

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DR. STEVEN SMALL

Plaintiff
(Defendant to the Counterclaim)

and

DEALNET CAPITAL CORPORATION, BRENT HOULDEN
and HAROLD BRIDGE

Defendants
(Plaintiffs by Counterclaim)

REPLY AND DEFENCE TO COUNTERCLAIM

1. The Plaintiff, Dr. Steven Small, admits the allegations contained in paragraphs 8, 10-11, 13-14, 18, and 23 of the Statement of Defence.
2. Dr. Small denies the allegations contained in paragraphs 15-17, 19-22, and 24-92 of the Statement of Defence.
3. Dr. Small has no or insufficient knowledge in respect of the allegations contained in paragraphs 9 and 12 of the Statement of Defence.
4. The Defendants allege that Dealnet Capital Corp. (“**Dealnet**” or the “**Company**”) terminated Dr. Small’s employment as its Executive Chairman for cause on the basis of breaches of contractual and fiduciary duties. These bald and vague allegations are false.

5. Dr. Small performed the duties required by the common law and his employment contract, and was terminated without cause.

6. The Defendants' after-the-fact allegations of cause are without any merit. The Defendants' pleadings are replete with false, inflammatory and irrelevant allegations inserted for improper purpose and contrary to the rules of pleadings.

Employment Agreement Known to the Defendants

7. Dr. Small's employment at Dealnet was governed by an Executive Employment Agreement (the "**Employment Agreement**") concluded on June 15, 2015. The Employment Agreement was approved by the Company's Board of Directors and signed by its then-interim CEO, Michael Hilmer, a signing officer with authority to bind the Company.

8. The Defendants' allegations that the Employment Agreement was not known to them are without any merit.

9. The terms of the Employment Agreement were always known to Dealnet. The Employment Agreement was filed with its corporate secretary, Chris Alexander, shortly after being executed.

10. Mr. Houlden and Mr. Bridge were provided copies of the Employment Agreement on August 18, 2015. The Employment Agreement was also available to all of Dealnet's directors on request.

Agreement Commercially Reasonable and Compensation Unanimously Approved by Board

11. The Defendants' allegations that the Employment Agreement contained commercially unreasonable or oppressive terms, or that Dr. Small extracted "excessive compensation" from the Company, are without any merit.

12. Section 5.1 of the Employment Agreement provided that Dr. Small was entitled to an annual base salary of \$90,000 when he commenced his employment, on June 15, 2015. On August 20, 2015, at a meeting of the Company's Compensation and Corporate Governance Committee ("CCGC"), which both Mr. Bridge and Mr. Houlden attended, the CCGC recommended to the Board that Dr. Small's base salary be increased to \$180,000 and that he be paid a special bonus of \$50,000 as recognition for his "exceptional and transformational performance."

13. The CCGC's recommendation was considered and unanimously accepted by the Board. The CCGC meeting, as well as all other Board discussions about, and votes on, Dr. Small's compensation were held in camera, outside of Dr. Small's presence.

14. The Employment Agreement was also discussed at Dealnet's March 3, 2016, Board meeting. During that meeting, the Board approved certain clerical changes to the Agreement, and further increased Dr. Small's base salary from \$180,000 to \$225,000.

Dr. Small Performed His Contractual Employment Duties

15. Dr. Small's skills and experience brought immediate and significant benefits to Dealnet. His contributions are set out, in part, in paragraphs 44-48 of the Statement of Claim. They were also recognized on multiple occasions by Dealnet's directors, officers, employees and agents. At no time did he breach any duties owed to Dealnet under the Employment Agreement.

16. The Defendants' self-serving allegations to the contrary are either inaccurate or have been presented without essential facts or context.

17. As noted above, on August 20, 2015, the CCGC recommended that Dr. Small be paid a \$50,000 bonus in recognition of his significant contributions to the Company.

18. On March 3, 2016, Dealnet's Board of Directors specifically recognized Dr. Small's outstanding work in connection with an equity capital raise, a large acquisition, and the securing of a new credit line for the Company, "obtained under severe market conditions".

19. The Board's assessment was confirmed in an executive compensation review commissioned by Dealnet from the independent consultancy Global Governance Advisors ("GGA") in late 2016. The report recognized Dr. Small's "distinct and widely recognized characteristics/expertise," and found that his presence gave Dealnet "a valuable advantage", that he "fundamentally elevated Dealnet's corporate visibility and credibility", and that he was "a critical component in developing the sustainable future growth of the organization".

20. The positive changes made at Dealnet by Dr. Small were so significant to Dealnet that GGA reported that he was "widely recognized as a founder" of the Company.

21. At no time while he was employed at Dealnet was Dr. Small informed, either verbally or in writing, or did he otherwise have any reason to believe, that his conduct was inappropriate or that his employment at Dealnet was in jeopardy.

Sufficient Time Spent at Dealnet

22. The Employment Agreement does not include a requirement for Dr. Small to work any specific number of hours. Rather, section 3.1(b) required him to "devote such reasonable time ... as [he] judge[d] prudent" to the position. The Agreement did not require, and the parties to it did not contemplate, that the position would be a full-time one. However, Dr. Small did in fact devote a great deal of time to Dealnet during his employment there.

23. Dr. Small was physically absent from Dealnet's offices for some time during late 2017 as a result of necessary treatment for prostate cancer, which included two surgeries and significant related medical treatment. Mr. Bridge and Mr. Houlden were fully aware of the seriousness of Dr. Small's illness and repeatedly urged him to take all the time he needed to recover. At no time did Mr. Bridge, Mr. Houlden, or any other person advise Dr. Small that his cancer treatment or his absence from Dealnet's offices were problematic, much less that they were jeopardizing his employment.

24. Even while battling cancer, Dr. Small remained in close contact with Dealnet's management and Board (including Mr. Bridge and Mr. Houlden). He was provided with status reports and gave input through near-daily telephone and e-mail communication.

No Inappropriate Behaviour

25. Dr. Small did not engage in "inappropriate behaviour" while at Dealnet. The Defendants have failed to provide any concrete examples of such behaviour in their pleading or in response to Dr. Small's Demand for Particulars.

26. Dr. Small did not send "unprofessional e-mails" to Mr. Hilmer or any other Dealnet employees. Any disagreements between Dr. Small and Mr. Hilmer were a natural consequence of operating a business in difficult financial circumstances, and demonstrate Dr. Small's investment in, and commitment to ensuring, the Company's success.

27. The Defendants' allegations of "back channeling" and "meddling" are spurious. As Executive Chairman, Dr. Small provided advice on strategy and oversaw Dealnet's operations. It was appropriate for him to have discussions with, and provide direction to, the Company's employees, to the extent he deemed prudent.

No Unjust Enrichment

28. Dr. Small never “extracted money” from the Company. All bonuses paid to him were recommended by the CCGC, of which Dr. Small was not a member. They were all unanimously approved by the Board, which voted on them outside Dr. Small’s presence. The bonuses were recommended on the basis of good faith representations about the Company’s performance by its management and external advisors, not just Dr. Small.

29. Dr. Small was contractually entitled to, and therefore did not have to (and did not), “request” a 25% raise in January 2018 under the Employment Agreement. However, he agreed to defer it in light of the Company’s financial position. Dr. Small is still entitled to that salary increase, which was guaranteed by section 5.3 of the Employment Agreement.

Settlement with Michael Hilmer

30. The settlement negotiations with Michael Hilmer were carried out with the full knowledge and support of Dealnet’s Board of Directors, including Mr. Bridge and Mr. Houlden. Mr. Houlden and the Company’s lawyers were involved, along with other senior executives, in drafting the settlement agreement, which was approved unanimously by the Board.

31. The agreement was beneficial to the Company. It resulted in a payment that was less than would have been required under Mr. Hilmer’s employment agreement, and allowed payments to be deferred over an extended period of time, which was crucial given the Company’s cashflow problems at the time.

32. The repayment of Mr. Hilmer’s loan to Dr. Small was disclosed to and approved by the Board. At no time did any Dealnet employee or director, or its counsel, object to the inclusion of the repayment term in the settlement agreement.

33. Dr. Small was under no duty to secure the return of Mr. Hilmer's computer. However, Dr. Small understands that Mr. Hilmer volunteered to provide a copy of the contents of his computer and mobile phone to the Company before his departure, in order to ensure that Dealnet retained any valuable information contained on it.

Dr. Small Fulfilled all Other Employment and Fiduciary Obligations

34. Dr. Small specifically denies the Defendants' vague allegations that he engaged in self-dealing, acted in a conflict of interest, improperly used Dealnet resources, or improperly disclosed any of the Company's confidential information. Dr. Small fulfilled all relevant duties he owed to the Company.

Green Planet

35. Dr. Small's involvement in the "Green Planet Deal" was on behalf of and for the benefit of Dealnet. Green Planet Home Services Inc. ("**Green Planet**") is a dealer of HVAC equipment, in contrast to Dealnet, which is a finance company. As such, Green Planet did not and could not compete with Dealnet.

36. Dealnet was considering the purchase of a book of loans from Green Planet. To allow Dealnet to conduct due diligence on the book, Mark Klavir, Green Planet's manager, sent Dealnet information about it. This information was not "improperly" obtained or shared with Dr. Small.

37. Dr. Small instructed Michael Koshan, Dealnet's treasurer, to analyze the Green Planet book to determine whether it would be a wise investment for Dealnet. The Defendants were aware of and approved this analysis and the use of Dealnet resources to carry it out.

38. Mr. Koshan determined that certain fees and penalties associated with the proposed transaction made it infeasible for Dealnet to purchase the Green Planet book. Dr. Small considered working with Mr. Klavir, who was able to purchase the book at a lower price than Dealnet could have, to purchase it, with the purpose either of reselling it to Dealnet or operating it for Dealnet's benefit.

39. This plan was known to and approved of by the Defendants at all times. Ultimately, no deal was ever reached, and Dr. Small received no benefit from it.

Easy Heat

40. Dr. Small's involvement with Easy Heat was also known to the Defendants and undertaken for the benefit of Dealnet.

41. Like Green Planet, Easy Heat is an HVAC equipment dealer, and therefore not a Dealnet competitor. Dealnet had considered providing financing for Easy Heat loan originations, but Dealnet's own financing arrangements prevented the Company from doing so.

42. Dr. Small developed a plan to work with other investors to finance Easy Heat's loans. This arrangement would have been to Dealnet's benefit: after the loans had established a track record of performance, Dealnet would have been able to acquire them for itself. Dr. Small advised Mr. Bridge and Mr. Houlden of this plan, and they were supportive of it.

43. Ultimately, Dr. Small did not reach a deal with Easy Heat, and received no benefit from it. He was never offered a position as its CEO, and never had any plans to take on that role.

Stalking Horse Bid

44. Dr. Small's involvement in the "Stalking Horse Bid" was likewise for the benefit of Dealnet. At the time, Dealnet was working with Mr. Klavir to put together a bid for the Company's call centres, with the aim of improving its financial position. In his capacity as Executive Chairman of Dealnet, Dr. Small sought to persuade Mr. Klavir to improve the bid, in order to make it as helpful as possible to Dealnet.

45. Dr. Small had no reason to favour the interests of Mr. Klavir over Dealnet: even aside from his fiduciary obligations to the Company, Dr. Small has invested several million dollars of his own money into Dealnet and is its largest individual shareholder. At all times, Dr. Small's goal was to secure the best price possible for its call centres. He never sought, or received, any personal benefit in connection with the bid.

Information Disclosure

46. Dr. Small's disclosure of Dealnet information to Mr. Klavir and ECN Capital was appropriate under the circumstances. Dr. Small acted within his discretion as the Company's Executive Chairman, and his actions were known to its management and directors, including Mr. Houlden and Mr. Bridge.

47. Mr. Klavir was a consultant for the Company and had signed a confidentiality agreement with it. ECN Capital was considering an investment in Dealnet and was in the process of conducting due diligence on it. This process required access to Dealnet documents, which were again provided under a non-disclosure agreement. In both cases, disclosure of relevant Dealnet information was necessary and in the best interests of the Company.

External Board Memberships

48. Dr. Small was not prohibited from serving on the boards of Hampton Securities or Canopy Growth Corp. (“**Canopy**”) by the Employment Agreement. The Agreement, in section 3.3, prohibits Dr. Small from serving on the board only of a corporation which is a “direct or indirect competitor” of Dealnet. Neither Hampton Securities (a wealth management firm) or Canopy (a marijuana producer) compete with Dealnet in any way.

49. The Defendants were aware of Dr. Small’s membership on these boards and never raised any objection to it. To the contrary, at one point, Mr. Bridge approached Dr. Small to see if Dr. Small could assist in having him appointed to the board of Hampton Securities as well. One of Dealnet’s other directors is currently serving on the board of Hampton Securities’ parent company.

Dr. Small was Dismissed Without Cause

50. Dealnet lacked cause to dismiss Dr. Small from his position as its Executive Chairman.

51. Contrary to the allegations in the Statement of Defence, the CCGC meeting on March 27, 2018 was not convened to discuss – in whole or in part – Dr. Small’s performance at Dealnet. His employment status was not on the agenda for the meeting, and it was raised without notice by Mr. Bridge.

52. Mr. Bridge presented the elimination of the Executive Chairman position to the CCGC as a financial decision. The CCGC agreed to eliminate the position of Executive Chairman at Dealnet on this basis. Committee members were not told of any allegations of cause, and did not discuss or consider any such allegations. Indeed, no allegations of cause had even been suggested to that point.

53. Mr. Bridge was authorized to inform Dr. Small about the elimination of his position, and he did so later that night. Mr. Bridge told Dr. Small that the decision was purely a cost-saving measure and did not make any allegation of cause for termination or refer to Dr. Small's performance in any respect. Mr. Bridge assured Dr. Small that the Company would honour its contractual obligations to him.

54. Later that night, Dr. Small informed Mr. Bridge by text message that the elimination of his position was a termination of his employment without cause under section 8.4 of the Employment Agreement and/or grounds for termination by Dr. Small for good reason under section 8.5.

55. The next day, Mr. Houlden informed Dr. Small that Dealnet would not honour its obligations, and in fact was planning to renege on them. Mr. Houlden made it clear that this decision was based on cost considerations. Mr. Bridge asked Dr. Small to remain at the Company as a director and consultant, but Dr. Small refused this offer, and asked to be paid his contractually-guaranteed termination payment. The parties conducted further discussions that day, but were unable to reach an agreement.

56. It was only a week later, after the Defendants had tried and failed to convince Dr. Small to accept less than he was owed, that the Company first alleged that it had cause to terminate him. The grounds for termination given to Dr. Small by the Company were mere boilerplate without any specifics or supporting evidence.

57. The investigation that the Defendants allegedly conducted after Dr. Small's termination was nothing more than an attempt to retroactively manufacture cause. As explained above, none of the allegedly "suspicious" behaviour the Defendants supposedly discovered during this process

was actually inappropriate, much less a breach of the Employment Agreement or Dr. Small's other obligations to Dealnet.

58. Dealnet's Board did not know of, let alone authorize, the purported investigation into Dr. Small's conduct, and none of the supposed findings of the investigation were presented to or considered by the Board.

59. Nor have the Defendants provided any details of any of the allegedly inappropriate e-mails or other evidence that their investigation supposedly uncovered. To the contrary, the Defendants state, in paragraph 15 of the response to Dr. Small's Demand for Particulars, that they have no particulars of their post-termination investigation.

60. All of the supposedly improper conduct alleged by the Defendants was or known to or could have been easily ascertained by them at the time of Dr. Small's termination on March 27, 2018. As a result, the defence of after-acquired cause is not available to the Defendants.

61. Dr. Small was entitled to, and did, treat Mr. Bridge's notification that his position would be eliminated for cost reasons as an actual or constructive dismissal. As a result, he is entitled to the treatment agreed to by the parties and set out at section 8.4 of the Employment Agreement.

DEFENCE TO COUNTERCLAIM

62. The Defendant to the Counterclaim, Dr. Steven Small, denies the allegations contained in paragraphs 96-99 of the Counterclaim.

63. Dr. Small pleads and relies upon the allegations in his Statement of Claim and Reply.

No Breach of Duty

64. As set out in his Reply, Dr. Small has fulfilled all of the fiduciary, contractual, and other duties he owed to Dealnet.

No Improper Benefits

65. Dr. Small has not received any benefits as a result of his employment at Dealnet other than those set out in the Employment Agreement and those he was entitled to by virtue of his directorship. In fact, Dr. Small agreed to postpone a contractually-guaranteed salary increase in January 2018 in recognition of the financial difficulties facing the Company.

66. The Defendants have been unable to support their bald allegations of improper benefit with any facts. The only allegedly improper benefit received by Dr. Small identified by the Defendants is a bonus payment that was approved by Dealnet's Board and paid to numerous executives in recognition of their "outstanding" performances. Dr. Small was only one of approximately 45 employees to whom this bonus was paid.

No Oppression

67. The counterclaim does not state a claim for oppression. The only basis for this claim appears to be vague allegations that Dr. Small's Employment Agreement is "commercially unreasonable" and was hidden from the Defendants. As explained above, the Agreement was

reasonable and fair. It was also known to the Defendants, having been provided to Mr. Bridge and Mr. Houlden, ratified by Dealnet's Board on numerous occasions, and reviewed by the Company's outside advisors.

68. Even if the Employment Agreement is found to have been excessive or unreasonable, the Defendants' oppression claim still fails, since Dr. Small was not yet an officer or director of the Company at the time he executed the Agreement. As a result, his actions could not have been oppressive to Dealnet's stakeholders.

69. Nor are Mr. Houlden or Mr. Bridge proper complainants for an oppression claim, since they are not alleged to have suffered any damages in their personal capacities, aside from those alleged to have been suffered by the Company.

70. Furthermore, the Counterclaim is statute-barred. The Defendants knew of the Agreement no later than August 18, 2015, approximately two years and eleven months before the filing of the Counterclaim. A claim cannot be brought more than two years after the date on which it was discovered.

No Damages or Entitlement to Declaratory, Disgorgement, Accounting or Trust Remedies

71. Dr. Small denies causing the Defendants damages, or that the Defendants have incurred any of the vague and unquantified amount damages sought in the Counterclaim.

72. The Defendants are not entitled to, and plead no basis for, the declaratory, disgorgement, accounting or a constructive trust remedies sought in the Counterclaim.

No Punitive Damages or Substantial Indemnity Costs

73. The Defendants have failed to identify any conduct of Dr. Small that would justify either punitive damages or substantial indemnity costs.

Conclusion

74. Dr. Small, pleads and relies upon the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B., s. 4, and the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 245 and 248.

75. The Counterclaim should be dismissed with costs.

September 25, 2018

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Court File No. CV-18-597161-0000

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PROCEEDING COMMENCED AT
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