

**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**

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**FACTUM OF THE APPLICANT, MODULAR SPACE CORPORATION  
(December 23, 2016)**

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and Resun Chippewa, LLC**

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**PART I - OVERVIEW**

1. The Applicant, Modular Space Corporation ("MSC" or the "**Applicant**"), brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), seeking orders recognizing certain proceedings commenced in the United States in respect of the Applicant and several related companies. The Applicant also seeks 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<sup>1</sup>.

4. All members of the ModSpace Group have a head office in Berwyn, Pennsylvania and all are registered in the state of Delaware, except for ModSpace Canada. ModSpace Canada has limited management personnel located at an office in Brampton, Ontario.
5. 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 “**US Code**”) (collectively, the “**Petitions**” and each a “**Petition**”) with the United States Bankruptcy Court for the District of Delaware (the “**US Court**”). The ModSpace Group requested that the Petitions be jointly administered for procedural purposes only (the “**US Proceedings**”).
6. On December 22, 2016 the Honourable Justice Carey granted various orders pursuant to Chapter 11 (the “**First Day Orders**”), the details of which will be reviewed below. As the ModSpace Group has certain assets in other jurisdictions including Canada, one of the First Day Orders sought by the ModSpace Group and granted by the US Court was an order authorizing Modular Space Corporation to act as the foreign representative of the ModSpace Group in any judicial or other proceeding, including these proceedings (the “**Foreign Representation Order**”).
7. As detailed below, the ModSpace Group has reached an agreement with its primary secured creditors for a pre-packaged plan that has been filed in the United States. The plan will involve a swap of approximately US\$400 million in secured debt in exchange for equity. Under the plan, Canadian unsecured creditors having valid claims will be unaffected and will receive payment in the ordinary course. To the extent Canadian creditors are not repaid in full during the course of these proceedings, their claims will remain due and owing following conclusion of the plan and exit from the restructuring

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<sup>1</sup> Further details of the history and business of the ModSpace Group (including the circumstances leading to the Chapter 11 filings) are set out in the First Day Declaration.

proceedings in the US and Canada. Disputed claims, in particular outstanding litigation claims, will not be paid in the ordinary course and will be stayed during the course of the US Proceedings.

8. In order to: (i) alleviate any potential harm to the ModSpace Group during the Chapter 11 Proceedings; (ii) ensure the protection of the ModSpace Group's Canadian assets during the course of the Chapter 11 Proceedings; and (iii) ensure that this court and the Canadian stakeholders are kept properly informed of the Chapter 11 Proceedings, Modular Space Corporation has brought this application to seek the following relief:

- (a) An order (the “**Initial Recognition Order**”) declaring that, *inter alia*:
- (i) Modular Space Corporation is the “foreign representative” as defined in section 45 of the CCAA in respect of the Chapter 11 Proceedings;
  - (ii) the Chapter 11 Proceedings are “foreign proceedings”, as defined in section 45 of the CCAA;
  - (iii) the Chapter 11 Proceedings are “foreign main proceedings”, as defined in section 45 of the CCAA, with respect to each member of the ModSpace Group; and
  - (iv) any claims, rights, remedies and proceedings against or in respect of any of the ModSpace Group or their property are stayed and suspended; and
- (b) An order (the “**Supplemental Recognition Order**”) that, *inter alia*:
- (i) recognizes in Canada and enforces certain of the First Day Orders (as discussed below) as set out in the Affidavit of David Orlofsky, sworn December 23, 2016 (the “**Orlofsky Affidavit**”);
  - (ii) appoints Alvarez & Marsal as information officer (in such capacity, the “**Information Officer**”) in respect of this proceeding; and

(iii) grants the Court-ordered charges, namely the Administration Charge and the DIP Lender's Charge (as each is defined below).

9. There are no other insolvency proceedings involving the ModSpace Group other than the Chapter 11 Proceedings and these proceedings.

## PART II - FACTS

### The First Day Motions

10. In support of the Petitions, a declaration was filed with the US Court (the "**First Day Declaration**"). The First Day Declaration sets out in greater detail, among other things, the history of the ModSpace Group and the present challenges leading to the US Proceedings. The First Day Declaration is attached to the Orlofsky Affidavit as Exhibit "B".

Orlofsky Affidavit, ¶6.

11. As part of the first day motions (the "**First Day Motions**") that were heard by the US Court on December 22, 2016, the US Court made several orders (collectively, the "**First Day Orders**"). The First Day Orders made by the US Court include, inter alia:
- (a) an order recognizing MSC as the foreign representative of the ModSpace Group (the "**Foreign Representative Order**");
  - (b) an order permitting the joint administration of the Chapter 11 cases of the ModSpace Group in the US Proceedings (the "**Joint Administration Order**");
  - (c) an order authorizing the ModSpace Group to pay pre-Petition wages, compensation and employee benefits (the "**Wages Order**");
  - (d) an interim order authorizing, but not directing, the ModSpace Group to maintain their existing bank accounts, cash management system and authorizing the continuation of (and administrative expense priority status of) intercompany transactions (the "**Cash Management Order**");

- (e) an interim order: (i) approving post-Petition financing; (ii) granting liens and super-priority administrative expense claim status to pre-Petition secured parties; (iii) modifying the automatic stay; and (iv) scheduling the final hearing (the “**DIP Financing Order**”);
- (f) an order authorizing the ModSpace Group to retain Kurtzman Carson Consultants LLC (“KCC”) as Claims and Noticing Agent, nunc pro tunc, to the Filing Date (the “**KCC Order**”);
- (g) an order authorizing the payment of pre-Petition taxes and fees (the “**Taxes Order**”);
- (h) an interim order with respect to utilities providers: (i) approving the ModSpace Group’s form of adequate assurance of payment; (ii) establishing procedures to resolve objections by utility companies; and (iii) restraining utility companies from discontinuing, alternating or refusing service (the “**Utilities Order**”);
- (i) an order: (i) confirming the enforcement and applicability of the automatic stay pursuant to Section 362 of the Code; and (ii) confirming the ModSpace Group’s authority with respect to post-Petition operations (the “**Automatic Stay Order**”);
- (j) an interim order establishing notification procedures and approving restrictions on certain transfers of or claims for worthlessness with respect to equity securities (the “**NOL Order**”);
- (k) an interim order authorizing the ModSpace Group to pay its pre-Petition unsecured creditors in the ordinary course of business (the “**Unsecured Creditors Order**”);
- (l) an order establishing bar dates for filing proofs of claim, approving the form and manner for filing proofs of claim and the manner for notice of same (the “**Claims Order**”);
- (m) an order (i) scheduling a combined disclosure statement approval and plan confirmation hearing; (ii) establishing a plan and disclosure statement objection

date and related procedures; (iii) approving solicitation and related procedures; (iv) approving the notice procedures; (v) approving notice and objection procedures for the assumption, assignment and rejection of executory contracts and unexpired leases; and (vi) extending the time, and upon confirmation, waiving the requirements that statements and schedules be filed and a creditors' meeting be convened (the "**Solicitation Procedures Order**"); and

- (n) an order approving procedures for rights offering and related forms and authorizing the ModSpace Group to conduct the rights offering in connection with the ModSpace Group's joint plan of reorganization pursuant to Chapter 11 (the "**Rights Offering Procedures Order**").

Orlofsky Affidavit, ¶9.

- 12. Copies of each of the First Day Orders are attached as Exhibits "C" to "P" of the Orlofsky Affidavit. The orders are further described in paragraphs 10 to 62 of the Orlofsky Affidavit. For ease of reference, the details of the DIP Financing Order are set out below.

***DIP Financing Order***

- 13. Pursuant to the DIP Financing Order:
  - (a) the US Debtors were authorized to borrow up to US\$568,000,000, subject to a borrowing base and availability reserves, pursuant to a US revolving loan facility (with up to US\$55,000,000 of this amount available prior to entry of the final DIP Financing Order);
  - (b) ModSpace Canada was authorized to borrow up to US\$200,000,000, subject to a borrowing base and availability reserves, pursuant to a Canadian revolving loan facility (with up to US\$6,000,000 of this amount available prior to entry of the final DIP Financing Order); and
  - (c) the US Debtors were authorized to borrow, subject to the entry of the final DIP Financing Order, under a US term loan in the amount of the unpaid principal

balance under the pre-Filing Date ABL Facility owed the U.S. Term Lender (as both terms are defined in the DIP Financing Order) pursuant to a US term loan in the amount of up to US\$26,257,000, with no funds available under this facility prior to entry of the final DIP Financing Order

(collectively the “**DIP Financing**”)

on such terms and conditions set out in the applicable post-petition credit agreement and related documents (collectively, the “**DIP Financing Documents**”).

Orlofsky Affidavit, ¶20.

14. The DIP Financing is being provided by a syndicate of lenders (the “**DIP Lenders**”) that also provided the ModSpace Group with its pre-Petition financing. Taking into account the borrowing base and reserve requirements under the DIP Financing Documents, ModSpace Canada had approximately US\$8.5 million of availability under the DIP Financing as of the Filing Date.

Orlofsky Affidavit, ¶21.

15. Pursuant to the DIP Financing Documents, and consistent with the pre-Petition financing terms, the US Debtors have guaranteed the obligations of ModSpace Canada under the DIP Financing Documents, but ModSpace Canada has not guaranteed the obligations of the US Debtors. Similarly, the assets of the US Debtors provide security to the DIP Lenders for the obligations of the US Debtors and ModSpace Canada, but the assets of ModSpace Canada provide security only for the obligations of ModSpace Canada.

Orlofsky Affidavit, ¶22.

16. The US Court also ordered that the DIP Financing be secured by security interests and liens in accordance with the US Code and that the amounts owed under the DIP Financing would constitute super-priority claims in priority to all other obligations and liabilities of the ModSpace Group.

Orlofsky Affidavit, ¶23.



17. The DIP Financing Order authorizes the US Debtors to use advances under the DIP Financing to repay pre-Petition amounts owed by them. However, ModSpace Canada is not authorized to use advances under the DIP Financing to repay pre-Petition amounts owed by it. The DIP Financing Order permits ModSpace Canada to use certain Cash Collateral (as that term is defined in the DIP Financing Order) to repay pre-Petition amounts owed by it. The DIP Financing Documents provide that proceeds of Accounts or Rental Equipment (as each is defined in the DIP Financing Documents) shall first be applied as set out in the DIP Financing Order (as above) until all pre-Petition amounts owed by ModSpace Canada have been repaid, before being applied to the obligations of ModSpace Canada under the DIP Financing.

Orlofsky Affidavit, ¶24.

18. Pursuant to the terms of the DIP Financing Documents, the ModSpace Canada portion of the DIP Financing funded in Canadian dollars will incur interest on the unpaid principal, from the date made until paid in cash at the “Canadian Prime Rate” (or “Canadian BA Rate”, if selected by ModSpace Canada) plus 3.5% (or 4.5% if the “Canadian BA Rate” was selected). The ModSpace Canada portion of the DIP Financing funded in US dollars will incur interest on the unpaid principal from the date made until paid in cash at a rate per annum equal to the “Canadian Base Rate” (or the “LIBOR Rate”, if selected by ModSpace Canada), plus 3.5% (or 4.5% if the “LIBOR Rate” was selected). If an “Event of Default” (as defined in the DIP Financing Documents) exists under the DIP Financing Documents, the interest rate is increased by 2% over the rate that would otherwise apply.

Orlofsky Affidavit, ¶25.

19. Since the reorganization plan is a pre-packaged restructuring, the DIP Lenders are providing a robust financing package, including the DIP Facilities and exit facilities under a fully consensual restructuring and reorganization deal in an expedited manner. All of the affected parties have considered the terms of the DIP Financing, including its pricing and terms, and found that they are reasonable and in line with the market.

Orlofsky Affidavit, ¶27.

20. The ModSpace Group explored alternative sources of interim financing, including considering a proposal submitted by the Ad Hoc Group of Noteholders (as defined below). This alternative structure would have been more expensive and since the ABL Lenders were opposed to this financing approach, it likely would have led to at least some litigation (particularly regarding the use of cash collateral, among other potential issues, including the ABL Lenders opposing priming charges). Further, this alternative structure did not include exit financing.

Orlofsky Affidavit, ¶28.

21. In the ordinary course of business, the ModSpace Group, and most of its competitors, use asset-based loans (“**ABL**”) to finance their working capital needs, both because their assets are high value and because ABL provide a less expensive source of funding. The ModSpace Group’s business plan is based on this lower cost of capital. Accordingly, the financing options available to the ModSpace Group are effectively limited to commercial banks with an ABL component. The DIP Financing is being provided by a syndicate of 13 lenders, most of whom are typical ABL lenders to the modular space industry, including the three largest lenders (Bank of America, Wells Fargo and JP Morgan). Since this is a large facility, any alternate structure would be widely syndicated, likely to many of the same lenders, such that any alternate financing is likely to be comprised of the same lenders and made on similar terms.

Orlofsky Affidavit, ¶29.

22. In the summer of 2016, the ModSpace Group was exploring a potential merger. In the course of those discussions, it received financing proposals. While those proposals were for different deals, David Orlofsky concluded that based on the terms and prices obtained in the course of those discussions, and his experience in restructuring matters, that the pricing and cost of the DIP Financing is reasonable and in line with market pricing and terms.

Orlofsky Affidavit, ¶30.

23. The US Court was satisfied that the DIP Financing Order was necessary to permit the orderly continuation and operation of the ModSpace Group, to maintain business

relationships and satisfy its business and operational needs (including payroll and other expenses incurred in the ordinary course of business) and to fund the administration of the US Proceedings and the ModSpace Group's efforts to restructure and implement the restructuring plan.

Orlofsky Affidavit, ¶31.

24. The US Court was also satisfied that the ModSpace Group would not be able to obtain financing on more favourable terms and would not be able to obtain adequate unsecured credit under the US Code.

Orlofsky Affidavit, ¶32.

25. The US Court was further satisfied that the DIP Financing was a sound exercise of the ModSpace Group's business judgment.

Orlofsky Affidavit, ¶33.

26. MSC seeks recognition of the DIP Financing Order from this Honourable Court, and submits that such recognition is necessary to ensure the financing remains available and that the ModSpace Group can meet its obligations and continue its efforts to restructure and to implement the restructuring plan. The DIP Financing is an important component of the pre-packaged restructuring agreed upon by the ModSpace Group and its primary financial stakeholders.

Orlofsky Affidavit, ¶34.

### **The Business of the ModSpace Group**

27. The ModSpace Group provides 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. ModSpace Canada's operations have been adversely affected by the price of oil, which has reduced the need for its products, which are frequently used in oil and gas projects.

Orlofsky Affidavit, ¶63.

28. Further details of the history and business of the ModSpace Group (including the circumstances leading to the Chapter 11 Petitions) are set out in the First Day Declaration, attached as Exhibit “B” to the Orlofsky Affidavit.

Orlofsky Affidavit, ¶64 and Exhibit “B”.

### **Corporate Structure of the ModSpace Group**

29. Details of the ModSpace Group, their incorporating jurisdiction and the location of their head office are as follows:

<b>Name</b>	<b>Jurisdiction of Registered Office</b>	<b>Location of Head Office/Headquarters</b>
Modular Space Holdings, Inc.	Delaware	Berwyn, Pennsylvania
Modular Space Intermediate Holdings, Inc.	Delaware	Berwyn, Pennsylvania
Modular Space Corporation	Delaware	Berwyn, Pennsylvania
Resun ModSpace, Inc.	Delaware	Berwyn, Pennsylvania
ModSpace Government Financial Services, Inc.	Delaware	Berwyn, Pennsylvania
ModSpace Financial Services Canada, Ltd.	Alberta	Berwyn, Pennsylvania
Resun Chippewa, LLC	Delaware	Berwyn, Pennsylvania

Orlofsky Affidavit, ¶65.

30. Further details of the corporate structure of the ModSpace Group, including an organization chart and the ownership structure are set out in the First Day Declaration, attached as Exhibit “B” to the Orlofsky Affidavit.

Orlofsky Affidavit, ¶66 and Exhibit “B”.

### **Operations of the ModSpace Group**

***The US Debtors***

31. The ModSpace Group's operations are based in the United States.

Orlofsky Affidavit, ¶67.

32. The US Debtors each have their registered office and conduct all operations in the United States. The US Debtors have no assets or operations in Canada and the US Debtors have no Canadian creditors or employees.

Orlofsky Affidavit, ¶68.

33. All material decisions with respect to business and operations of the US Debtors are directed by management located in the United States (in particular, the head office in Berwyn, Pennsylvania), including without limitation, all decisions regarding administration, finances, human resources, strategic planning, management, communication and accounting.

Orlofsky Affidavit, ¶69.

***ModSpace Canada***

34. ModSpace Canada has its registered and records office in Calgary, Alberta.

Orlofsky Affidavit, ¶70.

35. ModSpace Canada is a wholly owned subsidiary of MSC. MSC oversees the operations of ModSpace Canada and provides significant direction to and oversight of ModSpace Canada's operations and assets.

Orlofsky Affidavit, ¶84.

36. ModSpace Canada's head office is located in Berwyn, Pennsylvania, although ModSpace Canada has limited management personnel located at an office in Brampton, Ontario. ModSpace Canada has a Senior Vice President (the "SVP"). The SVP is considered a senior executive of ModSpace Canada and the ModSpace Group. ModSpace Canada had previously had a Human Resources Manager based in Brampton, Ontario, but this role was eliminated in early December 2016.

Orlofsky Affidavit, ¶85.

37. The SVP based in Brampton, Ontario is responsible for day-to-day sales, operations and administrative functions in Canada. The SVP also prepares the budget for ModSpace Canada. The SVP reports directly to the Chief Executive Officer and the Chief Financial Officer of MSC based in Berwyn, Pennsylvania. All strategic, financial and corporate decisions (including the budget for ModSpace Canada) are subject to approval of the Chief Executive Officer and Chief Financial Officer of MSC based in Berwyn, Pennsylvania. The SVP's compensation (through bonuses) is based on the overall financial performance of the ModSpace Group.

Orlofsky Affidavit, ¶86.

38. Since early December 2016, all human resources functions for ModSpace Canada have been managed and directed from Berwyn, Pennsylvania, under the direction of the Vice President of Human Resources of MSC.

Orlofsky Affidavit, ¶87.

39. All of ModSpace Canada's treasury and financial decisions, including borrowing and setting prices are made by the Chief Financial Officer of MSC based in Berwyn, Pennsylvania. All Canadian locations provide financial data and information to the head office in Berwyn, Pennsylvania, which consolidates the information and uses it to make these financial decisions.

Orlofsky Affidavit, ¶88.

40. All of ModSpace Canada's strategic decisions are made by the SVP, in conjunction with the Chief Executive Officer and the Chief Financial Officer of MSC based in Berwyn, Pennsylvania. The Chief Executive Officer and Chief Financial Officer of MSC rely on the expertise of the SVP, and give deference to the SVP's opinion, but the ultimate and final decisions are made by the Chief Executive Officer and the Chief Financial Officer of MSC.

Orlofsky Affidavit, ¶89.

41. All accounts payable and accounts receivable (including collections) are managed from the ModSpace Group head office in Berwyn, Pennsylvania.

Orlofsky Affidavit, ¶90.

### **Intercompany Transactions**

42. In light of the integrated and consolidated nature of the ModSpace Group, MSC makes a number of payments on behalf of the US Debtors that do not have bank accounts. Those US Debtors perform intercompany transactions to reimburse MSC. Similarly, ModSpace Canada benefits from services performed by MSC on behalf of ModSpace Canada and the US Debtors (other than Holdings and Intermediate) guarantee of the ModSpace Canada obligations under the ABL Facility (as defined in the First Day Declaration). Accordingly, ModSpace Canada pays a monthly management fee and guarantor fee (together, the “**Management Fees**”).

Orlofsky Affidavit, ¶102.

43. The Management Fees are approximately US\$600,000 per month, and are not subject to tax. The Management Fees, when paid, are applied against the outstanding balance on the ABL Facility.

Orlofsky Affidavit, ¶103.

44. All intercompany transactions are booked by the ModSpace Group head office in Berwyn, Pennsylvania.

Orlofsky Affidavit, ¶104.

45. The ModSpace Group expects that such intercompany transactions, including the monthly management and guarantor fee from ModSpace Canada to MSC, will continue in the ordinary course of business. The Cash Management Order specifically authorizes and approves the continuation of intercompany transactions, including payment of the Management Fee, in the ordinary course of business.

Orlofsky Affidavit, ¶105.

### ***August 2016 Loan Payment***

46. In June 2008, MSC, as lender, and ModSpace Canada, as borrower, entered into an agreement for MSC to provide ModSpace Canada with a revolving credit facility of CDN\$250,000,000. This agreement was set to expire on June 20, 2018. In August 2016, ModSpace Canada repaid this facility in full (approximately US\$2.1 million or CDN\$2.8 million) in order to provide liquidity to MSC and the US Debtors. As of December 20, 2016, the balance of this facility remained zero (although the facility remains open).

Orlofsky Affidavit, ¶106.

#### ***Other Intercompany Transactions***

47. Other than the MSC loan, which was repaid in the summer of 2016, and the monthly management and guarantor fees paid by ModSpace Canada to MSC, there are no intercompany transactions involving ModSpace Canada.

Orlofsky Affidavit, ¶107.

#### **ModSpace Canada's Finances**

48. In the twelve months ended September 30, 2016, the ModSpace Canada represented approximately 14% of the ModSpace Group's consolidated revenue and approximately 21% of the ModSpace Group's total adjusted EBITDA. Based on the consolidated financial statements ended September 30, 2015 (as described below and attached as Exhibit "S"), the ModSpace Group consolidated revenue for that period was approximately \$454 million, with ModSpace Canada representing approximately \$94 million (21% of revenue) over that period.

Orlofsky Affidavit, ¶108.

#### **ModSpace Group's Creditors**

49. As noted above and in the First Day Declaration, the ABL Facility is a global credit facility for the ModSpace Group. Accordingly, a significant creditor of the ModSpace Group is common to all members of the group, including ModSpace Canada. However,



there is otherwise little overlap between the creditors of ModSpace Canada and the creditors of the ModSpace Group.

Orlofsky Affidavit, ¶111.

50. ModSpace Canada owes approximately US\$60.1 million to the ABL Lenders (as defined in the First Day Declaration), the primary secured creditors of the ModSpace Group. The US Debtors owe the ABL Lenders approximately US\$533 million.

Orlofsky Affidavit, ¶112.

51. If the ABL Lenders were to require repayment in full of the amounts owed by ModSpace Canada (approximately US\$60.1 million), ModSpace Canada would be unable to repay the full amount owed.

Orlofsky Affidavit, ¶113.

52. The ModSpace Group and its creditors, including the ABL Lenders, have entered into an agreement for a restructuring of the ModSpace Group's operations, including ModSpace Canada. The participation of ModSpace Canada is an important component of this consensual restructuring and pre-packaged restructuring plan that will allow the entire ModSpace Group to restructure and continue its operations.

Orlofsky Affidavit, ¶114.

53. The US Debtors are guarantors under the Secured Notes, but ModSpace Canada has not issued any guarantees with respect to the Secured Notes.

Orlofsky Affidavit, ¶115.

54. Other than the lenders under the ABL Facility, ModSpace Canada has a limited number of secured creditors.

Orlofsky Affidavit, ¶116.

55. ModSpace Canada has approximately 260 unsecured creditors that are owed approximately US\$1.2 million. These include approximately US\$320,000 to manufacturers and equipment providers, approximately US\$20,000 to shippers and

approximately US\$820,000 to maintenance, refurbishment and construction service providers.

Orlofsky Affidavit, ¶117.

56. The US Debtors are also indebted pursuant to Secured Notes (as defined in the First Day Declaration). The Secured Notes are secured, in part, by a pledge of the stock of ModSpace Canada.

Orlofsky Affidavit, ¶118.

57. The ModSpace Canada Canadian creditors are to be paid in the ordinary course of business in accordance with the Unsecured Creditors Order. Some of ModSpace Canada's unsecured creditors may have their claims reinstated so that their debt and obligation will be owed by the reorganized entity following completion of the restructuring plan. No Canadian creditors or creditors of ModSpace Canada will have their claims extinguished or expunged as part of the restructuring plan.

Orlofsky Affidavit, ¶119.

### **The Restructuring Plan**

58. The US Debtor's creditors include holders of senior secured second lien notes (the "Secured Notes"). Further information regarding the Secured Notes and the ModSpace Group's other creditors are set out in the First Day Declaration.

Orlofsky Affidavit, ¶123.

59. Beginning in the summer of 2016, the US Debtors held various meetings with certain restricted holders of the Secured Notes (the "**Ad Hoc Group of Noteholders**") with a view to obtaining an equity investment acceptable to the Ad Hoc Group of Noteholders. Further details of the discussions between the US Debtors and the Ad Hoc Group of Noteholders are set out in the First Day Declaration.

Orlofsky Affidavit, ¶124.

60. On November 3, 2016, the US Debtors, Ad Hoc Group of Noteholders and Calera Capital Advisors LP ("**Calera**"), the largest equity holder of Holdings, entered into a term sheet

contemplating a consensual restructuring that would be implemented in accordance with the Plan.

Orlofsky Affidavit, ¶125.

61. To that end, the ModSpace Group, a syndicate of lenders (the “**ABL Lenders**”) led by Bank of America, N.A. as administrative agent, the Ad Hoc Group of Noteholders and Calera entered into the Restructuring Support Agreement (the “**RSA**”) for a consensual restructuring under Chapter 11 of the US Code.

Orlofsky Affidavit, ¶126.

62. Further details of the RSA and the Plan are set out in the First Day Declaration.

Orlofsky Affidavit, ¶127.

63. The key terms of the Plan include:

- (a) the ABL Lenders will provide post-petition financing for the ModSpace Group’s operations during the Chapter 11 proceedings;
- (b) all general unsecured claims are to be reinstated to the extent they are not paid prior to the emergence of the ModSpace Group from the Chapter 11 proceedings and these proceedings;
- (c) claims arising under the ModSpace Group’s indenture for the Secured Notes would receive: (i) a pro rata share of equity in a reorganized entity; (ii) the right to participate in an offering of US\$90 million of equity in the reorganized entity (the “Rights Offering”), and (iii) in exchange for agreeing to back-stop the Rights Offering, certain members of the Ad Hoc Group of Noteholders would receive a backstop fee;
- (d) the remaining equity in the reorganized entity, after the pro rata distribution to holders of Secured Notes and the rights offering will be distributed pro rata to the ModSpace Group’s existing equity holders, along with certain warrants; and

- (e) the existing agreement between the ModSpace Group and the ABL Lenders will be amended, restated, modified and assumed by the reorganized ModSpace Group pursuant to the exit financing (discussed below).

Orlofsky Affidavit, ¶128.

- 64. Pursuant to the RSA, the ModSpace Group will receive exit financing to support the Plan and the ongoing working capital requirements of the ModSpace Group following its reorganization. The exit financing will amend the existing facilities with the ABL Lenders.

Orlofsky Affidavit, ¶129.

- 65. Further details of the exit financing are set out in the First Day Declaration. Pursuant to the exit financing, the ModSpace Group will obtain approximately US\$719.5 million in revolving credit in commitments and term loans under the modified facilities with the ABL Lenders. ModSpace Canada will obtain approximately US\$149 million of these commitments, including a US\$20 million sub-limit for letters of credit and a US\$15 million sub-limit for swing-line loans.

Orlofsky Affidavit, ¶130.

- 66. The proceeds of the Rights Offering will also be used to aid in the ModSpace Group's exit from the Chapter 11 proceedings and these proceedings.

Orlofsky Affidavit, ¶131.

### ***Restructuring Support Agreement***

- 67. On December 20, 2016, the ModSpace Group, Bank of America N.A. as administrative agent (the "**ABL Agent**"), the Ad Hoc Group of Noteholders and Calera entered into the RSA in support of a pre-packaged Chapter 11 plan of reorganization.

Orlofsky Affidavit, ¶133.

- 68. Pursuant to the RSA, each of the ModSpace Group, the ABL Agent, the Ad Hoc Group of Noteholders and Calera agreed, inter alia to support, and take all commercially reasonable action to facilitate, the implementation of the restructuring plan, including the

DIP Financing. The ABL Agent and the Ad Hoc Group of Noteholders further consented to the ModSpace Group commencing the Chapter 11 proceedings and these proceedings, and to the adequate protection in the DIP Financing Documents and the DIP Financing Order.

Orlofsky Affidavit, ¶134.

69. Following execution of the RSA, the ModSpace Group began a pre-Petition solicitation of the Plan to the ABL Lenders, the holders of Secured Notes, Calera and the ModSpace Group's equity holders.

Orlofsky Affidavit, ¶135.

### **Litigation**

70. ModSpace Canada is a party to two litigation proceedings in Canada. While the orders sought would stay these litigation proceedings so that the ModSpace Group can focus on its restructuring and implementation of the Plan (over what is expected to be a short time) it is not the intention of the ModSpace Group to deal with the claims, in these proceedings. These litigation proceedings are set out in further detail in the Orlofsky Affidavit.

Orlofsky Affidavit, ¶136-144.

### **Information Officer**

71. MSC, as foreign representative of the ModSpace Group, seeks the appointment of A&M as Information Officer in these proceedings, especially given the complex corporate and financial structure of the ModSpace Group, the stakeholders located in Canada (including ModSpace Canada's employees) and the amount of the debt owed by the ModSpace Group.

Orlofsky Affidavit, ¶145.

### **Administration Charge**

72. MSC, as foreign representative of the ModSpace Group, seeks the granting of an administration charge over the assets of the ModSpace Group in Canada with respect to

the fees and disbursements of A&M, the proposed information officer, and its counsel, Torys LLP, to a maximum of \$300,000 (the “**Administration Charge**”).

Orlofsky Affidavit, ¶148.

73. A&M requires the Administration Charge as security for their fees in order to act in this matter and that A&M requires that the Administration Charge represent a first charge, including in priority to any charge granted for interim financing.

Orlofsky Affidavit, ¶151.

### **DIP Lender’s Charge**

74. As described above, pursuant to the DIP Financing Order, the US Court authorized the ModSpace Group to borrow on an interim financing facility and that the funds borrowed under that facility would have super-priority over the assets of the ModSpace Group, in priority to all of the ModSpace Group’s creditors.

Orlofsky Affidavit, ¶152.

### **PART III - ISSUES**

75. The issues on this Application are:
- (a) Should this Court recognize the Chapter 11 Proceeding as a foreign main proceeding pursuant to sections 46 through 48 of the CCAA and grant the Initial Recognition Order sought by the Applicant?
  - (b) Should this Court grant the Supplemental Recognition Order sought by the Applicant under section 49 of the CCAA?

## PART IV - ARGUMENT

### A. Initial Recognition Order

#### (i) *The Chapter 11 Proceeding is a "Foreign Proceeding"*

76. Part IV of the CCAA establishes a process and system for addressing cross-border and multi-national insolvencies. Section 44 of the CCAA states that the purpose of the CCAA's cross-border regime is 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.

CCAA, s. 44.

77. Part IV of the CCAA is consistent with the principle that a cross-border or multi-national business enterprise should "be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise". In such cases, one jurisdiction should take charge of the principal administration of the enterprise's reorganization.

*Babcock & Wilcox Canada Ltd. (Re)*, 2000 Carswell Ont 704, ¶21 (Ont. S.C.J. [Commercial List]) [*Babcock*], Brief of Authorities ("BOA"), Tab 1.

78. The underlying basis of Part IV of the CCAA is the principle of comity and cooperation between courts of various jurisdictions, whereby a Canadian court will accord respect to

“the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.”

*Babcock*, ¶21, BOA, Tab 1.

79. Section 47 of the CCAA provides that if this Court is satisfied that:

- (a) an application for the recognition of a foreign proceeding relates to a “foreign proceeding” within the meaning of the CCAA; and
- (b) the applicant is a “foreign representative” within the meaning of the CCAA in respect of that foreign proceeding,

then it *shall* make an order recognizing the foreign proceeding.

CCAA, s. 47.

80. Canadian courts have consistently recognized proceedings commenced under Chapter 11 of the US Code to be “foreign proceedings” for the purposes of the CCAA.

*Digital Domain Media Group Inc. (Re)*, 2012 BCSC 1565 [*Digital Domain*], ¶15, BOA, Tab 2.

81. This Application is supported by: (i) certified copies of the ModSpace Group’s Petitions that commenced the Chapter 11 Proceedings; and (ii) a certified copy of the Foreign Representation Order authorizing the Applicant to act as the ModSpace Group’s foreign representative in these proceedings, as required by Section 46(2) of the CCAA.

CCAA, s. 46(2); Orlofsky Affidavit, Exhibits “A” and “C”.

82. It is accordingly submitted that the Chapter 11 Proceeding ought to be recognized by this Court as a “foreign proceeding” as defined in s. 45(1) of the CCAA.

CCAA, s. 45(1).



**(ii) *Modular Space Holdings is a “Foreign Representative”***

83. The term “foreign representative” is defined under s. 45(1) of the CCAA as a person or body who is authorized in a foreign proceeding in respect of a debtor company to act as a representative in respect of the foreign proceeding.

CCAA, s. 45(1).

84. Modular Space Holdings has been duly authorized by the US Court to make this application and to act as a foreign representative of the ModSpace Group in these CCAA proceedings. It is accordingly submitted that Modular Space Corporation ought to be recognized by this Court as a “foreign representative” as defined in s. 45(1) of the CCAA.

Orlofsky Affidavit, Exhibit “C”.

**(iii) *The Chapter 11 Proceedings are a “Foreign Main Proceeding”***

85. If the court grants an order under subsection 47(1) of the CCAA, subsection 47(2) of the CCAA requires that the Court specify whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.” If a foreign proceeding is recognized as a “foreign main proceeding” then there is an automatic stay against any proceedings concerning the debtors’ property, debts, liabilities and obligations in Canada by operation of s. 48(1) of the CCAA.

CCAA, ss. 47(1), 47(2) and 48(1).

86. Subsection 45(1) of the CCAA provides that a “foreign main proceeding” is a foreign proceeding in a jurisdiction where the debtor company has the “centre of its main interests” (“**COMI**”).

CCAA, s. 45(2).

87. While the CCAA does not define what constitutes a debtor company's COMI, pursuant to subsection 45(2), a debtor company's COMI is presumed to be the location of its registered office, in the absence of proof to the contrary.

CCAA, s. 45(2).

88. However, a debtor's COMI is a substantive - not technical - determination and the statutory presumption may be rebutted by evidence of the operational realities of a debtor. A determination of a debtor's COMI will necessarily depend upon the particular facts and circumstances of each case.

*Digital Domain*, ¶24, BOA, Tab 2.

89. Justice Morawetz (as he then was) commented on the COMI analysis as follows in *Re Lightsquared*:

“In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.”

*Lightsquared LP (Re)*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]), ¶26, BOA, Tab 3.

90. This Court has accepted the following test in determining whether the statutory presumption of a debtor company's COMI has been rebutted:

“In circumstances where it is necessary to go beyond the s. 45(2) registered office presumption [...] the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interest. The factors are:

- (i) the location is readily ascertainable by creditors;
- (ii) the location is one in which the debtor's principal assets or operations are found; and
- (iii) the location is where the management of the debtor takes place.”

*Digital Domain*, ¶23, BOA, Tab 2, citing *Lightsquared LP (Re)*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]) ¶25, BOA, Tab 3.

91. In addition to the above “principal” factors, this court has made reference to the following factors in conducting the COMI analysis:
- (a) the location where corporate decisions are made;
  - (b) the location of employee administrations, including human resource functions;
  - (c) the location of the company’s marketing and communication functions;
  - (d) whether the enterprise is managed on a consolidated basis;
  - (e) the extent of integration of an enterprise’s international operations;
  - (f) the centre of an enterprise’s corporate, banking, strategic and management functions;
  - (g) the existence of shared management within entities and in an organization;
  - (h) the location where cash management and accounting functions are overseen;
  - (i) the location where pricing decisions and new business development initiatives are created; and
  - (j) the seat of an enterprise’s treasury management functions, including management of accounts receivable and accounts payable.

*Digital Domain*, ¶21, BOA, Tab 2, citing *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115 (B.C. S.C. [In Chambers]) ¶7, BOA, Tab 4.

92. The Applicant submits that the COMI for each member of the ModSpace Group, including ModSpace Canada, is the United States.
93. With respect to the US Debtors, each has its registered office in the United States and there is no evidence to rebut the presumption (and in fact, the evidence shows that the US Debtors have no presence or connection to Canada, other than their relationship with

ModSpace Canada). Accordingly, it is submitted that the COMI for the US Debtors is the United States.

94. With respect to Modspace Canada, the Applicant submits that the presumptive COMI on the basis of ModSpace Canada's registered office is rebutted. The evidence shows that ModSpace Canada's operations are intertwined with the ModSpace Group, and that ModSpace Canada's operations are directed from the ModSpace Group headquarters in Berwyn, Pennsylvania.
95. In particular, the Applicant submits that the following demonstrates that ModSpace Canada's COMI is the United States:
  - (a) The ModSpace Group, including ModSpace Canada, is fully integrated and is operated on a consolidated basis, with all corporate and other major decision making occurring in Berwyn, Pennsylvania, which is a location easily identifiable by creditors;
  - (b) ModSpace Canada is a wholly owned subsidiary of Modular Space Corporation. MSC oversees the operations of ModSpace Canada and provides significant direction to and oversight of ModSpace Canada's operations and assets.
  - (c) The ModSpace Group members share a Chief Executive Officer, Chief Financial Officer and General Counsel, and all such executives are residents of the United States and are based in Berwyn, Pennsylvania;
  - (d) All of the senior executives of the ModSpace Group, including ModSpace Canada, are residents of the United States, except for the SVP, who reports to and takes direction from the ModSpace Group Chief Executive Officers and Chief Financial Officer, both of whom are based in Berwyn, Pennsylvania;
  - (e) Although ModSpace Canada has regional sales and administrative staff, ModSpace Canada has limited management personnel and all of ModSpace Canada's management personnel report directly to, and take direction from, the ModSpace Group headquarters in Berwyn, Pennsylvania;

- (f) The decision making power of ModSpace Canada and its personnel is limited and material decisions regarding ModSpace Canada and its operations are directed by the ModSpace Group headquarters in Berwyn, Pennsylvania, including all decisions with respect to administration, finances, treasury, borrowing, price setting, strategic planning, management, communication and accounting;
- (g) Most human resources (“HR”) decisions for ModSpace Canada are made in Berwyn, Pennsylvania or require approval from the Vice President of Human Resources of MSC, who is based in Berwyn, Pennsylvania;
- (h) The collection of ModSpace Canada’s accounts receivable is managed and directed from the ModSpace Group’s head office in Berwyn, Pennsylvania, and the ModSpace Group is in the process of moving ModSpace Canada’s accounts payable to this location as well;
- (i) All members of the ModSpace Group, including ModSpace Canada, share a cash management system that is overseen by the ModSpace Group’s Chief Financial Officer, who is based in Berwyn, Pennsylvania;
- (j) All information technology (“IT”) services for ModSpace Canada are provided from the ModSpace Group’s head office in Berwyn, Pennsylvania. ModSpace Canada has no IT personnel or employees outside the IT team based in Berwyn, Pennsylvania.
- (k) The ModSpace Group has a global credit facility with U.S. lenders that is secured by, *inter alia*, a pledge of the shares of ModSpace Canada;
- (l) The substantive majority (numerically and by value) of secured and unsecured creditors having known claims against ModSpace Canada are located in the United States;
- (m) ModSpace Canada is wholly dependent on the Applicant and other US Debtors for all or substantially all of its funding requirements;

- (n) The marketing of the ModSpace Group, including ModSpace Canada, is directed by an eight-person marketing team based in Berwyn, Pennsylvania that is responsible for promoting the ModSpace Group brand, generating sales leads and supporting sales efforts by producing point-of-sale materials; and
  - (o) Correspondence with creditors of the ModSpace Group, including ModSpace Canada, is through the ModSpace Group headquarters in Berwyn, Pennsylvania.
96. ModSpace Canada has employees and assets within Canada, but the evidence demonstrates that the management of the Canadian employees and assets is fully integrated with the larger ModSpace Group, and that all fundamental decision-making functions are based in the United States.
97. Further, the ModSpace Group has enterprise-wide financing, and a significant creditor of the ModSpace Group is common to all members of the group as the ABL Facility is a global credit facility for the ModSpace Group, including ModSpace Canada.
98. In summary, the ModSpace Group is a highly-integrated corporate group which is centrally managed out of the United States. The evidence indicates that the seat of the ModSpace Group's business, including the businesses operated by ModSpace Canada, is in Berwyn, Pennsylvania and that ModSpace Canada is simply not a stand-alone company. Applicant submits that the above factual elements support the finding that the COMI of ModSpace Canada's the United States.
99. Accordingly, the Applicant submits that the COMI of all of the ModSpace Group, including ModSpace Canada, is the United States and that the Chapter 11 Proceedings should be recognized by this Court as a "foreign main proceeding."
- (iv) The Additional Relief Sought in the Initial Recognition Order Should be Granted*
100. Section 48(1) of the CCAA provides that on the making of an order recognizing a foreign proceeding that is specified by this Court to be a "foreign main proceeding", this 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.

CCAA, s. 48(1).

101. The Initial Recognition Order sought by the Applicant is based on this Court's Model CCAA Initial Recognition Order (Foreign Main Proceeding) and provides for all of the relief required by section 48 of the CCAA.

CCAA, s. 48.

102. The Initial Recognition Order is not inconsistent with any order that may be made under the CCAA.

CCAA, s. 48(2).

**B. The Supplemental Recognition Order**

*(i) Recognition of the First Day Orders*

103. In addition to the automatic relief provided in section 48, section 49 of the CCAA provides that the court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of a debtor company's property or the interests of a creditor or creditors. Section 50 of the CCAA further provides that an order made under

Part IV of the CCAA, including pursuant to section 49, may be made on any terms and conditions that the court considers appropriate.

CCAA, ss. 48, 49 and 50.

104. The Supplemental Recognition Order sought by the Applicant is based upon this Court's Model CCAA Supplemental Recognition Order (Foreign Main Proceeding).
105. Paragraph 4 of the Supplemental Recognition Order seeks to recognize certain First Day Orders (in certain circumstances granted initially on an interim basis and thereafter on a final basis) that were obtained by the ModSpace Group from the US Court, set out in paragraph 10 of this factum.
106. The First Day Orders were obtained by the ModSpace Group to facilitate their restructuring efforts in the Chapter 11 Proceedings by, among other things, minimizing the adverse effects of the Chapter 11 Proceedings on their business, and preserving and maximizing the potential value of the ModSpace Group's assets for the benefit of their creditors and other stakeholders.
107. The First Day Orders are not inconsistent with any order that may be granted under the CCAA. Canadian courts have regularly exercised their jurisdiction under sections 49 and 50 of the CCAA to recognize chapter 11 bankruptcy orders with similar effect to the First Day Orders to maintain the status quo and protect the assets of ModSpace Group while permitting them to continue operating their business as usual in Canada.

See, for example, *Horseshoe Holdings Corp. (Re)*, 2016 ONSC 958, ¶¶14, 42, BOA, Tab 5; *Massachusetts Elephant & Castle Group Inc. (Re)*, 2011 ONSC 4201, ¶¶36, 40, BOA, Tab 6.

108. The Applicant requests that this court recognize the First Day Orders set out in paragraph 10 of this factum.

**(ii) The Information Officer**

109. Section 53(b) of the CCAA requires the foreign representative to publish a notice of the recognition of the Chapter 11 Proceedings by this Court in one or more Canadian newspapers.



To the extent that additional Canadian creditors of the Canadian Debtor are identified through the statutory notice process set out in the Initial Recognition Order, they will be reported on to this Court and addressed on an as needed basis.

CCAA, s. 53(b).

110. The Applicant submits that the appointment of A&M as Information Officer will help facilitate these proceedings and the dissemination of information concerning developments in the Chapter 11 Proceedings to affected creditors, stakeholders and this Court.

Orlofsky Affidavit, ¶146.

111. The proposed role of A&M as Information Officer is consistent with the terms of appointment of information officers in other recent recognition proceedings under the CCAA in Ontario.

Supplemental Order in the Application of Hartford Computer Hardware Inc. dated December 21, 2011 (Ont. S.C.J.) (without schedules), BOA, Tab 7.

Supplemental Order in the Application of Massachusetts Elephant & Castle Group Inc. dated July 4, 2011 (Ont. S.C.J.) (without schedules), BOA, Tab 8.

**(iii) *DIP Lender's Charge***

112. Section 11.2(1) of the CCAA provides as follows:

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

CCAA, s. 11.2(1).

113. However, this court has recognized DIP financing orders of a foreign court, particularly those made in a foreign main proceeding, pursuant to the broad powers provided to the court in section 49 of the CCAA.

*Hartford Computer Hardware Inc. (Re)*, 2012 ONSC 964, ¶¶ 11, 15 (Ont. S.C.J. [Commercial List]) [*Hartford*], BOA, Tab 9.

*Xinergy Ltd. (Re)*, 2015 ONSC 2692, ¶20 (Ont. S.C.J. [Commercial List]) [*Xinergy*], BOA, Tab 10.

114. Section 49 of the CCAA provides that the court may make any order that it considers appropriate if the court is satisfied that the order is necessary for the protection of the debtor company's property, or the interests of creditors. Without the Supplemental Order recognizing the DIP Financing Order and the DIP Lender's Charge, the ModSpace Group will be unable to successfully restructure on a transnational basis and emerge from the Chapter 11 Proceedings as a going concern. Further, the DIP Lenders will not advance funds under the DIP Financing without a priority charge to secure repayment of the DIP Financing.

CCAA, s. 49.

Orlofsky Affidavit, ¶145.

115. In recognizing orders granted pursuant to foreign main proceedings, this court has considered whether granting such an order would materially prejudice Canadian interests or creditors. The Canadian creditors will not suffer any material prejudice should the court grant the Supplemental Recognition Order and nothing is being done that is contrary to the applicable provisions of the CCAA.

*Xinergy*, ¶21, BOA, Tab 10.

*Hartford*, ¶13, BOA, Tab 11.

116. This court has previously recognized the use of post-petition receipts to be used to pay pre-petition debt. In *Performance Sports*, Newbould J. held that the DIP facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Similar to the case at bar, in *Performance Sports*, without DIP financing, the debtors would not have had sufficient cash on hand or generated sufficient receipts to continue operating

their business and pursue a post-petition sales process. Further, the ModSpace Group will only use post-petition receipts generated by pre-petition collateral to pay pre-petition obligations and therefore, the DIP Lenders are in no better position with respect to the priority of their pre-petition debt relative to other creditors.

*Re Performance Sports Group Ltd.*, 2016 ONSC 6800 (Ont. S.C.J. [Commercial List]) [*Performance Sports*], ¶¶21, 22, BOA, Tab 11.

117. A significant factor that this court has taken into consideration is whether the US Court granted the DIP Financing Order. This is consistent with the court's recognition of the principles of comity provided by section 44 of Part IV of the CCAA. As such, given that the DIP Financing Order was granted in the U.S., this court should recognize the order.

*Xinergy*, ¶¶19, 21, BOA, Tab 10.

*Hartford*, ¶14, BOA, Tab 9.

CCAA, s. 44.

118. The order sought with respect to the DIP Lender's Charge is not contrary to public policy. Section 61(2) of the CCAA provides that nothing in Part IV of the CCAA prevents the court from refusing to do something that would be contrary to public policy. This court has in the past concluded that an order relating to a DIP charge, similar in nature to the DIP Financing Order, is not contrary to public policy.

CCAA, s. 61(2).

*Hartford*, ¶16, BOA, Tab 9.

**PART V - RELIEF REQUESTED**

119. The Applicant requests that this Honourable Court grant the Initial and Supplemental Recognition Orders in the form included at Tabs 3 and 4 of the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of December, 2016.**



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Roger Jaipargas / Evita 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. *Babcock & Wilcox Canada Ltd. (Re)*, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List])
2. Digital Domain Media Group Inc. (Re), 2012 BCSC 1565 (B.C. S.C.)
3. *Lightsquared LP (Re)*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List])
4. *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115 (B.C. S.C. [In Chambers])
5. *Horseshoe Holdings Corp. (Re)*, 2016 ONSC 958 (Ont. S.C.J. [Commercial List])
6. *Massachusetts Elephant & Castle Group Inc. (Re)*, 2011 ONSC 4201 (Ont. S.C.J. [Commercial List])
7. Supplemental Order in the Application of Hartford Computer Hardware Inc. dated December 21, 2011 (Ont. S.C.J. [Commercial List]) (without schedules)
8. Supplemental Order in the Application of Massachusetts Elephant & Castle Group Inc. dated July 4, 2011 (Ont. S.C.J. [Commercial List]) (without schedules)
9. *Hartford Computer Hardware Inc. (Re)*, 2012 ONSC 964 (Ont. S.C.J. [Commercial List])
10. *Xinergy Ltd. (Re)*, 2015 ONSC 2692 (Ont. S.C.J. [Commercial List])
11. *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 (Ont. 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.

## **Obligations of foreign representative**

**53.** If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- (a) without delay, inform the court of
  - (i) any substantial change in the status of the recognized foreign proceeding,
  - (ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and
  - (iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

- (b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

### **Multiple Proceedings**

#### **Concurrent proceedings**

54. If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

#### **Multiple foreign proceedings**

55. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

#### **Multiple foreign proceedings**

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

### **Miscellaneous Provisions**

#### **Authorization to act as representative of proceeding under this Act**

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

#### **Foreign representative status**

57. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

### **Foreign proceeding appeal**

**58.** A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

### **Presumption of insolvency**

**59.** For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

### **Credit for recovery in other jurisdictions**

**60.** (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

- (a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and
- (b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

### Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

### **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

**ONTARIO**

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

PROCEEDINGS COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT,  
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