

Court File No. CV-23-00710413-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

B E T W E E N

MBL ADMINISTRATIVE AGENT II LLC, as agent for POST ROAD
SPECIALTY LENDING FUND II LP (f/k/a MAN BRIDGE LANE
SPECIALTY LENDING FUND II (US) LP), and POST ROAD SPECIALTY
LENDING FUND (UMINN) LP (f/k/a MAN BRIDGE LANE SPECIALTY
LENDING FUND (UMINN) LP)

Applicant

and

TRADE X GROUP OF COMPANIES INC., 12771888 CANADA INC., TVAS INC.,
TRADEXPRESS AUTO CANADA INC., TRADE X FUND GP INC., TRADE X LP FUND
I, TRADE X CONTINENTAL INC., TX CAPITAL CORP., TECHLANTIC LTD. AND TX
OPS CANADA CORPORATION

Respondents

**MOTION RECORD OF THE VAN ESSEN
COMPANIES**

*(For Motion Regarding Unauthorized Access to
Privileged Documents)*

April 16, 2024

ROSEMOUNT LAW PC
150 King Street W. Suite 200
Toronto, ON M5H 1J9

Alexis Beale (LSO No. 65902W)
Tel:647-692-0222
abeale@rosemountlaw.com

Lawyers for the Moving Parties,
the Van Essen Companies and
Wouter Van Essen

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I, TRADE X CONTINENTAL INC., TX CAPITAL CORP., TECHLANTIC LTD. AND TX
OPS CANADA CORPORATION

Respondents

NOTICE OF MOTION

1309767 Ontario Limited and 2601658 Ontario Ltd. (the “**Van Essen Companies**”), the responding parties to the motion brought by FTI Consulting Canada Inc. (“**FTI Consulting**”), in its capacity as the Court-appointed receiver and manager (the “**Receiver**”), without security, of the following property of Trade X Group of Companies Inc., 12771888 Canada Inc., TVAS Inc., Tradexpress Auto Canada Inc., Trade X Fund GP Inc., Trade X LP Fund I, Trade X Continental Inc., TX Capital Corp., Techlantic Ltd. (“**Techlantic**”) and TX Ops Canada Corporation (collectively, “**Trade X**” or the “**Debtors**”) will make a motion to a Judge of the Commercial List as soon as the motion can be heard, at 330 University Avenue, 8th Floor, Toronto Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- 1) In writing under subrule 37.12.1 (1);

- 2) In writing as an opposed motion under subrule 37.12.1 (4);
- In person;
- 3) By telephone conference;
- 4) By video conference.

THE MOTION IS FOR AN ORDER:

- a) An Order striking out all evidence submitted by FTI Consulting Canada Inc. in the Motion and Cross-Motion (as defined below);
- b) An Order granting judgment in the Motion and Cross-Motion in favour of the Van Essen Companies;
- c) An Order staying the rights and claims of the Receiver and Applicant and any related parties, without prejudice to the rights of the Van Essen Companies and Wouter Van Essen;
- d) Costs of this motion on a full indemnity basis; and
- e) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- f) The Receiver, FTI Consulting Canada Inc., commenced the within proceeding by serving a motion on February 2, 2024, seeking recovery of \$1,723,495 that was subject to a series of balancing transactions carried out in December 2023, where the Van Essen Companies applied the funds to reduce Techlantic's outstanding indebtedness.
- g) The Van Essen Companies responded with a cross-motion seeking a final declaration that the funds belonged to them.
- h) Both the Receiver's Motion and the Van Essen Companies' Cross-Motion were scheduled

for April 3, 2024 and then adjourned at the Receiver's request to June 27, 2024 (the "**Underlying Motion and Cross-Motion**").

- i) Wouter Van Essen is the principal of the Van Essen Companies.
- j) After the Receiver served its First Supplemental Report to the First Report of the Receiver, dated April 3, 2024, it was discovered that the Receiver had full unauthorized access to Wouter Van Essen's email account since February 22, 2024;
- k) The Receiver's April 3, 2024 Report states: "In order to assess the issues described below, **the Receiver reviewed e-mails sent or received by Wouter Van Essen from his Techlantic e-mail address during the period from 2021-2024.** The Receiver also reviewed e-mails sent and received by other individuals based on certain targeted keyword searches" [emphasis added].
- l) Wouter Van Essen was not given advance notice that his email account would be collected, nor was he given any opportunity to advise of the contents of his e-mail account. The emails sent or received by Wouter Van Essen during the period of 2021-2024 include privileged and confidential documents.
- m) The Van Essen Companies notified the Receiver of the same on April 5, 2024.
- n) The Receiver continued to review the database until April 10, 2024.
- o) The Receiver has offered to 'temporarily shut down' the database. Otherwise, it continues to have unauthorized access to numerous privileged and confidential emails stored in Wouter Van Essen's email account, including 1950 documents stored in a folder labelled 'legal' and 326 documents between Wouter Van Essen and counsel in relation to this dispute.

- p) The Receiver has used this unauthorized access to inform their litigation strategy in the Underlying Motion and Cross-Motion noted above.
- q) The Receiver admits accessing Wouter Van Essen's emails but refuses to disclose the extent of their review of privileged materials.
- r) The Receiver is obligated to disclose the extent of their review of privileged materials.
- s) The Receiver has failed to rebut the presumption of prejudice.
- t) The Court should draw an adverse inference regarding both the extent of the Receiver's review of privileged material and the degree to which the contents of those materials are prejudicial.
- u) The Receiver's conduct fundamentally undermines the integrity of the adjudicative process in the ongoing proceedings involving the Van Essen Companies.
- v) The appropriate remedy and the only viable solution is an Order:
 - i) Striking out the evidence filed by the Receiver in these proceedings;
 - ii) Granting judgment in this Motion and Cross-Motion in favour of the Van Essen Companies;
 - iii) Staying the rights and claims of the Receiver, the Applicant and related entities in any ongoing or contemplated litigation against the Van Essen Companies or their officers or directors (former, current or prospective), without prejudice to the rights of the Van Essen Companies; and
 - iv) Ordering costs on a full indemnity basis.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of this motion:

- w) The Motion Record filed in the Underlying Motion and Cross-Motion (filed separately);
- x) Affidavit of Wouter Van Essen, sworn on April 16, 2024;
- y) Further affidavits and documentary evidence may be advised and permitted by this Honourable Court; and
- z) Such further or other order as to this Honourable Court may seem just.

April 16, 2024

ROSEMOUNT LAW PC
150 King Street W. Suite 200
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Tel: 647-692-0222
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Lawyers for the Moving Parties,
the Van Essen Companies and
Wouter Van Essen

TO: GOODMANS LLP
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btee@goodmans.ca

Tel: 416.849.6895

Lawyers for the Receiver,
FTI Consulting Canada Inc.

MBL ADMINISTRATIVE AGENT II LLC and TRADE X GROUP OF COMPANIES INC. et al. Court File No. CV-23-00710413-00CL

Applicant

Respondents

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

Proceeding commenced at Toronto

Notice of Motion

ROSEMOUNT LAW PC
150 King Street W. Suite 200
Toronto, ON M5H 1J9

Alexis Beale (LSO No. 65902W)
Tel: 647-692-0222
abeale@rosemountlaw.com

Lawyers for the Responding Parties and Moving
Parties on the Cross-Motion, the Van Essen
Companies and Wouter Van Essen

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Court File No.: CV-23-00710413-00CL

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

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BETWEEN:

**MBL ADMINISTRATIVE AGENT II LLC, as agent for POST ROAD
SPECIALTY LENDING FUND II LP (f/k/a MAN BRIDGE LANE
SPECIALTY LENDING FUND II (US) LP), and POST ROAD SPECIALTY
LENDING FUND (UMINN) LP (f/k/a MAN BRIDGE LANE SPECIALTY
LENDING FUND (UMINN) LP)**

Applicant

-and-

**TRADE X GROUP OF COMPANIES INC., 12771888 CANADA INC., TVAS INC.,
TRADEXPRESS AUTO CANADA INC., TRADE X FUND GP INC., TRADE X LP FUND
I, TRADE X CONTINENTAL INC., TX CAPITAL CORP., TECHLANTIC LTD. AND
TX OPS CANADA CORPORATION**

Respondents

AFFIDAVIT OF WOUTER VAN ESSEN

I, **WOUTER VAN ESSEN**, of the City of Oakville in the Province of Ontario, **MAKE OATH AND AFFIRM:**

1. I am the principal of 1309767 Ontario Ltd. ("**130 Ontario**") and 2601658 Ontario Ltd. ("**260 Ontario**", and together with 130 Ontario, the "**Van Essen Companies**"), and as such, I have direct and personal knowledge of the matters deposed to herein except where stated to be on information and belief, and where so stated, I believe them to be true.

2. This affidavit is sworn in support of our motion seeking to stay the rights and claims of the Receiver, FTI Consulting Canada Inc., and any related parties, and for an order granting judgment in the Motion and Cross-Motion in favour of the Van Essen Companies.

A. The Purchase of Techlantic by Trade X

3. I founded Techlantic Ltd. (“**Techlantic**”) in 2001 as a company engaged in the international trade of luxury vehicles. To that end, Techlantic enabled automotive trading customers in locations around the world to obtain financing and navigate the complexities of tax compliance and international regulation. Over the course of nearly twenty years, Techlantic became a market leader in the industry, by facilitating all aspects of trade financing, including cash flow management, tax claims, shipping, letters of credit processing and accounting.
4. In 2018, I sold my shares in Techlantic to my son, Eric Van Essen (“Eric”). I remained involved in a consulting capacity, with a view to lessening my role with time.
5. Techlantic was sold to Trade X in August 2021. I continued to be involved in its operations, primarily offering consultancy and being listed as a finance team member on Techlantic’s website.
6. I am also the principal of the Van Essen Companies, which include 1309767 Ontario Ltd., 2601658 Ontario Ltd., and other entities collectively known as the Van Essen Companies.

B. Introduction to the Dispute:

7. The underlying Motion, initiated by the Receiver on February 2, 2024, seeks the recovery of \$1,723,495, alleging these funds were improperly handled. We contest this claim.

8. Our Cross-Motion seeks a final declaration that the funds used to reduce Techlantic's outstanding indebtedness rightfully belong to the Van Essen Companies and not to the Receiver.

C. Unauthorized Access to Emails:

9. On April 3, 2024, it was revealed that the Receiver had unauthorized access to my email account since February 22, 2024. This breach was first disclosed in the Receiver's First Supplemental Report dated April 3, 2024, which stated:

D. THE RECEIVER'S REVIEW OF TECHLANTIC'S RECORDS

12. In order to gain a further understanding of the dealings between Techlantic and 130 Ontario, the Receiver uploaded Techlantic's electronic records, including e-mails sent and received by certain identified custodians, into document review software and conducted a review of certain documents with the assistance of its counsel.
 13. The Debtors' electronic records obtained by the Receiver include nearly one million documents. In order to assess the issues described below, the Receiver reviewed e-mails sent or received by Wouter Van Essen ("**Wouter**") from his Techlantic e-mail address during the period from 2021-2024. The Receiver also reviewed e-mails sent and received by other individuals based on certain targeted keyword searches.
10. Based on the Receiver's Report, I understood that the Receiver collected and reviewed my emails from 2021 to 2024 without my prior knowledge or consent. I was not notified about nor given the opportunity to address the contents of the emails collected or reviewed.
 11. The period collected pre-dated the sale of Techlantic to the Trade-X Group of Companies and was outside the scope of relevance for the motion. The emails were collected from a folder that includes all my correspondence with counsel. Other privileged and confidential correspondence, including all of my correspondence with counsel in relation to the litigation herein, were stored in other folders that were also collected.

12. I immediately notified my counsel that the emails collected and reviewed contained confidential and privileged information.

13. My counsel wrote to counsel for the Receiver to notify of this issue on April 5, 2024. In her email, she said:

Counsel,

We have reviewed the [First Supplemental Report to the First Report of the Receiver] and note that your client appears to have collected and reviewed all emails with the @techlantic.com domain and many with the @techlanticconsulting.com domain. These email domains were used by my clients for the purposes of receiving legal advice, settlement-related discussions and litigation advice and strategy, including in relation to the litigation herein. We have significant concerns regarding unauthorized access. It is trite to say that any such access would be prejudicial and in breach of the Receiver's authority.

To address this matter effectively, we request the following information:

1. Detailed Inventory: A comprehensive list of all email accounts and any other documents collected from the servers.
2. Document Collection and Review Protocol: Details on the protocols followed for document collection and review in this case, including measures taken to identify and exclude privileged information.

14. When counsel to the Receiver did not respond, my counsel contacted the Receiver's counsel by phone, requesting information about the scope of the review. My counsel reiterated that the emails collected included advice from her directly related to this litigation. She asked about any protocol or procedures used prior to the collection and asked whether the database review was ongoing. The contemporaneous email confirming the contents of the call between my counsel to the Receiver's counsel is attached as **Exhibit 'A'**.

15. Counsel to the Receiver responded in writing on April 11, 2024, and stated that they only did keyword searching (which contrasts with the information contained Receiver's First Supplemental Report dated April 3, 2024, which said that all emails sent or received by

Wouter were reviewed). They also refused to confirm whether the documents reviewed were privileged:

Your assertion that the Receiver reviewed all of the e-mails in the Techlantic.com domain is also not correct. The Receiver did not believe that a review of all of the Techlantic e-mails would be efficient. It conducted a targeted review of certain e-mails likely to be relevant, or to address specific issues. **The specific searches performed by the Receiver and its counsel are privileged, and need not be disclosed.** [emphasis added]

16. My counsel responded that same day, stating:

Thank you for your email. It is unfortunate that you think my clients' concerns are tactical. I can assure you that they are not. My clients had no choice but to raise this concern once they determined that their privileged correspondence had been accessed. You seem to imply from your email that they ought not to have notified you, which is problematic.

It is settled law that a breach of privilege "creates a serious risk to the integrity of the administration of justice." The *Celanese* test provides that "the onus is on the party with unauthorized access to another party's privileged documents to show that there is no risk that privileged and confidential information attributable to a solicitor and client relationship will be used to the prejudice of the party possessing the privilege."

That is why I asked you to provide my client with an inventory and protocol so they could be comforted that the Receiver did not review their privileged correspondence. My client would be happy to receive any other record keeping that serves the same purpose. **Please advise immediately if the Receiver is unwilling or unable to provide the same.**

Please also confirm: 1) the date when the relevant accounts were collected; 2) whether the server as a whole has been collected; and 3) the date when the 'temporary shut down' occurred.

17. On April 12, 2024, counsel for the Receiver responded to say, among other things, that despite being notified of this breach on April 5, 2024, the Receiver continued to access the email database until April 10, 2024. The full email chain referred to herein is included in **Exhibit 'B'**.

18. I assert that the Receiver has used this unauthorized access to gain an unfair advantage in the ongoing litigation related to the underlying Motion and Cross-Motion.

D. Impact of Unauthorized Access

19. The unauthorized review of these communications has potentially exposed sensitive and privileged information directly related to the legal advice and litigation strategy involved in the underlying Motion and Cross-Motion.

20. The Receiver has admitted to this access but has refused to disclose the extent of their review of the privileged materials, contrary to legal obligations.

21. Specifically, the Receiver admitted to accessing privileged documents, including:

- a. 1950 documents stored in a folder called 'legal' that I used to store privileged documents; and
- b. 326 documents between myself and my counsel in relation to this dispute.

22. Conclusion and Relief Sought:

22. Given the serious nature of the unauthorized access and the potential compromise of our legal strategy, we seek immediate remedies, including an injunction against the use of any information derived from the unauthorized access and costs on a full indemnity basis.

Sworn remotely by Wouter Van Essen)
of the City of Oakville in the Province)
of Ontario before me at the City of)
Toronto in the Province of Ontario on)
this 16 day of April, 2024, in)
accordance with O. Reg. 431/20,)
Administering an Oath Remotely.)



Alexis Beale

Commissioner for Taking Affidavits, etc.



Wouter Van Essen (Apr 16, 2024 20:48 EDT)

Wouter Van Essen

EXHIBIT A

This is **Exhibit “A”** referred to in the Affidavit of Wouter Van Essen of the City of Oakville, in the Province of Ontario, sworn before me at the City of Toronto, in the Province of Ontario this 16th day of April, 2024, in accordance with O. Reg. 431/20 Administering Oath or Declaration Remotely



[Commissioner for Taking Affidavits] [or as may be]
ALEXIS BEALE

From: [Dunn, Mark](#)
To: [Alexis Beale](#)
Cc: [Tee, Brittni](#); [Descours, Caroline](#)
Subject: RE: Trade X Receivership
Date: April 9, 2024 1:15:20 PM

Thank you. We will respond with our position. To be clear, I am not sure that you have fully or accurately captured our discussion but there is no need to debate that as our position will be set out in writing.

To be clear, I do not believe any review of the database is occurring or has occurred since we received your letter. My statement was that we were not committing to going “pens down” as you put it.

I understand from our discussion your clients’ perspective on this issue and what they are trying to accomplish so the conversation was helpful from that perspective.

Mark Dunn

He/Him
Goodmans LLP

416.849.6895 (office) 647.294.3866 (mobile)
mdunn@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
goodmans.ca

From: Alexis Beale <abeale@rosemountlaw.com>
Sent: Tuesday, April 9, 2024 1:08 PM
To: Dunn, Mark <mdunn@goodmans.ca>
Subject: FW: Trade X Receivership

Mark,

I am writing to provide a summary of our recent conversation following my email dated April 5, 2024, concerning the potential unauthorized review of privileged correspondence by FTI/Goodmans. In that discussion, I mentioned that the email domains techlantic.com and techlanticconsulting.com contain privileged emails, including advice from me regarding this litigation.

You mentioned that you are in the process of collecting relevant information to address the concern raised in my email. You advised that there were no custodian interviews or other formal protocols for the review and collection of documents in this case.

On the database topic, you indicated that there appears to be no evidence of unauthorized access to the techlanticconsulting emails and expressed uncertainty regarding their specifics.

You mentioned no prior knowledge that the information could be privileged and noted the lack of a third-party screening protocol for such documents. You suggested that if there were privileged documents, it was the responsibility of my client to notify the receiver.

You also informed me that your work has not ceased and that you are preparing for the examinations. You stated that you were concerned that this issue would cause some delay in the main motion.

You implied that raising these concerns might be seen as tactical and mentioned that resolving this through a motion would incur significant costs. I responded by stating that receiving the First Supplemental Report to the Receiver's First Report prompted these concerns. I reiterated that we are still unclear about the full extent of the collected data, and we would have to assess first.

Kind Regards,
Alexis Beale

Alexis Beale

Rosemount Law

(647) 692-0222

abeale@rosemountlaw.com

www.rosemountlaw.com

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From: Alexis Beale

Sent: Friday, April 5, 2024 4:18 PM

To: Mark Dunn <mdunn@goodmans.ca>; Brittnei Tee <btee@goodmans.ca>; Caroline Descours <cdescours@goodmans.ca>

Subject: RE: Trade X Receivership

Counsel,

I note that my email of 1:08 pm should refer to the First Supplemental Report to the First Report of the Receiver, dated April 3, 2024, and not the 'Amended Responding Record.'

Apologies for any confusion.

Kind Regards,
Alexis Beale

Alexis Beale
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(647) 692-0222
abeale@rosemountlaw.com
www.rosemountlaw.com

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From: Alexis Beale
Sent: Friday, April 5, 2024 1:08 PM
To: Mark Dunn <mdunn@goodmans.ca>; Brittnei Tee <btee@goodmans.ca>; Caroline Descours <cdescours@goodmans.ca>
Subject: Trade X Receivership

Counsel,

We have reviewed the Amended Responding Record and note that your client appears to have collected and reviewed all emails with the @techlantic.com domain and many with the @techlanticconsulting.com domain. These email domains were used by my clients for the purposes of receiving legal advice, settlement-related discussions and litigation advice and strategy, including in relation to the litigation herein. We have significant concerns regarding unauthorized access. It is trite to say that any such access would be prejudicial and in breach of the Receiver's authority.

To address this matter effectively, we request the following information:

- Detailed Inventory: A comprehensive list of all email accounts and any other

documents collected from the servers.

- Document Collection and Review Protocol: Details on the protocols followed for document collection and review in this case, including measures taken to identify and exclude privileged information.

Kind Regards,
Alexis Beale

Alexis Beale
Rosemount Law
(647) 692-0222

www.rosemountlaw.com

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***** Attention *****

This communication is intended solely for the named addressee(s) and may contain information that is privileged, confidential, protected or otherwise exempt from disclosure. No waiver of confidence, privilege, protection or otherwise is made. If you are not the intended recipient of this communication, or wish to unsubscribe, please advise us immediately at privacyofficer@goodmans.ca and delete this email without reading, copying or forwarding it to anyone. Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, ON, M5H 2S7, www.goodmans.ca. You may unsubscribe to certain communications by clicking [here](#).

EXHIBIT B

This is **Exhibit “B”** referred to in the Affidavit of Wouter Van Essen at the City of Oakville, in the Province of Ontario this 16th day of April, 2024, in accordance with O. Reg. 431/20 Administering Oath or Declaration Remotely



[Commissioner for Taking Affidavits] [or as may be]
ALEXIS BEALE

From: [Dunn, Mark](#)
To: [Alexis Beale](#)
Cc: [Tee, Brittni](#); [Descours, Caroline](#)
Subject: RE: Trade X Receivership
Date: April 16, 2024 10:24:49 AM

I am not sure that we are fully understanding each other, and I will try my best to clarify our position below.

The difficulty we are facing on our side is that we do not know what documents are alleged to be privileged. Your e-mail indicates that some of these e-mails are to or from you, but does not specify what (if any) other documents your clients are alleging to be privileged.

You seem to be asking for evidence that a particular set of documents has not been reviewed, but to do that we need to know what documents are in the set. Otherwise, we would need to disclose complete details of all the searches we did and everything that was reviewed. This is problematic from both a privilege perspective (since our work is privileged) and a practicality perspective (since I'm not sure if we can compile this information).

To be clear, here is what we propose:

1. You advise (whether based on the searches, inventory or both) what documents are alleged to be privileged, using the same information that would be included in a detailed schedule "B";
2. We can then assess: whether there is any dispute about privilege or who privilege belongs to (ie., Techlantic, the Van Essen Companies or both); whether any of the allegedly privileged documents were reviewed; whether any review caused (or could be reasonably alleged to cause) any prejudice; what evidence can be provided with respect to any of the above;
3. Once the two steps above are completed, we can determine what steps (if any) are appropriate to address the issue.

We want to deal with this issue expeditiously, in order to avoid any interference with the existing motion schedule and keep the matter moving forward. But I do believe that an appropriate process can certainly narrow and likely avoid any dispute.

Thanks,
Mark

Mark Dunn

He/Him
Goodmans LLP

416.849.6895 (office) 647.294.3866 (mobile)
mdunn@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
goodmans.ca

From: Alexis Beale <abeale@rosemountlaw.com>
Sent: Monday, April 15, 2024 8:56 PM
To: Dunn, Mark <mdunn@goodmans.ca>
Cc: Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

Hi Mark,

Your communications have not confirmed whether any privileged documents have been reviewed, nor have you proposed a method to confirm that such a review has not occurred. Please provide this by tomorrow, barring which my client will have no choice but to bring this motion.

The rest of your email concerns a prospective method to guard against future disclosure. It is likely too late and we will have to seek court directions on that as well.

Kind Regards,
Alexis Beale

Alexis Beale
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www.rosemountlaw.com

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From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Monday, April 15, 2024 8:01 PM
To: Alexis Beale <abeale@rosemountlaw.com>
Cc: Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

Thank you Alexis. I had suggested that you identify the documents over which privilege is claimed. We are not looking for any information beyond what would typically be included in a detailed schedule "B" to an affidavit of documents. But, as you can appreciate, we are operating at an informational disadvantage. If you identify the documents then we can provide an informed answer to your concerns. The information in your e-mail below, for example, is new to me.

Your e-mail seems to imply that you are waiting for an answer from us by end of day tomorrow, but it is not clear what answer you are waiting for and so clarification about that would be appreciated.

In the interim I can confirm (again) that the database is currently shut down and we will give you notice before it is activated. As I previously advised, we expect that this will occur after you identify the documents

Mark Dunn

He/Him
Goodmans LLP

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Toronto, ON M5H 2S7
goodmans.ca

From: Alexis Beale <abeale@rosemountlaw.com>
Sent: Monday, April 15, 2024 7:40 PM
To: Dunn, Mark <mdunn@goodmans.ca>
Cc: Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

Good evening,

Thank you for the inventory provided at 5:50 pm. **Note that this email does not constitute waiver of privilege. It is purely for the purpose of identifying in broad categories the privileged correspondence that the Receiver has collected and presumptively reviewed.**

Upon a very preliminary review, I can advise that you have collected and presumptively reviewed not less than 150 emails to or from me related to this litigation. To make matters worse, these were collected from folders called 'legal' as per the metadata in the inventory sheet that you circulated. These folders contain other privileged correspondence. I have not had time to identify all of the other solicitor-client and litigation-privileged content and I expect that a thorough privilege review of the type required would be prohibitively costly for my clients.

As I previously advised, I will wait until EOD tomorrow and then proceed to serve my clients' motion.

In the meantime, please confirm that no one will use this database for any purpose.

Kind Regards,
Alexis Beale

Alexis Beale

Rosemount Law
(647) 692-0222
abeale@rosemountlaw.com
www.rosemountlaw.com

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From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Monday, April 15, 2024 5:19 PM
To: Alexis Beale <abeale@rosemountlaw.com>
Cc: Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: Re: Trade X Receivership

My email states that the inventory will be provided shortly.

It is hard to see how we can address the issue further on our side without knowing what documents are involved but we remain prepared to cooperate and see if we can find a reasonable solution.

If you choose to bring a motion, we will review it and respond accordingly.

Sent from my iPhone

On Apr 15, 2024, at 5:07 PM, Alexis Beale <abeale@rosemountlaw.com> wrote:

Hi Mark,

Please confirm if you are no longer providing an inventory that you previously offered and advised would be delivered today?

I advised that there are definitely litigation privileged and solicitor client privileged documents in what you have collected.

What you are sharing will simply go to the extent and unfortunately, that review may have to occur in parallel with my clients' motion even the gravity of the issue.

Kind Regards,

Alexis Beale

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On Apr 15, 2024, at 5:02 PM, Dunn, Mark <mdunn@goodmans.ca> wrote:

Alexis,

You seem to have misunderstood our position. You asked for specific information and I answered. I did not make the statement attributed to me below.

We do not, at this stage, know what (if any) documents in the database are alleged to be privileged. That is why we offered to have FTI run searches for you, and set up an ethical screen to facilitate that. Contact information has been provided and the inventory you asked for will be provided shortly. Once we know what (if any) documents you are concerned about, we can determine how to best address any remaining concerns.

Sent from my iPhone

On Apr 15, 2024, at 4:13 PM, Alexis Beale
<abeale@rosemountlaw.com> wrote:

Mark,

Further to your email of April 12, 2024, please advise when I can anticipate FTI to contact me.

I reiterate my request in my emails of April 5 and 11 that the Receiver confirm and provide proof that neither it nor its' counsel reviewed any privileged documents. You previously refused to answer based on an assertion of privilege.

If I do not hear from you by EOD tomorrow, I will assume that you maintain this position and I will act on instructions to bring a motion to stay the Receiver's motion, among other things.

Kind Regards,
Alexis Beale

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From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Friday, April 12, 2024 5:25 PM
To: Alexis Beale <abeale@rosemountlaw.com>
Cc: Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

We don't think the tone below or the accusations about

“unauthorized access” and “the prejudice that already exists” are appropriate in these circumstances. We would also like to limit further debate of these issues by e-mail. We have been (and will continue to be) prepared to work cooperatively to address any valid concerns. Suffice to say that we do not agree that there has been any unauthorized access, we are confident that there has been (and will be) no prejudice and we remain concerned about the (unexplained) delay in raising these concerns. The Receiver is very much focused on a fair and appropriate approach to these issues so that it can move forward with its mandate.

With respect to your requests for information:

1. We have already offered to provide you with an inventory, and we will provide it on Monday;
2. The entire Techlantic server was preserved but is not in our database and has not been reviewed. Only the identified mailboxes were loaded into the database. The collection occurred on January 11, February 14 and February 16 for all of the databases apart from Wouter Van Essen. Mr. (Wouter) Van Essen’s mailbox was downloaded on February 22 and February 23. I believe the download occurred later because we did not know that Mr. (Wouter) Van Essen had a Techlantic e-mail when our review began;
3. The temporary shut down occurred on April 10, but no one from Goodmans accessed the database after your letter was received. FTI was conducting certain limited reviews during this period and we will confirm what (if any) access to the database this involved.

I will be back to you on Monday with contact information for the FTI personnel who can run the searches referenced in my prior e-mail. I suspect that we will be able to have a much more productive discussion about this once you are able to tell us what (if any) allegedly privileged material is in the database.

Mark Dunn
He/Him
Goodmans LLP

Mark Dunn
He/Him
Goodmans LLP

416.849.6895 (office) 647.294.3866 (mobile)
mdunn@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
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From: Alexis Beale <abeale@rosemountlaw.com>
Sent: Thursday, April 11, 2024 4:19 PM
To: Dunn, Mark <mdunn@goodmans.ca>
Cc: Tee, Brittni <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

Mark,

Thank you for your email. It is unfortunate that you think my clients' concerns are tactical. I can assure you that they are not. My clients had no choice but to raise this concern once they determined that their privileged correspondence had been accessed. You seem to imply from your email that they ought not to have notified you, which is problematic.

It is settled law that a breach of privilege "creates a serious risk to the integrity of the administration of justice." The *Celanese* test provides that "the onus is on the party with unauthorized access to another party's privileged documents to show that there is no risk that privileged and confidential information attributable to a solicitor and client relationship will be used to the prejudice of the party possessing the privilege."

That is why I asked you to provide my client with an inventory and protocol so they could be comforted that the Receiver did not review their privileged correspondence. My client would be happy to receive any other record keeping that serves the same purpose. **Please advise immediately if the Receiver is unwilling or unable to provide the same.**

Please also confirm: 1) the date when the relevant accounts were collected; 2) whether the server as a whole has been collected; and 3) the date when the

'temporary shut down' occurred.

Finally, the forward-looking procedures you suggest are acceptable, but they do not cure the prejudice that already exists.

The premise that the Receiver had no obligation to guard against unauthorized access is problematic for several reasons, but it is not productive to address them here, nor are they relevant to any legal argument.

Kind Regards,
Alexis Beale

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From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Thursday, April 11, 2024 2:36 PM
To: Alexis Beale <abeale@rosemountlaw.com>
Cc: Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

Ms.
Beale,

I am writing in response to your e-mail below. As set

out below, we (and our client) will work with you to ensure that any privileged documents are dealt with appropriately. We do not, however, accept your assertion that there has been “unauthorized” access to any material. We also do not understand why your client has waited so long to raise its concerns, and we do not believe that those concerns should confer any procedural or substantive advantage on them.

The Timing of your client’s objection

Your client has known that the Receiver had access to Techlantic’s electronic records since the Receivership Order was granted on December 22, 2023. It grants the Receiver a broad right to access Techlantic’s electronic records. If (as you now suggest) your clients stored privileged material on Techlantic’s system then they knew that the Receiver had access to that material. Conversely, the Receiver did not know (and had no reason to suspect) that your client’s privileged material might be stored on Techlantic’s system.

Your clients have also known that the Receiver was reviewing Techlantic’s electronic records in order to understand various issues relating to its business. We advised in our February 27, 2024 letter that the Receiver had reached certain conclusions based on its review of the “contemporaneous documents”. My e-mail of February 27, 2024 specifically said that the Receiver’s supplementary report would be based on information located in Techlantic’s records including e-mails sent and received by your clients. I discussed certain specific e-mails with you during our discussions about the merits of the case around the same time.

In the circumstances, it is not clear why any *bona fide* privilege concerns were not raised earlier so that any privileged (or potentially privileged) documents could be identified and addressed.

Request for a protocol and inventory

Your comments with respect to the scope of our client's review are, with respect, not correct. The Receiver requested a download of the following e-mails from the Debtors' IT provider:

eric@techlantic.com

eric.vanessen@tradexport.com

eric@tradexport.com

june@techlantic.com

michelle@techlantic.com

ping@techlantic.com

wouter@techlantic.com

Tradex custodians were also collected, but those custodians are not directly relevant to your request.

The Receiver did not request access to any e-mails from techlanticconsulting.com. We do not believe that such e-mails are in the database provided to the Receiver, except to the extent that someone with a techlanticconsulting.com e-mail sent or received to one of the e-mail addresses listed above.

Your assertion that the Receiver reviewed all of the e-mails in the Techlantic.com domain is also not correct. The Receiver did not believe that a review of all of the Techlantic e-mails would be efficient. It conducted a targeted review of certain e-mails likely to be relevant, or to address specific issues. The specific searches performed by the Receiver and its counsel are privileged, and need not be disclosed.

It is not clear, from your e-mail, whether you are asking for a list of all of the documents that are in our database.

We are prepared to provide this to you, but we note that there are more than one million documents in the database.

With respect to your request for a “protocol”, we did not institute any protocol to identify privileged documents belonging to third parties because we had no reason to believe such documents were (or might be) in Techlantic’s possession.

Procedures

All of that said, we would be pleased to work with you to address any concerns your clients have about this issue and an appropriate protocol to ensure that no privileged documents are in the Receiver’s database. We would propose the following:

1. We are prepared to have FTI’s technology personnel run a search at your request, solely to identify privileged documents;
2. The personnel that run the search will be separate from the team that has been working on this matter for FTI, and FTI will establish an ethical wall to prevent anyone working on this matter for the Receiver from accessing the information provided to you;
3. You will provide us with a list of documents that are alleged to be privileged, in a format equivalent to Schedule “B” to an Affidavit of Documents;
4. Any documents that you identify will be segregated and removed from the database, without prejudice to the Receiver’s right to challenge any privileged designation.

We have temporarily shut down the Receiver’s document database so that it cannot be accessed while this issue is being resolved. We are not, however, prepared to pause our review indefinitely.

Mark Dunn

He/Him

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mdunn@goodmans.ca

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Toronto, ON M5H 2S7

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From: Alexis Beale <abeale@rosemountlaw.com>
Sent: Friday, April 5, 2024 4:18 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Tee, Brittini <btee@goodmans.ca>; Descours, Caroline <cdescours@goodmans.ca>
Subject: RE: Trade X Receivership

Counsel,

I note that my email of 1:08 pm should refer to the First Supplemental Report to the First Report of the Receiver, dated April 3, 2024, and not the 'Amended Responding Record.' Apologies for any confusion.

Kind Regards,

Alexis Beale

Alexis Beale

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From: Alexis Beale**Sent:** Friday, April 5, 2024 1:08 PM**To:** Mark Dunn <mdunn@goodmans.ca>; Brittni Tee <btee@goodmans.ca>; Caroline Descours <cdescours@goodmans.ca>**Subject:** Trade X Receivership

Counsel,

We have reviewed the Amended Responding Record and note that your client appears to have collected and reviewed all emails with the @techlantic.com domain and many with the @techlanticconsulting.com domain. These email domains were used by my clients for the purposes of receiving legal advice, settlement-related discussions and litigation advice and strategy, including in relation to the litigation herein. We have significant concerns regarding unauthorized access. It is trite to say

that any such access would be prejudicial and in breach of the Receiver's authority.

To address this matter effectively, we request the following information:

1. Detailed Inventory: A comprehensive list of all email accounts and any other documents collected from the servers.
1. Document Collection and Review Protocol: Details on the protocols followed for document collection and review in this case, including measures taken to identify and exclude privileged information.

Kind Regards,

Alexis Beale

Alexis Beale

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Applicant

Respondents

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

Proceeding commenced at Toronto

AFFIDAVIT OF WOUTER VAN ESSEN

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Lawyers for the Responding Parties and Moving
Parties on the Cross-Motion, the Van Essen
Companies and Wouter Van Essen

Applicant

Respondents

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

Proceeding commenced at Toronto

Motion Record

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Parties on the Cross-Motion, the Van Essen
Companies and Wouter Van Essen