IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No. 306
CP(IB) 852 of 2019

Proceedings under Section 9 IBC

IN THE MATTER OF:

STR Holding,Inc **........Applicant**
V/s
Lucent Cleanenergy Pvt Ltd **........Respondent**

Order delivered on 15/06/2023

Coram:

Mr. Deep Chandra Joshi, Hon'ble Member(J)
Mr. Ajai Das Mehrotra, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-SD-
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-SD-
DEEP CHANDRA JOSHI
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT – II)

CP (IB) 852/NCLT/AHM/2019

[Application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency & Bankruptcy Code, 2016]

In the Matter of:

STR Holdings, Inc. — **Applicant/ Operational Creditor**

Versus

Lucent Cleanenergy Private Limited — **Respondent/ Corporate Debtor**

Order Pronounced on: 15/06/2023

Coram:
DEEP CHANDRA JOSHI
HON'BLE MEMBER(JUDICIAL)

AJAI DAS MEHROTRA
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

STR Holdings, Inc.
Having a registered office at
10, Water Street
CT 06082

& Correspondence Address at
C/o. Law Offices of Divya Bahl
401-402, Dalamal Towers
Free Press Journal Road
Nariman Point
MUMBAI 400 021 **… Applicant/Operational Creditor**

Versus

Lucent Cleanenergy Private Limited
14/15, First Floor,
Pushpak Apartment
Opp. Kaladarshan Flats
Prernatirth Derasar Road
Satellite,
AHMEDABAD 380 015
Gujarat State **… Respondent/Corporate Debtor**

Appearance:

For Applicant	: Mr. Rajshekhar Rao, Sr. Advocate a/w Mrs. Divya Bahl, Advocate, Mr. Peppino Bahl, Advocate & Mr. Areed Amanulla, Advocate
For the Respondent	: Mr. Navin Pahwa, Sr. Advocate a/w Ms. Natasha Shah, Advocate

ORDER

1. This application is filed on 02.12.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Mr. Robert S. Yorgensen, Chairman, President and CEO, duly authorised by the Applicant vide Board Resolution dated 08.11.2019 of M/s. STR Holdings, Inc. (for brevity 'Applicant'), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. Lucent Cleanenergy Private Limited (for brevity 'Corporate Debtor').
2. The Applicant is a 'Foreign Company' incorporated under the Delaware General Corporation Law, having its registered office at 10, Water Street, Enfield, CT, USA having US Federal Tax Payer ID No. (TIN) 27-1023344 and CIN 4736954. The Applicant is a global provider of high-quality, superior-performance encapsulants for the photovoltaic (PV) module industry.
3. The corporate debtor is a private limited company incorporated under the Companies Act, 1956 on 01.07.2011 having CIN U23201GJ2011PTC066131 and having office at 14/15, First Floor, Pushpak Apartment, Opp. Kaladarshan Flats, Prernatirth Derasar Road, Satellite, Ahmedabad 380 015, Gujarat State. The authorised share capital of the corporate debtor is Rs. 40,00,000/- and the

paid-up share capital is Rs. 29,28,840/-. The corporate debtor is engaged in manufacturing PV encapsulants.

4. The Applicant submitted that it decided to expand its manufacturing footprint to India had entered into a tolling arrangement in the year 2016 with the corporate debtor for tolling Ethylene Vinyl Acetate (EVA) Film to make PV encapsulants and the tolling fee was fixed @ USD 0.125 per square meter of EVA film. Accordingly, the Applicant commenced procurement through its third-party suppliers of EVA resin including TAICROS, Laromer and Dynasylan Chemicals and supplied to the corporate debtor for tolling to make PV encapsulants. Through its affiliate, Special Technology Resources, Inc., the Applicant appointed the corporate debtor as its contract manufacturing/tolling agent by executing a term sheet for tolling and proposed Joint Venture Agreement with the corporate debtor. The term sheet gave the Applicant an option to constitute a joint venture with the corporate debtor within six months of commencement of tolling, however, the Applicant did not exercise this option to constitute a joint venture with the corporate debtor and the corporate debtor continued to operate as a tolling agent for the Applicant.

4.2. It was submitted that during the period 02.07.2016 to 20.10.2018, the Applicant raised invoices against the supply of raw material to the corporate debtor giving a credit period of 12 months in each case in order to enable the corporate debtor to recover payments from end customers. During the above period the corporate debtor released the raw material from customs, undertook the tolling and supplied PV encapsulants to the end customers.

4.3. It was submitted that in addition to the tolling fee, the Applicant reimbursed the corporate debtor for customs duty, freight for raw materials and finished goods, transportation to end customers, GST and other incidental expenses undertaken by the corporate debtor in selling the PV encapsulants to the end customers.

4.4. It was submitted that orders for PV encapsulants were placed by end customers with the corporate debtor and payments were received into the account of the corporate debtor. After adjustment/set off of tolling fee and reimbursements due from the Applicant to the corporate debtor, the balance amounts were remitted back to the Applicant.

4.5. It was submitted that up to 15.02.2018, the Applicant remitted payments in settlement of the invoices raised by the corporate debtor, and payments in settlement of all subsequent invoices raised by the corporate debtor were adjusted/set off against payments due from the corporate debtor to the Applicant. From January 2019, the corporate debtor withheld payments due to the Applicant despite receiving the same from the end customers resulting into financial outstanding from the corporate debtor.

4.6. It was submitted that from January 2019 to April 2019 and thereafter the Applicant made concerted efforts to pursue its business relationship with the corporate debtor and also followed up to recover outstanding payments. On

26th April, 2019 a meeting was held between the representatives of the Applicant and corporate debtor, wherein, the corporate debtor terminated its tolling relationship with the Applicant and agreed to reconcile the accounts for closure of accounts. On 27.04.2019 corporate debtor sent an email to the Applicant giving a reconciliation plan of payments before 10.05.2019. On 18.05.2019, the corporate debtor forwarded to the Applicant its sales register recording up to 15.05.2019, the payments received from end customers and set off the tolling fee and reimbursements for the customs duty, GST and other misc. costs payable by the Applicant to the corporate debtor. On 11.07.2019 corporate debtor sent a reconciliation statement after reconciling payables to the Applicant of USD 1,550,525 which included a conditional discount of USD 20,000 subject to an amicable resolution and prompt payment of the outstanding by the corporate debtor. On 15.07.2019, the corporate debtor confirmed the accounts reconciliation statement forwarded on 11.07.2019 and confirmed a Zoom meeting for further actions relating to accounts reconciliation. At its Zoom meeting on 19.07.2019 corporate debtor accepted the purchase values for the inventory as insisted by the Applicant as of 30.06.2019 at USD 258,880. On 19.07.2019 the corporate debtor forwarded a structured payment schedule to the Applicant towards payment of USD 1,105,120 in partial settlement of the admitted outstanding, in four tranches starting from 17.07.2019 to 13.08.2019. Despite processing a remittance of USD 229,120 to the Applicant on 17.07.2019, the corporate debtor was facing technical issues with its bank. The Applicant could receive a remittance of only USD 217,525 against the promised remittance of USD 229,120 from the respondent.

5. The Applicant issued demand notice in Form 3 under Section 8 of the Insolvency & Bankruptcy Code read with Rule 5 of the Insolvency and Bankruptcy Regulations, 2016 dated 25.09.2019 on the corporate debtor demanding payment of USD 1,698,440 along with interest thereon as per accounts reconciliation statements reconciled upto 15.05.2019. The corporate debtor received the demand notice on 27.09.2019 and responded to the demand notice vide reply dated 07.10.2019.

6. Thereafter, the Applicant filed the instant application on 02.12.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016.

7. The corporate debtor filed an affidavit in reply inter alia raising the following objections:

- The present Applicant is not an 'operational creditor' as defined under Section 5(20) of the IB Code.
- The proposal to enter into a Joint Venture Agreement (JVA) was never implemented.
- As per clause 5 of the Term Sheet, the Applicant was required to provide raw materials, packing materials and technical assistance as may be required to manufacture the products as per the Applicant's formula and specifications, however, the Applicant has not complied with the said

clause. It was also provided at sub-clause 5 of the Term Sheet that a rent to be decided would be paid to the corporate debtor for its factory subject to it being not more than the royalty paid to the Applicant.

- The joint venture entity as contemplated in the term sheet was never activated.
- As per the term sheet, till the joint venture entity became operational, the corporate debtor was to do a pure tolling and all the raw materials, packing materials, chemicals, consumables etc. were to be supplied by the Applicant on a job work basis and the corporate debtor was to do only the conversion process.
- The Applicant used to facilitate the procurement of the imported raw material EVA resins and certain chemicals from Celanese, BASF and certain other parties. The corporate debtor used to make payment for custom clearance, transportation, loading and unloading etc. The Applicant had thus, facilitated and part financed the purchase of the imported raw materials by making some advance payment to the raw material suppliers on behalf of the corporate debtor.
- It was submitted that no purchase order was given by the corporate debtor to the Applicant and there was actually no shipment of material by the Applicant to the corporate debtor. Since the actual shipments were made by the third-party vendors directly to the corporate debtor, those vendors have been booked as operational creditors in the books of the corporate debtor

and not the Applicant. In its capacity as a proposed joint venture partner, the Applicant had financed purchase transactions by making direct payment to the supplier for the material concerned on behalf of the corporate debtor.

- On account of the Applicant making payment for the base prices of the raw material to the suppliers on behalf of the corporate debtor, the corporate debtor was bound to reimburse the Applicant the said amount and the same is reflected in the books of the corporate debtor as unsecured financial arrangement extended by the Applicant.
- Although the tolling arrangement had envisaged that all the raw materials/packing materials would be supplied by the Applicant to the corporate debtor for the conversion /job work, the expenses pertaining to the purchase of local raw materials, packing materials, chemicals, consumables stores etc. had been undertaken by the corporate debtor. Since all these purchases were made by the corporate debtor on behalf of the Applicant, the Applicant was bound to reimburse the corporate debtor. Therefore, the corporate debtor used to raise reimbursement invoices on the Applicant.
- As per the tolling agreement the sales were never to be made by the corporate debtor in its own name and the corporate debtor was only supposed to undertake job work and return the manufactured product back to the Applicant. The Applicant was then required to sell the product so manufactured to its customers in the name of the new JV entity.

- It was submitted that actual marketing was done by the Applicant through their global sales staff or marketing agents. In many cases the purchase orders were generated either in the name of the Applicant while in some cases the customer would give the purchase orders in the name of the corporate debtor. After the purchase orders were generated, the Applicant used to give a formal work order to the corporate debtor who will carry out the actual production and make dispatches to the customers concerned in their own name. Thus, although the sales were actually contracted by the Applicant, the sales invoices raised were that of the corporate debtor based on the understanding between the parties.
- It was submitted that it is clearly evident that the Applicant is not operational creditor within the meaning of the provisions of the IB Code.

8. The Applicant filed an affidavit in rebuttal inter alia stating that:

- Despite receiving the demand notice dated 25.09.2019 the corporate debtor did not raise any objection to the eligibility of the Applicant as an operational creditor to raise its demand for an operational debt. The corporate debtor has for the first time in its affidavit in reply stated that the raw material was financed and not sold by the Applicant.
- Vide its reply the corporate debtor has expressly admitted receiving the raw material invoiced by the Applicant and its liability to pay the Applicant for the imported raw materials.

- A consideration of the invoices of the suppliers of raw materials attached to the application clearly establish that the raw materials have been sold by the suppliers to the Applicant and not to the corporate debtor, corporate debtor's address is given by the Applicant to the suppliers only for shipment of the consignment. Purchase price in each instance has been paid by the Applicant to the suppliers and all right title and interest in the raw material was transferred by the suppliers to the Applicant only. Pursuant to specific purchase orders by the corporate debtor, the Applicant sold raw material to the corporate debtor and raised invoices for the same which are attached to the application. That the corporate debtor has in the past paid the Applicant's invoices via foreign exchange remittances till July 2019 and details of settled/outstanding invoices have been annexed to the application. Consideration of the ledger accounts of the corporate debtor annexed to the corporate debtor's reply record that payments were made by the corporate debtor to the Applicant against the Applicant's specific invoices for the supply of raw materials. This conclusively establishes that the corporate debtor recognised, admitted and accepted the Applicant's invoices and the sale of raw material captured thereunder as a genuine transaction having legal validity which makes the Applicant a corporate creditor as defined by and under the meaning of the provisions under Section 5 (20) of IBC, and also validates that an operational debt is owned to the Applicant as delineated and provided by Section 5 (21) of IBC.

Corporate debtor's purchase orders were received via email and the purchase order numbers are expressly mentioned in the Applicant's invoice annexed to the application.

- The corporate debtor is misleading the Tribunal by asserting that the Applicant is merely financing the purchase of raw materials from the third-party vendors and that the third-party vendors are the operational creditors and not the Applicant.
- The entries in the ledger records of the corporate debtor are of no significance in ascertaining whether the sale of raw material to the corporate debtor was effected by the Applicant or otherwise.
- Considering that the Applicant purchased raw material from its vendors and thereafter sold them to the corporate debtor under liberal open credit terms and several invoices remain unpaid, the Applicant cannot be deprived of its legitimate legal rights on account of the false entries of the corporate debtor.
- The reconciliation of accounts process undertaken pursuant to the meeting of 26.04.2019 was for final closing of accounts between the Applicant and corporate debtor and did not in any manner impact or have a bearing on the corporate debtor's obligation to pay the operational debt to the Applicant.
- In view of the credit period of 365 days under the Applicant's invoices, the corporate debtor would make payments to the Applicant against its invoices after-sales receipts and adjustment of reimbursements. The right of the

Applicant to recover outstanding dues from the corporate debtor accrued as soon as the credit period expired and was not dependant on the recoveries by the corporate debtor.

- The repeated demands by the Applicant calling for payment against its outstanding raw material invoices, there were no disputed claims respecting the subject operational debt or any other disputed claim by the corporate debtor against the Applicant prior to issue of the demand notice.
- The record of personal meeting on 26.04.2019 and the discussions thereunder as documented by the corporate debtor vide its email dated 27.04.2019 demonstrate that as on 26.04.2019 an amicable resolution was arrived on the past business processes and the parties were willing to discuss future business associations. In the very same meeting, it was agreed that the corporate debtor will provide a payment plan to the Applicant by 10.05.2019, well before completion of the reconciliation process establishing conclusively that payment of the operational debt was independent of the reconciliation of accounts. Therefore, it is obvious that there was no dispute and only an agreement to share and verify individual accounts under the identified heads to close the accounts between the corporate debtor to the Applicant.
- The corporate debtor is referring to the "reconciliation of accounts" as "reconciliation of disputes" to show the existence of disputes prior to the issuance of the demand notice dated 25.09.2019

- Emails exchanged between 09.07.2019, and 22.08.2019 were cited to show that accounts were being reconciled and continuous efforts were being made to narrow done the differences.
- Only after receiving the demand notice that the corporate debtor for the first time in its reply dated 07.10.2019 disputed the entries on closed items.

9. The Applicant filed written submissions reiterating the submissions made earlier.

10. Pursuant to the order dated 10.03.2022 the Applicant filed additional written submissions stating that:

- In response to the argument of the corporate debtor that there are no purchase orders, the Applicant states that the said argument is completely misconceived and contrary to contemporaneous documents on record. A few of the purchase orders are on record as Annexure – 11 of the appeal paper book volume II on pages 519 to 532.
- In response to the argument of the corporate debtor that invoices are proforma invoices in the nature of intimation only, the appellant submits that invoices annexed as Annexure A-15 (rejoinder Volume 1 & 2 pages 39 to 416) are commercial invoices and not proforma invoices. This material fact is evidenced further on perusal of the commercial invoices which mention the purchase order numbers (Annexure A-11 of appeal paper book volume 2 page 519-532). Further, the corporate debtor has made payments against the appellant's commercial invoices through Union Bank of India

by showing payment as import remittance thereby confirming that it was receiving raw materials from the Applicant and paying for the same as agreed.

- In response to the argument of the corporate debtor that business was carried out as job work according to the term sheet, the Applicant submits that business was not conducted as per the term sheet, confidentiality clause was binding and the actual business model was very different from what was contemplated in the term sheet.

- The Applicant further submitted that business was not job work, as finished goods were not handed back to the Applicant by the corporate debtor as the manufacture of finished goods, its sale and receipts were received by the corporate debtor only, with no control of the Applicant over receipts from end customers.

- In response to the argument of the corporate debtor that there is no admission of liability to pay the outstanding dues, the Applicant states that the corporate debtor has expressly admitted its liability to pay the outstanding dues to the Applicant in para 9 (xii) at page 7 of the counter affidavit filed by the corporate debtor to the appeal which reads as under:

> ***Para 9 (xii) at page 7:*** *On account of the appellant making payment of the base prices of the raw material to the suppliers on behalf of the respondent, the respondent was bound to reimburse the appellant to the same extent. Thus the amount*

standing to the credit of the Applicant in the books of the respondent would indicate that the same is payable towards the short-term unsecured financial arrangement extended by the appellant.

- Ledger accounts of the corporate debtor at Annexure E of the counter affidavit, filed by the corporate debtor, admit to liability to pay Rs. 13,48,57,311.69 against the Applicant's outstanding raw material invoices (pages 108-113).
- In response to the argument of the respondent that there exist outstanding disputes between the parties, the Applicant states that all disputes were resolved pursuant to the reconciliation meeting held on 26.04.2019. The minutes of the meeting were recorded by the CEO of the respondent and forwarded as draft vide email dated 27.04.2019 and accepted as accurate by the appellant vide email dated 27.04.2019 as annexure A-3 at appeal paper book Vol. I at pages 64-66.

11. The respondent filed written submissions/synopsis stating that:

- The Applicant is not an operational creditor, therefore, the application filed under section 9 of the IB Code is not maintainable.
- As per clause 5 of the term sheet, it is clearly mentioned that the respondent was supposed to do only tolling utilising the respondent's existing manufacturing facilities for the Applicant. As per said clause 5 the respondent was to carry out the production as a job worker and give the

finished goods to the Applicant and it was for the Applicant to then sell the products so manufactured by the respondent on tolling basis.

- As per the tolling arrangement as envisaged in the term sheet, the Applicant was supposed to supply all the raw materials, packing materials and all other inputs to the respondent for carrying out the job work. However, instead of supplying the materials for job work, the Applicant identified the parties from whom the Applicant wanted to source the imported raw materials, the Applicant thereafter raised their own purchase orders on such parties in their own name for purchase of such imported raw materials and made advance payment for imported raw materials to such suppliers who then supplied the materials to the respondent company. The respondent has not issued any purchase order to the Applicant or on any of the suppliers of the imported raw material.

12. The respondent filed a written note in furtherance of written submissions and in furtherance of the hearing dated 09.03.2022 and 10.03.2022 stating that:

- The Applicant was arranging for the import purchases from the actual suppliers like LG Chem, Korea; Cleanese Eva Polymers; Arkema, France; Evonik Performance Materials, Germany etc. The said suppliers shipped the material along with shipping documents including the invoices. The respondent cleared the shipping documents after payment of customs duty and other clearing and forwarding charges etc. when the material was received by the respondent. Only thereafter the purchases were booked by the respondent in the name of the respective suppliers. Therefore, it is evident that no purchase order was ever raised by the respondent to the Applicant.

- As a part of their own internal procedural record, the Applicant also had presumably generated corresponding purchase orders for their internal record. Thus, all the alleged purchase orders were generated as computer-generated documents by the Applicant and not by the respondent.
- Service of the rebuttal document submitted before the Adjudicating Authority was not effectively completed, therefore, the respondent could not receive it in time.
- The purchase orders which have been relied upon by the appellant are fabricated and computer generated by the Applicant as the purchase orders are not on printed letterheads.
- There have been serious pre-existing disputes on several matters involving the transaction structure which were evident from the 5 buckets agreed to by and between both the parties requiring reconciliation and mutual decision.

13. Vide order dated 15.03.2021, this Adjudicating Authority dismissed the present application thereafter the Applicant filed appeal before the Hon'ble NCLAT against the order of this Adjudicating Authority dated 15.03.2021. On 31.03.2022, the Hon'ble NCLAT remanded back the matter to this

Adjudicating Authority for a fresh look/adjudication in accordance with the law.

14.1 We have heard the Learned Counsels for the Applicant and the Respondent and have perused the documents filed by both parties. Through order dated 15.03.2021, NCLT Court–II Ahmedabad had rejected the present application under Section 9 of IBC, 2016 primarily on the following grounds:

(a) The claims of the Applicant is for remittance of money collected from end customers, cost of inventory given for tolling unaccounted for and not used. The said outstanding dues do not qualify as operational debt under Section 5(21) of IBC, 2016.

(b) There are pre-existing disputes between the parties among other things regarding scrap and other wastage, on usages of inventory etc. as shown in various mails.

14.2. The Hon'ble NCLAT vide order dated 31.03.2022 has remanded the matter back with the following observations:

> *"j. All this reflects that there is a need to find out voracity of various submissions and the business module; it does not seem to be straight jacket case that there is no payment due to the Appellant from the Respondent but at the same time it cannot confirmed that all sums as demanded by the Appellant is due and payable in law and on fact by the Respondent as there seems to be some back to back payment understanding between the parties as appears from the record.*
>
> *k. Hence, in the fitness of thing, justice demands to refer back the matter to the Adjudicating Authority for having a fresh look on various issues*

relating to the business module and the purchase order and invoices raised by the Appellant and the payment so far released and the balance due linking it to the back to back receipt from customer for the supply made by the Respondent which is a joint responsibility. Accordingly, without commenting on the merit of the case, we are remanding back the matter to the Adjudicating Authority for a fresh look and the Adjudicating Authority is requested to dispose of the matter expeditiously in accordance with law".

14.3. The business relationship between the Corporate Debtor and the Applicant is aptly described by the Applicant in part-IV of Form-5 of the application in page no. 10 and 11 as under:

"***Details of Transaction On Account of Which Debt Fell Due***

*(a) The Applicant is a global provider of high quality, superior performance encapsulants for the photovoltaic (PV) module industry. In 2016, the Applicant decided to expand its manufacturing footprint to India and appointed the Respondent/Corporate Debtor as its <u>contract manufacturing/tolling partner</u> by executing, through its affiliate, Specialized Technology Resources, Inc. a <u>legally binding term sheet</u> for Tolling and Joint Venture Agreement with the Respondent/Corporate Debtor on or around September 22, 2016. As <u>all material commercial and operational terms had been recorded in the afore-mentioned Term Sheet</u> for Tolling Joint Venture Agreement (**'Agreement'**), the Applicant and the Respondent/Corporate Debtor decided to operate the business without executing any further agreement, pursuant to which the Applicant provided the Respondent/Corporate Debtor, equipment, technology, training, and raw materials for the business….". (Emphasis provided)*

14.4. At this juncture, it will be pertinent to refer to the **"Term Sheet for Tolling and Joint Venture Agreement (the "Agreement") for the Ethylene Venyl Acetate (EVA) Film Project ("The Project")"** (hereinafter referred to as the

"Term Sheet") executed between the Applicant and the Respondent which forms the basis of business relationship between the Applicant and the Corporate Debtor. The term sheet is scanned below for reference.

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TERM SHEET
FOR
TOLLING and JOINT VENTURE AGREEMENT (THE "AGREEMENT")
FOR
THE ETHYLENE VINYL ACETATE (EVA) FILM PROJECT (THE "PROJECT")

This Term Sheet sets out the proposed terms of the Agreement and timetable for implementation. It is not intended to be legally binding, except as specifically set out below.

	DESCRIPTION	PROVISION
1.	**Parties:**	(1) Lucent Clean Energy Pvt. Ltd., an Indian corporation located at Block No. 187, Bavla Road, Changodar, Ahmedabad – 382213, Gujarat, India; and (2) Specialized Technology Resources, Inc., a Delaware corporation having its principal office at 10 Water Street, Enfield, CT, USA, or an affiliate thereof (**"STR"**); and (3) A newly formed joint venture between STR and Lucent (**"ProjCo"**) (Lucent, STR and ProjCo, each a **Party**, and collectively, the **"Parties"**).
2.	**Ownership; Option:**	ProjCo shall be owned by Lucent (50%) and STR (50%). Once tolling commences STR will have the Option to form ProjCo at their discretion within 6 months.
3.	**Business of ProjCo:**	To develop, design, finance, construct, maintain and operate an EVA Solar Encapsulant Film Plant with a design capacity to produce approximately 7,000 tonnes annually of the Products (as defined below), located in Ahmedabad, India (the **"Plant"**) and to market and sell the Products produced by the Plant.
4.	**Marketing**	Subject to the terms of the Agreement, ProjCo will be permitted to market the Products produced by the Plant solely to solar module manufacturers located and producing photovoltaic panels in India. Any marketing of the Products outside of India will be solely at STR's discretion. Any sales outside of India will be subject to a minimum gross margin as agreed to by Lucent and STR.
5.	**Tolling Facility**	In exchange for payment by STR to Lucent of the Tolling Fee of \$0.125/m2 exclusive of packaging materials, Lucent shall (i) produce product according to STR's formula and specification (ii) agree to compensate STR for materials used that do not meet customer requirements (iii) agree to limit recycled material content to less than 5% of the finished goods by weight (iv) agree to compensate STR for raw materials used beyond an agreed upon scrap rate of 3%. STR shall (i) provide raw materials necessary to fulfil manufacturing requirements (ii) provide packaging materials as needed (iii) provide technical assistance to maximize efficiency and throughput on the

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STR Holdings, Inc.

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	DESCRIPTION	PROVISION
		extrusion line. STR will also provide (i) raw materials for trials and (ii) blending equipment. The blending equipment and any unused raw materials are to be returned to STR at their request.
6.	Technology License	STR shall grant to ProjCo a license (the "**License**"), pursuant to which ProjCo shall have the right to use certain of STR's (i) proprietary formulations to produce, market and sell the Products, and (ii) proprietary manufacturing processes, to produce the Products for sale to photovoltaic panel manufacturers located in the Territory. In connection with the License, Lucent and ProjCo will, among other things, (i) be required to protect and keep confidential STR's technology, including without limitation its trade secrets, (ii) permit STR to monitor the quality of the Products, (iii) permit independent auditors as appointed by STR and Lucent to audit the books and records of ProjCo, and (iv) prohibit the transfer of Products by ProjCo customers to any party outside of the Territory.
7.	Equity	In connection with the Project, STR shall provide: (i) Technology License as outlined previously (ii) Existing Business – STR will transfer sales from China to the ProjCo sufficient to match current capacity. This is estimated at $6M in sales annually. (iii) Sales & Technical Support – Representatives will be in India as needed to ensure sales growth and provide technical assistance as needed. (iv) Manufacturing Line – When it becomes necessary, a second extrusion line capable of an estimated output of 6M m2 annually. (v) Rent – A nominal rent (TBD) will be paid to Lucent for the factory. The rent costs shall not exceed the royalty paid to STR. In connection with the Project, Lucent shall provide: (i) Factory. – Existing land, factory building, and extrusion line along with supporting equipment and Quality Control lab. (ii) Test Equipment – Lucent will supply the Quality Control lab with equipment per STR's specifications and requirements (iii) Warehouse – Construction of a temperature and humidity controlled warehouse sufficient for storage of raw materials and finished goods (iv) Installation/Renovation – Costs associated with the installation of a second extrusion line (v) Royalties – A nominal royalty (TBD) will be paid to STR on a quarterly basis. The royalty shall not exceed the rent paid to Lucent.
7.	Proposed Schedule	Assuming that the parties execute the Agreement by October 1, 2016, and extrusion trials to be conducted in September are successful: (i) STR will begin ordering under the tolling agreement in November 2016

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STR Holdings

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	DESCRIPTION	PROVISION
		(ii) STR will make decision on joint venture by May 1, 2017
8.	Term	The term of the Agreement shall be for a period of five (5) years, subject to earlier termination by the parties as set forth below under "Termination".
9.	Investment:	Following the date of exercise of the Option (the "**Option Exercise Date**"), each of Lucent and STR (the "Shareholders") will fund ProjCo's shareholder funding requirements for operating capital in proportion to their ownership (i.e. Lucent fifty per cent (50%) and STR fifty per cent (50%)).
10.	Additional Investment:	In the event that after the Option Exercise Date additional funding is required to complete, or provide operational support in respect of, the Plant, then the Shareholders shall contribute such support on a several basis in accordance with their proportionate shareholding.
11.	Financing Conditions and Security:	The Shareholders undertake to provide share pledges, direct agreements and security acknowledgements with the lenders to ProjCo in accordance with normal market practice.
12.	Dividends:	After the Option Exercise Date, the dividend policy of ProjCo shall be to maximise dividends for the Shareholders and the profits of the ProjCo from the operation of the Plant in any year shall be distributed to the Shareholders pro rata with their investment other than: (a) a reserve of [ten per cent (10%)] of annual net profits which shall be set aside as a statutory reserve; and (b) such other reserves as are required to comply with the terms of the finance documents. Each Shareholder shall be responsible for the payment of Indian income tax and any other tax or duty required in India (including with-holding tax on dividends). The Shareholders shall authorise the ProjCo to withhold sums from any payment of dividends in an amount equal to the tax due in respect of the relevant dividend payment provided that the sums withheld are promptly paid to the relevant authorities.
13.	Share Transfers:	No transfers shall be made without the written consent of the other Shareholder and pre-emption rights shall apply.
14.	President:	The General Manager of ProjCo shall be nominated by STR
15.	Board of Directors:	The day to day management of ProjCo shall be the responsibility of STR's CEO. Other matters shall be decided by a Board of Directors. Details are to be defined at a later date and outlined in a draft for Articles of Incorporation.

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STR Holdings, Inc.

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	DESCRIPTION	PROVISION
16.	Confidentiality:	This Term Sheet is confidential to the parties and their advisers, and is subject to the confidentiality agreement dated [DATE] already entered into between Lucent and STR, which continues in full force and effect. This paragraph is legally binding.
17.	Standards of Business Practice:	Detailed standards of practice and operating procedures shall be decided by the Board and in all circumstances the ProjCo shall comply with: (a) good industry practice for petrochemical plants of a similar size and nature being operated by skilled and prudent international petrochemical producers; (b) all material environmental laws and regulations including the Equator Principles and other standards necessary to secure financing from commercial banks; (c) all material health and safety standards applicable in India; and (d) all material laws and regulations of India.
18.	Incorporation mechanics:	Lucent and STR shall take the necessary steps to have ProjCo incorporated in India. Lucent and STR will represent and warrant that, as at the date of the transfer of shares, ProjCo has not traded and does not have any liabilities or obligations other than: (a) liabilities disclosed in writing to the Shareholders; or (b) those otherwise arising as an operation of law.
19.	Termination:	Either Party may elect to terminate the Agreement if the other Party: (a) has been insolvent or is wound-up; or (b) has committed a material breach of the Agreement that has not been remedied within a [90] day cure period.
20.	Assignment/Transfer:	No party may assign or transfer their rights under the Agreement without the other parties' consent other than in accordance with any share security granted to the lenders to ProjCo.[Discuss]
21.	Boilerplate:	Agreement boilerplate to include: (a) representations as to due capacity and authorisation; (b) each party to bear their respective costs in relation to negotiation and execution of the Agreement; (c) no announcements without other party's consent;

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STR Holdings, Inc.

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	DESCRIPTION	PROVISION
		(d) notices; (e) entire agreement; and (f) execution by counterparts.
22.	Dispute resolution:	Arbitration in London in accordance with ICC arbitration rules.
23.	Governing law:	English.
24.		
25.		

Luke Strzegowski
Director - Sales + Technology

Rahul Baidya
Director
Lucent cleanenergy

6

STR Holdings, Inc.

15

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STR

January 23, 2017

To whom it may concern:

Specialized Technology Resources (STR), in order to facilitate and streamline the production of their encapsulants at Lucent Clean Energy (Lucent), have agreed to transfer the formulation and production know-how to the personnel at Lucent.

STR acknowledges that the formulae being shared represent the current embodiments sold within India out of their existing factories and these formulae have not previously been disclosed to anyone at Lucent prior to the signing of this agreement.

In signing Lucent acknowledges that they do not currently possess these, or similar, formulae for either high light transmission or PID-resistant encapsulants. They also agree to not disclose, market, sell, or manufacture these or similar formulae except through agreement with STR.

Signed:	STR	Lucent
Name:	STR Luke Strzegowski	Lucent Prabul Barvaliya
Title:	STR Director, Sales & Technology	Lucent M. D.

STR Holdings, Inc.

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14.5 As per the "Term Sheet", which itself is an agreement for joint venture, and more specifically point no. 5, the raw material, packaging material, technical assistance, blending equipments, formula and specifications, etc. were to be provided by the Applicant to Corporate Debtor for undertaking processing for which tolling fee of $0.125/m^2 was agreed. It was also stated that the blending equipment and any unused raw material were to be returned to the Applicant at their request. As per the Term Sheet point no. 3 a new entity was visualized which was supposed to market and sell the products produced by the plant in which both parties were to have 50:50 share.

Thus, as per the Term Sheet and the joint venture agreement, the role of the Corporate Debtor was limited to carrying out job work for fixed charge. However, in the submissions made, it was agreed by both the parties that customs clearance, payment of applicable customs duty, loading charges etc. as well as marketing and sales of final product was undertaken by the Corporate Debtor as STR, which was to exercise option to form new joint venture entity, called ProjCo, chose to not exercise this option. Thus, while other terms of tolling and joint venture agreement were put in place, the new joint venture entity was not formed.

14.6. As noted in Part IV of Form- 5 (page no. 15 of the application) *"for ease of business, the customers placed orders directly on the Respondent/Corporate Debtor and sales recorded in the Respondent/Corporate Debtor's books".*

14.7. The Applicant has submitted to make out a case that the amount outstanding is primarily relating to 16 commercial invoices which remained unpaid. These invoices are attached with the application. One such invoice relating to goods supplied by Celanese given by the Applicant, is scanned below:

EXHIBIT 'J' COLLY

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STR®
STR Holdings, Inc.

10 WATER STREET
ENFIELD, CT 06082
TEL 860.272.4235
www.strsolar.com

REMIT TO: STR Holdings, Inc.
10 Water Street
Enfield, CT 06082

COMMERCIAL INVOICE

NUMBER	CLU16071		
DATE	2-Jul-16	PAGE	1 of 1
PURCHASE ORDER NO.	LUCENT/STR/2016/01		
OUR REFERENCE	N/A		
SALES ORDER NO.	N/A		
CUSTOMER NO.	N/A	LOCATION NO.	N/A
PROJECT NO.	N/A		

BILL TO: **Lucent Clean Energy Pvt. Ltd.**
Block No. 187, Opp. Laxmi Narayan Petrol Pump,
Nr. Sigma, Sarkhej – Bavla Road, Changodar,
Ahmedabad – 382213, Gujarat
INDIA
Phone: +91-96876-34297

SHIP TO: **Lucent Clean Energy Pvt. Ltd.**
Block No. 187, Opp. Laxmi Narayan Petrol Pump,
Nr. Sigma, Sarkhej – Bavla Road, Changodar,
Ahmedabad – 382213, Gujarat
INDIA
Phone: +91-96876-34297

INCO TERMS	CIP-Mundra	02-Jul-17	Luke Strzegowski	Praful Bavishiya	2-Jul-16	SEA	N/A
PAY TERMS	365 days OC	DUE DATE	SALESPERSON	CUSTOMER CONTACT	SHIP DATE	SHIP VIA	SHIPPING REF.

ITEM NO.	Item Number / Description	QUANTITY ORDERED	QUANTITY BACK ORD.	QUANTITY SHIPPED	UNIT	UNIT PRICE	EXTENDED AMOUNT
1	EVA Resin for PV Encapsulants (Make: Celanese)	12,345.76	0	12,345.76	Lbs	$0.81	$10,000.07

BANKING INSTRUCTIONS:
Bank of America, N.A.
100 West 33rd Street, 4th Floor, New York NY 10001 USA
Account Number: 385012581287
SWIFT: BOFAUS3N ABA: 026009593 ACH: 011900571

SUBTOTAL	TAX	SHIPPING	TOTAL
$10,000.07	$0.00	$0.00	$10,000.07

Currency: USD

5349Q EVERGREEN DATA SYSTEMS INC (Ver. 1.01)

STR Holdings, Inc.

14.8. The Applicant has submitted that for the said purchase from supplier Celanese, the purchase order was issued by the Respondent. The corresponding purchase order copy given by the Applicant is scanned below:

Exhibit "RR"
40

Lucent. cleanenergy

PURCHASE ORDER

PURCHASING LOCATION | GST NO. : 24AACCL0497P1Z3 | PO NO. : LUCENT/STR/2016/01
PO DATE : 28-06-2016

LUCENT CLEAN ENERGY PVT.LTD.(100%EOU)
Block No.-187, Opp. Laxminarayan Petrol
Pump,Sarkhej Bavla Highway,
Changodar, Ahmedabad – 382213
Gujarat, India.
Kind Attn. : Mr. Deepak Kumar Parida
Email: purchase@lucentcleanenergy.in
Mobile : +91 9687634299

VENDOR
STR HOLDINGS INC.
10 WATER STREET,
ENFIELD, CT 06082
www.strsolar.com

SHIP TO
LUCENT CLEAN ENERGY PVT.LTD.(100%EOU)
Block no – 187, Opp. Laxminarayan Petrol
Pump, Sarkhej Bavla Highway,
Changodar, Ahmedabad – 382213
Gujarat, India

PLEASE SUPPLY THE FOLLOWING MATERIALS AS PER THE TERMS & CONDITIONS MENTIONED BELOW.

SR. NO.	PART NO. & DESCRIPTION	QTY.	UNIT	UNIT PRICE (USD)	AMOUNT (USD)
1	EVA RESIN FOR PV ENCAPSULANTS (Make : Celanese)	12,345.76	Lbs	$0.81	10,000.07
TOTAL ORDER AMOUNT (IN WORDS) : TEN THOUSAND US DOLLAR AND SEVEN CENT ONLY					**10,000.07**

1. PAYMENT TERMS	365 Days open credit
2. INCO TERMS	CIP Mundra

SPECIAL INSTRUCTIONS

1. THIS ORDER MUST BE SHOWN ON ALL BOXES, PACKAGES, SHIPING DOCUMENTS, INVOICES AND CORRESPONDENCE.
2. ACCEPTANCE OF AND RESPONSIBILITY FOR MATERIAL SHIPPED ON THIS ORDER BEGINS ONLY UPON DELIVERY BY THE CARRIER TO THE DESTINATION.
3. MATERIALS REJECTED BECAUSE OF FAILURE TO MEET SPECIFICATION AND STANDARD ARE TO BE REMOVE BY VENDOR FROM DESTINATION AT THEIR EXPENCE WITHIN 30 DAYS OF NOTIFICATION FROM BUYER'S.
4. THE BUYER RESERVES THE RIGHT TO CANCELL ALL OR ANY PORTION OF THIS ORDER BY EMAIL, MAIL, FACSIMILE OR TELEPHONE & WRITTEN NOTICE.
5. MATERIALS TEST CERTIFICATE SHOULD BE ACCOMPLISHED WITH EACH SHIPMENT ALONG WITH PRE-DELIVERY INSPECTION REPORT.
6. ANY DISPUTE ARISING OUT OF TRANSCTIONS UNDER THIS ORDER WOULD BE SUBJECT TO JURISDICTION OF THE COURT AT AHMEDABAD, GUJARAT, INDIA.
7. DEMURRAGE : ANY DEMURRAGE OR OTHER LEVIES PAYABLE DUE TO NON-ADHERENCE TO DELIVERY SCHEDULE OR FAULTY DOCUMENTATION WILL BE BORNE BY YOU.

FOR, LUCENT CLEAN ENERGY PVT.LTD.

THIS IS COMPUTER GENERATED DOCUMENT: NO SIGNATURE NEEDED

PREPARED BY: AUTHORISED SIGNATORY

Regd. Office: 14/15, First Floor, Pushpak Apt. Opp. Kaladarshan Flats, Prernatirth Derasar Road, Satellite, Ahmedabad-380015, Gujarat, India.

REBECCA KMIOTEK
Notary Public
Connecticut
My Commission Expires May 31, 2020

14.9. However, the Respondent/Corporate Debtor in page 6, para 8(vii) of its reply has categorically stated that no purchase order was ever given by the Respondent to the Applicant. According to the Respondent, the Applicant had placed orders before third parties for supply of raw material to the Respondent. It was submitted that the Corporate Debtor has not made any purchase of raw material directly from the Applicant and no purchase order was ever issued to the Applicant. The Respondent states that the purchse orders are created by the Applicant, are computer generated and do not bear any signature or seal of the Respondent. The purchase orders issued by the Respondent to other parties are in totally different format. The Respondent has given copy of its purchase register as evidence and the sample of one such purchase order issued by it to some other party is scanned below to show the difference between purchase order issued by the Corporate Debtor and the computer generated alleged purchase order copy submitted by the Applicant:

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Lucent cleanenergy

PURCHASE ORDER

PURCHASING LOCATION

LUCENT CLEAN ENERGY PVT.LTD.(100%EOU)
Block No.-187, Opp. Laxminarayan Petrol Pump, Sarkhej Bavla Highway,
Changodar, Ahmedabad – 382213
Gujarat, India
Kind Attn. : Mr. Deepak Kumar Parida
Email: purchase@lucentcleanenergy.in
Mobile : +91 7600147307

ECC NO. AACCL0497PEM002
IEC NO. 0811012786
CST NO. 24573884802
VAT NO. 24073804802

PO NO. : LUCENT/17-18/003
Date : 30-04-2017

VENDOR

SHRI KRISHNA SCIENTIFIC COMPANY
No.5334, 1st Floor, Plot No. 2,
West Sadar Thana Road,
Delhi -110006, India
Co. Person : Mr. Anuj Goel
Mobile No. : +91 9899166708
E-mail : sksdentificcompany@gmail.com

SHIP TO

LUCENT CLEAN ENERGY PVT.LTD.(100%EOU)
Block No – 187, Opp. Laxminarayan Petrol Pump, Sarkhej Bavla Highway,
Changodar, Ahmedabad – 382213
Gujarat, India

PLEASE SUPPLY THE FOLLOWING MATERIALS AS PER THE TERMS & CONDITIONS MENTIONED BELOW

S. NO.	PART NO. & DESCRIPTION	QTY.	UNIT	UNIT PRICE (INR)	AMOUNT (INR)
1	FILTER PAPER (DIA : 125MM) TYPE - GEADE#1 QTY - 100 Pcs/Pkt	2	PKT	600.00	1200.00
	NOTE : MATERIAL SHOULD BE AS PER SAMPLE		CST 2% AGAINST C' FROM		24.00
TOTAL ORDER AMOUNT (IN WORDS) : INR. ONE THOUSAND TWO HUNDRED TWENY FOUR ONLY					1224.00

NOTE: Packing must be in good conditions

1. PAYMENT TERMS	100% advance against Proforma Invoice
2. PRICE BASIS	CST 2% Included in final price
3. PACKING INSTRUCTIONS	Standard transport worthy packing
4. INSURANCE	Borne by Party
5. FREIGHT CHARGES	Borne by Party
6. MODE OF DESPATCH	By road
7. DELIVERY SCHEDULE	Immediate after receipt of payment

SPECIAL INSTRUCTIONS

1. THIS ORDER MUST BE SHOWN ON ALL BOXES, PACKAGES, SHIPING DOCUMENTS, INVOICES AND CORRESPONDENCE.
2. ACCEPTANCE OF AND RESPONSIBILITY FOR MATERIAL SHIPPED ON THIS ORDER BEGINS ONLY UPON DELIVERY BY THE CARRIER TO THE DESTINATION.
3. MATERIALS REJECTED BECAUSE OF FAILURE TO MEET SPECIFICATION AND STANDARD ARE TO BE REMOVE BY VENDOR FROM DESTINATION AT THEIR EXPENCE WITHIN 30 DAYS OF NOTIFICATION FROM BUYER'S.
4. THE BUYER RESERVES THE RIGHT TO CANCELL ALL OR ANY PORTION OF THIS ORDER BY EMAIL, MAIL, FACSIMILE OR TELEPHONE & WRITTEN NOTICE.
5. MATERIALS TEST CERTIFICATE SHOULD BE ACCOMPLISHED WITH EACH SHIPMENT ALONG WITH PRE-DELIVERY INSPECTION REPORT.
6. ANY DISPUTE ARISING OUT OF TRANSECTIONS UNDER THIS ORDER WOULD BE SUBJECT TO JURISDICTION OF THE COURT AT AHMEDABAD, GUJARAT, INDIA.
7. DEMURRAGE : ANY DEMURRAGE OR OTHER LEVIES PAYABLE DUE TO NON-ADHERENCE TO DELIVERY SCHEDULE OR FAULTY DOCUMENTATION WILL BE BORNE BY YOU.

PREPARED BY:

FOR, LUCENT CLEAN ENERGY PVT.LTD.

AUTHORISED SIGNATORY

Regd. Office: 14/15, First Floor, Pushpak Apt. Opp. Kaladarshan Flats, Premathirth Derasar Road, Satellite, Ahmedabad-380015, Gujarat, India.

LUCENT CLEANENERGY PVT. LTD. AHMEDABAD

Further, the Respondent has submitted copy of invoice raised by Celanese corresponding to the alleged purchase order and alleged invoice referred in para 14.7 and 14.8, supra. The correct invoice submitted by the Respondent corresponding to the above-scanned document relating to purchase from Celanese is scanned below:

Copy
Invoice

Celanese

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Remit-To Address:
CELANESE EVA PERFORMANCE POLYMERS INC
16883 COLLECTION CENTER DR.
CHICAGO, IL., USA 60693
US

CONTACT
Employee name: SHERYL FARRIER
Phone: 800-914-6006
Fax:

SOLD-TO :
STR HOLDINGS INC
10 WATER STREET
ENFIELD CT 06082
USA

Customer no.:	1197211
Invoice no.:	977636417
Invoice date:	06/20/2016
Tax Exempt No.:	
GST Registration	R121816359
Page:	1 of 1

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DELIVERY ADDRESS :
LUCENT CLEAN ENERGY PUT LTD
OPP LAXMI NARAYAN PETROL PUMP
187 BLOCK NO
NR. SIGMA SARKHEJ BAVLA ROAD
382213 CHANGODAR
INDIA

India

ENTERED AUG 25 2016

71455.4011
~~70330.0601~~

TERMS OF DELIVERY :CIP MUNDRA PORT,GUJARAT, IN
MODE OF TRANSPORT: Liner (sea)

Item	Material	Quantity	Price	Per Unit	Amount
10	20009335	12,345.760 LB	81.00 USD	100 LB	10,000.07 USD

Ateva(R) 2821A EVA COPOLYMER RESIN
Exporting Commodity Code (Schedule B): 3901300000
P.O. no.: 217189-01
Sales order no.: 1726671 / 10
Country of origin : CA / Canada
Gross weight: 5,717.600 KG
Container ID : FCIU208834-6,APL LE HAVRE 018W

SHIPPING MARKS :

AUG 26 2016
PAID

Items Total	10,000.07 USD
Total Amount Due	10,000.07 USD

25AUG2016

order was placed in early June
but not shipped until last week.
It will not be arriving in India
very soon and should be paid when arrives
Jay 7/21

Terms of Payment: Due 30 days after invoice date
Due Date : 07/20/2016

This invoice is seller's acknowledgment and acceptance of buyer's order and a confirmation of our agreement (the "contract") expressly made conditional on buyer's assent by buyer to the terms hereof, shall constitute an agreement to all the terms and conditions herein, including seller's disclaimer of warranties, limitation of liability and remedies,buyer's assumption of risk and all other terms hereof regardless of any contrary statements or representations by buyer not contained herein.
This product is subject to Export Administration Regulations (EAR), administered by US Dept of Commerce, Bureau of Industry and Security. The Export of this product may require a license. Before exporting or re-exporting, confirm whether a license is required and whether the customer and any known end user appear on any government lists that prohibit exports to such entities or individuals.

3515 - 1

14.10 As per the scanned copy above, the goods were sold to the Applicant/ STR Holdings Inc. and the delivery address was that of the Corporate Debtor. As clear from the right upper corner of the invoice, the remittance was to be made to Celanese, apparently by the buyer STR Holdings Inc.

14.11. In its later submissions, the Applicant has tried to show that the outstanding debt is mainly on account of unpaid commercial invoices. However, in the application filed under Section 9 in Form 5, the Applicant has given break up of claims which has also been reproduced as Exhibit QQ on page 1724 of the application. The same is scanned below:

EXHIBIT QQ

1724

Items	Amount in USD
Payments from End Customers (upto May 15, 2019)	1,550,525
Equipment	189,880
Inventory (upto June 30, 2019)	258,880
Conditional discount on Equipment added back	20,000
Total	**2,019,285**
Less payments received since May 15, 2019	320,845
Outstanding Principal dues	**1,698,440**
Interest @12% calculated from April 27, 2019 upto September 18, 2019	86,325.02
Interest @12% calculated from September 19, 2019 to November 13, 2019	30,711.52
Grand Total Outstanding as of Novemeber 13, 2019	**1,815,476.54**

STR Holdings, Inc.

1

14.12. It is apparent that the payments claimed are largely relating to non- remittance of amounts received from end customers. In the email dated 12.07.2019 addressed to the Respondent, appearing at page no. 1572-73 (volume 6), the Applicant had stated that the bulk of funds reflected in the reconciliation pertain to sales register provided by the Respondent. Following paragraph from email of Applicant (page 1573) is reproduced for reference.

" ....Based upon the sales register dated 10JUL19, Lucent is currently in possession of more than $1.1 million belonging to the STR but has not made any payment since 24May2019, now seven weeks ago, despite your promises to pay within this period..."

From the submissions made at the time of filing of application, from Form 5 of the application, from the terms of "Term Sheet", from the reconciliation statements, which are also discussed below, it is established that the Respondent was not only carrying out job work but also selling the final product, and the outstanding debt relates to non-remittance of sale proceeds, return of un-used inventory, scrap, etc. As per the business model, the raw material was to be supplied by the Applicant and there was no liability of the Respondent towards purchase of raw materials. Thus, the debt due is mainly towards non-remittance of sale proceeds.

14.13. The predecessor Bench had held that the remittance of money collected from end customers or remittance towards unused raw material, etc. is not operational debt within the definition of Section 5(21) of IBC, 2016. We concur with the judgment of the predecessor Bench that non-remittance of money collected from end customers will not amount to operational debt as defined under Section 5(21) of IBC, 2016.

14.14. On the issue of pre-existing dispute, we find that there are extensive email exchanges between the Corporate Debtor and the Applicant. The disputes were placed under five buckets or five disputed areas, namely:

Bucket 1	*: Receivables from end customers of PV encapsulant*
Bucket 2	*: Outstanding payment for Equipment (Line 4 and STRM Blender)*
Bucket 3	*: Inventory (Raw material, packaging, finished goods)*
Bucket 4	*: Scrap/Waste/bad debts*
Bucket 5	*: Miscellaneous (GST, Credit note and judgments, etc)*

It is to be noted that there is no bucket for non-payment of purchase of raw material.

14.15. Continuously, correspondences were exchanged and meetings were held between the Corporate Debtor and the Applicant regarding reconciliation of accounts. The reconciliation sheet for five buckets dated 17.06.2019 is scanned below for ready reference. Again, it is clear from this sheet that bulk of the outstanding relates to non-remittance of sale proceeds.

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File Name:STR-Lucent Closing Accounts_v3_2019-06-17 (Sent by Lucent, Printing formatted).xlsx; Tab Name: By Bucket [Formatted for Printing - NCLT Submission]

Page 1 of 1

6/17/2019 v.3

Revison History
0 Created - Tom/Becki
Updated - By Bucket; Tom/Jay
1 Updated, formatted and linked to internal sheets
Sent to Lucent on 30MAY2019 by Jay
2 Changed all "unknowns" to "TBD" (To Be Determined), clarification for Prafulbhai per Jay/Praful discussions on 10JUN2019
Sent to Lucent on 12JUN2019 by Jay
3 Added columns (K-M) for Lucent Entry of amounts (Font=Green)
Sent to Lucent on 17JUN2019 by Jay for Updating

STR-Lucent Reconciliation of Accounts
(DUES FROM LUCENT TO STR)

	Per STR Amount Due	Per STR Reference	As Per Lucent Amount Due	As Per Lucent Reference	STR Added NOTES
1 Accounts receivable - US*	as of: 15-May-19	(at FX= 70.00 INR/USD)	as of: 15-May-19	(at FX= 70.00 INR/USD)	
Customer Current	$ 169,737	per Sales Register 05/15/19	$ 169,737 $ -	per Sales Register 05/15/19	To refresh with updated Sales Register
Customer Past due	$ 548,995	per Sales Register 05/15/19	$ 548,995 $ -	per Sales Register 05/15/19	To refresh with updated Sales Register
Net cash balance @ Lucent	$ 831,793	per Sales Register 05/15/19	$ 831,793 $ -	per Sales Register 05/15/19	To refresh with updated Sales Register
*-Net of tolling fees, taxes, reimb's	$ 1,550,525		$ 1,550,525		
2 Equipment		(in USD)		(in USD)	
STRE L#4 - balance due	$ 200,000		$ 200,000		
Less: Credit for winder/roll swap	$ (20,000)	estimate: -10%	$ (20,000)	estimate: -10%	New Winder Required
STRM Blender	$ 9,880	per invoice STR003/16	$ 9,880	per invoice STR003/16	Not Required so we will return
Total	$ 189,880		$ 189,880		
3 Inventory	as of: 30-Apr-19	(at FX= 70.00 INR/USD)	as of: 30-Apr-19	(at FX= 70.00 INR/USD)	To refresh inventory with May-end counts
RM	$ 233,000	per Inventory 04/30/19	TBD	per Inventory 04/30/19	Approx Cost; Place holder; can Link to detailed "Inventory" sheet
PK	$ 5,100	per Inventory 04/30/19	TBD	per Inventory 04/30/19	Approx Cost; Place holder; can Link to detailed "Inventory" sheet
FG	$ 190,800	per Inventory 04/30/19	TBD	per Inventory 04/30/19	FG= ~212ksm @0.90$/sm
Less: RM purchased by Lucent	TBD	April purchases, if any, charged to STR	TBD	April purchases only, if any, that have been charged to STR	
Total	$ 428,900		$ -		
4 Scrap/Waste/Bad Debt/Quality		(at FX= 70.00 INR/USD)		(at FX= 70.00 INR/USD)	
Excess scrap (> 3%)	$ 120,034	Cost of BOM over and above allowed Scrap	TBD	Cost of BOM over and above allowed Scrap	
Vikram quality problems	TBD	included in A/R	$ -	included in A/R	
Waaree bad material (STRC)	$ 11,405	assume sold for scrap and collected by Lucent	TBD	assume sold for scrap and collected by Lucent - Ground Rent and other Exp.	
Premier bad material	TBD		$ -		
Other customer rejects	TBD		$ -		
Tindo credit	$ 12,719	Delay in Shipment	$ - $ -	Delay in Shipment - Not Done	
Less: Amut trial materials	TBD		TBD		
Total	$ 144,158		$ -		
5 Misc./Wrap-up					
GST Adjustments	TBD	Adjust for outstanding credit/debit on Sales Register	TBD	Adjust for outstanding credit/debit on Sales Register	
Credit notes adjustment	TBD	(To be updated and linked to CN sheet)	TBD	(To be updated and linked to CN sheet)	
Other adjustments	TBD	Include Taxes, Duties, Transport, etc. for RM, FG- add or reverse	TBD	Include Taxes, Duties, Transport, etc. for RM, FG- add or reverse	
Loss of Business	TBD		TBD	Loss of Business for Lucent	
Others	TBD		TBD		
Total	$ -		$ -		
Net Amount Due to (from) STR	$ 2,313,463		$ 1,740,405		

STR Holdings, Inc.

Some resolution was achieved, and vide email dated 19.07.2019 payment of USD 11,05,120 was promised by the Corporate Debtor. However, reconciliation was limited to 3 of the 5 buckets and the disputes were not fully resolved as is seen from email dated 24.07.2019 and 12.08.2019 given at page no. 1562, and page no. 1591 volume 6 of the application. Further, the Corporate Debtor had not made payment of the promised amount.

14.16. From perusal of the record, it is apparent that there were disputes requiring reconciliation of accounts and finalisation of dues between the Applicant and the Corporate Debtor even before the issue of notice under Section 8 of IBC, 2016. In its reply dated 25.11.2019 to the notice under Section 8 of IBC, 2016, the Corporate Debtor has stated that there are pre-existing disputes. There were also counter claims by the Corporate Debtor of USD 64,43,295 including claims for rent of the factory for three years and losses relating to production line no. 4. From the records, it is clear that there were pre-existing disputes between the Applicant and the Corporate Debtor relating to claim and counter claim relating to outstanding amount. In the case of *Sabarmati Gas Limited Vs. Shah Alloys Limited in Civil Appeal No. 1669 of 2020 dated 04.01.2023*, the Hon'ble Supreme Court has held that pending reconciliation of accounts amounts to "pre-existing dispute". The relevant part of the judgment is reproduced below:

> "*…38. In this context the meaning of the word "reconciliation" is to be looked into. Going by Black's Law Dictionary, 10th Edition, the apt meaning suitable to the*

situation in relation to accounting, reads thus: "an adjustment of amounts so that they agree, especially by allowing for outstanding items". It is submitted by the learned counsel for the respondent that <u>such a reconciliation had not taken place</u> and also that indisputably, DRS was not formulated and approved. The aforesaid facts revealed from Annexure 40 together with the stand taken by the respondent in the letter dated 04.01.2013 (Annexure 36) <u>would reveal the existence of a pre-existing dispute between the parties</u>. In the contextual situation it is only apposite to be remindful of the observation in Mobilox Innovations (P) Ltd. (supra) that in doing the act of separating the grain from chaff the Court need not to be satisfied that the defence is likely to succeed. It is enough that a dispute exists between the parties and in other words, what is to be seen is whether there was a plausible contention requiring investigation for the purpose of adjudication. Taking note of the nature of the dispute of the respondent as referred hereinbefore in respect of the claim made by the appellant, we do not find any reason to disagree with the concurrent findings of the Tribunals that there existed a 'pre-existing dispute' between the parties before the receipt of demand notice under Section 8, IBC. In other words, the dismissal of the application under Section 9, IBC on the ground of 'pre-existing dispute' cannot be held to be patently illegal or perverse. We also do not find any reason, in the facts and circumstances, to hold that the case set up by the respondent was a patently feeble legal argument. At any rate, we are not inclined to brush aside the case of the respondent as spurious. We may hasten to add here that we shall not be understood to have held that the dispute set by the respondent regarding the dues is ultimately to be upheld. Certainly, when the expression 'pre-existing dispute' is used it will only indicate the existence of a dispute prior to the receipt of a demand notice under Section 8, IBC, and the correctness or its truthfulness is a matter of evidence. In short, the respondent has succeeded in raising a dispute describable as 'pre-existing dispute'. In that view of the matter once we find that the Tribunals have rightfully held that there existed a 'pre-existing dispute' between the parties there cannot be an order of remand of the matter to the Tribunal for reconsideration of Section 9 application under IBC." (Emphasis provided)

14.17. The Respondent has also brought to our notice that the Applicant has filed application under the provisions of Commercial Court Act, 2015 before the

Commercial Court, Mirzapur, Ahmedabad on 10.10.2022, thereby, admitting to commercial dispute as per averment made at page 2 of the said application.

14.18. The full reconciliation of accounts was still pending at the time of filing of the present application. It is clear from emails dated 24.07.2019 and 12.08.2019 of the Applicant that two buckets were yet to be resolved. The present application is not maintainable considering the pre-existing dispute. We concur with our predecessor Bench that existence of dispute prior to issue of notice under Section 8 of IBC, 2016 makes this application ineligible for admission under Section 9 of IBC, 2016.

14.19. Further, the business arrangement between the Applicant and the Corporate Debtor was in the nature of joint venture governed by the term sheet drawn between them. Hon'ble NCLAT in the Case of *M/s. Shree Sankeshwara of Foundation and Investment Vs. M/s. Dugar Housing Limited in company Appeal (AT) (Insolvency) No. 515 of 2019* has held that both parties being bound by a joint venture are not rendering service to each other and cannot be treated as operational creditor. The relevant portion of the said judgment is reproduced below:

> *"…6. Having gone through the records and stand taken by the Appellant, we hold that the Appellant along with Respondent ('Corporate Debtor') had executed Joint Development Agreement in the year 2012 for construction of structure and allotment to allottees. <u>Both of them being parties to a joint venture project, we hold that the Appellant cannot claim to be 'Operational Creditor' as it does not relate to supply of goods nor service rendered by the Appellant</u>. If joint venture under any*

service to the allottees and for that to pay service tax it does not mean that the parties of the joint venture will render service to each other.

7. Therefore, we hold that the Appellant is not an 'Operational Creditor'. The application under Section 9 at the instance of the Appellant was not maintainable and the same has been rightly rejected by the Adjudicating Authority.

The appeal is dismissed with aforesaid observations. No costs." (Emphasis supplied)

The said judgment had been followed in another judgment by Hon'ble NCLAT in the case of *M/s. RK Associates & Hoteliers Pvt Ltd Vs. BW Businessworld Media Pvt Ltd Through its Managing Director in Company Appeal (AT) (Insolvency) No. 511 of 2020*.

In the case of *Vinod Thimothy Vs. M/s. Urban Tree Infrastructures Private Limited (IBA/426/2020)*, the co-ordinate bench NCLT, Division Bench, Chennai and in the case of *Mrs. Ajit Kaur Gill vs. Raheja Developers Ltd., in CP(IB)/409(PB)/2019*, the Principal Bench, New Delhi have held that debt due and payable by the Corporate Debtor, which arises out of Joint Venture Agreement, does not fall within the confines of provision of Goods and Services and is therefore, not an operational debt and the application under Section 9 of IBC, 2016 were dismissed accordingly.

14.20. For the reasons elaborated in preceding paragraphs, we hold that the application under Section 9 of IBC, 2016 is not maintainable. We clarify that the observations made in this order shall not prejudice the proceedings in any other judicial forum.

14.21. Application is rejected and CP(IB) 852 of 2019 is accordingly disposed of.

14.22. The Registry is directed to communicate this order to both parties.

-SD-
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-SD-
DEEP CHANDRA JOSHI
MEMBER (JUDICIAL)

Rahul Singh/LRA
Rajeev Kr. Sen/PS