwarranted under the circumstances and, accordingly, respectfully requests a waiver of such requirements pursuant to Bankruptcy Rule 7065.

WHEREFORE, the Petitioners respectfully request that the Court (i) enter the proposed temporary restraining order attached hereto as Exhibit A, staying execution against the assets of the Debtor, applying section 362 of the Bankruptcy Code in the Debtor’s chapter 15 case on a provisional basis, and scheduling a hearing to consider the Petitioners’ request for a preliminary

injunction and (ii) after such hearing, enter the proposed preliminary injunction order attached hereto as Exhibit B, extending the relief in the temporary restraining order until the disposition of the Chapter 15 Petition, and (iii) grant such other relief as the Court determines is fair and equitable under the circumstances.

Dated: February 16, 2015  
New York, New York

Respectfully submitted,

Geoffrey T. Raicht

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