

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED**

**IN THE MATTER OF THE PROPOSAL OF
TECHNI-LITE SYSTEMS INC.
OF THE CITY OF PETERBOROUGH,
IN THE PROVINCE OF ONTARIO**

FACTUM OF THE APPLICANTS
(Returnable April 7, 2017)

March 30, 2017

MINDEN GROSS LLP
Barristers and Solicitors
145 King Street West
Suite 2200
Toronto, ON M5H 4G2

Timothy R. Dunn
LSUC #34249I
Tel: (416) 369-4335
Fax: (416) 864-9223

Rachel Moses
LSUC #42081V
Tel: (416) 369-4115
Fax: (416) 864-9223

Lawyers for the Applicants

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PART I - INTRODUCTION

1. On February 7, 2017, Techni-Lite Systems Inc. (the "**Debtor**") filed a Notice of Intention to Make a Proposal ("**NOI**") under section 50.4(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended (the "**BIA**"). A. Farber & Partners Inc. was named as proposal trustee in connection with the NOI (the "**Proposal Trustee**").
2. This Motion is brought by the Debtor seeking:
 - a) an order (the "**Approval and Vesting Order**") substantially in the form of the draft order attached as Tab 4 of the Motion Record, approving the sale transaction (the "**Transaction**") contemplated by the agreement of purchase and sale (the "**Sale Agreement**") between the Debtor and International Installations Inc. (in such capacity, the "**Purchaser**"), dated March 3, 2017, and vesting in the Purchaser the Debtor's right, title and interest in and to the Purchased Assets (as defined herein),

free and clear of any claims and encumbrances, other than certain permitted encumbrances;

b) an order (the "**Ancillary Order**") substantially in the form of the draft order attached as Tab 6 of the Motion Record:

- i. approving the Proposal Trustee's second report to the Ontario Superior Court of Justice (Commercial List) (the "**Court**") (the "**Second Report**") and the activities of the Proposal Trustee and its counsel;
- ii. approving the fees and disbursements of the Proposal Trustee, its counsel, Jaffe & Peritz LLP, and Techni-Lite's counsel, Minden Gross LLP, to and including March 24, 2017;
- iii. approving the estimated remaining fees and disbursements of the Proposal Trustee, its legal counsel and the Debtor's legal counsel to close the Transaction and complete the administration of the NOI estate (the "**Accrual Amount**");
- iv. such other relief as the Court may deem appropriate.

PART II – THE FACTS

A. BACKGROUND

3. The Debtor was incorporated on October 5, 1988 as 798388 Ontario Inc. and filed articles of amendment to change its name to Techni-Lite Systems Inc., effective August 27, 1999. The Debtor is a manufacturer and distributor of LED-based signage, lighting, displays and fixtures.

The Debtor is based in Peterborough, Ontario and operates out of leased premises located at 300 Millroy Drive, Peterborough, Ontario (the "**Techni-Lite Premises**").

First Report of the Proposal Trustee dated February 21, 2017 ("First Report") at para. 7

4. On August 1, 2015, a related corporation, David Wolfe Integrated Marketing Inc., which is also known as WolfeWorks ("**WolfeWorks**"), amalgamated with the Debtor. The amalgamated entity is Techni-Lite Systems Inc. WolfeWorks operates as a division of the Debtor from premises leased on a month-to-month basis, consisting of a facility located at 205 Peter Street, Port Hope, Ontario (the "**Wolfeworks Premises**"). WolfeWorks manufactures and develops interactive digital displays for LED signage.

First Report at para. 8

5. As at February 21, 2017, the Debtor employs 17 full- and part-time staff. Employee roles include sales representative, accounting clerk, and warehouse operator, among others. The employees of the Debtor are not unionized and the Debtor does not offer a pension plan.

First Report at para. 9

6. On February 28, 2017, the Debtor sought and obtained approval of the Court of a sale process to sell substantially all of the assets of the Debtor, as further described in the First Report of the Proposal Trustee ("**First Report**") (the "**Sale Process**"), which included the Debtor and International entering into the Sale Agreement. The Sale Agreement is a stalking horse bid, which provides a baseline price for the purchase of the Debtor's assets.

Second Report of the Proposal Trustee dated March 31, 2017 (the "Second Report") at para. 2

B. SALE PROCESS

7. The Sale Agreement was executed on March 3, 2017. International is the DIP Lender and first ranking secured creditor of the Debtor.

Affidavit of Bradley H. Nathan dated March 30, 2017 (the "Nathan Affidavit") at paras. 2 and 24

8. The Proposal Trustee gave notice of the Sale Process by distributing an interest solicitation letter to 68 prospective investors and purchasers and by causing notice of the Sale Process to be published in two national newspapers. Upon signing a confidentiality agreement, prospective purchasers gained access to an electronic data room set up by the Proposal Trustee that contained a standard form agreement of purchase and sale and financial and other information related to the Debtor.

Second Report at paras. 18 and 19

9. A total of 10 interested parties were provided access to the electronic data room. The Proposal Trustee worked closely with Techni-Lite to address the due diligence requirements of the interested parties.

Second Report at para. 19; Nathan Affidavit at para. 11

10. The Sales Process timetable provided for a deadline for submission of offers ("**Competing Bids**") of 2:00 p.m. (Toronto Time) on March 28, 2017 (the "**Offer Deadline**").

Second Report at para. 21

11. The Proposal Trustee did not receive any Competing Bids by the Offer Deadline. Accordingly, the Proposal Trustee advised the Debtor and the Purchaser of the result of the Sale Process and

proceeded to prepare materials for the Court to review in support of the motion for approval of the Sale Process result.

Second Report at para. 23

PART III – THE ISSUE

12. The issue on this motion is whether the Court should approve the Sale Agreement and the Transaction contemplated thereby.

PART IV – LAW AND ARGUMENT

A. THE COURT HAS THE JURISDICTION TO APPROVE THE SALE AGREEMENT

13. Section 65.13(1) of the BIA prohibits a debtor in respect of whom a notice of intention or a proposal is filed from selling or otherwise disposing of assets outside the ordinary course of business unless authorized by a court to do so. This Court has the jurisdiction to grant the order requested under s. 65.13 of the BIA.

BIA, s. 65.13(1); *Re Outdoor Broadcast Networks, Inc*, 2010 ONSC 5647 [Comml List], Tab 1 of the Applicant's Book of Authorities (the "BOA"); and *Re Hypnotic Clubs Inc*, 2010 ONSC 2987 [Comm List] ("*Hypnotic*"), Tab 2 of BOA.

14. Under s. 65.13 of the BIA, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not limited to cases where the debtor is capable of presenting a proposal to its creditors.

***Re Komtech Inc.*, 2011 ONSC 3230 [Comml List] at paras 25 & 33, Tab 3 of BOA.**

B. THE FACTORS FOR APPROVAL OF SALE OUTSIDE THE ORDINARY COURSE OF BUSINESS ARE MET

15. In deciding whether to authorize the sale or disposition of assets outside of the ordinary course of business, the court is to consider, among other things, the following factors:

- i. whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- ii. whether the trustee approved the process leading to the proposed sale or disposition;
- iii. whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- iv. the extent to which the creditors were consulted;
- v. the effects of the proposed sale or disposition on the creditors and other interested parties; and
- vi. whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

BIA, s. 65.13(4); *Hypnotic*, supra at para. 25, Tab 2 of BOA

16. The Courts also consider the following factors adopted by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* relating to a sale of assets by a receiver, which factors are substantially similar with the section 65.13(4) factors:

- i. whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;
- ii. whether the interests of all parties have been considered;
- iii. the efficacy and integrity of the process by which offers have been obtained; and
- iv. whether there has been unfairness in the working out of the process.

***Royal Bank v. Soundair Corp.*, (1991), 83 DLR (4th) 76 (ONCA) ("*Soundair*") at para. 16, Tab 4 of BOA**

17. It is respectfully submitted that each of the factors listed in sections 65.13(4) of the BIA and *Soundair* have been met as described herein.

i. The proposed sale or disposition was reasonable in the circumstances

18. The Sale Agreement is a stalking horse bid, which provides a baseline price for the purchase of the assets, which is disclosed to the public through an open and transparent Sale Process conducted in accordance with its Court-approved terms, and which included efforts to broadly canvass the market for any and all potential purchasers of the business and/or assets of the Debtor.

Nathan Affidavit at para. 16

19. The Proposal Trustee, with the assistance of the Debtor, has been actively engaged in conducting the Sale Process since the filing of the NOI. A total of 68 interested parties were contacted and provided with a solicitation letter and Confidentiality Agreement ("CA"). A total of 10 interested parties signed and returned executed CAs and were provided access to the electronic data room containing due diligence materials provided by the Debtor.

Second Report at para. 19

20. The management team of the Debtor has worked with the Proposal Trustee throughout the Sale Process to assist in preparing and providing all necessary and requested information in a prompt and timely manner.

Nathan Affidavit at para. 12

21. The Debtor was available for site tours for prospective purchasers; however, none of the interest parties requested a site tour of either of the Techni-Lite Premises or the Wolfeworks Premises.

Nathan Affidavit at para. 13

22. The Proposal Trustee and Debtor received no offers to purchase the assets, other than the initial stalking horse bid from International. It is noted that International is also the DIP Lender and first ranking secured creditor of the Debtor.

Second Report at para. 23

i. *The Proposal Trustee approved the process leading to the sale*

23. The Proposal Trustee ran the Court-approved Sale Process, which process ultimately resulted in the Transaction contemplated by the Sale Agreement. Furthermore, the Proposal Trustee supports the Transaction with the Purchaser contemplated by the Sale Agreement.

Second Report at paras. 16 and 29

ii. *The Proposal Trustee will file with the Court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy*

24. The Debtor understands that the Proposal Trustee will file with the Court the Second Report stating that in its opinion the sale contemplated by the Sale Agreement will be more beneficial to the creditors than a sale or disposition under a bankruptcy.

Second Report at paras. 29 and 33

iii. *The creditors were adequately consulted*

25. At all relevant times, the Purchaser was kept apprised of all developments with regards to the Sale Process. Specifically, the Purchaser (in its capacity as secured creditor and DIP Lender) which is the secured creditor with the largest economic interest in the Debtor, was consulted extensively throughout the Sale Process and it is obviously supportive of the Sale Agreement.

Nathan Affidavit at para. 24

26. Lynx Equity Limited, the second ranking secured creditor and sole shareholder of the Debtor, has been advised of the result of the Sale Process and is supportive of the Transaction.

Second Report at paras. 6 and 7; Nathan Affidavit at para. 25

iv. *The sale has a positive effect on the stakeholders*

27. The Sale Agreement represents the best possible transaction in the circumstances for the Debtor and its stakeholders, including its creditors, employees and contractual counterparties.

Second Report at para. 29; Nathan Affidavit at para. 27

28. The Purchaser will assume the vast majority of all of the Debtor's secured liabilities, and it is expected that the Purchaser will offer employment and/or contract roles to 3 of the Debtor's employees.

Nathan Affidavit at para. 18

29. As previously noted, the Purchaser is the first ranking secured creditor with the largest economic interest in the Debtor. The second ranking secured creditor (and primary shareholder of both the Debtor and the Purchaser), Lynx, is also supportive of the Transaction.

Second Report at paras. 6 and 7; Nathan Affidavit at para. 24 and 25

30. The purchase price contemplated to be paid pursuant to the Sale Agreement represents the highest price realizable through the Sale Process which will result in the highest possible recovery available in the circumstances, and a higher recovery than would be expected in a liquidation.

Second Report at para. 29; Nathan Affidavit at para. 17

- v. *The consideration to be received is reasonable and fair taking into account their market value*

31. In the judgment of the Debtor's management, the purchase price contemplated by the Sale Agreement is fair and reasonable, and represents the highest price realizable through the Sale Process.

Second Report at para. 29; Nathan Affidavit at para. 18

32. The Proposal Trustee extensively canvassed the market during the Sale Process and accordingly the purchase price represents the best and higher consideration in the circumstances. The purchase price also provides certainty and exceeds the projected value in a liquidation scenario.

Second Report at paras. 17 and 29

C. THE FACTORS FOR APPROVAL OF A SALE TO A RELATED PERSON ARE MET

33. In deciding whether to authorize the sale or disposition of assets to a related party, the court is to consider, among other things, the following factors:

- i. if good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the Debtor; and
- ii. if the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

BIA, s. 65.13(5).

34. It is respectfully submitted that each of the factors listed in sections 65.13(5) of the BIA have been met as described herein.

ii. Good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the Debtor

35. The Proposal Trustee, an independent third party and officer of the Court, conducted the Sale Process with the intention of canvassing the market as extensively as possible under the circumstances and in accordance with the Court's direction. The Proposal Trustee, with the assistance of the Debtor, sought offers from parties operating in the same industry and others in related industries, such as metal bending and commercial lighting, with operations in North America.

Second Report at paras. 17 and 29; Nathan Affidavit at para. 16

36. The Debtor has been acting in good faith since the date of the NOI filing. Such good faith activities have included, among other things:

- i. working with the Proposal Trustee to prepare cash flow forecasts;
- ii. working with its legal counsel to prepare motion materials;
- iii. consulting with, and assisting, the Proposal Trustee with respect to the Sale Process;
- iv. communicating with other stakeholders regarding the proposal proceedings and the Sale Process;
- v. continuing discussions with key vendors and partners to ensure the continuation of services/relationships;
- vi. finalizing and completing the Sale Agreement with the Purchaser; and

- vii. attending to issues relating to the closing of the Transaction, which is scheduled to occur prior to the expiry of the NOI stay period.

Second Report at para. 20; Nathan Affidavit at paras. 9, 21

- iii. *The consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition*

37. As noted above, the stalking horse bid provided a baseline price for the business and assets of the Debtor. As per the comparison analysis provided for in the Proposal Trustee's First Report at Confidential Appendix "2" the sale price equates to approximately \$1,310,000.00 after factoring in the credit bid and assumed debt, not including the adjustment for the credit bid of the balance on the DIP Loan outstanding at the Transaction's closing date; conversely, the liquidation value of the assets is estimated to be approximately \$509,000.00. The purchase price is almost three times as much as the liquidation value of the business and assets of the Debtor, which is likely what dissuaded other interested parties from making an offer.

First Report at Confidential Appendix 2; Second Report at paras. 25 to 27, 29

D. ADDITIONAL CRITERIA FOR APPROVAL UNDER SECTION 65.13 OF THE BIA ARE SATISFIED

38. Subsection 65.13(8) of the BIA sets out the following restrictions on disposition of assets within NOI proceedings:

The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 60.13(a) and (1.5)(a) if the court had approved the proposal.

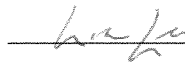
BIA, s. 65.13(8)

39. The Company intends to make the payments (or satisfactory arrangements therefor) that are required under sections 60(1.3)(a) and (1.5)(a) of the BIA, as applicable.

PART V – ORDER REQUESTED

40. The Debtor therefore requests the Orders substantially in the form of the draft Orders attached at Tabs 4 and 6 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31 day of March, 2017.



Rachel Moses

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Rachel Moses (LSUC# 42081V)
rmoses@mindengross.com
Tel: 416-369-4115
Fax: 416-864-9223

Lawyers for Techni-Lite Systems Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Outdoor Broadcast Networks, Inc.*, 2010 ONSC 5647 [Comm List]
2. *Re Hypnotic Clubs Inc.*, 2010 ONSC 2987 [Comm List]
3. *Re Komtech Inc.*, 2011 ONSC 3230 [Comm List]
4. *Royal Bank v. Soundair Corp.*, (1991), 83 DLR (4th) 76 (ONCA)

SCHEDULE "B"

TEXT OF RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act, RSC 1985, c B-3.*

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Factors to be considered

65.13 (4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

65.13 (5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Restriction — employers

65.13 (8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF TECHNI-LITE SYSTEMS INC.**

Court File No. 31-2215824

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at **TORONTO**

**FACTUM OF THE APPLICANTS
(RETURNABLE APRIL 7, 2017)**

MINDEN GROSS LLP

Barristers and Solicitors
145 King Street West
Suite 2200
Toronto, ON M5H 4G2

Timothy R. Dunn (LSUC #3424911)

Tel: 416-369-4335

Fax: 416-864-9223

Email: tdunn@mindengross.com

Rachel Moses (LSUC #42081V)

Tel: 416-369-4115

E-Mail: rmoses@mindengross.com

Lawyers for Techni-Lite Systems Inc.

(File No. 4103118)