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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEER CREEK FUND, LLC, Plaintiff, - against - MARKLAND TECHNOLOGIES, INC. and TECHNEST HOLDINGS, INC., Defendants.	05 Civ. 6647 **DECLARATION OF LISA M. BUCKLEY IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF**

LISA M. BUCKLEY, declares under penalty of perjury as follows:

1. I am a partner in the law firm Pryor Cashman Sherman & Flynn LLP, attorneys for Defendants Markland Technologies, Inc. ("Markland") and Technest Holdings, Inc. ("Technest")(collectively, the "Defendants"). I respectfully submit this declaration in opposition to Plaintiff Deer Creek Fund, LLC's ("Plaintiff" or "Deer Creek") motion for temporary and preliminary injunctive relief to prevent Markland from performing its obligations to deliver stock under certain Exchange Agreements dated June 20, 2005 (the "Exchange Agreements") between Markland, on the one hand, and four investors who are not parties to this lawsuit. As demonstrated below, Plaintiff's motion is fatally defective because Plaintiff has not and cannot demonstrate a likelihood of success on the merits of its claims, irreparable harm or that the

balance of hardships tips decidedly in its favor. Accordingly, the application for emergency injunctive relief should be denied in its entirety.

PRELIMINARY STATEMENT

1. 2. Markland is a public company in the business of developing security technology. Its stock is traded on the over-the-counter bulletin board. Technest is a majority-owned subsidiary of Markland and its stock is also publicly traded on the over-the-counter bulletin board. To raise capital in connection with its acquisition of a company called Genex Holdings, Inc., in February 2005, Technest did a private placement offering to sell Technest Series B Preferred Stock to certain sophisticated and qualified investors (as determined under criteria set forth in Federal securities laws and as specifically acknowledged, in writing, by such investors). Plaintiff Deer Creek, a sophisticated hedge fund, was one of those investors in the private placement. Pursuant to the explicit written terms of the private placement, the Technest Series B Preferred Stock is convertible to Markland common stock as of February 16, 2006.

2. On June 20, 2005, Markland entered into agreements with four of the Technest Series B Preferred investors. These four investors were also substantial shareholders in Markland at the time. Pursuant to the June 20, 2005 agreements, Markland acquired the four investors' Technest Series B Preferred Stock in exchange for Markland Series D Preferred Stock. The Markland Series D Preferred Stock is currently convertible into Markland common stock.

3. The apparent gravamen of Plaintiff's claims is that it is unfair that, by virtue of the exchange transactions, the four former Technest Series B Preferred investors will be able to convert their Markland Series D Preferred Stock into Markland common stock before the Plaintiff can convert its Technest Preferred B Stock to Markland common stock.

4. Contrary to Plaintiff's hyperbole and factually and legally unfounded accusations, the undisputed fact is that Plaintiff's rights as a holder of Technest Preferred B Stock have not

been changed in any way. Its rights have not been altered, diminished or reduced in any fashion whatsoever. In this contractually based case, Plaintiff's contractual rights remain inviolate.

5. Thus, it is undisputed that in February 2005, Plaintiff bargained for and received Technest Series D Preferred Stock convertible into Markland common stock as of February 16, 2006. It is undisputed that Plaintiff still has Technest Series B Preferred Stock convertible as of February 16, 2006. It is also undisputed that Plaintiff, a sophisticated investor, did not bargain for and did not receive any preemptive rights with respect to the Technest Series B Preferred Stock. Plaintiff did not bargain for and did not receive any assurances that if any other purchasers of the Technest Series B Preferred Stock were to secure any right to exchange their stock for any other securities, Plaintiff would have equivalent tag along rights.

6. In short, notwithstanding Plaintiff's complaints about unfairness, as a pure matter of Plaintiff's contractual rights, which are determinative of this dispute, there has been absolutely no change in the Plaintiff's rights.

7. Plaintiff claims that the Defendants committed some type of ill-defined wrongdoing because Markland acquired some of the investors' Technest Series B Preferred Stock, but did not acquire the Plaintiff's Technest stock. In essence, despite never seeking or obtaining such a right under its contract, Plaintiff is contending that if any of the holders of Technest Series B Preferred Stock were given the opportunity to sell their Technest stock on advantageous terms or for a premium of some kind, then Plaintiff necessarily had to be given the same opportunity. Simply put, Plaintiff is seeking to have this Court unilaterally amend Plaintiff's contractual rights to provide it with rights it neither bargained for nor obtained. Not surprisingly since Plaintiff's demands have no legal basis, nowhere in its motion papers is there any explanation of the legal basis for Plaintiff's demands for relief.

8. When buying a company's preferred stock, venture capitalists, such as Plaintiff, frequently bargain for "co-sale" or "tag along" rights, which specifically provide that if major preferred shareholders have the opportunity to sell their stock, then the same opportunity must be made available to the minority preferred shareholders. Plaintiff, however, did not bargain for and does not have co-sale or tag along rights. In the absence of any such rights, there is no legal requirement that Markland acquire Plaintiff's Technest stock and Defendants committed no wrongdoing when Markland entered into a new transaction with some, but not all of the Technest Series B Preferred investors.

9. Further, the rights of preferred stockholders (as opposed to common stockholders) are strictly contractual in nature. Neither Technest nor Markland owe Plaintiff "fiduciary duties" to make available to Plaintiff a deal that was made with other investors. Indeed, Plaintiff is not even a shareholder in Markland, so there is no conceivable basis for the imposition of a fiduciary duty. Although Plaintiff is a preferred shareholder in Technest, that company is not a party to the exchange transactions that are the subject of Plaintiff's complaint. Thus, far from establishing a likelihood of success on the merits, which Plaintiff is required to do in order to obtain temporary or preliminary injunctive relief, Plaintiff's claims have no legal merit.

10. Additionally, Plaintiff has not and cannot meet its burden of establishing that it will suffer immediate irreparable harm if the requested relief is not granted or that the balance of the equities tips decidedly in its favor. The harm that Plaintiff contends it will suffer if injunctive relief is not immediately granted -- that the other four investors might convert their Markland Series D Preferred Stock into Markland common stock before Plaintiff converts its Technest Series B Preferred Stock into Markland common stock, that the other four investors might sell their Markland common stock before Plaintiff can convert its Technest stock, that the four investors' potential sales of Markland common stock might have a depressive effect on the

market, and that this might impair the value of Plaintiff's stock which is not convertible until February of 2006 -- is completely speculative.

11. It is black letter law that for an injunction to issue, there must be some concrete threat of imminent harm (the prevention of which a Plaintiff has demonstrated a legal entitlement to obtain). Here, not only is there no threat of imminent harm, Plaintiff cannot even pretend to know who will sell stock, when they will sell stock, how much stock they will sell, how the market may react to the theoretical sale of stock. In fact, there is nothing that Plaintiff can even remotely point to that suggests, let alone demonstrates, that any theoretical future event will indisputably cause Plaintiff harm if not restrained.

12. Moreover, the type of harm that Plaintiff alleges is not harm that it is entitled to be protected against in the absence of co-sale or tag-along rights. For example, Plaintiff does not and cannot contend that Markland would be prohibited from issuing common stock or immediately convertible preferred stock to anyone in the world except the four investors that bought Technest Preferred Stock at the same time as Plaintiff. If Markland did sell common stock or immediately convertible preferred stock to such third parties, those parties could, if they wanted to, sell the stock. This may or may not have a depressive effect on the market price of the stock and it may or may not impair the value of Plaintiff's stock which is not convertible until February 16, 2006. Yet, there would be no basis for Plaintiff to stop Markland from selling stock to third parties or to prevent such third parties from selling their stock.

13. In short, Plaintiff is attempting, in the guise of a preliminary injunction motion, to have this Court rewrite the contract to afford Plaintiff co-sale or tag-along rights that it does not have and to simultaneously enforce the new rights that the Court would be creating.

14. Not only does Plaintiff not have any contractual right to the relief it seeks; not only does Plaintiff not have any immediate and concrete injury that it is seeking to prevent; in

this case, contrary to the lack of harm to Plaintiff, if temporary or preliminary injunctive relief were granted, Markland would be in breach of its obligations under the Exchange Agreements and potentially liable for significant damages. Its goodwill will be irreparably damaged by virtue of its inability to deliver stock or otherwise perform its obligations under the Exchange Agreements. Its relationships with the four investors, who are already substantial shareholders in Markland and have been actively engaged in negotiations with Markland for additional financing, will be irreparably harmed. And of course, its ability to raise funds in the future may be irretrievably destroyed. That will have a far greater tendency to diminish the value of Plaintiff's holdings than the purely speculative claim it is currently advancing.

BACKGROUND FACTS

15. Markland is one of a very few companies who is involved in a highly sensitive and vital service. Markland develops technology for numerous governmental agencies including most prominently the Department of Defense and the Department of Homeland Security. Its business areas include: (1) remote sensor systems for military and intelligence applications; (2) chemical detectors; (3) border security; (4) imaging and surveillance; and (5) advanced technologies. Markland's stated strategy is to build world class integrated solutions for the Homeland Security, Department of Defense and INTEL marketplaces via expansion of its existing contracts, development of its emerging technologies and acquisition of synergistic revenue producing assets.

16. Markland's most recent acquisition in this business strategy was a controlling interest in Technest, a public company with no operations. In connection with this transaction, and at the same time, Technest acquired all of the capital stock of Genex, a private company with expertise in imaging and surveillance whose primary customer is the U.S. Department of

Defense. Technest financed the acquisition of Genex through a private placement of securities to sophisticated "qualified" investors that is at the heart of this action.

Plaintiff's Agreement

17. Specifically, on or about February 14, 2005, the Plaintiff and five other investors purchased 1,149,425 shares of Technest Series B Preferred Stock ("Technest Preferred Stock") for a total purchase price of $5 million. Plaintiff's investment was a small piece of this investment, amounting to $500,000. The other five investors, DKR Soundshore Oasis Holding Fund, Ltd., DKR Soundshore Strategic Holding Fund, Ltd., Verdi Consulting, Inc., ipPartners, Inc., and Southshore collectively invested $4.5 million. (A copy of the Securities Purchase Agreement dated February 14, 2005 is annexed hereto as Exhibit A.)

18. Pursuant to the Certificate of Designation of Technest Series B Preferred Stock dated February 11, 2005 ("Certificate of Designation"), Plaintiff and the other five holders of the Technest Preferred Stock were each individually granted the right to convert their Technest Preferred Stock into shares of Markland Common Stock as of February 16, 2006. (A copy of the Certificate of Designation is annexed as Exhibit B.)

19. To facilitate the conversion rights of Plaintiff and the other holders of the Technest Preferred Stock, Markland agreed to issue shares of its common stock to Technest. (A copy of the agreement between Markland and Technest is annexed hereto as Exhibit C.)

20. In order to facilitate the ability of Plaintiff and the other holders of the Technest Preferred Stock to sell the shares of Markland Common Stock to be received upon conversion as of February 16, 2006, Markland executed a Registration Rights Agreement dated February 14, 2005 (the "Registration Rights Agreement").

21. Under the Registration Rights Agreement, Markland agreed to register with the Securities and Exchange Commission 17,000,000 shares of Markland Common Stock that would

be issuable to the holders of the Technest Preferred Stock upon conversion. Markland committed to file the appropriate Registration Statement within 75 days of the closing date of the transaction by which Plaintiff and the other investors acquired the Technest Preferred Stock, i.e., May 2005. (A copy of the Registration Rights Agreement is annexed as Exhibit D hereto.)

22. Plaintiff complains that to date, Markland has not filed the Registration Statement. Section 2(b) of the Registration Rights Agreement provides that in the event that Markland fails to register the stock in the applicable 75 day period, Plaintiff will be entitled to the payment of liquidated damages. Specifically, Section 2(b) of the Registration Rights Agreement provides in relevant part that:

> "If: (i) a Registration Statement is not filed on or prior to its Filing Date or (ii) a Registration Statement filed or required to be filed hereunder is not declared effective by the Commission by its Effectiveness Date, or (iii) after the Effective Date, a Registration Statement ceases for any reason to remain continuously effective as to all Registrable Securities for which it is required to be effective...then, on each such Event Date and every monthly anniversary thereof until the applicable event is cured, the Company shall pay to each Holder an amount in cash (or shares of Common Stock in accordance with Section 2(c) below, as liquidated damages and not as a penalty, equal to 2.0% per month pro rata on a daily basis, of (i) the Subscription Amount paid by such Holder pursuant to the Purchase Agreement for Securities then held by such Holder....."

23. What Plaintiff studiously fails to mention in its papers is that, in fact, Markland has paid the liquidated damages amount due under the Registration Rights Agreement. Moreover, Markland has every intention of filing the Registration Statement prior to the time the stock becomes convertible. The company will continue to pay liquidated damages until such time as it accomplishes the filing and the Plaintiff will suffer no actual harm by a delay in the registration, so as long as it is accomplished before February 2006, when Plaintiff's Technest

Preferred Stock becomes convertible. In any event, the contract itself provides for Plaintiff's remedy and Plaintiff has been afforded its contractual remedy in this regard.

24. It is critical to understand that while Markland agreed to register the Common Stock in May 2005, the Technest Preferred Stock is not convertible to Markland Common Stock until February 16, 2006. Thus, Markland's failure to register the stock within the 75 day period contemplated by the Registration Rights Agreement is at most a technical breach (for which, as I said, the contract provides a remedy which Plaintiff has received) which does not affect or impair any substantive rights of Plaintiff. The exclusive remedy for the company's failure to register the stock in accordance with the timetable set forth in the Registration Rights Agreement is the liquidated damages amount provided for in Section 2(b) of the Agreement so Plaintiff's reference to this point is a non-starter.

The Exchange Agreements

25. On or about June 20, 2005, Markland entered into the Exchange Agreements with DKR Soundshore Oasis Holding Fund, Ltd., DKR Soundshore Strategic Holding Fund, Ltd., Verdi Consulting, Inc. and ipPartners, Inc., the entities providing the predominant share of the financing secured by Technest with the private placement transaction. Pursuant to the Exchange Agreements, Markland acquired the Technest Preferred Stock owned by these investors in exchange for the issuance of Markland Series D Convertible Preferred Stock (the "Markland Preferred Stock"). (Copies of the Exchange Agreements are annexed as Exhibit E).

26. Unlike Plaintiff, these four investors, in addition to being Technest preferred investors, owned substantial interests in Markland. They were and continue to be actively engaged in negotiations to provide additional financing to Markland. They are in a substantially different position than Plaintiff.

27. The existence and terms of the Exchange Agreements were fully disclosed to the public in Markland's Form 8-K filed with the Securities and Exchange Commission on June 20, 2005. (A copy of the Form 8-K is annexed as Exhibit F hereto).

28. Pursuant to the Exchange Agreements, the Markland Preferred Stock can be converted to Markland Common Stock at any time. In order to facilitate the ability of the holders of the Markland Preferred Stock to sell the shares of Markland Common Stock to be received upon conversion, Markland agreed to register the shares on or before June 30, 2005, which it did.

29. On or about July 21, 2005, Plaintiff commenced this action in New York State Supreme Court. On Friday, July 22nd, Plaintiff's counsel advised Markland that it would present an emergency application on Monday, July 25th, requesting that the Court issue a temporary restraining order and preliminary injunction prohibiting the Defendants from issuing any shares of Markland stock to DKR Soundshore Oasis Holding Fund, Ltd., DKR Soundshore Strategic Holding Fund, Ltd., Verdi Consulting, Inc. and ipPartners, Inc. On July 25, 2005, Defendants' removed the action to this Court. Plaintiff made the present application on July 28th.

30. Plaintiff's claims are twofold. First, Plaintiff claims that when it purchased the Technest Series B Preferred Stock, it "relied upon the fact that all six purchasers would be permitted to convert their shares into Markland common stock at the same time." (Bolton Declaration, dated July 27, 2005 ("Bolton Decl.") at par. 5). However, there is absolutely nothing in the Securities Purchase Agreement, the Certificate of Designation or the Registration Rights Agreement -- the documents that govern Plaintiff's rights as a holder of Technest Preferred Stock -- that prevents the other investors from engaging in any transaction that might enable them to convert their shares into Markland common stock at a point in time different than Plaintiff.

31. Plaintiff is seeking to enforce contractual "co-sale" or "tag-along" rights providing that if majority shareholders sells their preferred shares, then the minority shareholder has the right to join the transaction and sell its shares. See, e.g., Investopedia.com and VCExperts.com. (Definitions of co-sale or tag-along rights from the foregoing websites are annexed as Exhibit G).

32. Although co-sale or tag-along rights are not uncommon in venture capital deals and are frequently bargained for, the Plaintiff here—a sophisticated hedge fund—did not bargain for such rights and it is clear from the express terms of the governing documents that no such co-sale or tag-along rights were granted. There is no other conceivable legal basis upon which Plaintiff can complain that Markland entered into a new contract with the other investors without including Plaintiff and, most importantly, that the Plaintiff had a right and Defendants had an obligation (contractual or fiduciary) to include Plaintiff.

33. Plaintiff claims that the Defendants have somehow breached fiduciary duties owing to Plaintiff by not including it in the Markland exchange transactions. As a matter of law, that the rights of preferred stockholders are governed purely by contract. Plaintiff is bound by the terms of the contract that it knowingly and voluntarily signed. Moreover, Plaintiff seeks to blur the distinction between Technest and Markland which are separate corporations. Markland, the corporation that acquired the other investors' Technest stock does not owe any fiduciary duties to Plaintiff because Plaintiff is not a Markland shareholder. Technest, in which Plaintiff does own stock, did not have any role in the exchange transactions between Markland and the other investors.

34. Further, Plaintiff's claim that "the defendants have materially altered the terms [of the parties' agreement] for the benefit of four of the investors...[by] allowing certain favored investors to 'exchange' their Technest Series B Preferred Shares for shares with immediate

conversion and sale rights" is wholly misleading. What is at issue here is not what Defendants did or did not do with respect to the other investors. What is at issue is what did Defendants do, if anything, to Plaintiff's rights. Defendants did not change or alter the rights of the Technest Series B Preferred Shareholders or the characteristics of the Series B Preferred Stock in any way. Defendants did not reduce, diminish or alter in any shape, manner or form any of Plaintiff's contractual rights as a preferred stockholder of Technest.

35. Markland entered into new contracts with four investors who, like Plaintiff, happened to own Technest Series B Preferred Stock. Pursuant to these new contracts, Markland acquired the four investors' Technest Series B Preferred Stock in exchange for Markland Series D Preferred Stock. The characteristics of the Technest Series B Preferred Stock and the Markland Series D Stock are different, namely, the former is convertible as of February 2006 and the latter is convertible now. Plaintiff's rights as a holder of Technest Series B Preferred Stock have not been changed or impaired by virtue of this transaction. The only thing that changed for the Plaintiff is that now Markland is a co-owner of the Technest Series B Preferred Stock and the other four investors are not. Plaintiff's rights as a holder of the Technest Series B Preferred Stock remain completely unchanged.

36. Plaintiff's reliance on Nevada Revised Statutes, Title 7, Chapter 78, for the proposition that "all shares within a given series must have the same rights" (Bolton Decl. at par. 6) is misplaced. Markland, which is now a holder of the Technest Series B Preferred Stock, has the exact same rights as Plaintiff in connection with the stock, namely, the right to convert it to shares of Markland Common Stock as of February 16, 2006. The other investors, who exchanged their Technest Preferred Stock for Markland Preferred Stock with different characteristics, are not holders of the Technest Preferred Stock. Comparing their rights with respect to their Markland Preferred Stock with Plaintiff's rights with respect to its Technest

Preferred Stock is like comparing apples to oranges. In the absence of co-sale or tag-along rights -- which Plaintiff clearly does not have -- there is no contractual or other legal impediment to Markland's making such an agreement with the four investors without including Plaintiff.

37. Plaintiff attempts to muddy the waters by claiming that the Defendants somehow breached fiduciary duties because one of the parties to the Exchange Agreements, ipPartners, Inc., is owned and controlled by Robert Tarini who also happens to be the Chairman of the Board and Chief Executive Officer of Markland and Technest. Conspicuous by its absence from Plaintiff's submission in this regard is any identification of to whom this alleged fiduciary duty is owed and how it was breached.

38. Thus, if Plaintiff is purporting to advance this claim on behalf of common stockholders of Markland that Markland breached fiduciary duties owing to them by entering into a transaction with ipPartners, Inc. (Bolton Decl. at par. 7), Plaintiff has no standing to assert the claim because it does not own Markland stock. Additionally, any such claim would be a derivative claim on behalf of the corporation that could only be brought by a shareholder if the company refused to bring the suit after due demand and Plaintiff's claim is not set forth as a derivative claim.

39. In any event, as a factual matter, the transaction with ipPartners and its connection to Mr. Tarini was fully disclosed in Markland's public filings and it was approved by the board of directors. Furthermore, while this claim has no legal or procedural basis, it also happens that there is a legitimate and significant business rationale for the exchange transactions with these four investors. First, they already had substantial pre-existing equity interests in Markland. Second, Markland and the four investors were and continue to be actively negotiating additional financing for Markland. Simply put, these investors are significant sources of financing for

Markland and have been helpful and cooperative. Thus, not only was Markland well within its legal rights in entering into the transaction with them, it had sound business reasons for doing so.

40. As stated above, Plaintiff's motion also fails to identify any non-speculative and immediate harm that it would suffer absent the issuance of an injunction. Its sole allegation of harm is dependent on supposed future events that may or may not occur and, if they were to occur, may or may not have the effect Plaintiff projects. Further, the harm that Plaintiff speculates about is a harm that it is not legally entitled to be protected against. It has no co-sale or tag along rights and it is not entitled to rewrite its contract to now obtain such rights.

41. In contrast to the highly speculative and legally non-cognizable harm alleged by Plaintiff, if temporary or preliminary injunctive relief is granted, Markland will be in breach of its obligations under the Exchange Agreement and potentially liable for significant damages. In addition, Markland's goodwill with its investors and its reputation in the marketplace and hence its ability to raise future financing (the lifeblood of companies like Markland) will be irreparably harmed.

42. For all the foregoing reasons, the Plaintiff's application be denied in its entirety.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: August 11, 2005

Lisa M. Buckley