

**ONTARIO SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR  
ARRANGEMENT WITH RESPECT TO  
BRAKE PRO, LTD.**

**MONITOR'S NINTH REPORT TO THE COURT**

**INTRODUCTION AND OVERVIEW**

1. BDO Dunwoody Limited (the "**Monitor**") was appointed Monitor of Brake Pro, Ltd. (also referred to as "**Brake Pro**", the "**Applicant**" or the "**Company**") by an Initial Order of the Honourable Justice Stinson of the Ontario Superior Court of Justice on 24 July 2007 (the "**Initial Order**"), pursuant to the application (the "**Application**") to the Court by the Applicant for protection from its creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**").
2. The stay of proceedings contained in the Initial Order had been extended by a series of Orders.
3. Brake Pro conducted business in Concord Ontario for many years. It manufactured brake friction material for buses and trucks. The assets of the Company have been sold and the Monitor presently holds Cdn\$320,795, plus US\$830, having remitted some \$2.2 million to Bennett Jones LLP in Trust, representing most of the proceeds from the sale net of disbursements (as defined in the March 17, 2008 Order of this Court, the "Trust Funds").
4. The Monitor obtained and put before the Court a legal opinion that the security of the Company's operating lender, Wachovia Capital Finance Corporation Canada

("Wachovia"), would be valid as against a trustee in bankruptcy. This position has not been contested.

5. The amounts owing to Wachovia are significantly greater than the amounts it has been able to recover through the Company's realizations of its assets. As such, there is no hope of a recovery for unsecured creditors as Wachovia estimates suffering a significant shortfall of several million dollars, even after resolving a priority issue with another secured lender, Tenneco Inc. ("Tenneco").
6. In or about November of 2007 a priority dispute arose between Tenneco and Wachovia as to the priority of their relative security. As of the date of this report the Monitor has been advised that this dispute has been settled. The resolution of this dispute does not change the fact that unsecured creditors have no hope of recovery, but it has delayed distribution of the funds in the hands of the Monitor.
7. The Monitor, its counsel and Company counsel were granted a first ranking administrative charge in the amount of \$100,000 for their fees (the "Administrative Charge"). The directors of the Company were given a \$100,000 second ranking charge as protection for their liabilities (the "Directors' Charge").
8. As previously reported, although the Company operated for a period of time following the commencement of its CCAA proceedings, it ceased operations on September 25, 2007 and terminated virtually all of its employees. The shut-down occurred because the Company ran out of money, when a sudden and unexpected rise in the Canadian dollar reduced the Company's borrowing availability under its facility with Wachovia, leaving it in a position where it was unable to pay those post-filing creditors who had supplied the Company with credit.
9. From the start of the CCAA process, the Company had been conducting a sales process to find a purchaser. A transaction was ultimately completed with Affinia Canada Corp., ("Affinia") for the sale of the bulk of the Company's assets. Affinia removed all the purchased assets from the leased premises in which the

Company conducted business. The premises were vacated and surrendered to the landlord as of February 29, 2008.

10. The Company marketed and sold remaining inventory up to February 29, 2008. The Company recovered approximately \$1.44 million from these inventory sales. Approximately \$400,000 was remitted to Wachovia and approximately \$1.0 million was deposited in the Monitor's trust account. Unsold inventory was abandoned to the landlord.
11. The Company's accounts receivable had been collected by Wachovia utilizing either Company staff or collection agents and have been deposited into a lock box administered by Wachovia. Collections of accounts receivable are believed to total approximately \$2.5 million.
12. On March 17, 2008 the Court granted an Order dealing with the termination of the CCAA proceeding and the distribution of the proceeds of sale of the assets of the Debtor (the "**Distribution Order**"), attached as Appendix "A" to this report. Under the terms of the Distribution Order:
  - (a) the stay of proceedings and the Stay Period in the Initial Order, terminated on March 17<sup>th</sup>, 2008 upon the issuance of the Bankruptcy Order of Justice Wilton-Siegel;
  - (b) that certain amounts on account of employee vacation pay be paid by the Monitor;
  - (c) that the Monitor pay certain amounts of pre- and post-filing GST;
  - (d) that the landlord had until April 19<sup>th</sup>, 2008 to advance its claims;
  - (e) that the Monitor was to reserve:
    - (i) the Administrative Charge in the amount of \$100,000.00;
    - (ii) the Directors' Charge in the amount of \$100,000.00;
    - (iii) the amount of \$29,000 on account of a claim for fees by counsel for the Company;
  - (f) that the net amount of sale proceeds be paid by the Monitor to counsel for Wachovia and be held pending further order of the Court;

- (g) that a claims bar date of March 19, 2008 be set for claims against the directors; and
- (h) that if no claims are maintained by the claims bar date that the Monitor re-attend to approve its fees and disbursements and that of its counsel and receive its discharge.

On March 17<sup>th</sup>, 2008 Justice Wilton-Siegel issued a bankruptcy order (the “**Bankruptcy Order**”) and A. Farber Partners Inc. (the “Trustee”) was appointed Trustee in Bankruptcy of the Company.

13. In accordance with the Distribution Order the Monitor has:
- (i) Retained in its trust account and paid the balance of the estimated funds required to pay the Post Shut-Down Payables;
  - (ii) Retained in its trust account, \$43,345.50 for the Hourly Vacation Pay and subsequently paid it to the hourly employees;
  - (iii) Retained in its trust account, \$100,000 for the Directors’ Charge;
  - (iv) Retained in its trust account, \$100,000 for the Administrative Charge;
  - (v) Retained in its trust account such \$29,000 with respect to fees for the counsel to the Company; and
  - (vi) Remitted the Trust Funds consisting of a balance of \$2,222,938, comprised of CDN\$ 1,994,418 and US\$ 228,520. to Bennett Jones LLP in trust.
14. The Monitor has made payment of outstanding Post Shut-Down Payables in the amount of \$104,860, inclusive of fees, disbursements and GST to February 29, 2008 to the Monitor of \$39,050.53 and its legal counsel of \$11,943.37.

## **GST**

15. The Monitor paid the amounts of \$95,018 and \$170,140 for pre- and post-filing GST as ordered by the Distribution Order and as reported in the Monitor’s Eighth Report.

## VACATION PAY

16. As authorized by the Honourable Court, the Monitor arranged for the payment of the outstanding Canadian vacation pay, for both pre- and post-filing periods. Vacation pay for the salaried employees of \$33,654.50 (the “**Salaried Vacation Pay**”) was remitted to ADP, the payroll service formerly used by the Company, which deposited the funds in the former employees’ accounts on March 14, 2008.
17. Because a payroll for the hourly employees had not been run for several months, the hourly payroll information had been archived by ADP. There was a delay in ADP retrieving and restoring this information. The vacation pay for the hourly employees of \$39,262.85, inclusive of EI, CPP and processing fees, (the “**Hourly Vacation Pay**”) was funded to ADP on March 17 2008 and paid to the former employees shortly thereafter.
18. The Monitor assisted the Trustee in Bankruptcy in arranging for the preparation and issuance to former employees of any required T-4 returns for wages paid in 2008 and for the vacation pay paid in 2008. Funds to pay ADP’s charges for this service were remitted to the Trustee from the Monitor’s trust account.

## POST SHUT-DOWN PAYABLES

19. At the time that the Company shut down its operations, it became clear that it would not be able to pay incurred post-filing unsecured debts, of some \$453,000. These balances remain unpaid. However, there were expenses incurred in the process of selling inventory, the removal of the assets purchased by Affinia (for which the Company received funds from Affinia) and disposing of and retaining some of its books and records (collectively the “**Post Shut-Down Payables**”).
20. As authorized by this Honourable Court, the Monitor paid \$85,818 of the Post Shut-Down Payables. A further CDN\$18,709 and US\$334 have been paid subsequent to the date of the Distribution Order, when the invoices and required support documents were received. The Monitor is not aware of any further outstanding Post Shut-Down Payables, except as described in this Report.

**RESULTS OF CLAIMS PROCEDURE**

21. As a result of the claims procedure, the Monitor is advised that the landlord, Circleland Investments Ltd., filed a claim in the amount of \$29,846.42 for pre-filing deduction from rent of the costs incurred to repair an elevator, arising from a dispute over responsibility for the repairs, \$11,850 for post-filing roof repairs, and other estimated repair costs, by making a motion to the Court. On the return of the motion to determine the priority of the landlord's claim on April 19<sup>th</sup>, 2008, the motion was adjourned to allow Wachovia and the landlord an opportunity to negotiate a settlement of this claim.
22. The landlord and Wachovia were unable to negotiate a settlement of this claim during the adjournment and the matter was argued before the Court on May 16, 2008. The Court subsequently delivered written reasons for decision dismissing the portion of the landlord's claim that related to post-filing repairs and allowing the parties three weeks to file additional materials relating to the pre-filing elevator repair claim. The Monitor is advised that the landlord and Wachovia have now settled all disputes.
23. The Ministry of Labour also filed a claim, attached as Appendix "B", with the Monitor prior to the claims bar date that included unsecured claims in the total amount of \$644,999.24, which was broken down as \$42,962 for directors' liability for vacation pay and unpaid wages ("Additional Vacation Pay"), and \$602,037.23 for employee termination and severance pay. The Monitor was advised by a representative of the Ministry of Labour that the Additional Vacation Pay is over and above the amounts previously paid and that these amounts arise from differences between the calculation methods used by the Company and the wording of individual employment letters. The Monitor has forwarded the claim to the Trustee and has not attempted to verify the amounts or evaluate the claim. In the view of the Monitor, the Additional Vacation Pay, if correct, may be a director liability covered under the Directors' Charge.

24. The Monitor is advised that Wachovia has requested that the validity of the Additional Vacation Pay claim be investigated. As the Company's records are in the custody of the Trustee and as the Monitor is seeking its discharge, it is appropriate that the Trustee conduct such an investigation. The Monitor, therefore, recommends that \$42,962, representing the quantum of the Additional Vacation Pay be remitted to the Trustee in trust.
25. No other claims have been advanced as a result of the claims procedure.

### **PROFESSIONAL FEES**

26. The Monitor and its counsel have been paid their fees for periods up to and including February 29, 2008 by the Company as set out in the Affidavits of Time for BDO Dunwoody Limited and for its counsel, Fraser Milner Casgrain LLP (the "**Affidavits of Time**") attached as Appendix "C" to this Report.
27. BDO, as Monitor, has incurred time charges of \$27,417.50, calculated at the normal billing rates of its personnel involved, and \$174.77 for out-of-pocket disbursements for the period March 1, 2008 to May 28, 2008, for a total of \$28,971.88 inclusive of GST. The Monitor has written off all time charges incurred after May 28, 2008, and does not intend to charge any additional fees unless a substantial further time commitment is required in the future. Attached as Appendix "D" is the Affidavit of Time of the Monitor. The Monitor seeks the approval of this Honourable Court for the payment of these fees and disbursements, plus applicable GST.
28. Fraser Milner Casgrain LLP, counsel to BDO, charged fees to the Monitor in the period March 1, 2008 to the date of this report, in the amount of \$7,415, calculated at the normal billing rates of its personnel involved, as well as \$155.36 for out-of-pocket disbursements for total fees and disbursements to \$7,948.90 including GST, plus their reasonable fees associated with the preparation and attendance upon the motion for approval of same and discharge as contemplated in this Report. Attached as Appendix "E" is the Affidavit of Time of the

Monitor's Counsel. The Monitor seeks the approval of the Honourable Court for the payment of these fees and disbursements, plus applicable GST.

29. The Monitor holds in trust \$8,400 with respect to Fraser Milner Casgrain LLP and \$19,687.50 with respect to BDO Dunwoody Limited for accrued fees. In addition, the Monitor holds in its Trust account funds in the amount of \$100,000 representing the administration charge to secure payment of the fees of the Monitor and the Monitor's counsel.
30. The Monitor has held back \$29,000 as required in the Distribution Order as a reserve for fees payable, or to be incurred, by counsel to the Company. The Monitor is advised that the quantum of fees is expected to be resolved between Wachovia and counsel to the Company by the return of the motion.

#### **CONCLUSION AND RECOMMENDATION**

31. The Monitor, therefore, makes this Report in support of an Order:
  - (i) Approving the Monitor's conduct and activities to date as set out in this and previous reports;
  - (ii) Approving the fees and disbursements of the Monitor and its counsel;
  - (iii) Approving the payment of the fees and disbursements of counsel to the Company in the amount to be determined;
  - (iv) Approving payment of the Additional Vacation Pay claim amount of \$42,962 from the funds held for the Directors' Charge to the Trustee in trust;
  - (v) Authorizing and approving the payment of the remainder of the funds held by the Monitor in respect of the Administrative Charge, the Directors' Charge, Post Shut-Down Payables and the funds held on account of Company counsel fees to Bennett Jones LLP in trust once the above payments have been made;
  - (vi) Authorizing and approving the release of the Trust Funds to Bennett Jones LLP; and
  - (vii) Discharging the Monitor, conditional upon carrying out the activities outlined above.

32. All of which is respectfully submitted this 7<sup>th</sup> day of July, 2008.

BDO DUNWOODY LIMITED

Monitor

Per:

A handwritten signature in black ink, appearing to read "Uwe Manski". The signature is fluid and cursive, with a large initial "U" and a long, sweeping tail.

Uwe Manski, FCA, FCIRP  
President