

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DR. STEVEN SMALL

Plaintiff/Defendant by Counterclaim

and

DEALNET CAPITAL CORPORATION, BRENT HOULDEN,
and HAROLD BRIDGE

Defendants/Plaintiffs by Counterclaim

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendants admit the allegations in paragraphs 5, 6, 8, 10, 11, 40, and 84 of the Statement of Claim.
2. The Defendants deny the allegations in paragraphs 4, 7, 9, 12, 15, 18, 20-39 and 41 – 83 of the Statement of Claim and specifically deny that the Plaintiff is entitled to the relief claimed in paragraph 1 of the Statement of Claim.
3. The Defendants have no knowledge in respect of the allegations in paragraphs 2, 3, 13, 14, 16, 17, and 19, of the Statement of Claim.

Overview

4. The Defendant, Dealnet Capital Corp. (“Dealnet”), incorrectly identified as Dealnet Capital Corporation, terminated the Plaintiff’s employment for cause on April 8, 2018, after it discovered that the Plaintiff had engaged in serious misconduct.

5. The Plaintiff was a director, officer and senior executive of a financial institution. He owed Dealnet the highest level of employment and fiduciary duties, including the duty to act in Dealnet's best interest at all times.

6. The conduct of the Plaintiff, as described further below, reveals a pattern of manipulation, self-interest, self-dealing, dishonesty, discreditable conduct and conflicts of interest that is so egregious and diametrically at odds with the contractual, common law, statutory and equitable duties he owed to Dealnet and its shareholders that his continued employment was simply untenable.

7. Dealnet had just cause to terminate the Plaintiff's employment.

The Parties

8. Dealnet is primarily a consumer finance business offering financing to consumers for home improvement products. Dealnet is also in the consumer engagement business and provides live engagement platforms to customers, including communication services such as operating call centres.

9. The Defendant, Brent Houlden ("Houlden"), is an experienced management consultant and financial advisor as well as a licensed insolvency trustee. He is regularly appointed for urgent and critical interim management assignments to assist companies during times of crisis including restructurings and turnaround situations. Houlden's specialty is focused on short term, intensive placements within organizations.

10. Houlden is the current Chief Executive Officer ("CEO") of Dealnet. His contract is of short, fixed term duration. Houlden was previously the interim CEO of Dealnet from October 27,

2017 up to his formal appointment to the position on April 9, 2018. Houlden has also been a Director on the Board of Directors (“BOD”) of Dealnet since June 16, 2015.

11. The Defendant, Harold Bridge (“Bridge”), is the Chairman of Dealnet’s BOD and has held this position since April 9, 2018. Bridge was previously the Lead Independent Director on the BOD of Dealnet and Chairman of the Audit Committee of Dealnet from June 16, 2015 until April 8, 2018.

12. Bridge has extensive experience:

- a) working with leasing companies like Dealnet and has been involved with companies in this industry since the early 1970s;
- b) co-authoring the Canadian Institute of Chartered Accountants’ publication “Leases: Financial Reporting and Analysis”;
- c) advising corporations on corporate governance issues; and
- d) in corporate audits, having served as an audit and financial advisory partner at Deloitte for over 32 years and as the Chair of the audit committee for another 25 billion dollar Toronto-based financial institution for over five years.

13. The Plaintiff, Steven Small (“Small”), a dentist and businessman, was employed by Dealnet in the position of Executive Chairman until his employment was terminated for cause on April 8, 2018. As Executive Chairman, Small was an employee, officer and director of Dealnet. Small was a director of Dealnet from June 16, 2015 until he resigned from that position on May 13, 2018.

Small's Employment with Dealnet

A. Terms and Conditions of Employment

14. Small commenced employment with Dealnet on June 16, 2015, in the position of Executive Chairman. Small and Dealnet were parties to an Executive Employment Agreement (the "Agreement") dated January 1, 2015. At no time did the Individual Defendants personally have a contract with Small.

15. The Agreement was approved by Dealnet's BOD at Small's urging on June 5, 2015, as one of the very last acts of the BOD before the majority of the independent directors resigned and a new BOD was appointed, which included Small, Houlden and Bridge.

16. Small's Agreement was binding on the new BOD that was appointed on June 16, 2015. The terms of Small's Agreement contained excessive compensation and its terms were commercially unreasonable and oppressive.

17. Until late 2016, Bridge and Houlden had no knowledge of Small's Agreement as it was approved by the previous BOD prior to their election to the new BOD. At all times, Small had a positive obligation to disclose the terms of his Agreement to all members of the new BOD. Not only did he fail to disclose the Agreement to the new BOD, he instructed others to keep the terms of his Agreement confidential.

18. At all times during the course of Small's employment with Dealnet, the express terms of his employment with Dealnet included, *inter alia*:

- a) Pursuant to Section 3.2 of the Agreement, Small was a fiduciary of Dealnet and the fiduciary obligations outlined therein applied during and following his employment with Dealnet;
- b) Pursuant to Section 3.3(b) of the Agreement, Small would not improperly bring to Dealnet or use any trade secrets, confidential information or other proprietary information of any third party;
- c) Pursuant to Section 3.3 of the Agreement, Small was required to have the BOD's written approval to be appointed as a Director for any other company;
- d) Pursuant to Section 8 of the Agreement, Small's employment could be terminated for cause at any time without notice or pay in lieu thereof for various reasons, including, *inter alia*,:
 - (i) 8.2 (c): dishonesty, fraud, or any act of moral turpitude;
 - (ii) 8.2(d): being in a conflict of interest, failing to honour his fiduciary or loyalty duties to Dealnet (including the duty to act in the best interests of Dealnet), or refusal to obey reasonable and appropriate directions and instructions of Dealnet;
 - (iii) 8.2(f): Small's breach of Section 3.3 of the Agreement; and
 - (iv) 8.2(g): any act or omission amounting to just cause as defined by the common law; and

- e) Pursuant to Section 9 of the Agreement, Small was bound by Confidentiality, Non-Solicitation, and Non-Competition obligations as outlined therein.

19. At all times during the course of Small's employment with Dealnet, the implied terms of his employment with Dealnet included, *inter alia*:

- a) he owed Dealnet a duty of good faith and fidelity which includes:
 - (i) a duty to act honestly and faithfully during employment, including putting Dealnet's interests first and avoiding conflicts of interest;
 - (ii) a duty not to disclose or appropriate Dealnet's trade secrets and confidential information;
 - (iii) a duty not to conceal facts from Dealnet which ought to be revealed; and
 - (iv) a duty not to compete with Dealnet's business or to assist a competitor.

20. At all times during the course of Small's employment with Dealnet, he owed fiduciary duties to Dealnet founded in contract and in equity and which include, *inter alia*, the following:

- (i) a duty of loyalty, good faith, honesty and avoidance of conflict of duty and self-interest;
- (ii) a positive duty to disclose relevant facts and information to Dealnet; and
- (iii) a duty to act in the best interests of Dealnet.

B. Small Was a Fiduciary of Dealnet

21. At all times during the course of Small's employment with Dealnet, he was a fiduciary of Dealnet. Small held the most senior position at Dealnet, with the CEO reporting directly to him. As a director, executive officer, and executive employee of a financial institution, Small owed the highest level of fiduciary duties to Dealnet and its shareholders.

22. Small had access to Dealnet's most confidential business information including business plans, strategies, client lists, budgets, contractual arrangements (including purchase and sale agreements and due diligence findings), and financial information such as cash flows. Small also had access to all of Dealnet's business contacts and contractual arrangements in the financial markets.

23. Small also had extensive knowledge of Dealnet's business and market opportunities. One of Small's roles was to find investors to fund Dealnet and he was responsible for representing Dealnet in the financial markets.

24. Small was also responsible for directing and overseeing the activities of the CEO and leading the BOD.

25. As Executive Chairman, Small had the highest level of unsupervised discretion and had the ability to exercise that discretion or power unilaterally on behalf of Dealnet. Dealnet and the BOD were vulnerable to Small and trusted him to act in their best interest at all times.

C. Dealnet Has Concerns with Small's Performance

(i) Poor Performance of Duties and Responsibilities

26. Dealnet hired Small with the expectation that he would perform all of his duties to the satisfaction of Dealnet and consistent with the expectations of an individual with the Executive

Chairman role. Towards the end of the employment relationship, it was apparent to Dealnet that Small was simply not prepared to carry out his duties and responsibilities.

27. During the first year of Small's employment, he made efforts to find investors and bring deals to Dealnet. However, after this time period, Small failed to perform his duties satisfactorily or at all. In particular:

- a) Small did not work the hours required even though Dealnet was facing severe financial constraints including potential defaults under various material agreements;
- b) After July 1, 2017, Small spent significant periods of time away from the Dealnet offices and in Florida;
- c) After December 31, 2016, Small did not source new investors or commercially reasonable deals for Dealnet;
- d) In the small number of deals recommended or sourced by Small, Dealnet often discovered major issues with the proposed deals including unreasonable commercial terms or business relationships with individuals or companies that were not credible or in Dealnet's best interests; and
- e) Small failed to dedicate appropriate attention to Dealnet.

(ii) Inappropriate Behaviour in the Workplace

28. When Small joined Dealnet in June of 2015, Mike Hilmer ("Hilmer") was the COO and acting interim CEO. Hilmer was formally appointed to CEO in August of 2015 on Small's recommendation. Initially, the work relationship between Hilmer and Small was functional.

However, Hilmer experienced increasing difficulties working with Small. The relationship eventually deteriorated.

29. In or around June of 2017, Hilmer complained to Dealnet about Small's inappropriate behaviour including:

- a) Small sent unprofessional e-mails, often on the weekends, engaging Hilmer in counter-productive debates via e-mail;
- b) Small made inappropriate comments directed to and at Hilmer;
- c) Small interfered in areas within Hilmer's purview which made it difficult for Hilmer to perform his duties; and
- d) Small undermined the reporting structure and would circumvent, side step or go over Hilmer's head when making decisions.

30. Dealnet also observed many issues regarding Small's behaviour directed at other individuals, including:

- a) unprofessional e-mail correspondence exchanged by Small including e-mails that were aggressive, accusatory and emotional;
- b) unprofessional treatment of staff including angry and aggressive behaviour directed at staff; and
- c) disruptive behaviour in the workplace including:
 - (i) rearranging priorities established by the CEO without communication or authorization;

- (ii) meddling;
- (iii) undermining the reporting structure and back channeling; and
- (iv) speaking negatively about other employees and BOD members in the workplace, which created acrimony, and in the business community, which undermined credibility.

31. On October 27, 2017, Small attended a BOD meeting which was held to discuss:

- a) the lack of progress on a series of initiatives being tracked weekly by the BOD;
- b) the dysfunctional relationship between Hilmer and Small; and
- c) Hilmer and Small's behaviour in the workplace.

32. The independent BOD members engaged in a lengthy discussion on whether the BOD should terminate Hilmer or Small's employment. Ultimately, the independent BOD members determined that Hilmer's employment should be terminated.

33. Small was aware that his relationship with Hilmer was dysfunctional and knew or ought to have known that, based on the discussions leading up to and at the meeting, his employment with Dealnet had been in jeopardy and his behaviour and relationship with the new interim CEO was expected to be greatly improved upon.

34. Houlden was appointed interim CEO on October 27, 2017. Houlden increasingly experienced the same issues as his predecessor, Hilmer. In particular, among other things:

- a) Small was undermining the reporting structure and back channeling;

- b) Small was meddling;
- c) Small operated with a lack of transparency and failed to keep Dealnet and the BOD apprised of critical developments;
- d) Small routinely undermined the CEO's authority;
- e) Small engaged in unprofessional e-mail correspondence including sending aggressive emails to the CEO;
- f) Small added negligible value in his position as Executive Chairman;
- g) Small promoted commercially unreasonable transactions to Dealnet; and
- h) Small was rarely in attendance in the Dealnet offices or at meetings.

(iii) Acting in Self-Interest

35. Small also engaged in conduct which furthered his own self-interest, contrary to Dealnet's best interest, which was a clear violation of his fiduciary obligations.

36. Small repeatedly extracted money from Dealnet in circumstances where he knew or ought to have known that it was not in Dealnet's best interest. For example:

- a) In November of 2016, Dealnet's management recommended large short term incentive bonuses and salary increases (including for Small) based on 'strong performance' which was approved by the BOD based on Small's recommendation and representations to the BOD that Dealnet was performing well and aggressively increasing its business size and that Dealnet had successfully completely integrated the EcoHome acquisition. Within months, loan delinquencies and defaults sky

rocketed and the portfolio funders had paused on all future funding given their significant concerns about these defaults and delinquencies. The true significance of these defaults and delinquencies and loan losses were not divulged to the BOD until after the approved bonuses had been paid to the employees; and

- b) In January of 2018, Small requested a 25% raise pursuant to his Agreement even though: (i) Dealnet had suffered a \$45 million loss in 2017, (ii) Dealnet was facing severe financial constraints including potential defaults under various material agreements, and (iii) the BOD had suspended the short term and long term incentive programs for all employees in July 2017.

37. Small also acted in his own self-interest with respect to a settlement negotiated between Dealnet and Hilmer following the termination of Hilmer's employment. Small privately negotiated (against the BOD's directions) a settlement agreement with Hilmer that caused Dealnet to pay excessive severance, above and beyond its obligations. Small presented the settlement to the BOD as final, non-negotiable and essential to approve immediately in order to secure financing.

38. Small also failed to secure the return of Hilmer's computer. Given that Hilmer's computer was not linked to the corporate server, there was a significant loss of institutional memory to Dealnet.

39. Small also negotiated preferential repayment terms in this settlement that related to money that Hilmer owed to Small personally. Small's conduct was clearly directed in self-interest and was contrary to his fiduciary obligations.

Termination of Small's Employment

40. In light of the issues described above, Small's continued employment with Dealnet was squarely in jeopardy. The BOD was actively considering the status of Small's employment.

41. In March of 2018, Dealnet approached Houlden with a proposal to be formally appointed to the CEO position. At this time, Houlden:

- a) notified the BOD of the issues arising with Small;
- b) advised that it would be in Dealnet's best interest to find a replacement CEO; and
- c) offered to stay in the position for up to four months to assist Dealnet with the executive search.

42. On March 27, 2018, Dealnet's Compensation & Corporate Governance Committee ("CCGC") met to discuss general corporate governance issues and the status of Small's employment and Houlden's future as the interim CEO. At the conclusion of this meeting, the CCGC voted to recommend to the BOD that Small's employment be terminated.

43. The CCGC felt that Small's behaviour in the workplace was having a detrimental impact on the work environment, that he was creating distractions in the workplace, and was hindering Management's attempts to turn-around Dealnet. The CCGC concluded that Small's performance was entirely unsatisfactory and that it should recommend to the BOD that his employment be terminated.

44. Contrary to the allegations in the Statement of Claim, the recommendation to terminate Small's employment was due to legitimate concerns about his performance rather than for any personal benefit flowing to Houlden or Bridge as alleged in the Statement of Claim.

45. On the evening of March 27, 2018, as a courtesy, Bridge advised Small of the CCGC's recommendation to terminate Small's employment.

46. Notwithstanding Dealnet's ability to terminate for cause following BOD approval, Dealnet, on a without prejudice basis, and as a courtesy to Small, attempted to negotiate terms to present to the BOD for approval so that Small could leave amicably.

47. On March 29, 2018, Houlden, Bridge and Small met to discuss the terms of an amicable departure. Dealnet made Small a without prejudice offer which he rejected.

48. Contrary to the allegations in the Statement of Claim, Small's employment had not been terminated at this time, as the BOD had not yet considered or voted on the CCGC's recommendation to terminate Small's employment .

49. Dealnet called a board meeting for April 1, 2018 to consider and vote on the CCGC's recommendation to terminate Small's employment. Small objected to the date because it fell on Easter Sunday. Small also asked Dealnet and the BOD to take more time to review the facts, prior minutes and contractual terms prior to making a decision. Accordingly, the board meeting was cancelled and Dealnet engaged in additional fact finding, including, *inter alia*, conducting a review of Small's e-mail account.

50. As described in detail further below, Dealnet discovered numerous emails which revealed egregious misconduct on the part of Small. In light of the previous misconduct and the newly discovered misconduct, Dealnet proceeded forthwith with terminating Small's employment for cause.

51. By letter dated April 4, 2018, Dealnet advised Small that it would be terminating his employment for cause. In this letter, Dealnet:

- a) outlined the nature of the cause allegations;
- b) invited Small to respond to the cause allegations;
- c) advised Small that the BOD would be voting on the recommendation of the CCGC for the termination of his employment at a meeting on April 7, 2018; and
- d) invited Small to attend the April 7 meeting to respond to the allegations.

52. By letter dated April 6, 2018, Small denied that he had engaged in any misconduct and rejected Dealnet's offer to substantively and meaningfully respond to the allegations.

53. At the board meeting on April 7, 2018, the BOD resolved to terminate Small's employment for cause. Small failed or refused to attend or speak to the issues as he had been invited to do.

54. Dealnet gave Small a further opportunity to respond to the allegations. It adjourned the April 7 meeting until April 8 at 8 p.m. Dealnet advised Small of this extension to give him an opportunity to reconsider his position.

55. Small failed or refused to respond by the deadline on April 8. Accordingly, the BOD resolved to terminate Small's employment for cause.

56. Dealnet gave Small every opportunity to address the allegations and to respond to them, including opportunities to address the BOD directly regarding the cause allegations. Small failed, at his own peril, to take advantage of these opportunities.

57. By e-mail dated April 8, 2018, Small was provided with notice of his termination for cause effective immediately. Dealnet also sent Small a letter on April 9, 2018, confirming that his employment had been terminated for cause effective April 8, 2018 (“Termination Letter”). The Termination Letter provided Small with details of the alleged misconduct, as previously outlined in the letter sent to him on April 4, 2018.

58. Contrary to the allegations at paragraphs 62 and 63 of the Statement of Claim, Small was advised of the recent investigation which uncovered the further misconduct and he was provided with the opportunity to meet with Dealnet to better understand the particulars of the misconduct alleged by Dealnet. Small failed or refused to accept Dealnet’s offer on several occasions.

59. At all times during the course of the termination of Small’s employment, Dealnet acted in good faith. In particular:

- a) Dealnet attempted to resolve the termination of Small’s employment on an amicable basis, which he rejected;
- b) Dealnet gave Small multiple opportunities to understand the cause allegations and to respond to them, which he rejected;
- c) Dealnet took great care not to damage Small’s reputation including:
 - (i) expediting the appointment of the CEO and the Chairman in order to announce Small’s departure in a press release addressing multiple changes in organizational structure rather than issuing a press release only related to Small’s departure;

- (ii) issuing neutral statements in press releases and public disclosures that did not directly reference Small's termination but rather disclosed the appointment of the new Chairman and the permanent CEO; and
- (iii) offering initially to allow him to depart amicably.

Breach of Employment and Fiduciary Duties

60. As outlined above, Dealnet discovered numerous suspicious e-mails originating from Small's Dealnet e-mail account which solidified his termination for cause.

(i) Green Planet

61. Small engaged in serious misconduct when he was negotiating a private deal to purchase a book of business from a company called Green Planet (the "Green Planet Deal"), which operates in the same business as Dealnet and is a competitor of Dealnet.

62. Small engaged in self-dealing, acted in a conflict of interest, acted contrary to Dealnet's best interests, was dishonest, improperly used Dealnet's proprietary information, resources and know-how for his own personal use, disclosed and misused Dealnet's confidential information, and improperly used a third party's confidential information during the Green Planet Deal.

63. In particular:

- a) Small used his Dealnet e-mail address to receive and use highly confidential and personal information of a third party (a book of business from Green Planet) from an individual named Mark Klavir ("Klavir") in circumstances where Small knew or ought to have known that the information was improperly obtained, contrary to Article 3.3(b) of the Agreement and exposed Dealnet to potential liability. This

conduct was contrary to the express terms of his Agreement and was contrary to Small's fiduciary obligations to act in Dealnet's best interest;

- b) Small directed Mike Koshan ("Koshan"), the Treasurer of Dealnet, on an 'exclusively confidential' basis to assist him with conducting financial analyses on a personal deal without advising Dealnet or Koshan of this fact. This conduct undermined the reporting structure, was dishonest, improperly used Dealnet's resources for personal use and was contrary to Small's fiduciary obligations to act in Dealnet's best interest;
- c) Small used Dealnet resources, including staff, and paid subscriptions such as Treasury and Balance Sheet Management ("TBSM"), without the knowledge or permission of Dealnet, to assist him in developing the terms of his personal Green Planet Deal. This conduct was contrary to Small's fiduciary obligations; and
- d) Small obtained precedent contractual documents (including copies of legal representations and warranties) drafted for Dealnet by external counsel on other deals and misled Dealnet's staff into believing it was for business purposes, when in fact, Small used this precedent in his personal Green Planet Deal. This conduct was dishonest, improperly used Dealnet's resources for personal use and was contrary to Small's fiduciary obligations.

(ii) Conflict of Interest With Personal Lawyer

64. Small repeatedly recommended the use of his personal lawyer on various occasions.

65. Small's use of his preferred personal lawyer was not in the best interests of Dealnet as the service fees to be paid were excessive. For example, Small's personal lawyer charged \$30 a

collection letter whereas Dealnet was able to source another lawyer to do the same work for \$5 a letter.

(iii) Stalking Horse Bid

66. Dealnet discovered that Small acted contrary to Dealnet's interests with respect to the disposition of a call centre.

67. Dealnet was working with Klavir with respect to the potential divestiture of its call centres. Klavir's corporation was supposed to be the stalking horse bid. Small knew that this entity was the stalking horse bid, such that the offer received by Klavir's corporation would be the floor from which bidding was set.

68. Klavir submitted a term sheet for the acquisition of the call centre on behalf of his corporation. Contrary to Dealnet's best interests, Small corresponded directly with Klavir and provided him with assistance in negotiating a deal more favourable for Klavir's corporation and less favourable to Dealnet.

69. Small also forwarded confidential information and materials developed by Dealnet regarding the stalking horse bid to Klavir. The documents were internal documents and were confidential and were not meant to be shared with external parties.

(iv) Disclosure of Confidential Information

70. Contrary to Small's duties to act in Dealnet's best interest and his duty not to disclose confidential information, Small regularly disclosed Dealnet's confidential and proprietary business information to third parties including, *inter alia*:

- a) Small disclosed Dealnet's confidential and proprietary information to a third party, without a legitimate business purpose, on various occasions during the Green Planet Deal;
- b) Small forwarded Dealnet's confidential information, without the appropriate arrangements in place, to executives at ECN Capital;
- c) Small forwarded Dealnet's confidential information to Klavir when he was not the intended recipient;
- d) Small asked Dealnet employees for certain Dealnet precedents (such as the representations and warranties as well as legal forms) and forwarded those documents on to external third parties without Dealnet's knowledge or consent; and
- e) Small forwarded a confidential documentation to Hilmer after Hilmer's employment with Dealnet had been terminated.

(v) Self-Dealing

71. Small also breached his duties owed to Dealnet when he failed to properly disclose relevant information to the BOD including his appointment to other boards such as Hampton Securities and Canopy.

72. Small also failed to disclose personal deals that he was involved in, such as Green Planet, outlined above and Easy Heat, as described further below.

73. Dealnet met with a company called Easy Heat with respect to a potential financing arrangement. After funding one deal for Easy Heat, Dealnet ultimately had to decline additional

deals from Easy Heat until appropriate funding could be arranged because deals from Easy Heat were not eligible for financing under Dealnet's existing funding agreements.

74. Small was expressly aware of the opportunity with Easy Heat and went behind Dealnet's back and was actively negotiating his own personal deal without advising the BOD of the details or his intention to do so. Dealnet discovered that Small intended to become the CEO of this new company, and that it would be a fully operational finance company (with staff, etc.)

75. Easy Heat would have been a competitor of Dealnet. Small had an obligation to disclose his dealings with Easy Heat and was required to obtain BOD approval to proceed with this kind of deal in addition to being appointed as its CEO. Small's failure to advise Dealnet of this deal was a flagrant breach of his obligations.

(vi) Undermining Authority

76. Dealnet also discovered in these e-mails that Small undermined the CEO's authority in front of other employees. In one example, Small reached out to Barclay Morton ("Morton"), SVP of Sales & Marketing, who reported to the CEO and told Morton that Small could get funding for him even if the CEO had said no and invited him to reach out to him on a confidential basis in the future. Subsequently, Morton did reach out to Small on a confidential basis without copying the CEO.

77. As a fiduciary, Small owed Dealnet the highest level of duties. The conduct outlined above, *inter alia*, constitutes clear breaches of Small's contractual, common law, equitable, statutory and/or fiduciary duties and constituted just cause for the termination of his employment.

78. In particular, Small breached his duty of good faith and fidelity and his fiduciary duties by, *inter alia*,

- a) actively competing with Dealnet;
- b) engaging in actual and potential conflicts of interest;
- c) improperly using Dealnet's resources, proprietary information, know-how, assets, and personnel, for his personal use;
- d) failing to disclose relevant information to Dealnet contrary to his employment obligations;
- e) misusing and improperly passing on confidential information to third parties;
- f) engaging in acts of dishonesty;
- g) bringing to Dealnet and using confidential and proprietary information of third parties which Small knew or ought to have known had been improperly obtained;
- h) failing to observe and undermining reporting structure; and
- i) engaging in extended abusive and obnoxious conduct towards other employees and members of the BOD.

79. Small's conduct described above and his dishonesty in failing to advise Dealnet of his dealings breached the trust inherent in the work relationship. His conduct was fundamentally inconsistent with the obligations he owed to Dealnet and violated essential terms and conditions of the Agreement. His continued employment with Dealnet was untenable.

No Wrongful Dismissal/Breach of Contract

80. Dealnet denies that Small was wrongfully dismissed or that his employment was terminated in violation of the terms of his Agreement, as alleged in the Statement of Claim, or at

all. Dealnet had just cause to terminate Small's employment under the Agreement and at common law.

81. In the alternative, if the cessation of Small's employment is deemed to have occurred on March 28, 2018, by way of a termination without cause, as alleged in the Statement of Claim, Dealnet pleads and relies on the doctrine of after-acquired cause.

82. In the further alternative, if Small's employment was terminated without cause, Dealnet pleads that the provisions in the Agreement relating to the compensation to be paid to Small on termination ought not to be enforced as these provisions are oppressive to Dealnet and its shareholders. Dealnet pleads and relies on the provisions of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.

No Civil Conspiracy

83. Bridge and Houlden deny that they engaged in a civil conspiracy as alleged at paragraphs 64-70 and 76 of the Statement of Claim, or at all. The Plaintiff has not plead any facts which support a claim for conspiracy.

84. The Plaintiff has asserted no facts to support the bald allegation that Bridge and Houlden entered into an agreement to conspire against Small. The Plaintiff has failed to identify any particulars of the nature of the agreement or when it came to be. There was no agreement between Bridge and Houlden at any time to conspire against Small.

85. The Plaintiff has failed to identify any unlawful conduct on the part of Bridge or Houlden and has plead no facts which would support a finding that Bridge or Houlden intended to injure

Small. Bridge and Houlden deny that any of their actions taken were unlawful and/or with the intent to injure Small.

86. In the alternative, Bridge and Houlden plead and rely upon the defence of justification, and the doctrine of merger.

87. The allegation of conspiracy, made against Bridge and Houlden, is reckless, without foundation and is a naked attempt to intimidate them.

No Reputational Damages

88. The Defendants deny that the Plaintiff's reputation is as claimed in the Statement of Claim or that he will suffer any damage to his reputation as alleged in the Statement of Claim or at all.

No Other Damages

89. The Defendants deny that Small has suffered the injuries and damages as alleged in the Statement of Claim or at all. The said injuries and damages are, in any event, excessive and too remote.

90. If Small has sustained any injuries and damages as alleged in the Statement of Claim, which is denied, those injuries and damages are not attributable in whole or in part to any actionable act or omission on the part of the Defendants.

91. If any damages are owing to Small, which is denied, Small has failed to mitigate any alleged damages suffered.

92. The Defendants ask that this action be dismissed with costs and HST.

COUNTERCLAIM

93. The Plaintiff by Counterclaim, Dealnet Capital Corp. (“Dealnet”), claims against Steven Small (“Small”):

- a) damages for breach of fiduciary duty, breach of duty of honesty and good faith in the performance of contractual obligations, and knowing receipt of property, money or other benefits resulting from a breach of trust or fiduciary duty, in an amount to be determined before trial;
- b) an accounting and disgorgement of all amounts or other benefits improperly received by Small relating to Small’s breach of his fiduciary duties;
- c) a declaration that all amounts or other benefits described in (b) are held in a constructive trust for Dealnet;
- d) punitive damages in the amount of \$500,000;
- e) pre-judgment interest in accordance with s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- f) post-judgment interest in accordance with s. 129 of the *Courts of Justice Act*;
- g) the costs of this proceeding on a substantial indemnity basis, plus all applicable taxes; and
- h) such further and other relief as this Honourable Court may deem just.

94. The Plaintiffs by Counterclaim, Dealnet, Brent Houlden and Harold Bridge, claim against Steven Small (“Small”):

- a) a declaration pursuant to section 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 that the compensation provisions and the termination provisions relating to post-employment compensation in Small's Employment Agreement dated January 1, 2015 are oppressive, unfairly prejudicial to the Plaintiffs' interests, are unenforceable and must be set aside;
- b) an accounting and disgorgement of all compensation improperly received by Small pursuant to any compensation provisions that are deemed to be oppressive;
- c) an Order pursuant to section 248(3)(j) that Small compensate any aggrieved person in relation to the oppression remedy claimed, in an amount to be determined before trial;
- d) punitive damages in the amount of \$500,000;
- e) pre-judgment interest in accordance with s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- f) post-judgment interest in accordance with s. 129 of the *Courts of Justice Act*;
- g) the costs of this proceeding on a substantial indemnity basis, plus all applicable taxes; and
- h) such further and other relief as this Honourable Court may deem just.

95. The Plaintiffs by Counterclaim repeat and rely upon the allegations in the Statement of Defence in support of this Counterclaim.

96. As outlined above, Small entered into an Employment Agreement with Dealnet dated January 1, 2015 (the "Agreement"). Small created an opportunity for himself to propose a self-interested employment contract and took that opportunity, to the detriment of Dealnet and its shareholders which he was bound by fiduciary duties to protect.

97. In particular, Small urged Dealnet's outgoing BOD to approve the Agreement immediately before the incoming directors were appointed. Small orchestrated this scheme knowing that the incoming BOD would have no knowledge of the terms of his Agreement and that if they had had such knowledge they never would have approved it. In further breach of Small's duties, he failed to disclose the terms of the Agreement to Dealnet's BOD, depriving them of the opportunity to have an objective assessment of the appropriateness of Small's Agreement or Small's requests for additional pay increases, or indeed any knowledge of it until much later.

98. During and after Small's employment, he received money and other benefits resulting from his breach of trust or fiduciary duties. Small had actual knowledge, or ought to have known, that the amounts he received resulted from a breach of trust or fiduciary duties.

99. In particular, Small extracted excessive compensation from Dealnet in circumstances where doing so was contrary to Dealnet's best interests. Small also profited from private deals, which deals were in breach of the fiduciary duties he owed to Dealnet.

Dealnet asks that the Counterclaim be tried at that same time as the main action.

July 16, 2018

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Court File No. CV-18-597161-0000

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STATEMENT OF DEFENCE

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