

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

In re:

MAAX Corporation, *et al.*,

Foreign Applicants in Foreign Proceedings.

Chapter 15

Case No. 08-_____ (___)

Jointly Administered

**MEMORANDUM OF LAW IN SUPPORT OF CHAPTER 15 PETITIONS
FOR RECOGNITION OF FOREIGN PROCEEDINGS AND RELATED RELIEF**

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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 ("**CCAA**"), pending before the Quebec Superior Court (Commercial Division) (the "**Quebec Court**").

The Monitor has commenced these chapter 15 cases ancillary to the Canadian Proceedings and respectfully files these Verified Petitions For Recognition of the Canadian Proceedings (collectively, the "**Chapter 15 Petitions**") with the documentation required by sections 1504 and 1515 of title 11 of the United States Code (the "**Bankruptcy Code**") seeking the entry of an order (the "**Proposed 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 on 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) in the United States; and (iv) facilitating the implementation of such order through section 365 of the Bankruptcy Code as made applicable by section 1521(a)(7) of the Bankruptcy Code. Additionally, the Monitor has filed a Motion for Provisional Relief (the "**Motion for Provisional Relief**") seeking to make

¹ The MAAX Group includes MAAX Corp., MAAX Canada Inc., 4200217 Canada Inc., MAAX Spas (Ontario), Inc., MAAX Cabinets Inc. (collectively, the "**Canadian Entities**") and MAAX KSD LLC ("**MAAX KSD**"), Pearl Baths LLC, MAAX-Hydro Swirl Manufacturing Corp., MAAX Midwest, Inc., MAAX Spas (Arizona), Inc. and Aker Plastics Company, Inc. (collectively, the "**U.S. Entities**"). All capitalized terms not defined herein have the meaning ascribed to the in the Chapter 15 Petitions (defined below).

section 365(e) of the Bankruptcy Code applicable in the above-captioned 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) in any of the MAAX Group's real property leases unenforceable against the MAAX Group until disposition of the Chapter 15 Petitions.

The Monitor respectfully files this Memorandum of Law in support of the Chapter 15 Petitions and the Motion for Provisional Relief.

FACTUAL BACKGROUND

The Court is respectfully referred to the Chapter 15 Petitions, the Affidavit of Mark Belanger in support of the Motion for Initial Order and Motion for Approval of the Sale of Assets and Vesting Order (the "**Canadian Sale Motion**") sworn to June 11, 2008 and submitted to the Quebec Court on June 12, 2008 (the "**Belanger Affidavit**"); the Affidavit of Denis Aubin in support of the Motion for Initial Order sworn to and submitted to the Quebec Court on June 11, 2008 (the "**First Aubin Affidavit**"); the Affidavit of Denis Aubin in support of the Motion for an Order Extending the Stay Period sworn to and submitted to the Quebec Court on June 25, 2008 (the "**Second Aubin Affidavit**"); the First Report of the Monitor dated June 25, 2008 (the "**Monitor's Report**"); and the Second Report of the Monitor dated July 9, 2008 (the "**Second Monitor's Report**"). The Belanger Affidavit, First Aubin Affidavit, Second Aubin Affidavit, Monitor's Report and Second Monitor's Report are annexed as Exhibits A through E respectively to the affidavit of Ken Coleman sworn to July 14, 2008 (the "**Coleman Affidavit**") and filed contemporaneously herewith. Copies of the Initial Orders and Vesting Order are annexed to the Coleman Affidavit as Exhibits G and H, respectively. Additionally, the

complete record filed in the Canadian Proceedings is available on the Monitor's website at www.alvarezandmarsal.com/maax.

ARGUMENT

The purpose of the Canadian Proceedings is to facilitate the transfer of substantially all of the MAAX Group's assets to Brookfield Bridge Lending Fund Inc. ("BBLF") pursuant to an order of the Quebec Court with the aid of this Court. As proceedings under the CCAA in the Quebec 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 the fair and efficient administration of the Canadian Proceedings, facilitate the rescue of a financially troubled business, and preserve the jobs of over 2,000 people consistent with the principles set forth in chapter 15 of the Bankruptcy Code.

POINT I: THE CANADIAN PROCEEDINGS ARE ENTITLED TO RECOGNITION AS FOREIGN MAIN PROCEEDINGS

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 section 101(23) of the Bankruptcy Code, and are foreign main proceedings within the meaning of section 1502(4) of the Bankruptcy Code, because the Canadian Proceedings are pending in the location of each member of the MAAX Group's center of main interest;

(B) the Monitor is a person within the meaning of section 101(41) of the Bankruptcy Code;

(C) the Monitor is a foreign representative within the meaning of section 101(24) of the Bankruptcy Code;

(D) the Chapter 15 Petitions were filed in accordance with section 1504 of the Bankruptcy Code with respect to each member of the MAAX Group; and

(E) the Chapter 15 Petitions meet the requirements of section 1515 of the Bankruptcy Code with respect to each member of the MAAX Group.

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 section 1501 of the Bankruptcy Code. 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. MAAX Corp.'s principal asset in the United States is MAAX Corp.'s stock in MAAX KSD, which under Delaware general corporate law is located in the State of Delaware.² Additionally, given the proximity of this District to Quebec, Canada, and the convenience of traveling to and from this District from Quebec, Canada, 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 Petitions, as provided by 28 U.S.C. § 1410 (1) and (3).

² Del. Gen. Corp. Law § 169 provides: "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State." See also *Castro v. ITT Corporation*, 598 A.2d 674, 681 (Del. Ch. Ct. 1991) (holding that section 169 "continues to fix the situs of all stock of a Delaware corporation in [Delaware] for all purposes other than taxation.").

B. These Cases are Properly Commenced under Chapter 15

Chapter 15 applies where, as here, assistance is sought in the United States by a foreign representative, such as the Monitor, 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 give effect in the United States through sections 1520, 1521, 363 and 365 of the Bankruptcy Code to the Vesting Order approving the consensual sale of the MAAX Group's assets to BBLF, which has been agreed to by substantially all affected stakeholders following an extensive sale process and approved by the Quebec Court in the Canadian Proceedings.

C. These Cases Concern Foreign Proceedings

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 reorganization or liquidation.

The Canadian Proceedings under the CCAA provide a statutory means to effect a sale of the MAAX Group's assets under the supervision of the Quebec Court. As such, the Canadian Proceedings are collective judicial proceedings in a foreign country under a law relating to insolvency and adjustment of debt in which the assets and affairs of the MAAX Group are subject to control or supervision by the Quebec Court for the purpose of reorganization or liquidation. Indeed, since the passage of Chapter 15, a number of Canadian proceedings under the CCAA have been recognized by US Courts. *See, e.g., In re Destinator Technologies, Inc.*,

No. 08-11003 (Bankr. D. Del. June 6, 2008) (Sontchi, J.)³; *In re: ROL Manufacturing (Canada) Ltd., et al.*, No. 08-31022 (Bankr. S.D. Ohio Apr. 17, 2008); *In re Baronet U.S.A. Inc. et al.*, No. 07-13821 (Bankr. S.D.N.Y. Jan. 10, 2008); *In re G.T.T. - Stats International, Inc.*, No. 07-11886 (Bankr. N.D.N.Y. Sept. 21, 2007); *In re Hollinger Inc., et al.*, No. 07-11029 (Bankr. D. Del. August 28, 2007) (Walsh, J.); *In re Creative Building Maintenance, Inc. et al.*, No. 06-03586 (Bankr. W.D.N.Y. Dec. 29, 2006); *In re Muscletech Research and Development Inc. et al.*, Nos. 06 CIV 538 and 539 (S.D.N.Y. March 2, 2006). Accordingly, the chapter 15 cases concern a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code.⁴ Likewise, the Canadian Proceedings are entitled to recognition.

D. These Cases were Commenced by a Foreign Representative

These chapter 15 cases were commenced by the "foreign representative" of the MAAX Group duly authorized in the Canadian Proceedings within the meaning of section 101(24) of the Bankruptcy Code, 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." 11 U.S.C. § 101(24).

The Initial Order evidences that the Monitor was appointed to act as the Monitor and is duly authorized to act as the foreign representative with respect to the MAAX Group and the Canadian Proceedings. Initial Order ¶42. By virtue of such appointment, the

³ Copies of unpublished decisions and orders referred to herein are attached for the Court's convenience as Exhibit K to the Coleman Affidavit filed contemporaneously herewith.

⁴ Further, under former section 304 of the Bankruptcy Code, the statutory predecessor to chapter 15, Canadian proceedings, including insolvency proceedings, were regularly granted comity. *See, e.g., Smith v. Dominion Bridge Corp.*, No. 96-7580, 1999 WL 111465, at *3 (E.D. Pa. March 2, 1999) ("As a sister common law jurisdiction, courts have consistently extended comity to Canadian Bankruptcy proceedings."); *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"); *Cornfeld v. Investors Overseas Servs. 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 B.R. 366 (N.D. Tex. 1989).

Monitor is a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code. *See, e.g., In re Destinator Technologies, Inc.*, No. 08-11003 (Bankr. D. Del. June 6, 2008) (recognizing CCAA proceeding as a "foreign proceeding" and court-appointed monitor as "foreign representative" under the Bankruptcy Code); *In re Baronet U.S.A. Inc. et al.*, No. 07-13821 (Bankr. S.D.N.Y. Jan. 10, 2008) (same); *In re Muscletech Research and Development Inc. et al., supra*, (same). Furthermore, the court is entitled under section 1516(a) of the Bankruptcy Code to presume that the foreign representative identified in the Initial Order is a foreign representative.

Further, under former section 304 of the Bankruptcy Code, monitors authorized or appointed under the CCAA by Canadian courts in CCAA proceedings have long been considered "foreign representatives." *See, e.g., In re Air Canada*, No. 03-11971 (Bankr. S.D.N.Y. Sept. 28, 2004) (recognizing CCAA proceeding as a "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 section 1504 of the Bankruptcy Code by the filing of the Chapter 15 Petitions for recognition of foreign proceedings under section 1515(a) of the Bankruptcy Code for each member of the MAAX Group accompanied by all documents and information required by sections 1515(b) and (c) of the Bankruptcy Code, including: (i) copies of the Initial Order and (ii) a statement (in the Verified Petition) identifying all foreign proceedings with respect to the MAAX Group that are known to the foreign representative.⁵ Having filed the above-referenced documents and because

⁵ The Monitor is not aware of any other foreign proceedings pending with respect to the MAAX Group.

the Court is entitled under section 1516(b) of the Bankruptcy Code to presume the authenticity of the Initial Orders, the requirements of section 1515 have been met.

F. The Canadian Proceedings Should be Recognized as Foreign Main Proceedings or, alternatively as Foreign Non-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 its 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, but such presumption may be rebutted by evidence to the contrary. 11 U.S.C. § 1516(c); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008).

The MAAX Group's businesses are seamlessly integrated and span national boundaries. The center of main interests for each MAAX Group entity is Quebec, Canada. The MAAX Group's headquarters are located at 160 Boulevard St-Joseph, Lachine, Quebec, H8S 2L3. Essentially all of the MAAX Group's strategic decision making and corporate management functions occurs at the Canadian headquarters. Paul Golden, the President of MAAX Corp., MAAX Canada, and MAAX KSD, along with other MAAX Group entities, maintains his office in the Lachine headquarters. Board meetings are typically held in person at Lachine, or by phone, with the call originating in Lachine. Senior management is concentrated in Lachine. Management incentive plans, training programs and internal communications are managed from Lachine, Quebec. Although some human resources functions are performed at each location, human resources is predominantly managed centrally at the MAAX Group's offices in Canada and higher level hiring and firing decisions are made from the province of Quebec.

The MAAX Group's administrative functions are centralized in Lachine and Beauce, Quebec. The corporate marketing, finance and in-house legal departments are located in the province of Quebec. Research & development is largely performed in Lachine and Beauce with only a small sub-set in Southampton, Pennsylvania for certain bathtubs. The information technology backbone, including servers, network and staff for the overwhelming majority of the MAAX Group is located in Beauce, Quebec. The website, www.maax.com, identifies Montreal as the location of the MAAX Group's home office. Accounting functions are conducted at Beauce, Quebec, where accounts payable and receivable are managed, with only certain delinquent U.S. accounts receivable pursued through the Minneapolis office. Warranty claims are reviewed at the divisional level, but all admitted warranty claims are administered in Beauce. Likewise, the MAAX Group's rebate programs are administered in Beauce. Minute books and other key documents, such as accounting documents, leases, title documents, insurance policies, patents, key corporate records, and employee files are maintained in Lachine. Approximately 45% of the total corporate overhead costs incurred in Canada are allocated to the U.S. Entities, with the remaining 55% allocated to the Canadian Entities.

Due to the high degree of integration among the MAAX Group, there are significant common suppliers, creditors and other stakeholders of the Canadian and U.S. Entities in both Canada and the United States. The MAAX Group's major contracts are negotiated at the corporate level in Lachine, Quebec; although purchase orders are issued and certain smaller invoices are paid at the plant level, invoices from corporate suppliers are sent to Beauce, Quebec and processing of payments is centralized there.

As described in the Chapter 15 Petitions, MAAX Canada is the principal operating entity in the MAAX Group. Approximately 94% of aggregate EBITDA for the North

American MAAX Business was generated in Canada in fiscal 2008. Consolidated property, plant and equipment, intangible assets and goodwill of approximately \$291 million was segmented on a geographic basis in the notes to the audited consolidated financial statements for fiscal 2008 as 76% in Canada, 23% in the United States and 2% in Europe. In fiscal 2008, MAAX Canada represented 49% of gross sales for the MAAX Business, with the next largest entity within the MAAX Group being Aker which accounted for 20% of gross sales.

The MAAX Group's funding, its principal banking agreements, and cash management arrangements in place are centralized in Canada. The Credit and Guaranty Agreement evidencing the Senior Secured Facility is governed by Ontario law and the borrower, MAAX Corp., and lender, BBLF, are Canadian entities. MAAX Corp. is also the issuer of the Senior Subordinated Notes (as defined herein). The Indenture Trustee of the Senior Subordinated Notes has retained counsel in Quebec, has appeared in the Quebec Court in support of the MAAX Group's Canadian Sale Motion, heard July 10, 2008, and is participating in the Canadian Proceedings. All members of the MAAX Group are guarantors under the Senior Secured Facility and the Senior Subordinated Notes. A recent stratification of the MAAX Group's trade accounts payable showed that MAAX Canada accounted for approximately 63% of total trade payables.

The majority of the bank accounts of the MAAX Group are with HSBC Bank Canada. The flow of cash to and from every member of the MAAX Group is managed on a daily basis by MAAX Corp. pursuant to a cash management system often referred to as the "zero balance account system" (the "**Cash Management System**"). At the close of business each day, the debits that accumulate daily for each of MAAX Corp.'s direct and indirect operating subsidiaries are netted against accumulated credits. Where there is a surplus of funds

(i.e. daily receipts exceed daily disbursements), those funds are swept into a concentration account operated in Canada by MAAX Corp. (the "**Concentration Account**"). Where there is a shortfall of funds (i.e. daily disbursements exceed daily receipts), the necessary funds are provided by MAAX Corp., either from cash on hand in the Concentration Account or via further borrowings under the Senior Secured Facility's revolving facility. Each operating member of the MAAX Group receives from MAAX Corp. deposits in its respective bank accounts, with those funds utilized to fund disbursements and surplus monies swept into the Concentration Account. MAAX Corp. does not receive any receipts relating to the operation of the MAAX Business directly, nor does it make any disbursements relating to the operation of the MAAX Business directly. However, MAAX Corp. is the borrower under the Senior Secured Facility and operates the Concentration Account located in Canada, which is fundamental to the working of the Cash Management System for the MAAX Group.

Accordingly, the Canadian Proceedings are pending in the center of main interest of each member of the MAAX Group and constitute "foreign main proceedings" as defined in section 1502(4) of the Bankruptcy Code. Alternatively, it can hardly be disputed that the Canadian Proceedings are pending where the MAAX Group has an "establishment" for the conduct of nontransitory economic activity, meaning a local place of business. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007), *aff'd*, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.* --- B.R.----, 2008 WL 2198272 (S.D.N.Y. 2008).

G. The Monitor is Entitled to an Order Granting Recognition

As evidenced above, the Canadian Proceedings are "foreign main proceedings" within the meaning of section 1502 of the Bankruptcy Code, the Monitor applying for recognition is a "foreign representative" within the meaning of section 101(24) of the

Bankruptcy Code, and the Chapter 15 Petitions meet the requirements of section 1515 of the Bankruptcy Code with respect to each member of the MAAX Group. Accordingly, the Monitor respectfully submits that the Court is required to enter an Order recognizing the Canadian Proceedings pursuant to section 1517 of the Bankruptcy Code.⁶

Moreover, recognizing the Canadian Proceedings would not be manifestly contrary to the public policy of the United States as prohibited by section 1506 of the Bankruptcy Code.⁷ To the contrary, granting such recognition effects the US public policy respecting foreign proceedings as articulated, among other ways, through the objectives set forth in sections 1501(a) and 1508 of the Bankruptcy Code.

**POINT II: THE PROVISIONAL RELIEF REQUESTED BY THE
MONITOR IS WITHIN THE SCOPE OF SECTION 1519
AND APPROPRIATE UNDER THE CIRCUMSTANCES**

By its Motion for Provisional Relief, the Monitor seeks the entry of an order making section 365(e) of the Bankruptcy Code applicable to the MAAX Group's real property

⁶ Section 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.

11 U.S.C. § 1517 (emphasis added).

The Legislative History of this section provides that the "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), 109 Cong., Sess. 2005, *reprinted in* 2005 U.S.C.C.A.N. 88, 169 at 175; *see In re Muscletech Research and Development Inc. et al.*, (Nos. 06 CIV 538 and 539) (S.D.N.Y. February 7, 2006).

⁷ 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.

leases in these Chapter 15 Cases pursuant to sections 1519(a)(3), 1521(a)(7) and 105(a) of the Bankruptcy Code.

The Monitor believes that 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 real property leases which will cause the MAAX Group to be unable to perform under the purchase agreement (described below) and result in irreparable damage to the value of the MAAX Group's estates.

Therefore, the Monitor seeks the application of 365(e) in these chapter 15 cases pursuant to sections 1519(a)(3) and 1521(a)(7) to render any provision of the type described in section 365(e)(1) in any of the MAAX Group's real property leases unenforceable against the MAAX Group until the disposition of the Chapter 15 Petitions.

A. The Relief Requested is Authorized by Sections 1519(a)(3), 1521(a)(7) and 105(a)

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 inapplicable here. *See, e.g., In re Destinator Technologies Inc.*, No. 08-11003 (Bankr. D. Del. May 23, 2008) (incorporating sections 363 and 364 in the interim period); *In re Madill Equipment Canada*, 08-41426 (Bankr. W.D. Wa. April 3, 2008) (incorporating sections 361 and 363 on a provisional basis); *In re ROL Manufacturing (Canada) Ltd., et al.*, No. 08-31022 (finding that unless provisional relief was issued, debtors' assets would be subject to attack by creditors); *In re Pro-Fit Holdings Limited*, No. 08-17043 (Bankr. C.D. Ca. 2008) (incorporating section 362 on a provisional basis). Section 365(e) of the Bankruptcy Code provides relief to a trustee by rendering unenforceable *ipso facto* clauses that would otherwise allow the non debtor party to an unexpired lease to terminate the

lease based solely on a condition of the kind described in section 365(e)(1).⁸ Accordingly, although section 365(e) of the Bankruptcy Code is not expressly incorporated into chapter 15, the Court has discretion to grant such relief pursuant to sections 1519(a)(3) and 1521(a)(7) of the Bankruptcy Code. 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]."

B. The Relief Requested is Necessary and Appropriate to Prevent Irreparable Harm

Relief under section 1519 of the Bankruptcy Code is available where the foreign representative can satisfy the standard for injunctive relief. When considering granting injunctive relief in the Third Circuit, courts must consider: "(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); *see also Conchatta, Inc. v. Evanko*, 83 Fed. Appx. 437, 440-441 (3d Cir. 2003) ("Under the familiar standard for granting a preliminary injunction, a plaintiff must show both (1) that the plaintiff is reasonably likely to succeed on the merits and (2) that the plaintiff is likely to experience irreparable harm without

⁸ 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).

the injunction."); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000) (requiring (i) irreparable harm absent an injunction and (ii) a reasonable likelihood of success on the merits and "if relevant, the court should also examine the likelihood of irreparable harm to the nonmoving party and whether the injunction serves the public interest."); *In re Uniflex, Inc.*, 319 B.R. 101, 104 (Bankr. D. Del. 2005) (same). The latter two factors should be taken into account only when they are relevant. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 197-98 (3d Cir. 1990); *Morton v. Beyer*, 822 F.2d 364, 367 at n.3 (3d Cir. 1987); *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975). "As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *AT&T Co. v. Winback And Conserve Program, Inc.*, 42 F.3d 1421 1427 (3d Cir. 1994).

(i) Reasonable Probability of Foreign Recognition

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. 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.

(ii) The MAAX Group Faces Irreparable Harm

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

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 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 Coleman Affidavit. Without the protection of section 365(e) of the Bankruptcy Code, the MAAX Group is at material risk of immediate and irreparable harm in that its real property leases will be at risk of immediate termination and the MAAX Group would be at risk of defaulting on their obligations 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.

(iii) 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 to finalize an orderly sale process will not significantly prejudice creditors. 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 satisfy its lease obligations in the ordinary course of business and such obligations will be assumed pursuant to the APA. Moreover, the MAAX Group's creditors will benefit from the Monitor's efforts to effectuate the sale of the MAAX Group pursuant to a consensual transaction whereby the substantial majority of trade creditors will continue to receive payment and over 2,000 employees will keep their jobs. Thus, the balance of the hardships tips decidedly in favor of the MAAX Group.

(iv) Granting the Requested Relief is Manifestly in Line with U.S. Public Policy

Granting the relief requested herein will help advance the purposes of chapter 15 expressly set forth in section 1501 of the Bankruptcy Code.

Unique to the Bankruptcy Code, Chapter 15 contains a statement of purpose: "[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501(a)(1)-(5); *In re SPhinX, Ltd.* 351 B.R. 103, 112 (Bankr.S.D.N.Y.2006), *aff'd*, 371 B.R. 10 (S.D.N.Y.2007).

In re Bear Stearns, 374 B.R. at 126. If the provisional relief sought herein is not granted, the MAAX Group will be exposed to the risk of immediate termination and default under the APA. Such termination would violate the stay provisions of the Initial Order, *see* Initial Order ¶ 8(c), impair the value of the MAAX Group's assets, and thereby interfere with the orderly administration of the Canadian Proceedings, which is exactly the type of harm chapter 15 is

intended to prevent. *See* 11 U.S.C. § 1501. Further, the transfer of the real property leases is necessary to effectuate another express purpose of this chapter, "to facilitate the rescue of financially troubled business, thereby protecting investment and preserving employment." 11 U.S.C. § 1501(a)(5). As described herein, the transaction with BBLF contemplates the preservation of the MAAX Business and Spa Business, and the employment of over 2,000 people, and would achieve the objectives of chapter 15 set forth in section 1501(5) of the Bankruptcy Code. Accordingly, the provisional relief requested is consistent with the public policy of the United States.

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.

**POINT III: THE VESTING ORDER WHICH APPROVED THE SALE
OF SUBSTANTIALLY ALL OF THE MAAX GROUP'S ASSETS SHOULD BE
GIVEN EFFECT IN THE UNITED STATES CONSISTENT WITH SECTION 363
OF THE BANKRUPTCY CODE**

The Monitor seeks enforcement of the Vesting Order, which approved the sale of substantially all of the MAAX Group's assets free and clear of any liens, claims, interests or encumbrances (except for the permitted encumbrances set forth in the Purchase Agreement) to BBLF, in the United States, pursuant to section 363 of the Bankruptcy Code. Section 363 is expressly incorporated into chapter 15 pursuant to section 1520 of the Bankruptcy Code.⁹ 11 U.S.C. § 1520(a)(2). *See, e.g., In re Destinator Technologies, Inc.*, No. 08-11003 (Bankr. D. Del. July 8, 2008) (Shannon, J.) (Order entered approving sale of assets consistent with relief under section 363 of the Bankruptcy Code and giving effect to Approval and Vesting Order of the Ontario Court in CCAA proceeding); *In re Madill Equipment Canada*, 08-41426 (Bankr. W.D. Wa. June 30, 2008) (same). Section 363 provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, the bankruptcy courts routinely authorize sales of a debtor's assets if such sale is based upon the sound business judgment of the debtor. *See Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *The Official Committee of Unsecured Creditors v. The LTV Corp. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992).

The Monitor supports the sale of the MAAX Group's assets after thorough consideration of all viable alternatives, and having concluded that the sale is based on a number

⁹ Relief under section 363 is also available in foreign non-main proceedings through section 1521(a)(7) of the Bankruptcy Code.

of sound business decisions. As discussed in the Chapter 15 Petitions, the MAAX Group has faced financial difficulties and despite its significant efforts, the MAAX Group has been unable to improve its financial situation. Thus, the MAAX Group seeks to sell substantially all of its assets which it believes is in the best interests of its stakeholders, will ensure the continuation of the MAAX Group as a going concern, and thereby preserve the jobs of over 2,000 employees. The Monitor also believes that the sale process of the MAAX Business was fair and commercially reasonable, generating a strong amount of interest.

The Monitor further submits that it is appropriate to sell substantially all the assets of the MAAX Group free and clear of liens, claims, interests and encumbrances (except the Permitted Encumbrances set forth in the Purchase Agreement) pursuant to section 363(f) of the Bankruptcy Code,¹⁰ with any such liens, claims, interests and encumbrances attaching to Excluded Assets (set forth in the Purchase Agreement). In addition, the Monitor believes that, at a minimum, section 363(f)(2) will be met in connection with the transactions proposed under the Purchase Agreement because each of the parties holding liens on the MAAX Business will consent, or absent any objections, will be deemed to have consented to the sale. This provision is supplemented by section 105(a) of the Bankruptcy Code, which provides that "[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). In addition, pursuant to the

¹⁰ Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of any interest in such property of an entity other than the estate if:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

Support Agreement, the MAAX Group has received substantial consent from the Senior Subordinated Noteholders.

Finally, the Monitor seeks to facilitate the implementation of the Vesting Order by requesting that relief consistent with section 365 of the Bankruptcy Code be granted. Specifically, the Monitor seeks the authority for the MAAX Group to assign certain real property leases to BBLF as set forth in the APA. Section 365 is not expressly incorporated into chapter 15; however, this Court has discretion, pursuant to sections 1521(a)(7), 1507, and 105(a) to grant the foreign representative the relief that may be available to a trustee, which would include relief available under section 365, or other additional assistance. Moreover, the assignment of the MAAX Group's real property leases is necessary and appropriate. The assignment of real property leases is a key feature of the Purchase Agreement, without which the transaction with BBLF would be significantly impaired. Moreover, the assignment of the real property leases is necessary to effectuate one of the express purposes of this chapter, "to facilitate the rescue of financially troubled business, thereby protecting investment and preserving employment." 11 U.S.C. § 1501(a)(5). As described herein, the transaction with BBLF contemplates the preservation of the MAAX Business, and the employment of over 2,000 people, and would achieve the objectives of chapter 15 set forth in section 1501(5). In addition, because the sale has already been approved by the Quebec Court, the failure to consummate such sale would impair the fair and efficient administration of the Canadian Proceedings, a result contrary to the purposes of chapter 15. *See* 11 U.S.C. § 1501(3). Granting the assignment of the MAAX Group's real property leases is relief consistent with section 365 of the Bankruptcy Code and is necessary and appropriate under these circumstances.

Accordingly, the Monitor believes that the sale of substantially all of the MAAX Group's assets to BBLF pursuant to the Purchase Agreement reflects the MAAX Group's sound business judgment, is commercially reasonable under the circumstances, and the Vesting Order should be given full force and effect in the United States.

CONCLUSION

The Canadian Proceedings qualify for recognition as foreign main proceedings and the enjoyment of the accompanying statutorily provided relief. Further, the Monitor has satisfied the requirements for the provisional relief requested. Without recognition and the requested provisional relief, the MAAX Group will be unable to complete the consensual sale of its assets to BBLF under the terms of the Purchase Agreement and its ability to recapitalize would be substantially impaired.

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For the foregoing reasons, the Monitor respectfully requests that this Court grant the relief requested.

Dated: Wilmington, Delaware
July 14, 2008

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