

Form 27
[Rule 6.3]



COURT FILE NUMBER 1801-16809
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANT ROBERT KULHAWY
RESPONDENT COMMERX HOLDINGS LLC and LOTUS INNOVATIONS PRIVATE EQUITY FUND also known as LOTUS INNOVATIONS LLC and COMMERX CORPORATION

**IN THE MATTER OF THE
BANKRUPTCY AND INSOLVENCY
ACT, RSC 1985, c b-3, AS AMENDED**

DOCUMENT **APPLICATION BY ROBERT KULHAWY**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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NOTICE TO THE RESPONDENT: COMMERX HOLDINGS LLC

This application is made against you. You are a respondent. You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date: June 19, 2019
Time: 11:00 a.m.
Where: Calgary Courts Centre
601-5th Street SW, Calgary, AB T2P 5P7
Before Whom: The Honourable Madame Justice Dario sitting on the Commercial List.

Go to the end of this document to see what else you can do and when you must do it.

Basis for this claim:

The Parties

1. The Applicant, Robert Kulhawy (the “**Applicant**” or “**Kulhawy**”), is an individual residing in the Province of Alberta and is the founder, Chief Executive Officer, and President of Commerx Corporation.
2. The Respondent, Commerx Corporation (the “**Company**”) is incorporated pursuant to the laws of the Province of Alberta and is a leading global provider of Information Technology (IT), digital and telecommunications (telecom) industries headquartered in Calgary, Alberta. The Company has deployed resources in over eighty-five (85) countries including the United States of America, Canada, Mexico, United Kingdom, India, Russia, and Taiwan.
3. As described in more detail herein, the Company filed a Notice of Intention to Make Proposal on March 7, 2019. The time to file a proposal and the stay of proceedings was subsequently extended twice by order of the Honourable Madame Justice Dario dated April 2, 2019 (the “**Extension Order**”), and the order of Honourable Mr. Justice Jones dated May 17, 2019 (the “**Second Extension Order**”). By operation of the Second Extension Order, the time to file a proposal and the stay of proceedings was extended to July 4, 2019.
4. The Respondent, Commerx Holdings LLC (“**Commerx Holdings**”) is a company based in the State of California, United States of America. Pursuant to the terms of the Purchase Agreement, Commerx Holdings is the majority shareholder of the Company (51%).
5. The Respondent, Lotus Innovations Private Equity Fund aka Lotus Innovations LLC (along with Commerx Holdings collectively referred to as “**Lotus**”) owns Commerx Holdings. Lotus is an Irvine, California based private equity investment fund that purports to build wealth for its investors by acquiring, transforming, and exiting high-potential, small to mid-size technology companies in enterprise IT and telecom.

Factual Background

6. On December 30, 2016, the Applicant and Lotus entered into a Purchase Agreement, whereby the Applicant agreed to sell and Lotus agreed to purchase fifty-one percent (51%) of the Class A shares of the Company in consideration for a purchase price of \$2,000,000 USD plus other considerations (the "**Purchase Agreement**").
7. Pursuant to the terms of the Purchase Agreement, the parties agreed that the share purchase was to be completed in two phases:
 - (a) Payment from Lotus to Kulhawy in the amount of \$500,000 USD on or before January 31, 2017 (**Phase 1**); and
 - (b) Payment from Lotus to Kulhawy in the amount of \$1,500,000 USD on or before November 30, 2018 (**Phase 2**).
8. Phase 1 of the transaction was not completed as contemplated in the Purchase Agreement. Instead, payment was not received until July 4, 2017.
9. Further, as part of the agreement to acquire a 51% interest in the Company, the shareholders of the Company, including Kulhawy and Lotus entered into a Shareholders' Agreement on December 30, 2016, wherein Lotus agreed to extend to the Company a \$3,000,00.00 USD revolving line of credit for the purpose of providing working capital up to December 31, 2018.
10. Since that time, Lotus has been and continues to be in default of its obligations under the Purchase Agreement and various other agreements between the parties as part of its agreement to acquire 51% interest in the Company, particularized in the table below:

Section	Action/Payment	Status
Purchase Agreement		
2.2(b)	Lotus to make subsequent payment of \$1,500,000 USD (the " Subsequent Payment ") to Kulhawy.	In default.
2.3(c)	Lotus to pay \$1,270,000 USD representing various ongoing and outstanding Company obligations	In default. Failed to pay approximately \$598,923 USD of the obligations

Settlement Agreement Payment		
4	Lotus to cause Commerx Holdings to redeem 1,148,381 Class "F" Preferred Shares issued to Fortitude Financial Investments Inc. (" Fortitude ") by June 30, 2017. If shares not redeemed, the cumulative dividend rate increases from 6% per annum to 24% per annum.	In default. Class "F" Preferred Shares were not redeemed on June 30, 2017.
Shareholder Agreement Line of Credit Payments		
14.1	Lotus to provide a \$3,000,000.00 USD line of credit from December 31, 2016 to December 31, 2018, to the Company for working capital. In January 2017, the Company paid \$30,000.00 USD as a fee to Lotus to secure the \$3,000,000.00 USD credit facility.	In default. No line of credit provided.

11. Lotus did not pay Kulhawy the \$1,500,000 USD due November 30, 2018 per the Purchase Agreement; did not provide the \$3,000,000 USD credit facility as per the Purchase per the Shareholders' Agreement; failed to pay the \$598,923 USD of Company obligations and advised the Applicant that it did not have the funds to redeem the Fortitude preferred shares due pursuant to the Settlement Agreement dated December 30, 2016.
12. Lotus refused to comply with its obligations under the Purchase Agreement, Shareholder and Settlement Agreements and refused to provide working capital to the Company, which it desperately needed, unless Kulhawy renegotiated the Purchase Agreement and permitted Lotus to reorganize the Company in a manner which would wipe out the value of other minority shareholders of the Company - which was clearly not in the best interests of the Company or any of its stakeholders other than Lotus.
13. The Applicant then brought an urgent application to the court on short notice and the Honourable Mr. Justice Feehan heard the contested application on November 29 and 30, 2018. The Applicant sought to obtain emergency and necessary funding (akin to a DIP loan).
14. Justice Feehan subsequently released Reasons for Decision on December 4, 2018 (the "**Reasons**"). In granting the order, Justice Feehan made the following findings at paragraph 27 of the Reasons:

I find that the evidence supported a reasonable expectation by Mr. Kulhawy that the Respondents would pay [\$1,500,000 USD] pursuant to the Purchase Agreement by November 30, 2018, provide working capital credit of \$3,000,000 USD between December 31, 2016 and December 31, 2018, and meet its other commitments pursuant to the Purchase Agreement, Shareholders Agreement, Stock Purchase Agreement and Settlement Agreement. I find that reasonable expectation was violated by the conduct of the Respondents within the definition of oppression and unfair prejudice.

15. The order of Justice Feehan authorized the Company to borrow up to \$500,000 (**“Loaned Funds”**) for the purpose of assisting it in the operations of its business. However, the Company was only authorized to spend up to a maximum of \$264,944 of the Loaned Funds (the **“Justice Feehan Order”**).
16. After the hearing before Justice Feehan and while working with the lender to access the Loaned Funds, Kulhawy discovered that Lotus previously permitted a company called Super G Capital, LLC (**“Super G Capital”**) to secure a charge on the assets of the Company. More particularly, some time in July 2018 and unbeknownst to Kulhawy, Lotus entered into a financing arrangement for \$2.1 Million USD with Super G Capital and pledged the assets of the Company as security.
17. Super G Capital delivered the funds to Lotus and on July 19, 2018, registered a security interest against all present and after-acquired personal property of the Company (the **“Super G Capital Registration”**).
18. The funds were for the sole benefit of Lotus and were never received by the Company.
19. By directly or indirectly encumbering assets of the Company, Lotus was in further breach of the provisions of the Purchase Agreement, Shareholders Agreement and the articles of the Company.
20. The Super G Capital Registration significantly impaired or prevented the Company from obtaining vital and necessary financing for working capital and assisting in its operations. Further, the Super G Capital Registration prevented the Company from effecting the Justice Feehan Order.

21. On February 25, 2019, the Honourable Madam Justice Dario granted an Order allowing Kulhawy to file a Notice of Intention to Make a Proposal (the “**NOI**”) on behalf of the Company. The NOI was subsequently filed on March 7, 2019.
22. On February 28, 2019, Justice Dario granted an Order which, *inter alia*, authorized the Company to obtain debtor-in-possession financing to finance the Company’s working capital requirements and other general corporate purposes (the “**DIP Order**”).
23. Under the protection of the proposal process and with use of the initial DIP financing as provided in the DIP Order, the Company:
 - (a) successfully obtained a discharge of the Super G Registration;
 - (b) stabilized its business operations and is once again generating revenue and sustaining itself from that revenue; and
 - (c) attempted to negotiate the return of the Company shares held by Lotus;
24. The discharge of the Super G Registration was a significant and important development in the restructuring efforts of the Company. As noted above, the Super G Registration previously caused serious problems for the Company as it attempted to obtain financing to fund the business and day to day cash flow requirements. These problems and issues ultimately led the Company to file the NOI.
25. With the Super G Registration discharged and resolved, there remains a strong likelihood that the Company will be able to restructure itself and deliver a viable proposal to its creditors in the coming months. However, before the Company can make its proposal, it will require resolution of the outstanding share issue or dispute with Lotus.
26. In the Second Report of the Proposal Trustee dated May 16, 2019, filed with the Court in connection with the Applicant’s application for an order extending the time to file a proposal to July 4, 2019, the Proposal Trustee was supportive of the Company’s request to make an application determining the parties’ ownership and rights with respect to the 51% of the Class “A” shares of the Company previously transferred to Lotus, because the Company’s management believes this matter is the critical factor to be addressed prior to the formulation of the Company’s proposal.

27. The Company likely requires a further extension of time to file a proposal until after the share issue is adjudicated. The Company will likely be able to make a viable proposal if the extension being applied for was granted. The request for an extension of time for this purpose has the support of the Proposal Trustee and is likely unopposed.
28. The Company continues to act in good faith and with due diligence with a view towards preparing a proposal for presentation to its creditors.
29. No creditor would be materially prejudiced if a further extension is granted.

Remedy sought:

30. The Applicant seeks an Order:
 - (a) Declaring service of this Application and its supporting materials good and sufficient, and if necessary, abridging time for notice of the Application to the time actually given;
 - (b) approving an extension to and including August 18, 2019, for the Company's deadline to file of proposal and extension of the stay of proceedings respecting the Company up to and including August 18, 2019;
 - (c) declaring that Lotus is in default of its purchase obligations under the Purchase Agreement;
 - (d) directing Lotus to transfer back to the Company, forthwith, all of the shares transferred under the Purchase Agreement, which shares shall be re-issued to the Company;
 - (e) costs of the within application on a substantial-indemnity basis; and
 - (f) Such further and other relief as this Honourable Court deems appropriate under the circumstances.

Affidavit or other evidence to be used in support of this application:

31. The Affidavit of Robert Kulhawy, sworn June , 2019, to be filed with this Application.

32. Such further and other materials as counsel may advise and this Honorable Court may permit.

Applicable Acts and Regulations:

33. Sections 50.4(1) and 64.2 of the *Bankruptcy and Insolvency Act*,

34. Rules 6.3, 9.14, 10.30, and 13.5 of the *Alberta Rules of Court*

35. *Judicature Act*, RSA, c. J-2, as amended;

36. The inherent and equitable jurisdiction of this Court.

37. Such further and other provisions and statutes as counsel may advise.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicants and against all persons claiming under the applicants. You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicants are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicants.