

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	Chapter 15
MAAX Corporation, <i>et al.</i> ,	Case No. _____ (___)
Foreign Applicants in Foreign Proceedings.	Jointly Administered

EX PARTE MOTION FOR PROVISIONAL RELIEF

Alvarez & Marsal Canada ULC, is the court-appointed monitor (the "**Monitor**") and authorized foreign representative of MAAX Corporation ("**MAAX Corp.**") and certain of its direct and indirect wholly owned subsidiaries (together, the "**MAAX Group**")¹ in proceedings (the "**Canadian Proceedings**") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, pending before the Quebec Superior Court (Commercial Division) (the "**Quebec Court**").

By this Motion, the Monitor moves this Court on an *ex parte* basis for entry of an order making section 365(e) of the Bankruptcy Code applicable to the MAAX Group's real property leases in the above-captioned cases pursuant to sections 1519(a)(3), 1521(a)(7) and 105(a) of title 11 of the United States Code (the "**Bankruptcy Code**") and rendering any provision of the type described in section 365(e)(1) unenforceable against the MAAX Group until such time as an order disposing of the Chapter 15 Petitions (defined below) is entered. In

¹ The MAAX Group includes MAAX Corp., MAAX Canada Inc., 4200217 Canada Inc., MAAX Spas (Ontario), Inc., MAAX Cabinets Inc., MAAX KSD LLC, Pearl Baths LLC, MAAX-Hydro Swirl Manufacturing Corp., MAAX Midwest, Inc., MAAX Spas (Arizona), Inc. and Aker Plastics Company, Inc.

support hereof, the Monitor respectfully submits the Memorandum of Law in Support Chapter 15 Petitions for Recognition of Foreign Proceedings and Related Relief, and states as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

2. Venue in this District is proper pursuant to 28 U.S.C. §§ 1410(1) and (3).

3. The statutory predicates for the relief requested herein are sections 1519, 1521 and 105(a) of the Bankruptcy Code.

BACKGROUND

4. The Monitor has commenced these chapter 15 cases ancillary to the Canadian Proceedings by filing Verified Petitions For Recognition of the Canadian Proceedings (collectively, the "**Chapter 15 Petitions**") with the documentation required by sections 1504 and 1515 of the Bankruptcy Code seeking the entry of an order (i) recognizing the Canadian Proceedings as "foreign main proceedings," or in the alternative, "foreign non-main proceedings," (ii) enforcing the Initial Order of the Quebec Court dated June 12, 2008 (the "**Initial Order**"), as extended on June 26, 2008, and July 10, 2008 (collectively, the "**Initial Orders**"), in the United States; (iii) enforcing the Sale and Vesting Order of the Quebec Court dated July 10, 2008 (the "**Vesting Order**") which approved the sale of substantially all of the MAAX Group's assets free and clear of all liens, claims, interests and encumbrances (except for permitted encumbrances set forth in the Purchase Agreement described in the Chapter 15 Petitions); and (iv) facilitating the implementation of such order through section 365 of the

Bankruptcy Code as made applicable by sections 1519(a)(3) and 1521(a)(7) of the Bankruptcy Code, as described more fully therein.

5. This Court is respectfully referred to the Chapter 15 Petitions which outline the relevant facts, all of which are incorporated herein by reference.

REQUEST AND BASIS FOR RELIEF

6. By this *ex parte* Motion, the Monitor seeks to make section 365(e) of the Bankruptcy Code applicable to the MAAX Group's real property leases in these Chapter 15 cases pursuant to sections 1519(a)(3), 1521(a)(7) and 105(a) of the Bankruptcy Code and render any provision of the type described in section 365(e)(1) unenforceable against the MAAX Group until such time as an order disposing of the Chapter 15 Petitions is entered.

7. Section 1519(a)(3) of the Bankruptcy Code authorizes the Court to grant, on a provisional basis, the relief available under section 1521(a)(7), which in turn provides for any relief available to a trustee, subject to certain statutory exceptions. Section 365(e) of the Bankruptcy Code provides relief to a trustee by rendering unenforceable *ipso facto* clauses that would otherwise allow a counterparty to a real property lease to terminate the lease based solely

on a condition of the kind described in section 365(e)(1).² Accordingly, although section 365(e) of the Bankruptcy Code is not expressly incorporated into chapter 15, the Court has discretion to grant such relief. In addition, section 105(a) of the Bankruptcy Code further allows the Court to “issue any order... necessary or appropriate to carry out the provisions of [title 11].”

8. Relief under section 1519 of the Bankruptcy Code is available where the foreign representative can satisfy the standard for injunctive relief. As discussed more fully in the accompanying Memorandum of Law, in the Third Circuit the "standard for evaluating a motion for preliminary injunction is a four-part inquiry as to: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." *U.S. v. Bell*, 414 F.3d 474, 478 n. 4 (3d Cir. 2005) (citing *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (*en banc*)).

9. The Monitor believes that the limited application of provisional relief under section 365(e) in these cases is critical to the prevention of irreparable damage to the value of the MAAX Group's estates. These Chapter 15 cases have been commenced for the purpose of

² Section 365(e)(1) of the Bankruptcy Code provides, in pertinent part:

"[n]otwithstanding a provision in an executory contract or unexpired lease,...an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on ----

- (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
- (B) the commencement of a case under this title; or
- (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

11 U.S.C. § 365(e)(1).

obtaining the assistance of this Court to give effect in the United States through sections 1520, 1521, 363 and 365 of the Bankruptcy Code to the Vesting Order which approved the consensual sale of the MAAX Group's assets to Brookfield Bridge Lending Fund Inc. ("**BBLF**"). A key aspect of the purchase agreement between BBLF and the MAAX Group is the assumption of substantially all of the MAAX Group's operating liabilities, including real property leases. Indeed, it is the MAAX Group's obligation under the purchase agreement to deliver to BBLF the real property leases set forth therein. *See* Section 6.2(g) of the Asset Purchase Agreement ("**APA**") dated June 11, 2008 (Conditions for the Benefit of the Buyer). A copy of the APA is annexed as Exhibit F to the affidavit of Ken Coleman sworn to July 14, 2008 and filed contemporaneously herewith. Without the protection of section 365(e) of the Bankruptcy Code, there is a material risk that counterparties to the MAAX Group's real property leases may take the position that the commencement of the Canadian Proceedings or these proceedings authorizes them to terminate their leases. Such termination will cause the MAAX Group to be unable to perform under the APA and result in irreparable damage to the value of the MAAX Group's estates.

10. In addition, for the reasons set forth in the Chapter 15 Petitions, the Monitor has amply demonstrated a reasonable probability that the Canadian Proceedings will be recognized as foreign main or non-main proceedings because the Canadian Proceedings are pending in Canada, which is the location of each member of the MAAX Group's center of main interest, or, at the very least, a jurisdiction in which each member of the MAAX Group maintains an establishment. Moreover, the Monitor can show that no harm will result to any party that is greater than the harm to the MAAX Group's estates in the absence of the requested relief. The relief requested herein is intended to be temporary, extending only through the disposition of the

Chapter 15 Petitions. In addition, the application of section 365(e) would only prevent a termination on account of the commencement of the Canadian Proceedings or these chapter 15 cases, and would not prohibit termination upon the occurrence of any other event of default. It is the Monitor's understanding that the MAAX Group intends to continue satisfying its obligations in the ordinary course of business. By contrast, if the provisional relief sought herein is not granted, the MAAX Group is at material risk of immediate and irreparable harm in that real property leases will be at risk of immediate termination and the MAAX Group would be in default under the APA. Such termination would violate the stay provisions of the Initial Order and thereby interfere with the orderly administration of the Canadian Proceedings. *See* Initial Order ¶ 8(c). Moreover, termination would interfere with the MAAX Group's rights under the Vesting Order by which the Quebec Court approved the transaction, including the transfer of material assets to BBLF. Real property lease terminations would jeopardize the transaction and impair the value of the MAAX Group's assets. The purpose of chapter 15 is to prevent this harm. *See* 11 U.S.C. § 1501. Finally, by its Initial Order and the Vesting Order, the Quebec Court has requested the assistance of this Court to effectuate its orders in the United States. *See* Initial Order ¶70; Vesting Order ¶21. Providing the requested assistance would effectuate the public policy considerations underpinning section 1525 of the Bankruptcy Code which mandates cooperation "to the maximum extent possible" between this Court and a foreign court. *See* 11 U.S.C. § 1525.

WHEREFORE, the Monitor respectfully requests the Court to enter the proposed Order attached hereto as **Exhibit A** and grant such other relief as this Court determines is fair and equitable under the circumstances.

Dated: Wilmington, Delaware
July 14, 2008

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