

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC.,
MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE
GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES
CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS,
INC. (THE "DEBTORS")**

**APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF
THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED**

**FACTUM OF MODULAR SPACE CORPORATION
(Returnable February 21, 2017)**

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and Resun Chippewa, LLC**

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PART I – OVERVIEW

1. Modular Space Corporation ("MSC" or the "**Foreign Representative**") brings this motion under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), seeking an order recognizing and giving full force and effect in Canada to the Confirmation Order (as defined below) made by the United States Bankruptcy Court for the District of Delaware (the "**US Court**") and for certain other ancillary relief.
2. Modular Space Holdings, Inc., Modular Space Intermediate Holdings, Inc., Resun ModSpace, Inc., ModSpace Government Financial Services, Inc., Resun Chippewa, LLC (with MSC, collectively, the "**US Debtors**") and ModSpace Financial Services Canada, Ltd. ("**ModSpace Canada**" and, together with the US Debtors, the "**ModSpace Group**"), provide temporary and permanent modular buildings, and are among the largest suppliers in the United States and Canada of temporary modular space and permanent modular construction.
3. The ModSpace Group provide a range of building products, including office trailers, classrooms, portable storage units and other modular units and construction projects. The ModSpace Group works with a range of industries, including commercial, construction,

education, government, healthcare, industrial, energy, franchise and retail and sports and entertainment.

4. Due to exigent financial circumstances, on or about December 21, 2016 (the “**Filing Date**”), the members of the ModSpace Group each filed voluntary petitions for relief pursuant to Chapter 11 of Title 11 (“**Chapter 11**”) of the United States Code (the “**Bankruptcy Code**”) (collectively, the “**Petitions**” and each a “**Petition**”) with the US Court. The ModSpace Group requested that the Petitions be jointly administered for procedural purposes only (the “**Chapter 11 Proceedings**”).

5. On December 22, 2016, Judge Carey granted various orders (the “**First Day Orders**”), which were recognized by the Ontario Superior Court of Justice (Commercial List) (the “**Canadian Court**”) on December 27, 2016.

6. On January 17 and 18, 2017, Judge Carey granted various orders in the Chapter 11 Proceedings (the “**Second Day Orders**”), which were recognized by the Canadian Court on January 25, 2017.

7. On February 15, 2017, the US Court made an order confirming the ModSpace Group’s joint pre-packaged plan of reorganization (the “**Plan**”) pursuant to Chapter 11 of the Bankruptcy Code, including the ModSpace Group’s disclosure statement in respect of the Plan (the “**Confirmation Order**”), the details of which will be reviewed below.

8. MSC has brought this motion to seek an order granting certain relief, including, *inter alia*:

- (a) abridging the time for service of the Notice of Motion and the Motion Record and directing that any further service of the Notice of Motion and Motion Record be dispensed with such that this motion is properly returnable on February 21, 2017;

- (b) recognizing and giving full force and effect in Canada to the Confirmation Order;
- (c) recognizing, implementing and giving full force and effect in Canada to the Plan;
- (d) authorizing and permitting the Debtors to take all such steps and actions necessary or appropriate to implement the Plan, including the transactions contemplated by the Plan;
- (e) giving effect to all compromises, releases, discharges and injunctions set forth in the Confirmation Order and the Plan;
- (f) amending the articles of ModSpace Financial Services Canada, Ltd. in accordance with the Plan;
- (g) directing the Registrar of Corporations of the Alberta Corporate Registry to give effect to this Order and to implement the Articles of Reorganization contemplated by the Plan, pursuant to Section 192 of the *Business Corporations Act* (Alberta);
- (h) approving the Second Report of Alvarez & Marsal Canada Inc. (“**A&M**”), in its capacity as the information officer (the “**Information Officer**”) of the Debtors dated February 16, 2017 (the “**Second Report**”) and approving the activities of A&M as described in the Second Report;
- (i) approving the fees and disbursements of A&M in its capacity as Information Officer for the period from December 12, 2016 to February 11, 2017 and approving the estimated fees and disbursements of A&M’s up to the date of discharge, as set out in the affidavit of Alan J. Hutchens, sworn February 15, 2017 (the “**Hutchens Affidavit**”);
- (j) approving the fees and disbursements of Torys LLP (“**Torys**”), legal counsel to the Information Officer for the period from December 13, 2016 to February 14, 2017 and approving the estimated fees and disbursements of Torys for

services to be provided to the Information Officer up to its date of discharge, as set out in the affidavit of Adam Slavens, sworn February 15, 2017 (the “**Slavens Affidavit**”);

- (k) terminating, discharging and releasing the Administration Charge, as defined in and created in the Supplemental Order of Mr. Justice Newbould dated December 27, 2016, upon the filing of the Certificate (as defined below);
- (l) terminating the stay of proceedings, as provided for in the Initial Recognition Order and the Supplemental Order of Mr. Justice Newbould, both dated December 27, 2016, upon the filing of the Certificate (as defined below);
- (m) terminating these proceedings commenced under Part IV of the CCAA upon the filing of the Certificate (as defined below);
- (n) discharging A&M in its capacity as Information Officer upon A&M filing a Certificate of Discharge (the “**Certificate**”) with the Court certifying that the Information Officer has attended to certain remaining matters, as described in the Information Officer’s Second Report; and
- (o) such further and other relief as counsel may request and this Court deems just.

PART II – FACTS

The Plan

9. On December 20, 2016, the Debtors filed the Plan, and on February 3, 2017, the Debtors filed an updated version of the Plan with the US Court.

Affidavit of David Orlofsky sworn February 16, 2017 at para 14 [Third Orlofsky Affidavit].

10. The Plan involves a swap of approximately US\$400 million in secured debt in exchange for equity, along with a rights offering (the “**Rights Offering**”). The Rights Offering includes a backstop agreement (previously recognized by this Court) to ensure liquidity for the

Debtors. The proceeds of the Rights Offering will facilitate the Debtors' emergence from the Chapter 11 Proceedings and these CCAA Part IV proceedings.

Third Orlofsky Affidavit at para 15.

11. Under the Plan, Canadian unsecured creditors having valid claims will be unaffected. To the extent that Canadian creditors are not repaid in full, their claims will remain due and owing following implementation of the Plan and exit from these proceedings and the Chapter 11 Proceedings. Disputed claims, including outstanding litigation claims as described in further detail in the affidavit of David Orlofsky sworn December 23, 2016 (the "**First Orlofsky Affidavit**"), are unpaid, and the Debtors will continue to dispute such claims following its exit from these proceedings and the Chapter 11 Proceedings.

Third Orlofsky Affidavit at para 16.

12. The Plan does not extinguish any unsecured claims. The only creditors of ModSpace Canada that are impaired (as that term is defined in the Bankruptcy Code) are obligations under the Third Amended and Restated Credit Agreement dated as of June 6, 2011 (the "**Pre-Filing Facility**") among the Debtors and Bank of America, N.A. in its capacity as the First Lien Agent, and a syndicate of lenders, which Pre-Filing Facility will be amended and restated pursuant to an exit financing agreement. The group of lenders under the Pre-Filing Facility are also the lenders under the Debtors' debtor-in-possession financing facilities.

Third Orlofsky Affidavit at para 17.

13. Prior to filing the Plan and the Petitions, the Debtors began soliciting votes for approval of the Plan and providing notice of various dates in connection with the Plan.

Third Orlofsky Affidavit at para 18.

14. The Debtors have received unanimous support for the Plan.

Third Orlofsky Affidavit at para 19.

15. The Plan includes, among other things:

- (a) an injunction to prevent interference with implementation of the Plan;
- (b) releases by the Debtors (and the reorganized entities) in favour of (i) each of the First Lien Agent, the First Lien Lenders, the DIP Agent, the DIP Lenders, the Exit Agent and the Exit Lenders, (ii) each of the foregoing entities' respective predecessors, successors, assigns, subsidiaries, funds, portfolio companies, management companies and related Persons or entities who have administered or participated in any aspect of the lending relationship under the First Lien Credit Facility (or who, in the case of Bank of America, N.A., and its related Persons or entities, served as arrangers, underwriters, securities clearing agencies, investment advisors, brokers, counsel, or other professional persons, in each case involved in any capacity in the issuance, marketing, sale or distribution of the Notes) and parties acting in concert with or at the direction of any of the foregoing Persons, and (iii) with respect to each of the foregoing Persons, such Person's attorneys, financial advisors, directors, officers, members, shareholders, accountants, investment bankers, consultants, and other professional advisors (in each case, solely in their capacity as such and as relates to one or more of the Debtors) (collectively, the "**Lender Released Parties**");
- (c) releases by the Debtors (and the reorganized entities) in favour of each of: (i) the Debtors and the Reorganized Debtors; (ii) the Consenting Noteholders, (iii) the Trustee, (iv) the Consenting Interest Holders, (v) each current and former Backstop Party and (vi) with respect to each of the foregoing Entities in subsections (c)(i) to (c)(v), such Entity's predecessors, Professionals, successors and assigns, Affiliates, subsidiaries, funds, portfolio companies, management companies and each of their respective current and former (with respect to the Debtors and Reorganized Debtors to the extent employed or serving at any time before the Effective Date) directors, officers, members, employees, shareholders, partners, managers, independent contractors, agents, representatives, principals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (in each case, solely in their capacity as such as relates

to one or more of the Debtors) (collectively, the “**Non-Lender Released Parties**”);

- (d) releases by (i) each of the First Lien Agent, the First Lien Lenders, the DIP Agent, and the DIP Lenders, (ii) each of the foregoing Entity’s respective predecessors, successors, assigns, subsidiaries, funds, portfolio companies, management companies, agents, representatives, and related Persons or entities who have administered or participated in any aspect of the lending relationship under the First Lien Credit Facility (or who, in the case of the Bank of America N.A., and its related Persons or entities, served as arrangers, underwriters, securities, clearing agencies, investment advisors, brokers, counsel, or other professional persons, in each case involved in any capacity in the issuance, marketing, sale or distribution of the Notes) and parties acting in concert with or at the direction of the foregoing Persons and (iii) with respect to each of the foregoing Persons, such Persons’ attorneys, financial advisors, directors, officers, members, shareholders, accountants, investment bankers, consultants, and other professional advisors (in each case, solely in their capacity as such and as relates to one or more of the Debtors) (collectively, the “**Lender Releasing Parties**”) in favour of the Lender Released Parties and the Non-Lender Released Parties; and

- (e) releases by each of: (i) (a) the Trustee; (b) the Consenting Noteholders, (c) the Consenting Interest Holders; (d) each current and former Backstop Party; (ii) excluding the Lender Releasing Parties, each holder of Impaired Claims who (a) has voted to accept the Plan or (b) has voted to reject the Plan but has not checked the box on the Ballot indicating that such holder opts out of the releases, and returned it in accordance with the instructions set forth therein; (iii) to the fullest extent permissible under applicable law, but excluding the Lender Releasing Parties, (a) holders of Unimpaired Claims, and (b) each other holder of Equity Interests who (1) has voted to accept the Plan or (2) has voted to reject the Plan but has not checked the box on the Ballot indicating that such holder opts out of the releases, and returned it in accordance with the instructions set forth therein,

and (iv) with respect to each of the foregoing Entities in clauses (i), (ii) and (iii), such Entity's predecessors, successors and assigns, agents, representatives, related Persons or entities, who have participated in any aspect of the relationship with the Debtors, parties acting in concert with or at the direction of any of the foregoing Persons, and attorneys financial advisors, directors, officers, employees, members, shareholders, accountants, investment bankers, consultants, and other professional advisors of any of the foregoing Persons (in each case, solely in their capacity as such and as relates to one or more of the Debtors) (collectively, and as subject to Article X.C of the Plan, the "**Non-Lender Releasing Parties**") in favour of the Lender Released Parties and Non-Lender Released Parties.

Third Orlofsky Affidavit at para 20.

16. The terms of the releases under the Plan were negotiated and agreed upon by the Debtors' primary stakeholders.

Third Orlofsky Affidavit at para 21.

17. The Debtors believe that these releases are standard, appropriate and reasonable, and that such releases are necessary to implement the Plan.

Third Orlofsky Affidavit at para 22.

18. All of the Debtors' classes of creditors would receive 100% recovery under the Plan. Under a liquidation scenario, only the first secured lenders under the Debtors' pre-Petition credit facility would receive full recovery.

Third Orlofsky Affidavit at para 24.

19. There are no unresolved objections in respect of the Plan.

Third Orlofsky Affidavit at para 25.

Articles of ModSpace Financial Services Canada, Ltd.

20. Pursuant to the supplement to the Plan filed on or about February 13, 2017, the Debtors will amend and restate the articles of each of the Debtors, including ModSpace Canada.

Third Orlofsky Affidavit at para 26.

21. The amendments to the ModSpace Canada articles are to comply with requirements of the Bankruptcy Code. The amendments restrict ModSpace Canada's ability to issue non-voting equity securities, except to the extent permitted by section 1123(a)(6) of the Bankruptcy Code.

Third Orlofsky Affidavit at para 27.

22. As noted in the First Orlofsky Affidavit, ModSpace Canada is a corporation registered pursuant to the laws of the Province of Alberta.

Third Orlofsky Affidavit at para 28.

23. The Alberta Corporate Registry requires an Order of the Alberta Court of Queen's Bench in order to implement a change to the Articles of ModSpace Canada. Accordingly, the Debtors ask that this Court request the aid and assistance of the Alberta Court in order to modify the ModSpace Canada articles in accordance with the Plan.

Third Orlofsky Affidavit at para 29.

The Confirmation Order

24. On February 15, 2017, the US Court made the Confirmation Order confirming the Plan and approving the Debtors' disclosure statement in respect of the Plan.

Third Orlofsky Affidavit at para 30.

25. In making the Confirmation Order, the US Court was satisfied that, among other things:

- (a) all holders of impaired (as defined in the Bankruptcy Code) claims and equity interest who voted on the Plan voted in favour of the Plan, and that the remaining claims were unimpaired (as defined in the Bankruptcy Code);
- (b) within the respective classes, the Debtors will treat each claim or equity interest the same, except where the party has agreed to a less favourable treatment;
- (c) the Plan satisfies the requirements of the Bankruptcy Code, in particular regarding adequate means for implementation;
- (d) creditors would receive at least as much under the Plan as they would receive in a liquidation (based on a liquidation analysis attached to the disclosure statement and other evidence presented to the US Court);
- (e) at each of the voting classes voted to accept the Plan (including at least one impaired class from each of the Debtors);
- (f) the principal purpose of the Plan is not the avoidance of taxes; and,
- (g) the Debtors and other parties, including the lenders under the Pre-Filing Facility, have acted in good faith within the meaning of the Bankruptcy Code.

Third Orlofsky Affidavit at para 31.

26. Implementation of the Plan will permit the Debtors to emerge from the Chapter 11 Proceedings and the Part IV CCAA proceedings having completed its restructuring, which will benefit the various stakeholders of the Debtors.

Third Orlofsky Affidavit at para 32.

PART III - THE ISSUE

27. Should this Court grant the motion of the Companies for an order, among other things, recognizing and implementing the Confirmation Order and the Plan in Canada?

PART IV - THE LAW

Purpose of Part IV of the CCAA

28. The CCAA is remedial and flexible legislation that is to be given a liberal interpretation to facilitate its objectives.

Re Babcock & Wilcox Canada Ltd., 2000 CarswellOnt 704 (S.C.J.) at paras 11 and 13, Brief of Authorities, Tab 1 [*Babcock*].

29. Section 18.6 was added to the CCAA in 1997 in order to provide a mechanism to facilitate and co-ordinate international insolvencies in an effective and fair manner. In 2009, Part IV of the CCAA was proclaimed into force as a replacement to section 18.6.

Babcock at para 12.

30. The purpose of Part IV of the CCAA is set out in section 44, which provides as follows:

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote:

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

- (d) the protection and the maximization of the value of a debtor company's property;
and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

CCAA, s. 44, Schedule "B".

31. In considering applications for relief under the former section 18.6 of the CCAA, Courts recognized that in the context of cross-border insolvencies, comity is to be encouraged. Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions. It is submitted that this principle should also apply to applications made under Part IV of the CCAA, as section 44 expressly reflects that this is the purpose of Part IV.

***Re Lear Canada* (2009), 2009 CarswellOnt 4232 (S.C.J. [Commercial List])
at para 11, Brief of Authorities, Tab 2.**

32. The objective of cross-border coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located. Harmonizing insolvency proceedings in the U.S. and in Canada creates the most stable conditions under which a successful reorganization can occur. Where a cross-border insolvency is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings.

***Re Matlack Inc.* (2001), 2001 CarswellOnt 1830 (S.C.J. [Commercial List])
at paras 3 and 8, Brief of Authorities, Tab 3.**

Recognition and Implementation of the Confirmation Order and the Plan in Canada

33. The ModSpace Group are debtor companies in the Chapter 11 Proceedings. The Chapter 11 Proceedings have been recognized by this Court under Part IV of the CCAA as a

“foreign main proceeding”. MSC has also been recognized by this Court as a foreign representative.

34. Pursuant to section 49 of the CCAA, if an order recognizing a foreign proceeding is made, as is the case in this proceeding, the Court may, on application by the foreign representative, make any order that it considers appropriate if the Court is satisfied that it is necessary for the protection of the debtor company’s property or the interests of a creditor or creditors.

CCAA, s. 49, Schedule “B”.

35. Pursuant to section 50 of the CCAA, the Court is given a broad discretion to make an order under Part IV on any terms and conditions that the Court considers appropriate in the circumstances.

CCAA, s. 50, Schedule “B”.

36. Pursuant to section 52 of the CCAA, the Court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding. Cooperation may be provided by any appropriate means, including the coordination of the administration and supervision of the debtor company’s assets and affairs.

CCAA, s. 52, Schedule “B”.

37. Pursuant to section 61 of the CCAA, the Court has the authority to apply any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of the CCAA. The Court maintains the discretion to refuse to do something that would be contrary to public policy.

CCAA, s. 61, Schedule “B”.

38. In the context of cross-border proceedings and in the interests of comity and cooperation between the courts of Canada and the U.S., Ontario courts have regularly made

orders under Part IV of the CCAA recognizing and giving full force and effect to orders of U.S. courts confirming plans of reorganization, and to Chapter 11 plans.

Recognition Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated February 17, 2012, Application of Terrestar Networks Inc. et al, Court File No. 10-CL-8944- 00CL, Brief of Authorities, Tab 4.

Recognition Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated November 3, 2010, In the Matter of Chemtura Canada Co./CIE, Court File No. 10-CL-8846-00CL, Brief of Authorities, Tab 5.

Order of Mr. Justice Campbell of the Ontario Superior Court of Justice (Commercial List) dated May 11, 2010, Application of TLC Vision Corporation et al, Court File No. 09-8515-00CL, Brief of Authorities, Tab 6.

Order of Mr. Justice Wilton-Siegel of the Ontario Superior Court of Justice (Commercial List) dated September 28, 2012, Application of Durabla Canada Ltd. et al, Court File No. 12-9762-00CL, Brief of Authorities, Tab 7.

39. In considering whether it is appropriate to recognize and give full force and effect in Canada to a Chapter 11 plan and to orders of U.S. courts confirming plans of reorganization in the context of cross-border insolvency proceedings, Canadian courts have considered:

- (a) whether the Plan is critical to the restructuring of the debtor companies as a global corporate unit;
- (b) the level of support amongst creditors for the Plan;
- (c) whether the stakeholders of the debtors have been subject to a single, standard and well established claims process that treats them equally regardless of jurisdiction; and
- (d) whether ample notice has been given of the existence of the Chapter 11 Proceedings and ancillary Canadian proceedings.

***Re Xerium Technologies Inc.* (2010), 2010 CarswellOnt 7712 (S.C.J. [Commercial List]) at para 27, Brief of Authorities, Tab 8.**

Re Laidlaw (2003), 2003 CarswellOnt 787 (S.C.J.) at para 5, Brief of Authorities, Tab 9.

40. On December 20, 2016, the ModSpace Group filed the Plan, and on February 3, 2017, the ModSpace Group filed an updated version of the Plan with the US Court. The ModSpace Group spent a considerable amount of time negotiating a Plan with its stakeholders. The Plan involves a swap of approximately US\$400 million in secured debt in exchange for equity, along with a rights offering (the “**Rights Offering**”). The Rights Offering includes a backstop agreement (previously recognized by this Court) to ensure liquidity. The proceeds of the Rights Offering will facilitate the ModSpace Group’s emergence from the Chapter 11 proceedings and these proceedings.

Third Orlofsky Affidavit, paras 14 and 15.

41. Under the Plan, Canadian unsecured creditors having valid claims will be unaffected and will receive payment for their claims. To the extent that Canadian creditors are not repaid in full, their claims will remain due and owing following implementation of the Plan and exit from these proceedings and the Chapter 11 Proceedings. Disputed claims, including outstanding litigation claims, as described in further detail in the First Orlofsky Affidavit, are unpaid, and the ModSpace Group will continue to dispute such claims following its exit from these proceedings and the Chapter 11 Proceedings before the US Court.

Third Orlofsky Affidavit, para 16.

42. The Plan does not extinguish any unsecured claims. The only creditors of ModSpace Canada that are impaired (as that term is defined in the Bankruptcy Code) are those pursuant to the obligations under the Third Amended and Restated Credit Agreement dated as of June 6, 2011 (the “**Pre-Filing Facility**”) among the ModSpace Group and Bank of America, N.A. in its capacity as the First Lien Agent, and a syndicate of lenders. The group of lenders under the Pre-Filing Facility are also the lenders under the ModSpace Group’s debtor-in-possession financing facilities.

Third Orlofsky Affidavit, para 17.

43. The Confirmation Order and the Plan are important steps in the reorganization of the Companies. The recognition and implementation of the Confirmation Order and the Plan by this Court will facilitate the completion of this restructuring on a global basis and allow stakeholders to be treated equitably regardless of the jurisdiction in which they reside.

44. This Court has the discretion to recognize, implement and give full force and effect to the Confirmation Order and the Plan under Part IV of the CCAA. The Court has previously exercised such discretion to recognize other orders granted in the Chapter 11 Proceedings in these proceedings, and the Companies respectively request that such discretion be exercised once again to recognize the Confirmation Order and the Plan, as granting such an order:

- (a) provides for a fair and efficient administration of the Chapter 11 proceedings and these proceedings that protects the interests of the ModSpace Group's creditors and other interested persons;
- (b) protects and maximizes the value of the property of the ModSpace Group for the benefit of the ModSpace Group's stakeholders;
- (c) provides for coordination of the administration and supervision of the ModSpace Group's assets and affairs; and
- (d) is consistent with the principles of the CCAA and the common law and not contrary to public policy.

Recognition and Implementation of Provisions in the Plan in Canada

45. The Plan contains provisions that provide for an injunction to prevent interference with implementation of the Plan. The Plan also provides for releases to the Lender Release Parties and Non-Lender Release Parties (together, the "**Release Parties**"), and stays, restrains and enjoins claimants from taking any action against the Release Parties, upon implementation of

the Plan. The ModSpace Group submits that this Court has the discretion to approve and give effect to a Plan that contains such release and injunctive provisions.

46. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, the Ontario Court of Appeal considered whether courts have jurisdiction to sanction a CCAA plan containing releases in favour of third parties, notwithstanding that the CCAA does not expressly contemplate granting such releases. The Ontario Court of Appeal held that the court has jurisdiction under the CCAA to approve a plan that includes third party releases, and listed the following factors to be considered in determining whether to approve third-party releases:

- (a) the parties to be released are necessary and essential to the restructuring of the debtor;
- (b) the claims to be released are rationally related to the purpose of the Plan and are necessary for it;
- (c) the Plan cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- (e) the Plan will benefit not only the debtor companies but creditors generally;
- (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.
(2008), 2008 CarswellOnt 4811 (C.A.) at para 113, Brief of Authorities, Tab 10.

47. The above are not mandatory criteria and no individual factor is determinative of the issue of approval of a release.

***Kitchener Frame Ltd., Re* (2012), 86 CBR (5th) 274 at para 82 (Ont. Sup Ct. J.), Brief of Authorities, Tab 11.**

48. In *Re Muscletech Research & Developments Inc.*, Justice Ground of the Ontario Superior Court of Justice (Commercial List) approved releases in favour of third parties, including insurers who were funding the proposed plan of compromise that provided for a global resolution of a large number of product liability cases. In *Re Angiotech Pharmaceuticals Inc.*, Justice Walker of the British Columbia Supreme Court sanctioned a plan that contained a release in favour of a third party on the basis that:

...the proposed release contained in the plan is rationally connected to the purpose of the plan, is necessary for the implementation of the plan, and it meets the tests ...The creditors who are protected by the release were instrumental in facilitating the reorganization of the petitioners' affairs...

***Re Muscletech Research & Developments Inc.* (2007), 2007 CarswellOnt 1029 (S.C.J. [Commercial List]) at paras 23-27, Brief of Authorities, Tab 12.**

***Re Angiotech Pharmaceuticals Inc.* (2011), 2011 CarswellBC 841 (S.C.) at paras 12-13, Brief of Authorities, Tab 13.**

49. In *Re Canwest Global Communications*, Justice Pepall of the Ontario Superior Court of Justice (Commercial List) considered a CCAA plan that contained a third party release. Justice Pepall sanctioned the CCAA plan, on the basis that:

The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable.

***Re Canwest Global Communications* (2010), 2010 CarswellOnt 5510 (S.C.J. [Commercial List]) at para 30, Brief of Authorities, Tab 14.**

50. The ModSpace Group respectfully submits that the Plan, including the releases and injunctions, should be recognized, implemented and given full effect in Canada, as the

releases and injunctions in favour of the Release Parties satisfy the common law tests set out above, as:

- (a) the Release Parties are necessary and essential to the restructuring of the ModSpace Group;
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases, as they were a component of the agreement reached that resulted in the Release Parties providing support to the ModSpace Group;
- (d) the Release Parties contributed in a tangible and realistic way to the Plan by providing, among other things, support to the ModSpace Group;
- (e) the Plan will benefit not only the ModSpace Group, but creditors generally, as it likely provides for greater recovery for the claimants than a liquidation;
- (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and
- (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

51. The releases provided for in the Plan are integral to the framework of compromises in the Plan and are fair and reasonable in the circumstances. In the absence of the releases, the ModSpace Group would not expect to have been able to achieve the support from its stakeholders that now exists in favour of the Plan. The ModSpace Group is not aware of any objections to the releases provided for in the Plan.

52. The Information Officer supports the relief sought by the ModSpace Group. Accordingly, it is submitted that it is appropriate for the Court to recognize the Confirmation Order and the releases provided for in the Plan.

PART V - ORDER REQUESTED

53. MSC requests that this Court grant the Order in the form included at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of February, 2017.

R. JAIPARGAS / E Ferreira

Roger Jaipargas / Erita Ferreira

Lawyers for Modular Space Holdings, Inc., Modular Space Intermediate Holdings, Inc., Modular Space Corporation, Resun ModSpace, Inc., ModSpace Government Financial Services, Inc., ModSpace Financial Services Canada, Ltd. and Resun Chippewa, LLC

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Babcock & Wilcox Canada Ltd.*, 2000 CarswellOnt 704 (S.C.J.)
2. *Re Lear Canada* (2009), 2009 CarswellOnt 4232 (S.C.J. [Commercial List])
3. *Re Matlack Inc.* (2001), 2001 CarswellOnt 1830 (S.C.J. [Commercial List])
4. *Application of Terrestar Networks Inc. et al*, Court File No. 10-CL-8944-00CL, Recognition Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated February 17, 2012
5. *In the Matter of Chemtura Canada Co./CIE*, Court File No. 10-CL-8846-00CL, Recognition Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated November 3, 2010
6. *Application of TLC Vision Corporation et al*, Court File No. 09-8515-00CL, Order of Mr. Justice Campbell of the Ontario Superior Court of Justice (Commercial List) dated May 11, 2010
7. *Application of Durabla Canada Ltd. et al*, Court File No. 12-9762-00CL, Order of Mr. Justice Wilton-Siegel of the Ontario Superior Court of Justice (Commercial List) dated September 28, 2012
8. *Re Xerium Technologies Inc.* (2010), 2010 CarswellOnt 7712 (S.C.J. [Commercial List])
9. *Re Laidlaw* (2003), 2003 CarswellOnt 787 (S.C.J.)
10. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 4811 (C.A.)
11. *Kitchener Frame Ltd., Re* (2012), 86 CBR (5th) 274 at para 82 (Ont. S.C.J.)
12. *Re Muscletech Research & Developments Inc.* (2007), 2007 CarswellOnt 1029 (S.C.J. [Commercial List])
13. *Re Angiotech Pharmaceuticals Inc.* (2011), 2011 CarswellBC 841 (S.C.)
14. *Re Canwest Global Communications* (2010), 2010 CarswellOnt 5510 (S.C.J. [Commercial List])

SCHEDULE "B"
STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended.

PART IV

CROSS-BORDER INSOLVENCIES

Purpose

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

Interpretation Definitions

45. (1) The following definitions apply in this Part.

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

“foreign representative” means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

- (a) monitor the debtor company’s business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

Centre of debtor company’s main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its main interests.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

- (2) Subject to subsection (3), the application must be accompanied by
 - (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
 - (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative’s authority to act in that capacity; and
 - (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative’s authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

Order recognizing foreign proceeding

47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Other orders

49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
- (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
- (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Terms and conditions of orders

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Commencement or continuation of proceedings

51. If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

Obligations

Cooperation - court

52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation - other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a) the appointment of a person to act at the direction of the court;
- (b) the communication of information by any means considered appropriate by the court;
- (c) the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e) the coordination of concurrent proceedings regarding the same debtor company.

Court not prevented from applying certain rules

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC., MODULAR SPACE CORPORATION, RESUN
MODSPACE, INC., MODSPACE GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES CANADA, LTD.,
RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS, INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

<p>ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)</p> <p>PROCEEDINGS COMMENCED AT TORONTO</p> <p>FACTUM OF MODULAR SPACE CORPORATION (Returnable February 21, 2017)</p> <p>BORDEN LADNER GERVAIS LLP Bay Adelaide Centre, East Tower 22 Adelaide St. W. Toronto, ON M5H 4E3</p> <p>ROGER JAIPARGAS / LSUC # 43275C Tel: 416-367-6266 Email: rjaipargas@blg.com</p> <p>EVITA FERREIRA / LSUC# 69967K Tel: 416-367-6708 Email: eferreira@blg.com</p> <p>Lawyers for Modular Space Holdings, Inc., Modular Space Intermediate Holdings, Inc., Modular Space Corporation, Resun ModSpace, Inc., ModSpace Government Financial Services, Inc., ModSpace Financial Services Canada, Ltd. and Resun Chippewa, LLC</p>	
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