

**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 1484558 ONTARIO INC.,
TREKLOGIC INC., 4386396 CANADA INC., 4386370
CANADA INC. and PROTEC EMPLOYMENT
SERVICES LTD.**

APPLICANTS

**SUPPLEMENTAL REPORT TO THE ELEVENTH REPORT OF THE MONITOR
DATED APRIL 27, 2011**

INTRODUCTION

1. The purpose of this supplemental report to the Monitor's Eleventh Report to the Court is to provide the Court with an update regarding the Costs Order sought by Zylog Systems (Canada) Ltd. and Zylog Systems (India) Limited (together, "Zylog") and the ad hoc committee of Noteholders against Breakwall Financial Corp. ("Breakwall") and the status of the claim by a former employee of the Company for unpaid vacation pay.
2. Unless otherwise specified, capitalized terms used herein have the meanings ascribed thereto in the Eleventh Report.

COSTS ORDER AGAINST BREAKWALL

3. As set out in the Eleventh Report, in accordance with the direction of the Honourable Mr. Justice Wilton-Siegel, the Monitor holds the sum of \$10,000.00 on account of the Success Fee otherwise payable to Breakwall pending resolution of the claim for costs by each of Zylog and the ad hoc committee of Noteholders.

4. Attached hereto as Exhibit "A" is the Endorsement of the Honourable Mr. Justice Wilton-Siegel regarding the Costs Motion. Pursuant to this Endorsement, the Court has awarded costs in favour of Zylog in the amount of \$5,124.00 and in favour of the ad hoc committee of Noteholders in the amount of \$3,777.50, such costs to be payable by Breakwall within thirty (30) days.
5. The Monitor requests that it be authorized and directed to disburse the Cost Fund in accordance with the foregoing Endorsement, with the balance of the Cost Fund to be paid by the Monitor to Breakwall.

CLAIM BY FORMER EMPLOYEE FOR VACATION PAY

6. On April 20, 2011, the Monitor received correspondence from counsel to a former employee of the Company claiming entitlement to vacation pay calculated with reference to the eight weeks of statutory termination pay owing pursuant to the provisions of the *Employment Standards Act (Ontario)*.
7. On or about April 26, 2011, the former employee filed a responding record in this proceeding setting out the basis upon which his claim would form part of the Priority Claim Amount and constitute a claim against the Escrow Fund.
8. By letter dated April 27, 2011, the Monitor's counsel advised counsel to the former employee of the Monitor's position that the former employee is not entitled to maintain a claim against the Company for unpaid vacation pay.
9. On April 27, 2011, counsel to the former employee confirmed that he would not be proceeding with his claim for unpaid vacation pay at the return of the Monitor's discharge motion on Friday, April 29, 2011. No payment will be made to the former employee from the Escrow Fund on account of the vacation pay claim described above.

All of which is respectfully submitted at Toronto, Ontario this 27th day of April, 2011.

DELOITTE & TOUCHE INC.
in its capacity as Monitor
of 1484558 Ontario Inc. (formerly
Brainhunter Inc.) and the other Applicants



Per:

Paul M. Casey, CA-CIRP
Senior Vice-President

EXHIBIT "A"**CITATION:** Brainhunter Inc. (Re), 2011 ONSC 2433**COURT FILE NO.:** 09-8482-00CL**DATE:** 20100420**SUPERIOR COURT OF JUSTICE - ONTARIO****RE:** 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**BEFORE:** Mr. Justice H.J. Wilton-Siegel**COUNSEL:** *E. Pilon*, for Zylog Systems (Canada) Ltd. and Zylog Systems (India) Limited*D. R. Dowdall*, for the ad hoc committee of Noteholders*E.J. Babin*, for Breakwall Financial Corporation and Dennis Jewett**BY WRITTEN SUBMISSIONS****ENDORSEMENT RE COSTS**

[1] On this motion, the applicants Brainhunter Inc. and its subsidiary corporations (collectively "Brainhunter"), sought an order permitting payment of a success fee to Breakwall Financial Corp. ("Breakwall") that included 3.5% of the value received by the holders of secured notes of Brainhunter Inc. (the "Noteholders") pursuant to certain lock-up agreements entered into with Zylog Systems (Canada) Ltd. and Zylog Systems (India) Limited (collectively "Zylog"). The lock-up agreements were entered into in connection with the sale of the assets of Brainhunter to Zylog.

[2] The motion was denied. Under the terms of the agreement between Brainhunter Inc. and Breakwall, a success fee of \$325,000 was payable to Breakwall. The amount of \$10,000 was withheld from the amount paid to Breakwall.

[3] Zylog and the ad hoc committee of Noteholders seek costs of the motion against Breakwall and its chief executive officer Dennis Jewett ("Jewett"), who was the chief restructuring officer of Brainhunter in the proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), as amended.

[4] The principal issue in respect of costs is whether costs should be awarded against Breakwall and/or Jewett given that they did not participate in the motion, which was brought instead by Brainhunter.

[5] The Court has the inherent jurisdiction to award costs against third parties. In *Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.*, [1997] O.J. No. 1944, the Court of Appeal set out a three part test to be satisfied if such costs are to be awarded.

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[6] The first of the requirements is that the party against whom costs are sought must have had the status to bring the action on its own behalf. This requirement cannot be satisfied in respect of Jewett. At all times, the success fee claimed was owing to Breakwall rather than to Jewett, personally. There is no basis for piercing the corporate veil in these circumstances.

[7] Zylog argues that the three-part test is satisfied in respect of Breakwall. I think the present circumstances, while exceptional, satisfy this test for the following reasons.

[8] Central to the issue is the fact that Breakwall could itself have brought the motion, but, for unexplained reasons, did not. Instead, Brainhunter brought the motion even though it would not have benefitted in any way had it been successful on the motion. Moreover, this was not a motion of Brainhunter for the directions of the Court but a motion for a determination of Breakwall's right. In fact, with Breakwall's concurrence, Brainhunter argued the motion on the basis of the joint views of Brainhunter and Breakwall as to the manner in which the agreement operated. In addition, Breakwall had notice of the motion and was represented at the hearing of the motion. I am, therefore, satisfied that Breakwall was the true litigant in this motion.

[9] While I agree that, in most circumstances, costs cannot be awarded against a party who is not advised in advance of the hearing of the motion for which costs are being sought, there are special circumstances in the present proceeding. Breakwall is an experienced and sophisticated party. Jewett was the chief restructuring officer of Brainhunter. I have no doubt that he was aware that the motion would incur costs that would effectively be borne by Zylog as the purchaser of Brainhunter, even if successful, unless the Court awarded costs against Breakwall. Not surprisingly, Brainhunter has made no costs submissions in this matter. In the circumstances, I conclude that Breakwall had sufficient notice of the risk of a costs award against it such that it should have acted.

[10] Based on the foregoing, I conclude that the requirements of the three-part test in *Television Real Estate Ltd., supra* have been satisfied. Breakwall clearly had the status to bring the action and was the true plaintiff as it alone would benefit from the motion. I also conclude that Brainhunter brought the motion with Breakwall's concurrence with a view to protecting Breakwall from a cost award.

[11] I am not satisfied, however, that costs should be awarded on a substantial indemnity basis. The circumstances were novel. It was not entirely clear how the success fee arrangements operated in these circumstances. Breakwall was therefore entitled to assert a claim for a success fee on the basis proposed in the motion.

[12] With respect to quantum, I am satisfied that the amounts sought by each of Zylog and the ad hoc committee of Noteholders on a partial indemnity basis is reasonable given the nature of the matter, the seniority of counsel - given the need for familiarity with the CCAA proceedings - the timing of the motion, and the importance of the motion to these parties.

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[13] Accordingly costs are awarded in favour of Zylog in the amount of \$5,124 and in favour of the ad hoc committee of Noteholders in the amount of \$3,777.50, such costs to be payable by Breakwall within thirty days.



H.J. Wilton-Siegel

Date: April 20, 2011

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36 AS AMENDED
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO 1484558 ONTARIO INC.,
TREKLOGIC INC., 4386396 CANADA INC., 4386370 CANADA INC. AND PROTEC EMPLOYMENT SERVICES LIMITED

Court File No.: 09-8482-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

**SUPPLEMENTAL REPORT TO THE ELEVENTH
REPORT OF THE MONITOR
DATED APRIL 27, 2011**

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