

**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 A PLAN OF COMPROMISE OR
ARRANGEMENT OF TIMMINCO LIMITED AND
BECANOUR SILICON INC.**

Applicants

**MOTION RECORD OF THE RESPONDENT,
QSI PARTNERS LTD.**

April 11, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

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(as at April 9, 2012)**

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INDEX

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INDEX

Tab

Page No.

1. Affidavit of Stephen Lebowitz

1

TAB 1

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**AFFIDAVIT OF STEPHEN LEBOWITZ
(Sworn April 11, 2012)**

I, Stephen Lebowitz, of the town of Roslyn, in the state of New York, **MAKE OATH AND SAY:**

1. I am the General Counsel of Globe Specialty Metals Inc. ("**Globe**") and an authorized representative of QSI Partners Ltd. ("**QSI**"). QSI is a wholly-owned subsidiary of Globe.
2. Unless otherwise stated herein, all facts set forth in this affidavit (the "**Affidavit**") are based upon: (a) my personal knowledge; (b) my experience as General Counsel of Globe and an authorized representative of QSI; and (c) information provided to me by employees and authorized representatives and professionals of Globe and QSI. If called upon to testify, I would testify competently to the facts set forth in this Affidavit. I am authorized to submit this Affidavit on behalf of QSI.
3. I submit this Affidavit in response to the motion of the Applicants requesting an extension of the Phase II Bid Deadline (as defined below) (the "**Sales Process Amendment Motion**"), originally returnable April 10, 2012, but adjourned by this Court until April 12, 2012.
4. QSI, as DIP lender to the Applicants and "stalking horse" and proposed purchaser under that certain Agreement of Purchase and Sale dated March 1, 2012 between the Applicants, QSI,

and Globe (as guarantor) (the “**APA**”), objects to the Sales Process Amendment Motion on the basis that the relief requested therein constitutes a material amendment to the Bidding Procedures (as defined below), the APA, and the Sales Process and Bidding Procedures Order (as defined below), and materially prejudices QSI.

Background

5. On February 8, 2012, this Court issued an order approving a DIP financing agreement between the Applicants, as borrowers, and QSI, as lender.

6. On March 9, 2012, this Court issued an order approving certain provisions of the APA granting certain protections to QSI for its agreement to as a “stalking horse” in the Applicants’ sales process (the “**Sales Process**”) and approving certain bidding and auction procedures (the “**Bidding Procedures**”) in respect of the Applicants’ solicitation of higher offers than that contemplated under the APA (the “**Sales Process and Bidding Procedures Order**”).

7. The Bidding Procedures are also a schedule to the APA, and are to be in a form substantially similar to the form attached as Schedule D to the APA. The Bidding Procedures were heavily negotiated between QSI and the Applicants.

8. A key provision of the Bidding Procedures was the date by which “Phase II Bids” must be received to be “Qualified Phase II Bids” and be entitled to participate at the Auction, which was defined in the Bidding Procedures as the “Phase II Bid Deadline”.

9. The date agreed to by the parties to the APA for the Phase II Bid Deadline was April 16, 2012.

10. By the Sales Process Amendment Motion, the Applicants now seek to delay the Phase II Bid Deadline by three (3) days to provide additional time to pursue activities that are not consistent with the Bidding Procedures and the agreement among the parties.

Material Prejudice to QSI

11. QSI objects to such requested amendment on the basis that this proposed extension of time is, in fact, a material amendment to the Sales Process approved by this Court in the Sales Process and Bidding Procedures Order, and materially prejudices QSI, as stalking horse, who has

proceeded in good faith on the basis of such Sales Process as approved in the Sales Process and Bidding Procedures Order.

12. In particular, the Phase II Bid Deadline is the date under the Bidding Procedures by which Qualified Phase II Bidders must submit a binding offer to purchase the Applicants' assets through submission of a mark-up of the APA. It is by this time, that bidders must have completed their due diligence and the binding offer must be on terms no less favourable to the Applicant than those agreed to by QSI under the APA.

13. But through the requested extension (which was first requested to be two weeks and only shortened to three days after QSI indicated its disagreement with any change to the timing under the Bidding Procedures), the Applicants not only seek to provide bidders with more time to conduct due diligence (which is only an advantage to such bidders and not QSI as QSI has already entered into the APA), but also to allow such bidders access to various third parties, including counterparties under the contracts to be assigned as part of the sale transaction (in particular, Dow Corning), union representatives, and the Applicants' primary pre-filing secured lender.

14. Before entering into the APA, QSI was not afforded an opportunity to speak with such parties. In fact, in negotiations of the APA, QSI requested such an opportunity to reach out to these parties, but this was rejected by the Applicants. For example, in a draft of the APA circulated to the Applicants' counsel by QSI's counsel on February 5, 2012 (attached hereto with corresponding relevant blacklined page at Exhibit "A"), QSI proposed language to the APA that would permit QSI to engage in discussions with Dow Corning regarding the proposed sale transaction. This language was deleted in a draft of the APA circulated by the Applicants' counsel on February 8, 2012 (attached hereto with corresponding relevant blacklined page attached as Exhibit "B").

15. QSI agreed to not have explicit language in the APA indicating that QSI could reach out to these third parties regarding the proposed sales transaction, but only on the understanding that other bidders would similarly not be afforded an opportunity to reach out to such parties before being obligated to submit a binding agreement by the Phase II Bid Deadline. It was my understanding, based on discussions had with the Monitor, that other bidders would, similarly,

not be afforded an opportunity to speak with third parties before agreeing to enter into a binding agreement with the Applicants.

16. QSI formulated its bid amount and what contracts and assets to take or not take all without the benefit of these conversations. Had QSI been entitled to engage in such conversations, its bid may have been different. By allowing other bidders to now have these conversations before entering into a binding agreement, is simply not a level playing field.

17. This is the basis for the extended closing date under the APA following the Auction (as defined in the Bidding Procedures) of up to twenty-eight (28) days (*i.e.*, that this 28 day period was to provide the necessary time following the Auction to reach out to parties to negotiate any required consents or arrangements and bring a motion to assign any contracts where consents could not be obtained, but that all of this would occur after the Auction).

18. On April 4, 2012, just after QSI learned that other bidders would be permitted to contract the third parties or that such discussions had already occurred, the Applicants and Monitor confirmed in writing to QSI that it, too, would be permitted to have discussions with the various third parties. In order to avoid being further prejudiced, QSI was compelled to agree to seek to have the same meetings with third parties that other bidders were offered, but QSI's participation in such meetings and discussions is not approval or consent to the Applicants having changed the rules of the game.

19. But this is a fundamental change to the Sales Process that QSI is compelled to engage in or risk that other bidders have a competitive advantage at any Auction, and QSI will incur additional costs to engage in these discussions before it knows whether it is the "Successful Bidder" under the Bidding Procedures, which costs are not reflected in the Expense Reimbursement under the APA (and approved by the Sales Process and Bidding Procedures Order). QSI was required to enter into the APA without the benefit of speaking with third parties. The additional work and costs associated with these meetings means that QSI will incur costs not anticipated and for which QSI would have sought to recover through a larger Expense Reimbursement had it known that this work would be required before the Auction, and not after it. Thus, the Applicants' requested three day extension of the Phase II Bid Deadline, is not just an immaterial change that will not prejudice any party, but, indeed, will result in QSI incurring

three days of additional expenses not provided for in the Expense Reimbursement and for which no additional consideration will be received by QSI.

20. The requested extension further prejudices QSI as DIP lender, given that these additional meetings raise issues concerning additional costs and delays involving the meetings with third parties being held in Quebec and the required presence of the Monitor thereat. These costs and delays were not contemplated by the parties under the DIP facility.

21. Based on the foregoing, the Sales Process Amendment Motion should be denied and the Phase II Bid Deadline, as negotiated and relied upon by QSI in agreeing to its Expense Reimbursement under the APA, should remain April 16, 2012.

SWORN before me at the City of New York, in the state of New York, this 11th day of April, 2012.

Notary



Stephen Lebowitz

This is Exhibit "A" referred to in the
Affidavit of Stephen Levowitz
Sworn before me, this 11th
day of April, 2012

A Commissioner, Etc.

Cassey, Lee

Subject: FW: Project Tetris - APA Issues Call
Attachments: #13186621v7_TorysAtWork_ - Project Tetris - APA (Torys Draft).doc; WS Compare Doc_13186621_4-_13186621_7.doc; 3bclean-control.bin; Revised Stalking Horse Bid APA

-----Original Message-----

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Sent: February-05-12 4:17 PM
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Cc: Foster, Eric; Bish, David
Subject: RE: Project Tetris - APA Issues Call

Further to today's call, please find attached a revised version of the APA and a blackline to the draft circulated by Stikemans. Please note that in the interest of time, this agreement is being circulated concurrently to our client and remains subject to their review.

Guy Berman
Torys LLP

-----Original Message-----

From: Leibel, Robbie
Sent: February-05-12 11:16 AM
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Cc: Berman, Guy; Foster, Eric
Subject: Project Tetris - APA Issues Call

All,

Please see below for dial-in details for the call scheduled for 1:30 this afternoon to discuss APA issues.

Toll Free - 866-410-4581
INTL - +1-660-422-5415
12508324

Regards,
Robbie
Robbie Leibel
Torys LLP
Tel: 416.865.8201
Rleibel@Torys.com

assignment shall be permitted so long as the requirements of this Section 8.11 are complied with. This Agreement may not be assigned by the Vendors without the consent of the Purchaser.

8.12 Discussions with DCC

[Notwithstanding any provision in this Agreement or any other agreement relating to matters herein, the Purchaser shall be permitted to discuss the Transaction with DCC and any of its Affiliates.] [Note to Draft: Parties to discuss]

8.13 9.12-Further Assurances

Each of the Parties shall, at the request and expense of the requesting party, take or cause to be taken such action and execute and deliver or cause to be executed and delivered to the other such documents (including registrations and removal of Encumbrances (other than Permitted Encumbrances)) and further assurances as may be reasonably necessary or desirable to give effect to this Agreement.

8.14 9.13-Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same agreement. Transmission by facsimile or by e-mail of an executed counterpart of this Agreement shall be deemed to constitute due and sufficient delivery of such counterpart.

[THE REMAINDER OF THIS PAGE HAS BEEN LEFT INTENTIONALLY BLANK]

This is Exhibit "B" referred to in the
Affidavit of Stephen Levowitz
Sworn before me, this 11th
day of April, 2012

A Commissioner, Etc.

Cassey, Lee

From: Daphne MacKenzie <DMacKenzie@stikeman.com>
Sent: February-08-12 8:19 PM
To: Berman, Guy; Bish, David; Foster, Eric; 'Nigel.Meakin@fticonsulting.com'; Jill Lankin; Ashley Taylor
Cc: Doug Fastuca; Peter A. M. Kalins (pkalins@timminco.com); Robert Assal (rassal@timminco.com)
Subject: Revised Stalking Horse Bid APA
Attachments: #5925474-vrtf-APA - Torys.RTF; #5927067-v1-Schedule L.DOC; #5924276-v6-APA.DOC; #5924276-vrtf-APA.RTF

All,
Attached is a revised draft of the APA. There are two blacklines, one marked to show changes to the draft circulated by Torys on Sunday and the other blacklined to mark changes made to the draft circulated by us last Friday, February 3. Also attached is draft Schedule L, the Estimated Working Capital Schedule.
Please note that in the interests of time, this agreement is being circulated concurrently to our client and remains subject to their comments and the Monitor's comments, in all respects.
Best regards,
Daphne

STIKEMAN ELLIOTT LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L 1B9

www.stikeman.com

TORONTO MONTREAL OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

This e-mail is confidential and may contain privileged information. If you are not an intended recipient, please delete this e-mail and notify us immediately. Any unauthorized use or disclosure is prohibited.

9.9 8.9-Governing Law

—This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and each of the Parties irrevocably attorns to the non-exclusive jurisdiction of the courts of the Province of Ontario.

9.10 8.10-Commission

—The Purchaser agrees to indemnify the Vendors against any claim for compensation or commission by any third party or agent retained by the Purchaser in connection with, or in contemplation of, the Transaction and the Vendors shall jointly and severally indemnify the Purchaser for any agent or broker fees or other commissions payable by the Vendors on the Purchase Price or otherwise in connection with the Transaction.

9.11 8.11-Assignment by Purchaser

—This Agreement may not be assigned by the Purchaser without the prior written consent of the Vendors, which consent may be withheld in the Vendors' sole and absolute discretion; provided, however that the Purchaser shall be permitted to assign the benefit of all or a portion of this Agreement prior to or after Closing to an Affiliate thereof in circumstances where (i) prior notice of such assignment is provided to the Vendors, (ii) such assignee agrees to be bound by the terms of this Agreement to the extent of the assignment, and (iii) such assignment shall not release the Purchaser or the Guarantor from any obligation or liability hereunder and the Purchaser and the Guarantor shall acknowledge and confirm their continuing obligations and liabilities in form and substance satisfactory to the Vendors; for greater certainty, the Purchaser shall be permitted to assign the right to buy all or a portion of the Purchased Assets to one or more Affiliates and such assignment shall be permitted so long as the requirements of this Section ~~8.11~~9.11 are complied with. This Agreement may not be assigned by the Vendors without the consent of the Purchaser.

~~8.12—Discussions with DCC~~

~~—[Notwithstanding any provision in this Agreement or any other agreement relating to matters herein, the Purchaser shall be permitted to discuss the Transaction with DCC and any of its Affiliates.] [Note to Draft: Parties to discuss]~~

9.12 8.13-Further Assurances

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ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

AFFIDAVIT OF STEPHEN LEBOWITZ
(Sworn April 11, 2012)

Torys LLP
79 Wellington Street West
Suite 300, TD Centre
Toronto, Ontario M5K 1N2

Fax: 416.865.7380

David Bish (LSUC#: 41629A)
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Lee Cassey (LSUC#: 53654I)
Tel: 416.865.7960
Email: lcassey@torys.com

Lawyers for QSI Partners Ltd.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND
BECANCOUR SILICON INC.

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

**MOTION RECORD OF THE RESPONDENT,
QSI PARTNERS LTD.**

Torys LLP

79 Wellington Street West
Suite 300, TD Centre
Toronto, Ontario M5K 1N2

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Lawyers for QSI Partners Ltd.