

**NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V**

(IB) 2413(ND)/2019

In the matter of:

**M/S IMPERIAL FASTNERS PRIVATE LIMITED
1092, SHIV MOTOR MARKET,
BARA BAZAR, KASHMIRI GATE,
NEW DELHI-110006**

.....Operational Creditor

V/s

**M/S SOLVEN POWER SYSTEMS
B1/E1, 2ND FLOOR, RAJENDRA HOUSE,
MOHAN COOPERATIVE INDUSTRIAL ESTATE,
MATHURA ROAD, NEW DELHI- 110044**

ALSO AT:

**HOUSE NO. 106, SHOP NO. 1,
GROUND FLOOR BLK-C, PKT-7,
SECTOR-8, ROHINI,
DELHI-110085**

.....Corporate Debtor

SECTION: U/S 9 of IBC, 2016

Order delivered on: 18.02.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Petitioner: Mr. Rajesh Rai, Mr. Manjeet Singh Marwah

For the Respondent: Adv. Vinam Gupta, Adv. Girbran Naushad

ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. The present petition has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") by the M/S Imperial Fastners Private Limited praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor on grounds of its inability to liquidate its operational debt.
2. As per averments made in the petition, the Corporate Debtor entered into an agreement in Operation and Management on dated 18th April 2018 with Operational Creditor to provide Operation and management services of the Captive Power Plant at Post Kathara, Distt. Bokaro, Jharkhand-829116, and the Corporate Debtor took over the project from effective date of agreement i.e. 01st December, 2017 and was responsible for the Operations of the project for a period of nine years as per terms envisaged in Operation and Management Agreement dated 18.04.2018 and was receiving regular payments from Central Coalfield Limited in the accredited bank account maintained at SBI Bank, Branch Kathra. Ledger account of Central Coalfield Limited is annexed as Annexure-A7(Colly). In terms of Operation and Management Agreement dated 18.04.2018 it was only agreed that the Corporate Debtor shall pay Operational Creditor a sum of Rs. 25,00,000/- per month. As per the terms of Operation

and Management Agreement dated 18.04.2018 and as per Section 5.1 of the Operation and Management Agreement dated 18.04.2018 the total outstanding which the Corporate Debtor had to pay the Operational Creditor from December, 2017 to June, 2018 is as follows: -

- a) 25 lacs per month for the month of December-2017, January-2018, February- 2018 and June- 2018
- b) Rs. 25 lacs * 4 months = Rs. 1,00,00,000/- (Rupees One Crore Only) along with interest at 12% p.a.

3. Further as per the section 5.1 (m) of the Operation and Management Agreement dated 18.04.2019 the Corporate Debtor did not provide the Bank Guarantee of Rs. 25,00,000/- (Twenty-Five Lacs) from one year of the date of signing of the Agreement i.e. 18.04.2018. The Corporate Debtor had entered the Agreement for a period of Nine years from the effective date however, never had any intention of running the plant for that period by putting in genuine efforts and resources. The Corporate Debtor only made false promises and therefore breached the Operation and Management Agreement dated 18.04.2018. The Operational Creditor has been suffering massive losses for which the Corporate Debtor is fully liable as the Operation and Management Agreement dated 18.04.2018 was duly signed by both the parties and till date is not terminated.

4. The Operational Creditor issued the demand notice dated 29th August, 2019 which was sent to the registered address of the



Corporate Debtor twice but the same was returned with a note “insufficient address and address is out of access”. Therefore, Operational Creditor sent a demand notice through email id i.e. accounts@solvenpower.com, hr@solvenpower.com, solvenpower2017@gmail.com, marketing@solvenpower.com on 16.09.2019 and the same did not bounce back. Further, despite the demand notice received by the Corporate Debtor, no reply has been given by the Corporate Debtor. The cause of action arose when the Corporate Debtor and Directors delayed in making the payment of Rs. 25 lakhs per month i.e. on 29th August, 2019.

5. In view of the Corporate Debtor’s failure to reduce or liquidate its liability, the present petition has been filed in the required format praying for initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor.
6. The Respondent/Corporate Debtor has filed its reply and has asserted the following contentions:
 - i. The Corporate Debtor raised the maintainability of the application and submitted that the Petitioner does not come under the definition of Operational Creditor as defined under Section 5(20) of the Code, because Section 1.3 and 3.1 of the Agreement clearly states that the Respondent had been retained by the Petitioner to operate, consult, maintain and manage the Plant on behalf of the Petitioner. It is therefore, clear that the Respondent was providing services to the Petitioner in relation



to the Plant and the Petitioner was availing such services, thereby bringing the Petitioner outside the ambit of an 'Operational Creditor' as per the Code.

- ii. The Petitioner was entitled to receive a fixed rental sum of Rs. 25 lakhs from the Respondent pursuant to Section 5.1(m) of the Agreement. However, such payment was not in lieu of any goods or services provided by the Petitioner to the Respondent. The Agreement clearly contemplates the employment and retention of the Respondent by the Petitioner for the provision of services, and accordingly the claims in the Application, based on the assumption of the Petitioner being an Operational Creditor, are incorrect and premised on an incorrect understanding of law.
- iii. Rent does not amount to an operational debt and the Petitioner therefore cannot claim to be an operational creditor. The debt claimed by the Petitioner is not an admitted debt which is due and payable. Pursuant to Section 5.1(m) of the Agreement, the Respondent was to pay the Petitioner a fixed rental sum of Rs. 25 lakh per month. The Respondent was to take over the operations of the Plant in return for such payment. Additionally, the revenue generated from such operations was to be remitted to the Respondent by the Petitioner upon receipt from Central Coalfields Limited pursuant to the Agreements.
- iv. It is a matter of record that the Petitioner failed to make timely payments to the Respondent in terms of the Agreements which is evidenced by an email dated 23.07.2018 addressed by the



erstwhile Managing Director of the Petitioner admitting a liability of Rs. 84, 32, 059 as on 31.03.2019. Subsequently, the parties entered into multiple discussions with regards to the dues to be paid to the Respondent and eventually the Petitioner in view of Respondent's repeated requests and follow-ups agreed to pay a sum of Rs. 57,21,779/- to the Respondent.

- v. It is further matter of record that the cheques issued by the Petitioner for payment of the aforesaid amount were dishonored resulting in the Respondent filing criminal complaints against the Petitioner. The Directors of the Petitioner company were resultantly summoned and are presently on bail.
- vi. The aforementioned sequence of events makes it clear that the issue relating to the payments between the parties pursuant to the Agreements is currently 'open' and no debt is admitted by the Respondent for it to be due and payable in accordance with the Code. It is, however, clear from the aforesaid trajectory that an admitted debt is due and payable as per the Code by the Petitioner to the Respondent, particularly, in view of the email dated 23.07.2018 addressed by the erstwhile Managing Director of the Petitioner. Accordingly, the entire premise of the Application assuming an operational debt which is due and payable is wholly baseless and against the materials available on record.

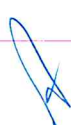


- vii. The application is intended to dissuade the Respondent from pursuing criminal complaints filed by the Respondent for the non-payment of dues by the Petitioner.
- viii. The Petitioner had agreed to pay the Respondent a sum of Rs. 57,21,779/- as a full and final settlement of its unpaid dues, an understanding which was also recorded in the emails addressed by the Respondent dated 16.09.2018 and 08.10.2018. The Cheques issued to release such payments were however dishonored.
- ix. As aforementioned, in view of the Petitioner's ignorance of the repeated notices of the Respondent in relation to the dishonored cheques, the Respondent was constrained to file criminal complaints against the Petitioner which are currently pending and the Directors of the Petitioner company are currently on bail.
- x. The Respondent submits that the present application is nothing but a counterblast to the criminal complaints filed by the Respondent. The Petitioner, by way of the present Application, intends to harass and dissuade the Respondent from pursuing the criminal complaints. The Petitioner has already admitted its liability towards the Respondent on multiple occasions, and eventually being perturbed by the Respondent's lawful actions in relation to the dues owed to it by the Petitioner, the Petitioner has attempted to mislead the Hon'ble Tribunal by way of the present Application with the ultimate objective of preventing the

Respondent from continuing to proceed with the criminal proceedings initiated by them. Accordingly, the Respondent submits that the present Application is not bonafide and needs to be dismissed at the very outset.

7. The Petitioner/Operational Creditor has filed its rejoinder and has asserted the following contentions:-

- i. The contents of the Paragraph No. 5 of the Brief Facts of the Reply filed by the Corporate Debtor are denied for being false, frivolous, and mischievous. It is denied that the Corporate Debtor is a private limited company duly registered and incorporated under the Companies Act, 2013 and is involved in the setting up, operation and maintenance of power plants. It is denied that the Corporate Debtor is having complete expertise and technical competence in the smooth running and operation of power plants at optimum capacity and is a name of repute in the business circles for providing quality services in the related field. It is submitted that the Corporate Debtor though has represented to be an expert and has technical competence on the basis of which they managed to obtain the contract from Operational Creditor however, the Corporate Debtor is incompetent and lacks expertise in running the operation of power plants in optimum capacity. It is submitted that the plant had suffered huge losses due to the incompetence and negligence of the Corporate Debtor.



- ii. It is a matter of record that Mr. Varun Jindal is the Director of the Respondent company and is duly authorized and competent to sign and verify the present Reply against the accused persons and to engage and authorize lawyers for the said purpose vide Board Resolution dated 25.09.2019. It is a matter of record that he is acquainted with the records of the Respondent company and as such he is well conversant with the facts and circumstances of the present case.
- iii. It is admitted to the extent that the Respondent had entered into the Operation and Management Agreement dated 18.04.2018 ("Agreement"). It is denied that in addition several other LOI/ MOUs / agreements (together with Agreement, "Agreement") were entered with the Corporate Debtor for the power plant of Central Coalfields Limited of CPP at Kathara District in Bokaro, Jharkhand ("Plant"). It is submitted that only a Memorandum of Understanding dated 02.12.2017 was entered between the Operational Creditor and Corporate Debtor prior to signing of the Operation and Management Agreement dated 18.04.2018.
- iv. The contents of the Paragraph No. 8 of the Brief Facts of the Reply filed by the Corporate Debtor are denied for being false, frivolous, and mischievous. It is denied that the Operational Creditor was to receive a fixed monthly rental sum of Rs. 25 lakhs from the Corporate Debtor. It is denied that the revenue generated from such operations was to be remitted to the

Corporate Debtor by the Corporate Debtor upon receipt from Central Coalfields Limited. It is submitted that as per clause 5.1(m) of the Agreement dated 18.04.2019 the Operational Creditor shall be entitled to Rs. 25 lakhs however, in the event there is inadequate profits to the service the said amount of Rs. 25 lakhs shall not be paid. It is further submitted from the aforesaid clause it evident that the amount payable is not rent and is dependent on the profits earned during the operation.

- v. Further, Operational Creditor denied this fact, he has admitted his liability towards the Corporate Debtor to the extent of Rs. 84,32,059/- as on 31st March, 2018. Rather, the Operational Creditor has been making payments to the Corporate Debtor timely basis as per the accounts statement. However, the Operational Creditor has enclosed performance report along with demand notice and according to which an amount of Rs. 1 crore is due and payable as there was adequate profit in the month of December-2017, January-2018, February-2018 and June-2018. Therefore, there is clearly amount payable along with interest of Rs. 26,62,500/-
- vi. The contents of the Paragraph No. 16 of the Preliminary Objections of the Reply filed by the Corporate Debtor are denied for being false, frivolous, and mischievous. It is denied that Operational Creditor's submissions that it is an Operational Creditor is incorrect in view of the provisions of the Code. It is matter of record that Section 5(20) of the Code defines and



Operational Creditor which includes person to whom 'Operational Debt' is owed. It is matter of record that the 'Operational Debt' has been defined in Section 5(21) of the Code and includes a 'claim in respect of the provision of goods and services including employment. It is submitted that the Section 5(21) states that "Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority and therefore the M/s Imperial Fastners is an Operational Creditor.

8. We have heard the Learned Counsels appearing for the Operational Creditor as well as the Corporate Debtor. In course of arguments, Learned Counsel appearing for the Operational Creditor submitted that although the Demand Notice sent by post was returned undelivered but thereafter the Operational Creditor had sent the demand notice through the registered email id and that had not bounced back. He further submitted that the email id on which the Demand Notice was sent, the same email id has been used by the Corporate Debtor while giving the email to the Operational Creditor which would be evident from page 31 of the reply and so the Operational Creditor has complied with the provision of Section 8 of the Code. He further submitted that the statement is attached by the

Operational Creditor so that the payment for the four months has not been made by the Corporate Debtor to the Operational Creditor. Therefore, there is a default in making the payment which the Operational Creditor is entitled to get.

9. On the other hand, Learned Counsel appearing for the Corporate Debtor submitted that in view of the agreement on the basis of which the Operational Creditor claimed the amount that agreement shows that Operational Creditor is entitled to get only after the payment as referred in Section 5.1 (a to l) is made and thereafter if there are adequate profit to service only that the Operational Creditor is entitled to get the amount but the payment as referred in Section 5.1 (a to l) was not made and on several correspondences made by the Corporate Debtor regarding the payment, the amount has not been received by the Corporate Debtor from the Operational Creditor.
10. He also referred exchange email which he has attached at page 31 of the reply. He further submitted that the Operational Creditor has handed over two cheques dated 14.11.2018, the sum of Rs. 47,21,779 and the cheque dated 19.11.2018, the sum of Rs. 10 lakhs and both the cheques were dishonored and for that the case under Section 138 of the Negotiable Instruments Act is pending and so the Operational Creditor is not entitled to get any amount from the Corporate Debtor rather it is the Corporate Debtor who is entitled to get the amount from the Operational Creditor.

11. Now in the light of the submissions raised on behalf of the parties, we have gone through the averments made in the application from reply and rejoinder filed by the respective parties as well as the documents enclosed along with application, reply and rejoinder and we find admittedly the Operational Creditor in Para 14 and 15 admits that the Demand Notice sent through post officer returned undelivered but subsequently in para 17 part (4) he claimed that the Demand Notice was sent on the email ids accounts@solvenpower.com, hr@solvenpower.com, solvenpower2017@gmail.com, marketing@solvenpower.com was not bounced back and at this juncture, he also submitted that the email id was used by the Corporate Debtor while sending the email to the Operational Creditor and he also referred the email enclosed by the Corporate Debtor in his reply at page 28 and 31. Now in the light of those submissions, we have gone through the correspondences made between the Operational Creditor and the Corporate Debtor through the email id and we find, the Corporate Debtor at page 28 and 31 enclosed 2 email correspondence made by him to the Operational Creditor from the same email account on which the demand notice was sent. Therefore, we are of the considered view that since this is the email id of the Corporate Debtor, therefore, the Corporate Debtor has complied with the provision of Section 8(1) read with Regulation 5 and sending the demand notice on the email Id of the Corporate Debtor will be deemed to be delivered but the Corporate Debtor fails to give reply to that demand notice as required under Section 8(2) of the Code. Therefore,

at this juncture, we would like to refer Section 8 and 9 of the Code and the same is quoted below: -

“8. Insolvency resolution by operational creditor-

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

(a) existence of a dispute, 1[if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment] of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding 3[payment] operational debt in respect of which the default has occurred.”

“9. Application for initiation of corporate insolvency resolution process by operational creditor. –

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt 1[by the corporate debtor, if available;]

[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if -

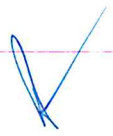
(a) the application made under sub-section (2) is incomplete;

(b) there has been 1[payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:



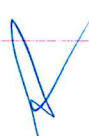
Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

Mere plain reading of the provision shows that the Corporate Debtor shall within a period of 10 days of the receipt of the demand notice of copy of invoices mentioned in Section 8(2), bring to the notice of the Operational Creditor existences of disputed if any or record of pendency of suit or arbitration proceeding filed by the receipt of such notice or invoice in relation to such dispute but admittedly this has not been done by the Corporate Debtor.

12. Now at this juncture, we would like to refer the decision of Hon'ble Supreme Court in ***“MobiloX Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353”***, in which the Apex Court analysed the meaning of dispute with respect to Operational Creditors and observed:

“24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or



deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”

“25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)**
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and**
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?**

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

13. In the light of above discussion, when we shall consider the case in hand then we find that admittedly no reply was sent to the Demand Notice and hence no dispute was raised under Section 8 sub Section 2 of the Code and the amount claimed by the Operational Creditor has not been paid by the Corporate Debtor and we have also noticed that the application is complete. We further find that the amount claimed by the Operational Creditor is more than Rs. 1 lakh which is the minimum threshold limit fixed under IBC, 2016 and the present petition being filed on 24.09.2019 is within limitation, being within three years from the date of the cause of action i.e. 31.12.2017. Therefore, under such circumstances, we have no option but to reject the contention of the Corporate Debtor that the application is not maintainable and it is liable to be rejected rather we are of the considered view that the Operational Creditor has succeeded to establish this fact that the Corporate Debtor did not honour the contract and has defaulted in paying the dues.

14. Considering the aforesaid circumstances, this Adjudicating Authority is inclined to admit this petition and initiate CIRP of the Respondent. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Code is imposed forthwith in terms of the following:-

“(a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

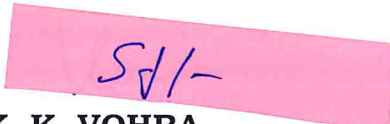
(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

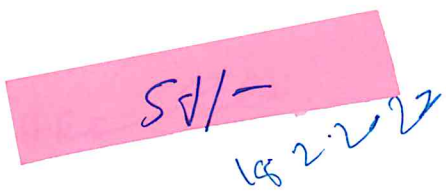
(4) *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process."*

15. The Operational Creditor has proposed the name of Mr. Neeraj Parmar as the IRP. His details are as registration no. IBBI/IPA-002/IP-N00485/2017-18/11447, The consent of the Mr. Neeraj Parmar is on record along with the copy of his certificate and there is no disciplinary proceeding pending against the proposed IRP. We accordingly appoint him as the IRP. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report.

16. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

17. Renotify this case for report of the IRP.


K. K. VOHRA
Member (T)


ABNI RANJAN KUMAR SINHA
Member (J)