

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER of a Plan of Compromise or Arrangement of Brainhunter Inc., TrekLogic Inc., Brainhunter Canada Inc., Brainhunter (Ottawa) Inc. and Protec Employment Services Limited

Applicants

**AFFIDAVIT OF DENNIS JEWITT**

I, Dennis Jewitt, of the City of Burlington, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the President and sole shareholder of Breakwall Financial Corp. ("**Breakwall**"). Breakwall was retained by Brainhunter Inc. ("**Brainhunter**" or the "**Company**") in August 2009 as a restructuring advisor. I report to the board of directors of Brainhunter (the "**Board**"). As such I have personal knowledge of the matters referred to in this affidavit that have occurred subsequent to Breakwall's engagement in August of 2009, and, for all other matters, I have relied on information provided to me by the senior management of Brainhunter and verily believe such information to be true.

2. I have over 30 years of experience providing and implementing going concern solutions for a wide variety of clients. My resume is attached as Exhibit "A".

3. In this affidavit I:

- (a) provide an overview of this Application;
- (b) describe the Applicants' business;
- (c) describe the financial situation of the Applicants;
- (d) set out the debt structure of the Applicants;
- (e) explain the reasons for the Applicants' insolvency;
- (f) describe the refinancing, sales process and restructuring efforts taken prior to this Application; and
- (g) address the principal elements of the proposed restructuring under the *Companies' Creditors Arrangement Act* ("**CCAA**").

### Overview

4. Brainhunter is one of the largest information technology and engineering staffing services and solution providers in Canada. Its shares are listed on the Toronto Stock Exchange ("**TSX**").<sup>1</sup>

5. Brainhunter and its wholly-owned subsidiary companies, TrekLogic Inc. ("**TrekLogic**"), Brainhunter Canada Inc. ("**BH Toronto**"), Brainhunter (Ottawa) Inc. ("**BH Ottawa**") and Protec Employment Services Limited ("**Protec**") (collectively, the "**Subsidiaries**" and together with Brainhunter, the "**Applicants**") seek protection under the CCAA. Vision2Hire Inc. ("**Vision**"), a wholly-owned subsidiary of Brainhunter, is not part of this Application. There are also certain foreign wholly-owned subsidiaries of

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<sup>1</sup> It should be noted that on September 3, 2009, the TSX announced that it was reviewing Brainhunter's compliance with the continued listing requirements of the Exchange. Brainhunter was given 120 days to regain compliance with such requirements.

Brainhunter that are not part of this Application.<sup>2</sup> These foreign subsidiaries are Brainhunter.com Inc. ("**BH US**"), Brainhunter UK Limited ("**BH UK**") and Brainhunter Recruiting (India) Private Limited ("**BH India**") (together the "**Foreign Subsidiaries**", and together with the Applicants and Vision, the "**BH Group**").

6. The Applicants are insolvent for the reasons set out therein. They seek court-ordered protection to provide them with a stable operational environment so that they can complete a court-approved Bid Process (as described below) to solicit going concern asset purchase offers for the BH Group's business, as well as offers to sponsor a plan of arrangement, as defined within the CCAA. Absent court protection and the extension of debtor-in-possession financing, the Applicants' business will fail because the BH Group lacks the liquidity to operate its business during the Bid Process. Over the past several years, the BH Group has incurred operating losses as a result of decreasing gross profits and high overhead costs. The Applicants do not have adequate operating profits to service their outstanding debt and are in default of their debt obligations. The Company was unable to refinance its senior secured debt when it came due in October of 2008 and has been operating with the cooperation of its secured lenders under the terms of Standstill Agreements (as defined below), which were to expire on September 30, 2009. The Company breached these agreements in August 2009. The Toronto-Dominion Bank ("**TD Bank**"), the Company's senior secured

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<sup>2</sup> In addition to the Foreign Subsidiaries and Vision, protection is not being sought in respect of SioLink Solutions Inc. or Balanced Brain Initiatives Inc. These companies are all partially-owned or wholly-owned subsidiaries of Brainhunter and are discussed further below.

lender, has been providing financing on an informal basis since that date to permit Brainhunter time to develop a strategy to maximize value for its stakeholders.

7. Protection under the CCAA will maximize enterprise value by permitting the Applicants to present to the Court for approval a Bid Process that would allow parties to submit bids to either restructure the Applicants or acquire their assets. In this respect, the Applicants have entered into an agreement to sell substantially all of their assets as a going concern on the understanding that this agreement will serve as a stalking horse bid (the "**Stalking Horse Bid**") and establish a floor price for the BH Group. This agreement will automatically terminate if it is not approved by this Court.

8. The Applicants intend to submit the Stalking Horse Bid for approval a few days after the Initial Order (assuming the initial Application is granted) and will also seek, at that time, approval of a sale process designed to solicit competing offers from prospective investors (the "**Bid Process**"). The Stalking Horse Bid, if approved, will provide certainty to the Applicants' Clients (as defined below) and suppliers that the business will continue and the Bid Process will assist to maximize recoveries for the Applicants' creditors. The Applicants' two most senior secured creditors, TD Bank and Roynat Capital Inc. ("**Roynat**") support the Bid Process. The approval of the Bid Process on terms acceptable to TD Bank is a condition of funding under the Term Sheet (as defined below) for which approval is sought on this Application.

## The Business

### (A) The Nature of the Business

9. The BH Group, together with their predecessor firms, have been carrying on business for approximately 25 years in the recruitment and technology sectors. The business is focused on using a leading technology platform to provide end-to-end recruiting and staffing services and solutions in information technology, engineering and other selected market sectors to major companies and governments in Canada and the U.S.

10. Brainhunter provides temporary staffing and related services, primarily in respect of information technology ("IT") and engineering jobs, to a wide variety of industries.

11. Staffing services are provided to Clients pursuant to the terms and conditions of umbrella agreements generally referred to as Master Service Agreements. These agreements are entered into by the applicable Applicant and each of their respective contract staffing clients ("**Clients**").

12. Each time a contract staffing Client wishes to retain the services of an individual (each a "**Contractor**") pursuant to a Master Services Agreement, the Client will enter into a sub-agreement referred to as a "**Statement of Work**" in respect of the specific Contractor. The Statement of Work sets out, among other things, the term of the specific contract, the qualifications of the Contractor and the rate to be paid by the

Client. The applicable Applicant subsequently enters into an agreement with the Contractor to fulfill the Statement of Work.

13. The BH Group's roster of Contractors is made up of individuals that possess the various skills sets to fulfill Client requirements. Most Contractors provide their services through corporations, some conduct their business as sole proprietorships and others are employees of the BH Group.

14. Each Contractor issues invoices to the applicable Applicant for the work he or she performs for the Client (on a bi-weekly, semi-monthly or monthly basis). The applicable Applicant then pays the Contractor and bills the Client. The Applicants charge Clients and pay Contractors at respective rates that are intended to provide the Applicants with a satisfactory gross profit.

15. Because the BH Group receives payment from its Clients after it pays its Contractors, the BH Group is extremely dependent on having adequate credit facilities available to fund the payments to Contractors until the related invoices from the Client can be collected.

16. A description of the specific services provided by the BH Group are listed below, together with the revenue percentages for the fiscal year ending September 30, 2009:

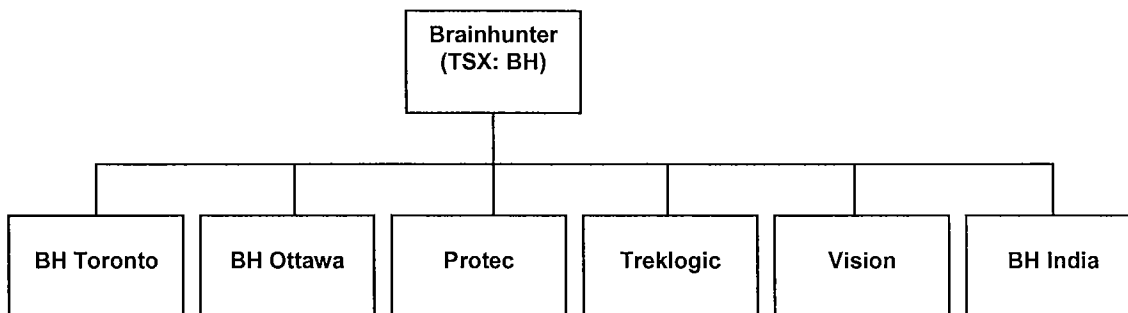
- (a) Temporary staffing (57%): the recruitment and provision of contract staff to clients on a temporary basis. The Contractor is engaged by the BH Group and will typically be deployed to a client and the client is billed an hourly rate;

- (b) Hiresafe (payrolling) (35%): the employment and administration of contract staff which have been recruited by Clients. The Contractor is engaged by the BH Group and deployed to a Client, and the Client is billed an hourly rate;
- (c) Managed services (4%): the turn-key management of specific business processes by Contractors on behalf of Clients under a service-level agreement. The Contractor is hired by the BH Group and deployed to a Client and the Client is billed an hourly rate;
- (d) Software development and migration (2%): the provision of staff for the purposes of executing specific projects for clients including software development and customization or the migration of IT platforms. The BH Group delivers custom solutions to clients for an hourly fee plus agreed expenses, and Contractors are deployed to deliver the solutions;
- (e) Permanent staffing (1%): the recruitment of staff to be permanently employed by Clients. The Client requests that the BH Group find a suitable candidate for permanent hire and pays to the BH Group a one-time fee which is typically based on a percentage of a candidate's starting salary; and
- (f) Recruiting systems (1%): the provision of Internet-enabled software applications for Contractor billing, vendor management, time and expense management, and applicant tracking. The software is licensed to Clients for use on the basis of up-front licensing fees, percentage of transaction revenue, user fees on a monthly basis, and fees for customization as required.

**(B) Current Corporate Structure**

17. Brainhunter is a company continued under the *Business Corporations Act* (Ontario) with its head office located in Toronto, Ontario. Brainhunter directly owns 100% of the equity of each of the Subsidiaries and the Foreign Subsidiaries.

18. The following is an abbreviated diagram depicting all wholly-owned entities in the organizational structure of Brainhunter, excluding those with nominal activity:



19. The corporate chart does not show BH US, BH UK, SioLink Solutions Inc. ("**SioLink**") or Balanced Brain Initiatives Inc. ("**BBI**"). BH US is a shell company used to transfer payroll monies in respect of US-based Contractors. BH UK is a discontinued business with nominal cash balances. SioLink is a Chinese staffing venture in which Brainhunter has a 40% interest but which has very little activity. BBI is a relatively new venture in which Brainhunter has a 33.33% interest, and the entity has little activity.

20. The following chart summarizes the business segments in which each legal entity is involved:

	Temporary staffing	Software development and migration	Hiresafe (payrolling)	Permanent staffing	Recruiting systems	Managed services
BH Toronto	✓		✓	✓	✓	✓
BH Ottawa	✓					
Protec	✓		✓	✓		
TrekLogic		✓				✓

Vision					✓	
BH India	✓		✓	✓		

**(C) Facilities**

21. The Applicants do not own any real property and the business is operated out of leased premises. In particular, Brainhunter, BH Toronto, TrekLogic and Protec operate out of a commercial office building located in Toronto, Ontario and BH Ottawa operates out of a commercial office building located in Ottawa, Ontario. The Applicants currently have leases for commercial office space as follows:

Address	Landlord	End of Term
6915-8 <sup>th</sup> Street N.E., Unit 125, Calgary, Alberta	Sunlife Assurance Company of Canada	August 15, 2013
1001 de Maisonneuve West, 8 <sup>th</sup> Floor, Montréal, Québec	Standard Life Assurance Company of Canada	January 31, 2014
2 Sheppard Avenue East, Suites 700 and 2000, Toronto, Ontario	The Standard Life Assurance Company of Canada	December 31, 2014
1545 Carling Avenue, Suites 308, 600 and 612, Ottawa, Ontario	bcIMC Realty Corporation	October 31, 2016

22. The office spaces in Montréal and Calgary, as well as Suite 700 in the Toronto office are currently vacant and held for sublease. If this Application is granted, the Applicants will disclaim the, Montreal and Calgary leases in the immediate future and

may disclaim the Toronto and Ottawa leases if a prospective bidder does not wish to assume these leases.

**(D) Customers**

23. The Clients of the staffing business are comprised of several major industries and geographic locations. The largest sector served by the BH Group is the public sector.

24. The following provides an estimate of the revenues for the fiscal year ending September 30, 2009, broken down by major Clients (in millions):

Government of Canada (taken as one entity although contracts are with various departments, ministries and Crown corporations)*	\$51.8
Amec	\$51.7
IBM Canada	\$21.6
Deloitte & Touche LLP	\$10.2
Microsoft	\$6.7
Canadian Tire	\$6.7
<b>Total top Clients</b>	<b>\$141.8</b>
Others	\$66.8
<b>Total for year</b>	<b>\$208.6</b>

\* Note: includes \$6.9 million in revenue where the BH Group acts as a sub-contractor to one of five competitors, and the competitors are the direct provider to the government Client.

**(E) Suppliers**

25. The Applicants' primary suppliers are approximately 1,350 Contractors who, as explained above, contract with the Applicants to provide services to their Clients under

the terms of Statements of Work. As further detailed below, the continued supply of services by the Contractors are critical to the operations of the Applicants.

26. Other suppliers of the Applicants include landlords for the commercial office locations, professional advisors, utility suppliers for telephone and internet, and office supplies.

**(F) Employees**

27. The Applicants currently employ approximately 145 corporate staff and an additional 130 Contractors that are billed out to Clients on an hourly basis.

28. None of the Applicants is a party to a collective agreement nor are any of the employees of the Applicants represented by a union or other employee association.

29. The Applicants do not offer a pension plan or RRSP to their employees.

**(G) Share Capital**

30. The authorized capital structure of the Company consists of an unlimited number of common shares, an unlimited number of preferred shares and an unlimited number of non-cumulative, non-redeemable, non-retractable, convertible voting Series A preferred shares. Currently, there are approximately 46.3 million common shares outstanding. There are no other shares outstanding.

31. The Company also had approximately 1.3 million options outstanding and 5.6 million warrants outstanding for the period ended September 30, 2009.

**(H) Intercompany Debt**

32. All of the Subsidiaries borrow and repay Brainhunter on an as-needed basis to fund operations. As a result, at any time, each of the Subsidiaries has an inter-company account with Brainhunter which may be a debt or receivable depending on activity. As at September 30, 2009, an aggregate of \$16.5 million was owing from the Subsidiaries to Brainhunter.

**(I) Contingent Assets and Liabilities Litigation**

33. The Applicants, or some of them, are defendants to a number of legal proceedings. The protection sought in this Application includes a stay, to the extent applicable, of each of these proceedings and any and all steps within each proceeding. I have attached to my Affidavit as Exhibit "B" a chart that provides an overview of the various legal proceedings that the Applicants are party to as at December 1, 2009.

34. The litigation chart refers to one matter of particular note. Specifically, the Competition Bureau of Canada has charged Brainhunter, among others, alleging that Brainhunter and certain of its employees were involved in bid-rigging contrary to the provisions of the *Competition Act*. In connection with these charges, Public Works and Government Services Canada is conducting an administrative review of Brainhunter that could result in a suspension or debarment of Brainhunter and BH Ottawa's right to contract with the Federal Government for a period of up to three years.

35. In addition to the matters listed in the litigation chart, the BH Group owes money to Mr. John McKimm, the former Chairman and Chief Executive Officer of Brainhunter, pursuant to an arrangement entered into with Mr. McKimm relating to his departure from the BH Group. As a result of the BH Group's financial difficulties, certain of the payments owed to Mr. McKimm have not been made. As at October 31, 2009, the unpaid amounts owing to Mr. McKimm in this regard totalled approximately \$800,000. Mr. McKimm has threatened litigation against the Company and the Board.

### **The Financial Situation of the Applicants**

#### **(A) Financial Statements**

36. Attached as Exhibit "C" are the draft unaudited consolidated financial statements of the BH Group dated September 30, 2009 with comparatives to audited results of the prior fiscal year.

#### **(B) Financial Highlights**

37. The BH Group's financial highlights for the five fiscal years ending September 30, 2009, are as follows (in millions):

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Years ended September 30	2009 Unaudited \$	2008 Audited \$	2007 Audited \$	2006 Audited \$	2005 Audited \$
Revenue	208,543	234,026	221,313	166,504	76,061
Gross profit	26,430 12.7%	33,465 14.3%	32,582 14.7%	27,673 16.6%	16,077 21.1%
Other staffing costs	16,308	21,336	18,615	17,611	9,703
Selling, general & administrative	8,262	9,625	6,982	7,016	5,425
Operating income <sup>1</sup>	1,860 0.9%	2,504 1.1%	6,985 3.2%	3,046 1.8%	949 1.2%
Restructuring costs	4,135	-	-	-	-
Net loss	(12,757) -6.1%	(12,335) -5.3%	(2,951) -1.3%	(4,700) -2.8%	(3,391) -4.5%
Total assets	44,415	55,219	80,987	83,707	38,093
Total liabilities	56,900	54,871	67,922	67,129	19,657
Total shareholder's equity	(12,485)	348	13,065	16,578	18,436
Debt to total capital	64.1%	49.7%	41.9%	40.1%	25.8%

Note 1: Typically presented in the BH Group's financial statements as income before interest, amortization and unusual items.

38. As at the end of the most recent taxation year ended September 30, 2009, the BH Group had accumulated tax losses of approximately \$15.9 million.

### **Debt Structure**

39. At October 31, 2009, the date of the BH Group's most recent financial statements, the BH Group had total secured debt obligations of \$36.5 million and unsecured debt obligations of approximately \$21.1 million. The following provides a breakdown of these obligations:

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Type of Debt	Principal outstanding as at October 31, 2009 (millions)	Interest outstanding as at October 31, 2009 (millions)	Total outstanding as at October 31, 2009 (millions)
TD Facility (as defined below)	\$18.7	\$ -	\$18.7
Debenture (as defined below)	5.4	0.5	5.9
2005 Convertible Notes (as defined below)	7.8	0.9	8.7
2007 Convertible Notes (as defined below)	2.6	0.6	3.2
<b>Total secured obligations</b>	<b>34.5</b>	<b>2.0</b>	<b>36.5</b>
Contractors' liabilities	14.6	-	14.6
Other unsecured liabilities	6.5	-	6.5
<b>TOTAL</b>	<b>\$55.6</b>	<b>\$2.0</b>	<b>\$57.6</b>

40. The Applicants do not have adequate cash flow to service their outstanding debt and, as explained below, are in default of their debt obligations. The Applicants were funding their operations through a loan facility with the TD Bank (the "**TD Facility**"), which, they were accessing until August 27, 2009, before they breached the terms of the Standstill Agreements. Subsequently, they continued to access the TD Facility with the indulgence and cooperation of TD Bank. The Standstill Agreements were intended to give the BH Group until September 30, 2009 to solicit the market for offers through Ernst & Young Orenda Corporate Finance Inc. and Ernst & Young Corporate Finance (Canada) Inc. (collectively "**EYO**") and to effect a transaction, investment or refinancing

intended to repay the BH Group's outstanding debts, including its indebtedness to TD Bank. As described in more detail below, no such transaction was forthcoming, and as a result, the Special Committee (as defined below) in consultation with its advisors, began to develop a revised restructuring plan, which has culminated in a CCAA filing and a proposed Bid Process (as described below).

**(A) The TD Facility**

41. On November 14, 2005, Brainhunter entered into a credit agreement (the "**Credit Agreement**") with TD Bank, pursuant to which it obtained a term bank facility (as defined above, the "**TD Facility**") of \$20 million with a two-year term. The TD Facility is collateralized by a charge over all the assets of Brainhunter and certain of the Subsidiaries.

42. As a condition to the extension of credit by the TD Bank to Brainhunter pursuant to the Credit Agreement:

- (a) Brainhunter Limited (now BH Toronto), BH Ottawa, iGate,<sup>3</sup> Protec, TrekLogic and AJJA<sup>4</sup> each entered into a Guarantee and Indemnity with TD Bank guaranteeing the performance of the obligations of Brainhunter under the Credit Agreement;
- (b) Brainhunter, Brainhunter Limited, BH Ottawa, iGate, Protec, TrekLogic and AJJA each executed a security agreement in favour of TD Bank

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<sup>3</sup> As defined below. It should also be noted that this entity has been amalgamated with BH Toronto.

<sup>4</sup> It should also be noted that this entity has been amalgamated with BH Ottawa.

granting TD Bank a security interest in all of their respective present and after-acquired personal property;

- (c) Brainhunter Limited and AJJA each executed an intellectual property security agreement in favour of TD Bank granting the bank a security interest in their respective intellectual property and all rights, agreements and licences granted in connection with such intellectual property; and
- (d) Brainhunter, iGate and AJJA also entered into an assignment of insurance proceeds agreement with TD Bank, pursuant to which they assigned certain rights and payment obligations under their respective insurance policies.

43. The Credit Agreement was amended and restated on September 22, 2006 to increase the TD Facility to \$22 million and the maturity date was revised to November 14, 2007. The TD Facility was further increased on May 14, 2007 to \$26 million and the term was extended to October 15, 2008. The TD Facility expired on October 15, 2008.

44. On April 2, 2009, Brainhunter executed a standstill agreement with the TD Bank, which was subsequently amended on July 29, 2009 (as amended, the "**Bank Standstill Agreement**") that provided for the extension of the TD Facility on a reduced basis to September 30, 2009, to allow the BH Group to pursue the EYO solicitation process described below. The Bank Standstill Agreement and related amendments are attached as Exhibit "D".

45. On August 27, 2009, TD Bank notified Brainhunter that it had failed to satisfy certain covenants under the Bank Standstill Agreement. The defaults included a failure to furnish TD Bank, on or before August 7, 2009, with a signed letter of intent from an independent party detailing a proposed Take Out Transaction (as defined in Bank Standstill Agreement), and evidence satisfactory to TD Bank of that party's financial

ability to consummate the Take Out Transaction, before September 30, 2009. As a result of these covenant breaches, TD Bank terminated the Bank Standstill Agreement. Further, TD Bank prohibited Brainhunter from making any distributions to Roynat or the Noteholders (collectively, the "**Junior Lenders**").

46. As at the date of this Affidavit, TD Bank has not pursued its enforcement rights and the BH Group has been operating with the co-operation of the TD Bank. No payments have been made to Junior Lenders since May 15, 2009.

47. On August 28, 2009, the Company issued a press release disclosing the default under the Bank Standstill Agreement. The TSX subsequently issued a delisting review in respect of the Company. Copies of the Company's press release and the TSX press release in respect of this issue are attached to my Affidavit as Exhibit "E" and "F", respectively.

**(B) Subordinated Term Debenture**

48. On November 14, 2005, Brainhunter issued a \$5 million debenture (the "**Debenture**") to Roynat repayable on December 15, 2008. Pursuant to the Debenture, Brainhunter granted Roynat a security interest in its assets and undertaking.

49. In connection with the Debenture, certain of the Subsidiaries executed the following documents in favour of Roynat:

- (a) Brainhunter Limited, AJJA, BH Ottawa, iGate, Protec and TrekLogic each entered into a corporate agreement of guarantee with Roynat

guaranteeing the performance of the obligations of Brainhunter under the terms of the Debenture;

- (b) Brainhunter Limited, AJJA, BH Ottawa, iGate, Protec and TrekLogic each entered into a security agreement with Roynat granting Roynat a security interest in their respective present and after-acquired personal property; and
- (c) Brainhunter and AJJA entered into an assignment of insurance with Roynat, transferring their interest in certain insurance policies to Roynat.

50. The Debenture is secured by a floating charge on all of the assets of Brainhunter and certain of the Subsidiaries, which is subordinate to the security held by the TD Bank.

51. On April 2, 2009, Brainhunter and Roynat entered into a standstill agreement (the "**Roynat Standstill Agreement**" and together with the Bank Standstill Agreement, the "**Standstill Agreements**") extending the Debenture to September 30, 2009. Pursuant to such agreement, the Debenture has an interest rate of 15% per annum payable monthly based on certain financial ratios plus 3% per annum payable at the end of the term.

52. Certain events of default have occurred between Brainhunter and Roynat under the Roynat Standstill Agreement. Since September 30, 2009, there has been no formal extension of the Standstill Agreements.

### **(C) Financial Administration Act Receivables**

53. Pursuant to the Roynat Standstill Agreement, Brainhunter agreed to deliver to Roynat executed but uncompleted specific assignments of those accounts receivable of

Brainhunter, BH Ottawa and the other Subsidiaries subject to the *Financial Administration Act* from time to time owing by the Government of Canada and its agencies and federal Crown corporations (the "**FAA Receivables**"), together with an authorization in favour of Roynat to complete the assignments and deliver same to the relevant crown corporation or government agency.

54. The Roynat Standstill Agreement provides that Roynat will pay to TD Bank any net proceeds collected in connection with the foregoing assignments, which shall be applied in reduction of amounts outstanding under the TD Facility until such time as the TD Facility is permanently repaid and cancelled.

55. At October 31, 2009, approximately \$7.8 million in FAA Receivables were owing directly from the Government of Canada and its agencies.

56. Roynat and TD Bank have appointed Morrison Financial Services Limited ("**Morrison Financial**") as their agent to collect and receive the FAA Receivables pursuant to an agency agreement between Roynat, Morrison Financial, TD Bank and the Subsidiaries (the "**Agency Agreement**") dated November 20, 2009.

57. Under the terms of the Agency Agreement, Roynat and TD Bank have authorized and directed Morrison Financial to take all steps necessary in accordance with the assignment provisions of the *Financial Administration Act* to properly implement the assignment of all FAA Receivables to Morrison Financial as agent and trustee for Roynat and TD Bank. Morrison Financial has agreed that, upon receipt, it will deposit

the FAA Receivables to a trust account with TD Bank. All funds on deposit in the trust account are to be swept on a daily basis and will be applied in reduction of amounts outstanding under the DIP financing, the TD Facility and the Debenture, respectively.

58. The Agency Agreement is to remain in full force and effect until such time as the Debenture has been permanently repaid, subject to the right of Roynat and TD Bank to terminate the Agency Agreement at any time. Upon termination of the Agency Agreement, Morrison Financial is required to pay any and all FAA Receivables assigned to Morrison Financial prior to such termination to TD Bank and Roynat or to such party as they may direct in writing.

**(D) Term Notes**

59. In October, November and December 2005, Brainhunter issued convertible notes ("**2005 Convertible Notes**") of the aggregate amount of \$7,856,000 with a term of three years. In February 2007, Brainhunter issued additional convertible notes (the "**2007 Convertible Notes**") of \$2,586,000. Pursuant to the Standstill Agreements, Brainhunter agreed to replace the 2005 Convertible Notes and the 2007 Convertible Notes with an issue of Term Notes (as defined below).

60. By an amending agreement dated April 1, 2009 (the "**Amending Agreement**"), Brainhunter issued approximately \$11 million in term notes (the "**Term Notes**"). The holders of the Term Notes are to be paid 15% interest per annum payable monthly

based on certain financial ratios. The Term Notes are due January 31, 2010. These notes are held by approximately 70 individuals and corporations (the "**Noteholders**").

61. The Company granted the Noteholders a security interest in the assets and undertaking of Brainhunter pursuant to the terms of a general security agreement, which formed part of the Amending Agreement. Pursuant to a *pari passu* agreement, which also formed part of the Amending Agreement, each of the Term Notes ranks equally in priority with each other. None of the Subsidiaries guaranteed or provided security for the Term Notes. The Term Notes are subordinate to TD Bank and Roynat.

62. As a result of the breaches under and expiry of the Standstill Agreements, the Company is prohibited from making any distribution to the Noteholders.

### **Reasons for Insolvency**

63. The Applicants' insolvency is a result of a number of factors.

64. Beginning in 2002, the BH Group experienced a period of rapid growth through acquisitions that added significant leverage to the BH Group's balance sheet without a corresponding increase in profitability. In particular, the BH Group invested in new technology platforms and service lines and acquired numerous staffing entities to expand its market share. Many of the acquisitions were financed by way of debt capital. The acquisitions include, Xycorp Inc.,<sup>5</sup> IT Assets of Thinkpath Inc.,<sup>6</sup> Advanced Solutions

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<sup>5</sup> This company amalgamated with TrekLogic in October 2006.

Group Inc.,<sup>7</sup> Protec, Prolink Consulting Inc.,<sup>8</sup> Sirius Consulting Group Inc.,<sup>9</sup> Vision, Promethean Systems Consultants Inc.,<sup>10</sup> AJJA<sup>11</sup> and iGate Mastech Ltd. ("**iGate**").<sup>12</sup> In addition, in March 2005, the Company launched a business process outsourcing centre (the "**BPO Centre**") in India, built out its square footage in Toronto and Calgary and expanded its staff complement, which along with other expenditures substantially increased its total costs.

65. Although revenues increased from acquisitions and through organic growth, the BH Group was not able to generate sufficient gross profits to cover increased operating expenditures from expanded premises, offices and other overhead costs. This situation contributed to the losses experienced by the BH Group over the last several years.

66. The Applicants also experienced declines in gross profit consistent with the decline of the general economy. In this respect, many of the Clients use the Applicants' services to complete the type of projects that are often deferred or cancelled in difficult economic conditions. As at September 30, 2009, revenues and gross profit declined by

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<sup>6</sup> This company was an asset purchase of BH Toronto.

<sup>7</sup> This company amalgamated with TrekLogic in October 2004.

<sup>8</sup> This company amalgamated with BH Toronto in October 2004 (although at the time BH Toronto was named Brainhunter Limited).

<sup>9</sup> This company amalgamated with BH Ottawa in October 2004.

<sup>10</sup> This company amalgamated with TrekLogic in October 2006.

<sup>11</sup> This company amalgamated with BH Ottawa in October 2006.

<sup>12</sup> This company amalgamated with BH Toronto in October 2006.

10.9% and 21%, respectively, as compared to the same period last year. By contrast, corporate expenses increased significantly, from \$25.6 million to \$31.0 million between 2007 and 2008, representing a 21% increase.

67. In an effort to improve its business and address the mounting financial difficulties, the Applicants implemented measures during the fiscal year ending September 30, 2009 to "right-size" the business to adjust for the fact that gross profit has not kept pace with the expansion of the business and to otherwise adjust for the general decrease in revenues. Although these actions were considered necessary to improve the long term profitability of the BH Group, these restructuring activities resulted in non-recurring charges during the fiscal year ending September 2009 in the amount of approximately \$6 million and served to further increase its funding requirements. The principal restructuring costs can be summarized as follows:

- (a) An expense of approximately \$1,060,000 related to the arrangement made with the former CEO of the Company, Mr. John McKimm, on his departure;
- (b) \$1,148,000 in severance costs associated with the reduction of the Applicants' workforce by approximately 80 people;
- (c) Provisions of \$1,072,000 in respect of the anticipated costs associated with the elimination of excess office space. This includes costs related to the closure of BH UK and costs related to the closure of the Applicants' office in Montreal; and
- (d) Approximately \$1,712,000 related to:
  - (i) financing fees paid to lenders in respect of extensions fees to existing credit arrangement lenders;
  - (ii) EYO's professional fees with respect to the EYO Solicitation Process; and

- (iii) commitment fees related to failed or aborted re-financing and professional fees paid while the BH Group searched for financing alternatives; and
- (iv) professional fees related to the extension/conversion of the Term Notes.

68. Further, the BH Group experienced a number of financially negative events during the fiscal year ending September 30, 2009, including the following:

- (a) The BH Group incurred \$470,000 in settlement of a successful employment related action brought by a former employee;
- (b) The BH Group was required to defend charges brought under the *Competition Act* (described above); and
- (c) The BH Group lost its official supplier status with IBM Canada, one of its largest Clients.

#### **The BH Group's Pre-CCAA Restructuring Efforts**

69. In addition to implementing the operational restructuring measures referred to above, the BH Group attempted to refinance the business and complete a sale or partial sale of the business. In this respect, Brainhunter retained EYO in February 2009 to advise the BH Group with respect to its strategic alternatives, including the potential private placement of securities to retire all or a portion of the Company's indebtedness and/or the sale of the BH Group. As part of its engagement, EYO conducted a four-month marketing process for the BH Group and/or its assets (the "**EYO Solicitation Process**"). The EYO Solicitation Process commenced in mid-April, 2009.

70. In the midst of these restructuring efforts, the Brainhunter's management and Board underwent significant changes. Mr. John McKimm (the Company's former CEO)

stepped down as Chairman of the Board and CEO on June 12, 2009. He was replaced by Raj Singh, who was at the time, President and COO. In addition, at Brainhunter's July 20, 2009, annual general meeting, certain directors declined to stand for re-election and seven new directors were appointed. According to the press release dated June 12, 2009, the replacement of Mr. McKimm and the seven directors not standing for re-election "was the result of negotiations between [two shareholder groups] groups to avoid a proxy fight".

71. Shortly after the annual shareholders meeting, the Board constituted a special committee comprised of independent directors to oversee and implement the BH Group's restructuring efforts (the "**Special Committee**").

72. From an operational perspective, the measures implemented by the BH Group in the final quarter of the last fiscal year (under the oversight of the new management team and the Special Committee) have resulted in significant improvements to the BH Group's cost structure, including meaningful reductions to corporate headcount, the arrangement for the sub-leasing of excess office space and an exit from unprofitable markets. The Applicants' 2010 projections indicate an improvement in the Applicants' financial performance as a result of the restructuring measures taken or underway, but those projections assume the retention of Clients, Contractors and key employees.

73. The Special Committee also oversaw the EYO Solicitation Process. By August 2009, the Committee was concerned that the Process would not result in a price for the BH Group satisfactory to its shareholders and that a sale could not be completed within

the time frame agreed to under the Bank Standstill Agreement. In an effort to identify viable alternatives to a full sale of the business, the Special Committee expanded EYO's mandate to include a partial sale of the business. This mandate expansion followed from discussions EYO had with a number of parties who had expressed interest in purchasing parts of the business.

74. In addition, the Special Committee caused the Company to retain Breakwall to assist with the refinancing of the TD Bank debt and/or renegotiation of lending arrangements with TD Bank and to negotiate with Roynat and the Noteholders. Breakwall approached approximately 20 asset-based lenders to assess whether the TD Bank's debt could be refinanced. During the discussions and negotiations with these asset-based lenders, it became clear that refinancing all of the TD Bank debt was not feasible, given the BH Group's financial situation and the fact that the Company was already in default of its existing lending arrangements. Notwithstanding these issues, Morrison Financial offered to refinance the FAA Receivables, albeit at a rate that was higher than that in the TD Facility. At the same time, EYO was receiving preliminary interest in parts of the business.

75. Although the refinancing of the FAA Receivables coupled with the sale of parts of the business could have significantly reduced the amount due to TD Bank, the Company would still have been faced with the maturity of the Roynat debt on September 30, 2009 and the maturity of the Term Notes in January 2010. Therefore, even if the TD Bank had granted a further extension of the TD Facility to enable the BH

Group to accomplish the refinancing and partial sales, it would not have resolved its liquidity crisis.

76. In light of the foregoing, the Company requested that TD Bank not only consider granting an extension of its facility but that a portion of the proceeds from sales be used to negotiate extensions and/or compromises of the amounts due to Roynat and the Noteholders. TD Bank advised that it would not agree to any proposal where proceeds from the sale of assets covered by their security would be used to partially repay Roynat or the Noteholders as part of a compromise of their debt.

### **Elements of CCAA Restructuring**

#### **(A) Rationale for CCAA**

77. During this period following the termination of the Bank Standstill Agreement, there were significant discussions among the Special Committee, Breakwall, TD Bank and other advisors regarding the option for filing for protection under the CCAA. Issues that were considered included:

- (a) The purchaser of any of the business units might want assurance that they have good and valid title to the business they are buying and a court vesting order might be the only way to satisfy them, particularly in light of the need to comply with the *Bulk Sales Act*;
- (b) The Term Notes could not be compromised without 100% approval because they were not issued under a trust indenture and there was no mechanism to amend the Notes without the consent of each holder;
- (c) The CCAA would allow the BH Group to compromise unsecured claims and disclaim leases, etc.;

- (d) TD Bank could provide Debtor in Possession ("**DIP**") financing which could ensure that all the Contractors could be paid in the normal course;
- (e) The BH Group could explain to the Clients that CCAA is a temporary measure that will allow the BH Group to shed some of its legacy costs and improve its financial position;
- (f) The BH Group could exit from CCAA proceedings and make a fresh start, cleansed of its contingent liabilities and a significant portion of its existing debts; and
- (g) As part of the process, the Company could be privatized in order to avoid future public company costs which are no longer justified in light of the right-sizing of the Company.

78. Breakwall and the Company initially expressed serious concerns about a CCAA filing for the following reasons:

- (a) Customers might be lost as the BH Group goes through the formal proceedings. The "pipeline" could evaporate if major Clients concluded that the BH Group would not survive, and elected to move their business to competitors;
- (b) The proposed sale of individual business units would probably not be concluded if potential purchasers believed the process would damage the business or if they expected that the businesses could be bought cheaper post-filing;
- (c) Management may be concerned that the BH Group might not survive, they might leave and thus destroy value in the business; and
- (d) Filing for protection under the CCAA is an expensive process.

79. TD Bank indicated that given the lack of acceptable offers for the Company or its divisions, it was not inclined to continue to support an informal restructuring of the BH Group.

80. Under the circumstances, the Special Committee decided that it could not, in good faith, continue discussions with parties that had expressed interest in purchasing

subsidiaries or divisions of the business since it did not appear the Company would be given sufficient time to complete the proposed transactions. Further, in many instances, the Company's various divisions had common Clients that relied on Brainhunter as a one-stop shop for its different staffing needs. Parties that had expressed preliminary interest had expressed a need for co-marketing agreements, transition agreements and non-competition agreements which, under the circumstances, the Company might not be able to provide. For these reasons, EYO was instructed to inform interested parties that the Company was considering its options and that until a disposition strategy was finalized, all discussions relating to potential sales of divisions were to be held in abeyance.

**(B) Stalking Horse Bid**

81. At this juncture, two significant events occurred that were to form the basis of the Bid Process described herein. First, Mr. Singh expressed an interest in purchasing assets of the BH Group if the Board ever considered selling the business at a price that the preliminary expressions of interest suggested the BH Group was worth. Secondly, the Company's advisors suggested that a stalking horse bid was one way to provide Clients, Contractors and employees assurance that the business would continue uninterrupted and emerge from CCAA protection relatively quickly.

82. The Bid Process contemplates a stalking horse bid pursuant to an agreement to sell the assets of the Applicants as a going concern. This agreement, in effect, acts as a reserve bid under a court supervised sale process. The Bid Process also allows other

interested parties a reasonable period of time to conduct due diligence, enter a binding offer to purchase these assets for a price in excess of the stalking horse bid or a proposal to support a plan of arrangement, in order to maximize recovery for the Applicants' creditors.

83. Given the fact Brainhunter is a public company and it could not realistically seek a third party stalking horse bidder without disclosing the actions being contemplated, the Special Committee encouraged Mr. Singh to present a stalking horse bid.

84. The Special Committee stipulated that Mr. Singh's offer would have to be an unconditional, binding offer supported by evidence of financing, at a price acceptable to the Special Committee.

85. Mr. Singh agreed to submit the Stalking Horse Bid on the condition that the Company agreed to pay a break fee of equal to 2½% of the purchase price in the event that Mr. Singh's offer was not the successful bid and that the Company deal with him on an exclusive basis. The break fee is to compensate Mr. Singh for:

- (a) the costs incurred by Mr. Singh for professional and financing commitment fees;
- (b) the time and effort expended (including opportunity cost);
- (c) significant contributions made to enhance the value of the sale of the BH Group, including the risks associated with an unconditional offer having a delayed closing date;
- (d) attempting to maximize the recovery to the creditors and other claimants in the CCAA proceedings; and
- (e) advancing the successful completion of the CCAA proceedings.

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86. The Company, agreed to these conditions.

87. TD Bank agreed with the stalking horse bid concept and has continued to provide funding to the BH Group while Mr. Singh formulated his bid and arranged financing.

88. The Company has entered into an asset purchase agreement with companies in which Mr. Singh has a direct or indirect ownership interest. The Company, TD Bank and Roynat support Mr. Singh's offer as the Stalking Horse Bid. The agreement is subject to approval by the Court. Due to the significance of the approval of the Stalking Horse Bid and Bid Process, the Company has opted to bring a motion for approval, shortly after the Initial Order is obtained (assuming the Application is granted). This will provide affected stakeholders with an opportunity to voice their opinions on the acceptability of the Stalking Horse Bid and the Bid Process being contemplated by the Company.

89. While the Stalking Horse Bid was negotiated, EYO has continued discussions with a number of potential purchasers for the business in the expectation that they will take part in the Bid Process. For parties who have signed a confidentiality agreement, EYO has continued to provide access to a data room so that they can conduct due diligence on the BH Group. These efforts will further facilitate an expeditious and effective Bid Process.

**(C) Bid Process**

90. It is my opinion that the value of the Applicants' assets on a liquidation basis is materially lower than its value as a going concern as established by the Stalking Horse Bid. Additionally, I believe that absent protection under the CCAA, the recoveries to the BH Group's creditors would be materially reduced.

91. The Bid Process is designed to ensure that other offers from prospective purchasers of the BH Group can be solicited with the goal of improving upon the terms of the Stalking Horse Bid.

92. If CCAA protection is granted, the Applicants will present the Bid Process, including the Stalking Horse Bid, to the Court for approval. The Bid Process and the proposed Stalking Horse Bid have been carefully considered by Breakwall, other advisors and the Special Committee. In the circumstances, I am confident that the Bid Process will result in the maximum recovery for the Applicants' creditors and provide certainty to the Applicants' Clients, Contractors and employees that the business will continue.

**(D) The Monitor**

93. The Company proposes that Deloitte & Touche Inc. ("**Deloitte**") be appointed Monitor for this proceeding. Deloitte's consent to act as Monitor is attached as Exhibit "G".

94. The Monitor's role will include:

- (a) monitoring the assets and the conduct of the Applicants' businesses;
- (b) advising the Applicants in connection with the preparation of their cash flow statements and other financial affairs in connection with the DIP financing described below;
- (c) submitting progress reports to the Court;
- (d) facilitating communications between the Applicants and their creditors and other stakeholders;
- (e) advising the Applicants, the Court, and the Applicants' creditors on the business affairs of the Applicants during the course of these proceedings; and
- (f) assisting with the Bid Process, including financially qualifying all participants and evaluating all bids.

95. Although Deloitte is a client of BH Toronto and purchases IT staffing services, it has provided assurances of its independence and that its relationship as a client will not impair its abilities to act as an independent court officer.

**(E) Cash Flows**

96. Attached as Exhibit "H" is a statement indicating, on a weekly basis, the projected cash flow of the BH Group for the 13-week period ending February 26, 2010. Attached as Exhibit "I" is a report containing the prescribed representations of Brainhunter regarding the preparation of the cash flow statements. With the availability of the DIP financing described below, the BH Group will have adequate funds to operate through to the completion of the transactions contemplated by the Bid Process.

**(F) DIP Financing**

97. The TD Bank has agreed to provide the Company with DIP financing to enable the BH Group to meet its working capital requirements during the course of this CCAA proceeding. Attached as Exhibit "J" is a copy of the DIP financing term sheet (the "**Term Sheet**").

98. The TD Bank has agreed to provide up to \$7 million in DIP financing to the Applicants, on the terms set out in the Term Sheet. The Applicants sought competitive proposals for DIP financing and received one other financing offer. The Company believes the proposal from the TD Bank is the better proposal because its terms are reasonable for transactions of this nature and were less expensive than the alternative proposal. Due to their financial condition, the Applicants were not able to procure sufficient financing from an alternative lender on more favourable terms than those that govern the DIP financing.

99. The DIP financing is necessary to permit the Applicants to operate as a going concern while they implement the Bid Process, as the Applicants do not have sufficient sources of working capital to operate their business while they attempt to implement the proposed restructuring. The Applicants' ability to continue operating is critical to preserving the Applicants' going concern value and ensuring that the value of the Applicants' assets is maximized. The Applicants, their employees and other stakeholders will suffer irreparable harm if the DIP financing is not approved and if the

Applicants do not obtain the working capital they need to consummate a going concern transaction or restructuring under the protection of the CCAA.

100. Subject to the approval of the Court, the Applicants propose to enter into the Term Sheet and all related and collateral documentation required by that agreement.

101. Granting the TD Bank (which is the Applicants' senior ranking secured creditor in respect of its existing debt and security) a security or charge in priority over the claims of the BH Group's secured creditors is a condition to such DIP financing.

#### **(G) Cash Management System**

102. In the ordinary course of business, the BH Group uses a centralized cash management system to collect funds from its operations and to pay operating and administrative expenses (the "**CMS**"), similar to those used by other companies to collect, transfer and disburse funds in a cost effective and efficient manner.

103. The CMS is carefully managed through oversight procedures and controls implemented by the Company's accounting department, including forecasting and reporting, collection monitoring and funds disbursement, and the administration of various bank accounts required to effect the collection, disbursement and movement of cash.

104. The CMS primarily operates through bank accounts located in Canada at TD Bank, with one primary concentration operating account acting as the central operating

account. Revenues typically reach the operating account through deposits of Client cheques or electronic payment made directly by Clients.

105. It is critical that the Applicants continue to remain part of the CMS so that the Company remains able to manage cash and centrally coordinate transfers of funds in order to efficiently and effectively operate its business operations. Disrupting the Applicants' current cash management procedures would:

- (a) impair the Applicants' ability to preserve and enhance their respective going concern value and to successfully complete a sale during these restructuring proceedings;
- (b) cause delays in the collection and disbursement of funds, thus impeding the Applicants' ability to carry out their normal business operations to the detriment of the Applicants' employees, customers and suppliers;
- (c) undermine the effectiveness and documentation of accounting controls; and
- (d) make it difficult to preserve a "business as usual" atmosphere.

106. Therefore, it is both essential and in the best interests of the Applicants that the CMS be maintained. Furthermore, the Applicants' efforts to consummate a sale of their business operations will be facilitated by preserving the "business as usual" atmosphere and avoiding the distractions that would be associated with disruptions in the CMS.

#### **(H) The Contractors**

107. The Contractors are an integral part of the business. The continued supply of services by the Contractors is critical to the BH Group's continued operation.

108. At October 31, 2009, approximately \$14.6 million was owed to the Contractors in respect of invoices issued to the BH Group for work performed prior to that date. The aggregate amounts owing to Contractors by the Applicants from time to time typically ranges between \$14 and \$21 million, depending on the time of month. In addition, in any given month, Contractors will have performed services for which invoices have yet to be rendered. As discussed above, the BH Group pays the Contractors and then collects the related receivables from the relevant Clients. At October 31, 2009, there was approximately \$31 million in accounts receivable owing from the Applicants' Clients in respect of the invoices issued by the Contractors.

109. The Applicants are seeking an order permitting them to pay the Contractors for services provided both before and after the filing date. Given the nature of the Applicants' business, such an order is critical to the continued operation of the business as a going concern during the CCAA proceedings for the benefit of all of the Applicants' stakeholders.

110. If the Contractors are not paid for past services, there is a substantial risk they will not continue to perform services under the current Statement of Work. This would result in a default by the Applicants to their Clients and impact the ability of the Applicants to continue as a going concern. It would also very likely create a material issue with the collection of receivables from Clients. If the Contractors cease performing their work due to non-payment of pre-filing amounts, the Clients could seek

damages from the Applicants and off-set these damages against money owing from the Clients to the Applicants.

111. Furthermore, given that many Contractors are individuals who are engaged full-time by the BH Group, it would impose undue hardship on the Contractors if they were not paid for what could be up to 45 days of services performed before the filing date.

112. Having regard to the fundamental importance of the Contractors to the Applicants' business, the Applicants are also seeking a charge in favour of the Contractors in an amount up to \$15 million. This charge is supported by TD Bank and Roynat.

**(I) Management of the Company**

113. The Applicants anticipate that they will be subject to CCAA proceedings until on or around February 28, 2010. The Applicants' business and financial affairs will be managed by the Board and by Mr. Singh, the Company's President & CEO and former President and COO of Brainhunter's staffing business and the other members of its executive team.

**(A) Breakwall and EYO Fees**

114. The Special Committee caused the Company to retain Breakwall. The Special Committee believes that Breakwall's services are critical to the success of the restructuring and therefore seeks approval of Breakwall's contract, which is attached as

Exhibit "K" and a charge to secure any outstanding payments under this contract (see below). The terms of this contract were negotiated to incentivize Breakwall to maximize the proceeds available to the Applicants' stakeholders, and has been reviewed by and is acceptable to TD Bank.

115. The Company is also continuing the services of EYO as a financial advisor, primarily for the purpose of implementing the Bid Process. In this respect, the Company believes that it is beneficial to continue to use the services of EYO, having regard to the many months EYO spent marketing the BH Group in the EYO Solicitation Process. A copy of the engagement agreement between EYO dated February 6, 2009, as amended August 21, 2009 and as further amended on October 13, 2009, is attached as Exhibit "L". EYO is paid on an hourly basis. The Company is seeking a charge to protect Breakwall's fees and EYO's fees as part of a Administrative Charge.

**(B) Key Employee Retention Plan ("KERP") and Charge**

116. The Special Committee has resolved, subject to Court approval, to ensure that key employees remain with the Applicants while the Applicants restructure their affairs by implementing a Key Employee Retention Plan. Both the Monitor and the TD Bank support the implementation of the KERP.

117. Pursuant to the KERP, Mr. Singh shall be paid a retention bonus of \$50,000 per month for the next two months in addition to his salary, ending January 30, 2010. Mr. Singh will manage the BH Group's business and financial affairs during the CCAA

proceeding. Based on my involvement with the BH Group over the past several months, I believe that Mr. Singh's leadership is required to hold the management team together during this trying time. He also has established relationships with many of the Applicants' key Clients. Without the retention bonus, it is probable that Mr. Singh will not remain in the employ of the Company.

118. The Company shall pay at least ten other key employees up to an aggregate amount of \$190,000 provided that these employees remain with the Company for a period of four months from the date of filing. The retention bonus will not be paid to these employees until the earlier of (i) the end of the four-month period, (ii) the early termination of any of the employees covered under the KERP, and (iii) the closing of a transaction related to the sale of the Applicants. If employees leave before these events occur, they will not receive these payments. I believe that it would be detrimental to the operations of the Company to disclose the identity of the individuals who will be receiving KERP payments as this would likely result in other employees either requesting such payments or feeling underappreciated.

119. The initial order sought in support of this Application contemplates a charge for up to \$290,000 in respect of the KERP, and in priority to the DIP facility.

**(C) Administrative Charge**

120. The TD Bank has also agreed to a \$700,000 charge in favour of the Monitor, counsel to the Monitor, counsel to the Company, Breakwall and EYO as security for

payment of their respective fees and disbursements, in each case at their standard rate and charges, which will rank ahead of the DIP. The TD Bank has also agreed that a further Administrative Charge of \$300,000 for any additional amounts owing to such parties may rank ahead of the existing TD Facility.

**(D) D&O Charge**

121. Given Brainhunter's current financial circumstances, the directors and officers of the Company have indicated that they are not prepared to remain in office without knowing that they will be fully protected from any liability which may arise during their continuance as directors and officers. The Company currently has a directors' and officers' insurance policy through Continental Casualty Company (CAN), Temple Insurance Company, XL Reinsurance America Inc. and Aviva Insurance Company of Canada, who are the policy holders of an insurance policy written by ENCON Group Inc. (the "**Policy**"). The limit of liability under the Policy is \$10 million per claim per policy period in the aggregate, including defence costs. The limit is increased by \$1 million in the event of insolvency. The Policy covers the period from April 23, 2009 to April 23, 2010 and covers the Subsidiaries. The Policy affords coverage to the directors and officers of the Applicants for any matter claimed against them by reason of their status as directors or officers for which the Applicants are not permitted to indemnify them. The Applicants have agreed to indemnify the directors and officers of the Company for all liabilities arising post-filing except due to their gross negligence or wilful misconduct. However, the Applicants do not have sufficient funds to satisfy those

indemnities should the directors or officers of the Applicants be found responsible for potential liabilities.

122. The directors have been threatened with litigation and wish to ensure that existing insurance coverage is available to cover claims arising prior to the CCAA filing. The Company contacted its insurance broker on or around November 16, 2009 and asked whether the insurer would issue additional coverage during the CCAA period to cover all matters that would be covered by a D&O charge in the CCAA proceeding. Under the circumstances, the insurer is very unlikely to even consider increasing coverage.

123. Accordingly, the Company requests a charge in favour of its directors and officers against obligations and liabilities that they may incur as a director or officer during the restructuring period. The directors' continued service to the Applicants will be dependent upon a D&O charge to ensure that any strict liability amounts (i.e., wage and vacation arrears), other possible statutory liability amounts and any defence costs associated therewith are provided for. The Applicants estimate rolling exposure to such liabilities at \$1.7 million. The TD Bank has consented to the granting of this charge, to rank subordinate to the TD Facility, in the amount of \$1.7 million.


**Conclusion**

124. The Special Committee unanimously recommended to the Board and the Board unanimously resolved that it is in the best interest of the Applicants to file for protection under the CCAA and, if approved, implement the Bid Process.

125. The Applicants have determined, based on the advice of their advisors, that absent CCAA protection and the provision of the DIP Facility, the only recourse for the Applicants would be to declare bankruptcy, which, as described above, would be detrimental to the interests of all of the Applicants' creditors, as well as its Clients, employees and suppliers.

126. For the reasons expressed herein, I am of the view that the Applicants are acting in good faith and with due diligence both in seeking protection under the CCAA and with respect to their intention to forthwith seek approval of the Bid Process.

SWORN BEFORE ME in  
the City of Toronto, in the  
Province of Ontario, this  
1 st day of December, 2009



Commissioner for taking  
Affidavits, etc.

Natalie Renner



DENNIS JEWITT

IN THE MATTER OF the Companies' Creditors Arrangement Act,  
R.S.C. 1985, c. C-36

AND IN THE MATTER of a Plan of Compromise or Arrangement of Brainhunter Inc. et al.

Court File No:

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding commenced at Toronto

**AFFIDAVIT OF DENNIS JEWITT**

DAVIES WARD PHILLIPS & VINEBERG LLP  
44th Floor, 1 First Canadian Place  
Toronto Canada M5X 1B1

Jay A. Swartz (LSUC #15417L)  
James D. Bunting (LSUC #48244K)  
Natalie Renner (LSUC # 55954A)

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Applicants

