

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY**

BETWEEN:

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY**

IN THE MATTER OF:

**TITAN INVESTMENTS LIMITED PARTNERSHIP,
TITAN GENSPAR INC.,
AND EVOLUTION CAPITAL MANAGEMENT LTD.,
AND THE ESTATE OF DAVID COMTE, DECEASED,
AND THE COMTE FAMILY TRUST
AND PREDATOR HOLDINGS LTD.**

**IN THE MATTER OF THE JUDICATURE ACT, R.S.A.
2000, c. J-2 AND RULES 467 AND 468 OF THE ALBERTA
RULES OF COURT**

**BRIEF OF ARGUMENT OF THE APPLICANTS
TO BE HEARD AUGUST 10, 2005 AT 9:00 A.M.
BEFORE THE HONOURABLE MR. JUSTICE HAWCO IN CHAMBERS**

Glenn Solomon
MAY JENSEN SHAWA SOLOMON LLP
#800, 304 - 8th Avenue SW
Calgary, Alberta T2P 1C2

Phone: 571-1507
Fax: 571-1528

Solicitors for the Applicants

Clive O. Llewellyn
FLEMING LLP
1500, 736 - 6 Avenue SW
Calgary, AB T2P 3T7
Phone: 266-7629
Fax: 265-6910

Solicitors for the Receiver

Kelsey Drozdowski & Frank R. Dearlove
BENNETT JONES LLP
4500, 855 - 2nd Street SW
Calgary, AB T2P 4K7

Phone: 298-3323
Fax: 265-7219

Solicitors for the Investors Committee

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This Brief of Argument is respectfully submitted by the Applicants, Technology & Research Inc., Technology & Research Co. Inc., and MS Computing Ltd., in support of an Application for an Order approving a distribution formula that properly recognizes the investment of these Applicants.

SUBMISSIONS

1. This Application is brought pursuant to a direction of the Honourable Mr. Justice LoVecchio. His Lordship indicated that any investors who wished to be treated in a manner differently than that proposed in the redistribution formula have the onus of applying accordingly on August 10, 2005, bringing forth evidence in support of such claims, or alternatively being bound by whatever result emanates from the Court with respect to those who do so come forward.
2. Based on the extensive appearances and filings to date in this matter, this Brief will not address the extensive background to the failure of Titan Investments Limited Partnership, and instead will deal directly with the narrow issues raised by these Applicants.

3. Tad Sudol is the 100% shareholder and a director of Technology & Research Inc. ("T & R"), an investor in the Titan Partnership. He is a 20% shareholder in Technology & Research Co. Inc. ("T & R Co."), an investor in the Titan Partnership. His son, Philip Sudol, holds the remaining 80% of the shares in T & R Co., and is a director of that entity. His wife, Maja Sudol, is the 100% shareholder and a director in MS Computing Ltd. ("MS"). MS is an investor in the Titan Partnership. Mr. Sudol was personally involved in the investments in the Titan Partnership by T & R, T & R Co. and MS.
4. In July 2002, T & R invested in Comte Global Partners, which later changed its name to Titan Investments Limited Partnership. At the time of that initial investment, David Comte explained to Mr. Sudol that Alberta Securities Commission regulations limited the number of investors in Comte Global Partners to 50 investors. Mr. Comte told Mr. Sudol that T & R was the last investor allowed in.
5. In April 2003, Mr. Comte announced that he would be opening two additional funds named Tyche Investments LP and Prometheus Investments LP, which would be operational from May 1, 2003. Mr. Comte explained that these additional investment funds were created to increase the number of investors by 100, in accordance with Alberta Securities Commission requirements.
6. On June 1, 2003, Mr. Comte caused all three funds to be renamed Titan Investments Limited Partnership.
7. T & R's investments in Titan Investments Limited Partnership were made as follows:

<u>Date</u>	<u>Amount (USD)</u>
July 25, 2002	-\$ 45,000.00
July 26, 2002	25,000.00
September 20, 2002	20,000.00
January 28, 2003	50,000.00
December 17, 2003	<u>10,000.00</u>
TOTAL NET INVESTMENT	\$150,000.00

8. When the new funds being operated by Mr. Comte became available, MS invested \$5,000.00 U.S. That \$5,000.00 U.S. was Mr. Sudol's personal money, provided to MS for the purpose of investing in Titan Investments. Similarly, T & R Co. invested \$5,000.00 U.S. on April 23, 2003 and \$5,000.00 U.S. on April 24, 2003. Again, these were Mr. Sudol's personal funds invested through T & R Co.
9. On June 13, 2003, T & R Co. invested a further \$5,000.00 U.S., and a further \$170,000.00 U.S. Again, these were Mr. Sudol's personal funds invested through T & R Co.
10. The total investment by T & R Co., to June 13, 2003, was as follows:

<u>Date</u>	<u>Amount (USD)</u>
April 23, 2003	\$ 5,000.00
April 24, 2003	5,000.00
June 13, 2003	5,000.00
June 13, 2003	170,000.00
TOTAL NET INVESTMENT	\$185,000.00

11. By June 13, 2003, \$330,000.00 U.S. of Mr. Sudol's money was invested in Titan Investments Limited Partnership through MS, T & R, and T & R Co. Mr. Sudol started to feel uneasy about the investment in Titan Investments Limited Partnership at around that time, and began considering whether he should withdraw some funds in order to test the system and determine whether Mr. Comte intended to repay investments. In July of 2003 Mr. Sudol spoke with his friends, Vladimir Reitman and Wlodzimierz Rydz, about his intention to test the system. Both Mr. Reitman and Mr. Rydz were investors in Titan Investments, and both of them live in Edmonton. They both indicated that they were very interested in this exercise given that, if Titan Investments failed to pay, this would affect their investments as well. Mr. Sudol told them that he had resolved to make a withdrawal in order to test the system and determine whether Titan Investments would pay back money invested. Mr. Sudol told both Mr. Reitman and Mr. Rydz that he would advise them of the outcome of this exercise.
12. At the time that Mr. Sudol resolved that he would withdraw some funds, in order to determine whether Titan Investments Limited Partnership would repay investors, he had decided that he would reinvest the funds so withdrawn, and more money, in Titan Investments Limited Partnership if he was satisfied that Titan Investments would repay investors.
13. In August 2003, Mr. Sudol spoke with his son, Philip Sudol, and asked him to request a withdrawal of \$100,000.00 US from the account of T & R Co. held by Titan Investments Limited Partnership. Mr. Sudol explained that he wanted to test the liquidity of Titan Investments Limited Partnership, the system, and Mr. Comte's intention to repay investors. Philip Sudol made that request on behalf of T & R Co. in August 2003. On September 3, 2003, T & R Co. received a certified cheque in the amount of \$100,000.00 U.S. dated August 31, 2003. In the result, the total net investment in Titan Investments by T & R Co. then stood at \$85,000.00 U.S.
14. Upon receiving the \$100,000.00 U.S. cheque from Titan Investments to T & R Co., Mr. Sudol was reassured that the system being used by Mr. Comte through Titan Investments Limited Partnership worked, that it was liquid, and that it would pay investors. Thereafter, Mr. Sudol told Mr. Reitman and Mr. Rydz of the results of this test of the system. He also discussed the results of this test of the system with his son, Philip Sudol, and his wife, Maja Sudol.
15. As noted above, at the time that Mr. Sudol caused T & R Co. to request the return of \$100,000.00 U.S., he had already resolved that the money would be reinvested if it was received. When T & R Co. received the \$100,000.00 U.S. return of its funds, it provided those funds to Mr. Sudol, as those were his personal funds.
16. The \$100,000.00 U.S. received from T & R Co. was then reinvested in Titan Investments Limited Partnership through MS, by payments made September 29, 2003 in the amount of \$50,000.00 U.S., and October 30, 2003 in the amount of \$50,000.00 U.S. As well, MS invested \$5,000.00 U.S. on October 27, 2003. In the result, the total net investment of MS, was as follows:

<u>Date</u>	<u>Amount (USD)</u>
April 23, 2003	\$ 5,000.00
September 29, 2003	50,000.00
October 27, 2003	5,000.00
October 30, 2003	50,000.00
TOTAL NET INVESTMENT	\$110,000.00

17. The \$100,000.00 U.S. invested in Titan Investments Limited Partnership through MS consisted of funds belonging to Mr. Sudol personally.
18. With Mr. Sudol's renewed confidence in Titan Investments Limited Partnership, and consistent with the intention that he had in July of 2003, T & R made a further investment of \$10,000.00 U.S. in Titan Investments on December 17, 2003. In the result, the total investments of T & R were as follows:

<u>Date</u>	<u>Amount (USD)</u>
July 25, 2002	\$ 45,000.00
July 26, 2002	25,000.00
September 20, 2002	20,000.00
January 28, 2003	50,000.00
December 17, 2003	<u>10,000.00</u>
TOTAL NET INVESTMENT	\$150,000.00

All of the funds invested in Titan Investments through T & R were Mr. Sudol's personal funds.

19. In total, MS, T & R Co. and T & R invested \$345,000.00 U.S. in Titan Investments Limited Partnership up to December 17, 2003. With the exception of \$5,000.00 U.S. invested by MS on October 27, 2003, all of the funds so invested were Mr. Sudol's personal funds.
20. On February 10, 2005, Mr. Sudol spoke with Michael Costello, a representative of Alger & Associates Inc. At that time Mr. Sudol attempted to describe the transfer of money from one account to the other to him, and explained to him that the principal reason for making such a transfer was to test the Titan Investments Limited Partnership. Mr. Costello asked Mr. Sudol to wait until there was a decision on the redistribution. On March 21, 2005 Mr. Sudol found a "redistribution list" on the internet on the Alger & Associates website. At that time, for the first time, Mr. Sudol learned that T & R Co. would not receive its proportionate share of funds recovered on its \$85,000.00 net investment, but would receive a lesser amount.
21. On March 22, 2005 Mr. Sudol spoke with Mr. Costello and asked him why the total investment made by T & R, T & R Co. and MS, in the amount of \$345,000.00 U.S. would not receive its proportionate share of any funds recovered. At that time, Mr. Costello explained that the redistribution formula was prepared and approved by the "investors committee". The "investors committee" is a group of investors in the Titan Investments Limited Partnership, who have their own interests in recovering money for themselves and who have organized to instruct counsel in these proceedings.
22. In his March 22, 2005 telephone conversation with Mr. Costello, he told Mr. Sudol that "testing Titan Limited Partnership" is not a good enough reason to justify treating the \$100,000.00 U.S. withdrawn from T & R Co.'s account, and re-deposited into MS's account, as a transfer from one account to the other. Mr. Costello asked Mr. Sudol to write him a letter explaining the investment of MS, T & R Co. and T & R, and the reasons behind the transfer of money from T & R Co. to MS.

23. Exhibit "A" to Mr. Sudol's Affidavit is a copy of an email dated March 22, 2005 which Mr. Sudol sent to Mr. Costello, further to his request of that date. Below the email is the letter that was sent with that email to Mr. Costello. The principal reason for a withdrawal and a re-deposit of \$100,000.00 U.S. was to test Titan Investments, as noted above. In his letter to Mr. Costello Mr. Sudol also indicated that this was done for tax purposes, although he has now candidly disclosed that he can think of no tax advantage that any of the companies would ultimately obtain as a result of this transfer of the investment.
24. On March 24, 2005, Mr. Costello responded to Mr. Sudol's email. Exhibit "B" to Mr. Sudol's Affidavit is a copy of Mr. Costello's response. In his email, among other things, Mr. Costello states:

The only situations whereby we have allowed such a "transfer" to be affected on our Redistribution Schedule is for partners who have conducted such a transfer on a non-cash basis and/or where such transfers are officially documented as such within Titan's Notice of Amendments filed with the Corporate Registry and as such where Titan's bookkeeping has in effect been inaccurate as a result by recording a cash investment and a cash redemption in equivalent amounts. Your \$100,000.00 fits neither of these two categories.

Mr. Sudol challenges parts of Mr. Costello's email, and in particular that:

- A. Making a distinction between a cash transfer and a non-cash transfer is fair or reasonable;
 - B. Mr. Sudol is among many parties who would suffer a similar shortfall - rather, he believes that he is in a unique position among the investors;
 - C. A net investment formula would be any more or less arbitrary than treating cash and non-cash transfers differently;
 - D. The formula adopted by the investors committee has resulted in a quicker conclusion in this matter or lower costs;
 - E. Mr. Sudol's circumstances, if recognized appropriately, would result in a lower recovery for Mr. Sudol.
25. Simply, it appears that the position of the investors committee and the Receiver is that a book transfer from one account to another would be overlooked for the purposes of ensuring a full share of the distribution of recovered funds, but that a cash transfer would not be so treated.
26. Through the course of his communications with Mr. Costello, Mr. Sudol concluded that Mr. Costello had simply become the mouthpiece for the investors committee, that he would defer to them, and defend them. This, too, left Mr. Sudol uneasy, as he had come to appreciate that the investors committee consists of people who have their own personal interests to deal with as a result of the failure of Titan Investments Limited Partnership.
27. As a result of his dissatisfaction with his dealings with Mr. Costello, on May 11, 2005, Mr. Sudol provided a summary of his investments to Bruce Alger of Alger & Associates. Exhibit "C" to Mr. Sudol's Affidavit is the document that he provided to Mr. Alger. On May 11, 2005 Mr. Sudol received an email from Mr. Costello, a copy of which is attached as Exhibit "D" to his Affidavit, indicating that

Mr. Sudol could make a Court Application objecting to the present treatment by the Receiver, thereby putting all affected parties on notice.

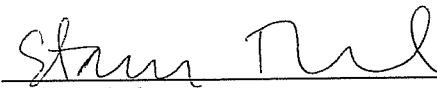
28. Exhibit "E" to Mr. Sudol's Affidavit is his calculation of the extent to which T & R Co. is affected by the proposed redistribution, depending upon the total amount available for distribution. Simply, by treating cash transfers between accounts differently than non-cash transfers, if 50% of the net investments made by unpaid investors is available for distribution, T & R Co. will lose \$42,500.00 more than any other unpaid investor.
29. Attachment 2 to the Receiver's report of March 18, 2005 provides the first schedule of repayments at 30%. T & R Co. does not get 30% on its \$85,000.00, because it is assumed that T & R Co. recovered \$100,000.00 of its \$185,000.00, which is more than a 30% recovery on \$185,000.00.
30. In the Affidavit of Croft Axsen dated March 18, 2005 he suggests that the cost of readjusting the formula adopted by the investors committee would exceed \$600,000.00. He suggested that this number would triple if litigation became necessary. The basis for this assertion is not known, or accepted as correct.
31. In fact, the Court has now directed that anyone who wishes to be treated differently than the manner proposed in respect of them in the redistribution formula, has the responsibility to bring forward those claims. It is anticipated that there will not be 128 claims, as suggested by Mr. Axsen, and in fact that there will be very few claims brought forward other than Mr. Sudol's. In Mr. Axsen's Affidavit sworn May 6, 2005, the receiver did revise the payment schedule in order to treat "non-cash transfers" as having never happened. It is assumed that, if this was done at a cost of \$600,000.00 in accordance with Mr. Axsen's speculation, this fact would have been brought to the attention of all investors. It is submitted that the cost of revising the repayment schedule in order to treat Mr. Sudol's single cash transfer in the same way as the non-cash transfers will be fairly insignificant - and that the Court is able to ensure that this is so.
32. In the Affidavit of Croft Axsen sworn January 17, 2005 is a copy of the Partnership Agreement (found at Exhibit "A" to that Affidavit). Mr. Sudol believes that that is the form of Partnership Agreement that applied to the investments of T & R, T & R Co. and MS. Section 13.4 deals with the order of distribution of net proceeds from the liquidation of the assets of the Partnership. It provides an order of priority. Item C provides that payment will be made to the limited partners in payment of the credit balance, if any, in each limited partner's current account. In this case, T & R Co. is not receiving payment of the credit balance in its limited partner's current account in the same manner as other investors. There is nothing in the Partnership Agreement that would cause T & R Co. to receive a reduced return on a remaining balance in its account, whether that money was reinvested or not. It is respectfully submitted that there is also no reason in fairness or equity to treat this reinvestment differently than those reinvestments done by a book transfer or those recorded in certain types of corporate records only. The formula adopted by the investors committee is inconsistent with paragraph 13.4 of that Partnership Agreement, and therefore inconsistent with the expectation that Mr. Sudol, and presumably all other investors, had when they made their investment in Titan Investments Limited Partnership.

33. The reinvestment of the funds withdrawn from T & R Co.'s account, to MS Computing, merely sheds light on the obvious departure from the Partnership Agreement by the investors committee - a committee not governed by altruism, and subject to self-interest. They are using all the investors' money to fund litigation to advance their own ends, and they have come up with a redistribution formula which, at least with respect to the \$85,000.00 balance in T & R Co.'s account, is not fair, equitable or in accordance with the Partnership Agreement. Rather, it is arbitrary, whimsical, and technical to the point of being absurd.
34. T & R Co. would be better off if the reinvestment in MS were ignored, and those funds were returned to T & R Co.'s account with Titan Investments. Indeed, if T & R Co. never withdrew and reinvested the money, the same amount that was invested by T & R, T & R Co. and MS would yield a greater return based on the investors committee's proposed distribution.
35. The arbitrariness, and consequent unfairness, of the very technical distinction being made by the investors committee, can be seen in a few simple examples. The total amount invested by T & R, T & R Co. and MS was \$345,000.00 U.S. If T & R Co. did a book transfer to MS of \$100,000.00, or presumably some other form of "non-cash" transfer, T & R Co. would then get the benefit of the full allocation of its share of the redistribution on its remaining \$85,000.00. If T & R Co. did not transfer \$100,000.00 at all to MS, it would receive its full allocation on the \$100,000.00 U.S. amount and the \$85,000.00 U.S. amount.
36. The fundamental factor in this case, it is respectfully submitted, is not the movement of funds, or the closeness of the identity of the investors in issue. Indeed, other types of transfers have been recognized, and apparently without any regard to the closeness of the relationship as between those investors. In the result, the only distinction - as made plain by Mr. Costello - is that this transfer was done on a "cash" basis as opposed to a "non-cash" basis. It is respectfully submitted that there is no basis at law, in equity, or in the Partnership Agreement, to make such a fine distinction and to thereby prejudice perhaps only one small group of investors.
37. In the circumstances, these Applicants respectfully request that the redistribution formula be approved, subject to only one change as it relates to the treatment of the remaining balance in T & R Co.'s account with Titan Investments.
38. Unless this Honourable Court is prepared to accept the distinction between "cash" and "non-cash" transfers, it is respectfully submitted that there is no good reason to treat the transfer in this case any differently than the non-cash transfers already recognized by the investors committee. If the Court seeks to make these distinctions based on corporate identity or the relationship between the various account holders, rather than transfers based on "cash" and "non-cash" bases, then it is respectfully submitted that all of the "non-cash" transfers will need to be reviewed to determine whether the appropriate proximity exists in each of those cases.
39. With respect to the costs of this Application, it is noted that the investors committee, consisting of investors in the Titan Investments Limited Partnership, have been having their legal fees paid for from the assets of Titan Investments Limited Partnership. When this issue arose, it became clear that the same counsel could not represent Mr. Sudol and his companies, as an obvious conflict of interest had arisen. In the circumstances, separate counsel had to be retained to address this issue. It is respectfully

submitted that all counsel with respect to this issue ought to be paid out of the assets of Titan Investments, or alternatively that none should be.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2005.

MAY JENSEN SHAWA SOLOMON LLP

Per: 
for Glenn Solomon
Solicitors for the Applicants,
Technology & Research Inc.,
Technology & Research Co. Inc. and
MS Computing Ltd.

Estimated Length of Argument: 20 Minutes
Calgary, Alberta

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MAY JENSEN SHAWA SOLOMON LLP

Barristers

#800 The Lancaster Building

304 - 8th Avenue S.W.

Calgary, Alberta T2P 1C2

Glenn Solomon

Phone: (403) 571-1507

Fax: (403) 571-1528

File: 10398 001

CLERK OF THE COURT
AUG - 4 2005
CALGARY, ALBERTA