

**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
(January 25, 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 certain orders 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 “**US 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 “**US Proceedings**”).
5. On December 22, 2016, the Honourable 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, the Honourable Judge Carey granted various orders in the US Proceedings (the “**Second Day Orders**”), the details of which will be reviewed below.
7. MSC has brought this motion to seek an order for the following:
 - (a) if necessary, 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 January 25, 2017;
 - (b) approving the Preliminary Report of Alvarez & Marsal Canada Inc. (“**A&M**”), in its capacity as the proposed information officer of the Debtors dated December 24, 2016 (the “**Preliminary Report**”) and approving the activities of A&M as described in the Preliminary Report;
 - (c) approving the First Report of A&M in its capacity as the Court-appointed information officer (the “**Information Officer**”) dated January 20, 2017 (the

“**First Report**”) and approving the activities of A&M as described in the First Report; and

- (d) recognizing and enforcing a final order (i) approving post-petition financing (the “**DIP Financing**”); (ii) granting liens and super-priority administrative status to the DIP Financing expenses; (iii) authorizing use of the DIP Financing proceeds to pay certain US pre-filing obligations; (iv) granting adequate protection to certain of the Debtors’ pre-filing secured creditors (the “**Final DIP Order**”);
- (e) recognizing and enforcing an order authorizing the Debtors’ assumption of the restructuring support agreement dated as of December 20, 2016 (the “**RSA Order**”);
- (f) recognizing and enforcing an order approving the Debtors’ entry into and performance under a stock purchase and backstop agreement dated as of December 28, 2016 and authorizing them to pay certain fees and expenses in connection with that agreement (the “**SPBA Order**”);
- (g) recognizing and enforcing a final order authorizing the Debtors to pay pre-Petition wages, compensation and employee benefits (the “**Final Wages Order**”);
- (h) recognizing and enforcing a final order authorizing, but not directing, the Debtors to maintain their existing bank accounts, cash management system and authorizing the continuation of (and administrative expense priority status of) intercompany transactions (the “**Final Cash Management Order**”);
- (i) recognizing and enforcing a final order with respect to utility providers: (i) approving the Debtors’ 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 “**Final Utilities Order**”);

- (j) recognizing and enforcing a final order establishing notification procedures and approving restrictions on certain transfers of or claims for worthlessness with respect to equity securities (the “**Final NOL Order**”); and
- (k) recognizing and enforcing an order authorizing the Debtors to employ and pay professionals in the ordinary course of business, *nunc pro tunc*, to December 21, 2016 (the “**OCP Order**”).

PART II - FACTS

8. The ModSpace Group has reached an agreement with its primary secured creditors for a pre-packaged plan (the “**Plan**”) that has been filed in the United States and is expected to be implemented in the proceedings before the United States Bankruptcy Court for the District of Delaware.

Affidavit of David Orlofsky sworn on January 20, 2017 at ¶3 [*Second Orlofsky Affidavit*].

9. The order sought by MSC is set out at paragraph 7 of this factum. The US Court granted various additional Second Day Orders, which MSC is not seeking the recognition of in Canada, authorizing but not directing, the Debtors’ retention and payment of professionals used in the ordinary course of business, *nunc pro tunc*, to December 21, 2016, including the following:
- (a) an order authorizing the Debtors’ engagement of Cleary Gottlieb Steen & Hamilton LLP as US counsel for the ModSpace Group, *nunc pro tunc*, to December 21, 2016 (the “**Cleary Retention Order**”);
 - (b) an order authorizing the Debtors’ engagement of Young Conaway Stargatt & Taylor LLP as US co-counsel for the ModSpace Group, *nunc pro tunc*, to December 21, 2016 (the “**Young Conaway Retention Order**”);
 - (c) an order authorizing the Debtors’ engagement of Borden Ladner Gervais LLP as Canadian counsel for the ModSpace Group, *nunc pro tunc*, to December 21, 2016 (the “**BLG Retention Order**”);

- (d) an order authorizing the Debtors' engagement of Zolfo Cooper LLC as bankruptcy consultants and special financial advisors to the ModSpace Group, nunc pro tunc, to December 21, 2016 (the "**Zolfo Retention Order**");
- (e) an order authorizing the Debtors' engagement of Lazard Middle Market LLC and Larzard Freres & Co LLC as investment bankers to the ModSpace Group, nunc pro tunc, to December 21, 2016 (the "**Lazard Retention Order**"); and
- (f) an order authorizing the Debtors' engagement of Kurtzman Carson Consultants LLC as administrative advisor for the ModSpace Group, nunc pro tunc, to December 21, 2016 (the "**KCC Retention Order**" and, together with the Cleary Retention Order, the Young Conaway Retention Order, the BLG Retention Order, the Zolfo Retention Order and the Lazard Retention Order, the "**Retention Orders**").

Second Orlofsky Affidavit at ¶10.

The Final DIP Order

- 10. The Final DIP Order grants on a final basis substantially the same relief granted on an interim basis in the DIP Financing Order (as defined in the affidavit of David Orlofsky sworn on December 23, 2016 (the "**First Orlofsky Affidavit**")).

Second Orlofsky Affidavit at ¶11.

- 11. Pursuant to the Final DIP Order:
 - (a) the US Debtors were authorized to borrow up to US\$568,000,000, subject to borrowing base and availability reserves, pursuant to a US revolving loan facility;
 - (b) ModSpace Canada was authorized to borrow up to US\$200,000,000, subject to borrowing base and availability reserves, pursuant to a Canadian revolving loan facility; and
 - (c) the US Debtors were authorized to borrow under a US term loan in the amount of the unpaid principal balance under the pre-December 21, 2016 ABL Facility owed

to the U.S. Term Lender (as both terms are defined in the interim order made by the US Court on December 22, 2016 approving post-Petition financing) pursuant to a US term loan in the amount of up to US\$25,000,000;

(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**”).

Second Orlofsky Affidavit at ¶12.

12. The DIP Financing is being provided by a syndicate of lenders (the “**DIP Lenders**”) pursuant to the DIP Financing Documents. The DIP Lenders consist of the syndicate of lenders that provided the ModSpace Group with its pre-Petition financing.

Second Orlofsky Affidavit at ¶13.

13. Pursuant to the DIP Financing Documents, and consistent with the pre-Petition financing terms, the US Debtors guarantee the obligations of ModSpace Canada under the DIP Financing Documents, but ModSpace Canada does not guarantee 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.

Second Orlofsky Affidavit at ¶14.

14. 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 certain other obligations and liabilities of the ModSpace Group.

Second Orlofsky Affidavit at ¶15.

15. The Final DIP Order authorizes the US Debtors to use advances under the DIP Financing to repay pre-Petition amounts owed by them to the pre-Petition US ABL Lenders (as defined in the DIP Financing Documents). However, ModSpace Canada is not authorized to use advances under the DIP Financing to repay pre-Petition amounts owed by it. The

Final DIP Order permits ModSpace Canada to use certain of its Cash Collateral (as that term is defined in the Final DIP Order) to repay pre-Petition amounts owed by it to the pre-Petition Canadian ABL Lenders (as defined in the DIP Financing Documents). The DIP Financing Documents provide that proceeds of Accounts or Rental Equipment (as each is defined in the DIP Financing Documents) of ModSpace Canada shall first be applied as set out in the Final DIP 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.

Second Orlofsky Affidavit at ¶16.

16. 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 of the advance 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” is selected). The ModSpace Canada portion of the DIP Financing funded in US dollars will incur interest on the unpaid principal from the date of the advance 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” is selected). If an “Event of Default” (as defined in the DIP Financing Documents) occurs under the DIP Financing Documents, the interest rate is increased by 2% over the rate that would otherwise apply.

Second Orlofsky Affidavit at ¶17.

17. Since the Plan is part of a pre-packaged restructuring, the DIP Lenders are providing a robust financing package, including the DIP Financing 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 same are reasonable and in line with the market.

Second Orlofsky Affidavit at ¶19.

18. 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 existing 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 existing lenders opposing priming charges). Further, this alternative structure did not include exit financing.

Second Orlofsky Affidavit at ¶20.

19. 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 an ABL facility provides 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.

Second Orlofsky Affidavit at ¶21.

20. Finally, 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, based on the terms and prices obtained in the course of those discussions, the pricing and cost of the DIP Financing is reasonable and in line with market pricing and terms.

Second Orlofsky Affidavit at ¶22.

21. The US Court was satisfied that the Final DIP 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 Plan.

Second Orlofsky Affidavit at ¶23.

22. 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.

Second Orlofsky Affidavit at ¶24.

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

Second Orlofsky Affidavit at ¶25.

24. MSC seeks recognition of the Final DIP 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 Plan. The DIP Financing is an important component of the pre-packaged restructuring agreed upon by the ModSpace Group and its primary financial stakeholders.

Second Orlofsky Affidavit at ¶26.

The RSA Order

25. 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 VI, LLC, and its affiliates (collectively, "Calera") entered into a restructuring support agreement (the "**RSA**") in support of the Plan.

Second Orlofsky Affidavit at ¶27.

26. 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 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 to the adequate protection in the DIP Financing Documents and to the Final DIP Order.

Second Orlofsky Affidavit at ¶28.

27. 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. Based on the RSA, the ModSpace Group will have sufficient members of each class entitled to vote on the Plan to secure those classes accepting the Plan.

Second Orlofsky Affidavit at ¶29.

28. Pursuant to the RSA Order, the ModSpace Group and the other parties to the RSA are authorized to perform under the RSA, including taking all actions, executing all documents and making all payments that may be necessary to give effect to the RSA and the relief granted in the RSA Order.

Second Orlofsky Affidavit at ¶30.

29. In making the RSA Order, the US Court determined that the RSA represented a valid exercise of the ModSpace Group's business judgment.

Second Orlofsky Affidavit at ¶31.

The SPBA Order

30. On December 28, 2016, the Debtors entered into a stock purchase and backstop agreement with certain noteholders (the "SPBA").

Second Orlofsky Affidavit at ¶32.

31. As described in greater detail in the First Orlofsky Affidavit, the Plan includes a rights offering (the "**Rights Offering**") expected to raise approximately US \$90 million. In the event that the Rights Offering is under-subscribed and it does not raise sufficient funds, the SPBA ensures the ModSpace Group will have the liquidity necessary to implement the Plan.

Second Orlofsky Affidavit at ¶33.

32. In particular, under the SPBA, if a portion of the Rights Offering is not fully subscribed, certain noteholders have agreed to purchase equity interests in the reorganized entity. In exchange for this commitment, these noteholders will receive a commitment premium

and reimbursement of expenses. The form of the commitment premium is equity in the reorganized entity equal to 5% of the aggregate amount of the total equity interests of the reorganized entity.

Second Orlofsky Affidavit at ¶34.

33. The ModSpace Group determined that the SPBA was reasonable and necessary to ensure it was able to implement the Plan.

Second Orlofsky Affidavit at ¶35.

34. Pursuant to the SPBA Order, the US Court approved the Debtors entering into the SPBA and authorized them to execute, deliver and implement the SPBA, including performing the obligations contemplated under the SPBA and paying the costs and expenses associated with the SPBA.

Second Orlofsky Affidavit at ¶36.

Final Wages Order

35. The Final Wages Order grants on a final basis substantially the same relief granted on an interim basis in the Wages Order (as defined in the First Orlofsky Affidavit).

Second Orlofsky Affidavit at ¶37.

36. Pursuant to the Final Wages Order, the US Court authorized the ModSpace Group to, *inter alia*, pay pre-Petition wages and other amounts owed to its employees, to continue all employee benefit programs and to pay all withholding obligations as such obligations are due.

Second Orlofsky Affidavit at ¶38.

37. In granting the Final Wages Order, the US Court was satisfied that failure to make payments for these obligations to the ModSpace Group employees (and for withholdings related to those employees) would threaten the ModSpace Group's ability to operate and its efforts to restructure and to implement the Plan. The US Court was further satisfied that authorizing payments of these amounts was a sound exercise of the ModSpace Group's business judgment.

Second Orlofsky Affidavit at ¶39.

38. MSC seeks recognition of the Final Wages Order from this Honourable Court to ensure that all ModSpace Group employees and government entities receiving withholdings are treated consistently.

Second Orlofsky Affidavit at ¶40.

Final Cash Management Order

39. The Final Cash Management Order grants on a final basis substantially the same relief granted on an interim basis in the Cash Management Order (as defined in the First Orlofsky Affidavit).

Second Orlofsky Affidavit at ¶41.

40. Pursuant to the Final Cash Management Order, the US Court authorized the ModSpace Group to continue to operate its existing cash management system (including maintaining existing bank accounts), to maintain its existing business forms (such as cheques), and to continue to perform intercompany transactions consistent with past practice.

Second Orlofsky Affidavit at ¶42.

41. In granting the Final Cash Management Order, the US Court was satisfied that the existing system was essential to the ModSpace Group's ongoing operations and restructuring efforts and that there would be no prejudice to the ModSpace Group continuing to use pre-printed business forms without modification to identify the members of the ModSpace Group as debtors in possession.

Second Orlofsky Affidavit at ¶43.

42. The US Court was also satisfied that the intercompany transactions should continue because the system was largely automated and if the intercompany transactions were discontinued, the existing cash management system and related administrative controls would be disrupted. In making the Final Cash Management Order, the US Court was further satisfied that disrupting the intercompany transactions would cause irreparable harm to the ModSpace Group. Particulars of such intercompany transactions involving ModSpace Canada are set out below.

Second Orlofsky Affidavit at ¶44.

43. MSC seeks recognition of the Final Cash Management Order from this Honourable Court to ensure that the ModSpace Group's finances, which are highly integrated, can continue in the ordinary course and to ensure the efficient administration of the ModSpace Group as it works to restructure and implement the Plan.

Second Orlofsky Affidavit at ¶45.

Final Utilities Order

44. The Final Utilities Order grants on a final basis substantially the same relief granted on an interim basis in the Utilities Order (as defined in the First Orlofsky Affidavit). The Final Utilities Order and the Utilities Order includes 39 Canadian utilities providers (listed at Schedule 1 to the Final Utilities Order).

Second Orlofsky Affidavit at ¶46.

45. Pursuant to the Final Utilities Order:
- (a) the US Court approved adequate assurance of payment for certain utility providers, establishing procedures for resolving claims by utility providers and prohibiting the utility providers from terminating service solely on the basis of the commencement of the US Proceedings; and
 - (b) the ModSpace Group has created a segregated account for utilities for the benefit of all of the utility companies listed on the Utilities Order (including the Canadian providers).

Second Orlofsky Affidavit at ¶47.

46. In making the Final Utilities Order, the US Court was satisfied that continued service was reasonable, appropriate and necessary to maintain the ModSpace Group's operations while it continues its efforts to restructure and to implement the Plan.

Second Orlofsky Affidavit at ¶48.

47. MSC seeks recognition of the Final Utilities Order from this Honourable Court and submits that such recognition is necessary to ensure consistency between these proceedings and the US Proceedings. MSC also seeks recognition of the Final Utilities Order from this Honourable Court to ensure Canadian utility providers are treated consistently with the US utility providers.

Second Orlofsky Affidavit at ¶49.

Final NOL Order

48. The Final NOL Order grants on a final basis substantially the same relief granted on an interim basis in the NOL Order (as defined in the First Orlofsky Affidavit).

Second Orlofsky Affidavit at ¶50.

49. Pursuant to the Final NOL Order, the US Court, inter alia, established notification procedures and approved restrictions on certain transfers of (or declarations of worthlessness for US federal or state tax purposes with respect to) equity securities of Modular Space Holdings, Inc. (“MSH”). In particular,
- (a) each “Substantial Equityholder”, except as set out in the NOL Order, must serve MSH with a notice setting out the amount of stock of which it has tax ownership;
 - (b) any entity that is not, as of the Filing Date, a Substantial Equityholder that wishes to purchase stock must deliver a notice regarding the proposed acquisition;
 - (c) any Substantial Equityholder that wishes to purchase additional stock must deliver a notice regarding the proposed acquisition;
 - (d) any Substantial Equityholder that wishes to sell stock must deliver a notice regarding the proposed sale; and
 - (e) if the ModSpace Group does not file an objection to the proposed acquisitions or transfers set out at subparagraphs (b), (c) and (d) above within 21 days, the transaction may proceed. If the ModSpace Group files an objection, the transaction will be subject to approval from the US Court.

Second Orlofsky Affidavit at ¶51.

50. Similarly, parties wishing to make a declaration of worthlessness for tax purposes must deliver notices in accordance with the Final NOL Order, to which the ModSpace Group will have 30 days to object before the declaration of worthlessness can become effective. If the ModSpace Group objects, the declaration of worthlessness will not be permitted without further order of the US Court.

Second Orlofsky Affidavit at ¶52.

51. In making the Final NOL Order, the US Court determined that unrestricted trading of the MSH equity securities could limit the ModSpace Group's ability to restructure and to implement the Plan (by limiting the ModSpace's Group's ability to use its tax benefits, including net operating losses) and that, accordingly, establishing procedures and restrictions was reasonable in the circumstances. The restrictions and notification procedures are not an injunction on trading, but rather designed to monitor trading and to allow the ModSpace Group to assess the impact trading may have on its tax attributes.

Second Orlofsky Affidavit at ¶53.

The OCP Order

52. The OCP Order authorizes the Debtors to employ and pay certain professionals in the ordinary course of their business nunc pro tunc to December 21, 2016.

Second Orlofsky Affidavit at ¶54.

53. Pursuant to the OCP Order, the Debtors are authorized to retain, pay compensation to, and reimburse the expenses of certain professionals ("**OCPs**"), including three Canadian law firms (listed at Exhibit I of the OCP Order), who provide services to the Debtors in the ordinary course of business without requiring those professionals to file applications with the US Court.

Second Orlofsky Affidavit at ¶55.

54. The OCP Order sets out two classifications of OCPs, approving a fee cap of US \$50,000 per month over a rolling three-month period for "**Tier One OCPs**" and a fee cap of US \$100,000 per month on average over a rolling three-month period for "**Tier Two OCPs**".

The OCP Order also sets out the method through which the Debtors can retain additional OCPs not specified in Exhibit I to the OCP Order. The three Canadian OCPs are Tier One OCPs.

Second Orlofsky Affidavit at ¶56.

55. In granting the OCP Order, the US Court was satisfied that granting the relief sought therein was in the best interests of the Debtors, their estates, their creditors and the parties in interest.

Second Orlofsky Affidavit at ¶57.

56. MSC seeks recognition of the OCP Order from this Honourable Court and submits that such recognition is necessary to ensure that the services provided by the Debtors' Canadian OCPs can continue on the same uninterrupted basis, on the same retention and payment policies as the Debtors' US OCPs.

Second Orlofsky Affidavit at ¶58.

Intercompany Transactions

57. As set out in further detail in the First Orlofsky Affidavit, ModSpace Canada benefits from services provided by MSC, including guaranteeing ModSpace Canada's obligations under the ABL Facility (as defined in the First Day Declaration). In exchange for these services, ModSpace Canada pays MSC a monthly management fee and guarantor fee (the "**Management Fee**") of approximately US\$600,000.

Second Orlofsky Affidavit at ¶59.

58. As noted in the First Orlofsky Affidavit, the Management Fee has continued in the ordinary course. ModSpace Canada expects to pay the Management Fee in the coming days.

Second Orlofsky Affidavit at ¶60.

PART III - THE ISSUE

59. The issue on this motion is as follows:

- (a) Should this Court grant the Order sought by MSC pursuant to section 49 of the CCAA recognizing the Second Day Orders?

PART IV - THE LAW

A. Part IV of the CCAA

60. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and to promote the fair and efficient administration of cross-border insolvencies which also protects the interests of debtors, creditors and other interested persons.

Horsehead Holding Corp., Re, 2016 ONSC 958 at ¶15, BOA, Tab 1
[*Horsehead*]; *CCAA, supra*, at s. 44.

61. In the context of Part IV of the CCAA, the court is granted the authority to apply any legal or equitable rules necessary, provided that they are not inconsistent with the provisions of the CCAA.

CCAA, supra, at s. 61(1).

B. Recognition of the Second Day Orders

62. 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 that the order is in 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. Further, once an order recognizing a foreign proceeding is made, the court is required to cooperate, to the maximum extent possible with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA or which would raise concerns regarding public policy.

CCAA, supra, at ss. 49, 50, 52(1) and 61(2).

63. MSC seeks the recognition of certain Second Day Orders that were obtained by the ModSpace Group from the US Court.
64. The Second 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 Second Day Orders. The recognition by this court of the Second Day Orders will assist in maintaining the status quo and protect the assets of the ModSpace Group while permitting the ModSpace Group to continue operating their business as usual in Canada.

See, for example, Horsehead at ¶¶14, 42; Massachusetts Elephant & Castle Group Inc. (Re), 2011 ONSC 4201 at ¶¶36, 40, BOA, Tab 2.

65. In cross-border insolvencies, Canadian and U.S. courts have made efforts to complement, coordinate and, where appropriate, accommodate the proceedings of the other in order to enable cross-border enterprises to restructure. Comity and cooperation are increasingly important in the bankruptcy context because as internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, resulting in potentially inconsistent orders and decisions and general uncertainty.

Babcock & Wilcox Canada Ltd. (Re), 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) at ¶¶9-10, BOA, Tab 3 [Babcock], citing Taylor v Dow Corning Australia Pty. Ltd. (December 19, 1997), Dco. 8438/95 (Australia Vic. Sup. Ct.)

66. The Second 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.
67. When a court considers whether it will recognize a foreign order, including an order made in a Chapter 11 proceeding, it considers the following:
 - (a) the principles of comity and the need to encourage cooperation between courts of various jurisdictions;

- (b) the need to accord respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;
- (c) whether stakeholders will be treated equitably, and in particular whether recognition will ensure that, to the extent reasonably possible, stakeholders are treated equally, regardless of the jurisdiction to which they reside;
- (d) the importance of promoting plans that allow the enterprise to reorganize globally, especially where there is an established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of stakeholders and does not detract from the net benefits that may be available from alternative approaches;
- (e) that the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise;
- (f) that where one jurisdiction has an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and
- (g) that all affected stakeholders receive effective notice and have an opportunity to return to court to review the granted order.

Babcock at ¶21; *Xerium Technologies Inc., Re*, 2010 ONSC 3974 at ¶¶26-27, BOA, Tab 4.

68. MSC submits that the Second Day Orders meet the above requirements, such that it is appropriate that this Honourable Court recognize and give effect to the Second Day Orders. The Second Day Orders were made in good faith and in the interest of the ModSpace Group's creditors and equity holders. None of the Second Day Orders breach

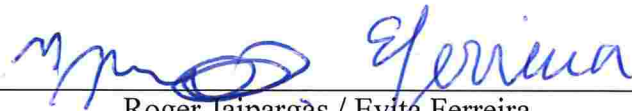
any applicable Canadian law. MSC submits that recognition of the Second Day Orders is necessary to ensure that the purposes of the CCAA are satisfied and the ModSpace Group has the best opportunity to restructure its affairs.

69. Accordingly, MSC requests that this court recognize the Second Day Orders.

PART V - RELIEF REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of January, 2017.

A handwritten signature in blue ink, appearing to read "Roger Jaipargàs / Evita Ferreira", is written over a horizontal line.

Roger Jaipargàs / 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. *Horsehead Holding Corp. (Re)*, 2016 ONSC 958 (Ont. S.C.J. [Commercial List])
2. *Massachusetts Elephant & Castle Group Inc. (Re)*, 2011 ONSC 4201 (Ont. S.C.J. [Commercial List])
3. *Babcock & Wilcox Canada Ltd. (Re)*, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List])
4. *Xerium Technologies Inc., Re*, 2010 ONSC 3974 (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 MODULAR SPACE
CORPORATION**
(January 25, 2017)

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