Court File No. CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

NOTICE OF MOTION

The defendants, Tennenbaum Capital Partners, LLC (**"Tennenbaum"**), 64 NM Holdings GP LLC, 64NM Holdings LP (**"64NM"**), and LG Capital Investors LLC (**"LGCI"**) (collectively, the **"U.S. Investor Defendants"**) will make a motion to a Judge of the Commercial List on a date and time to be fixed at 330 University Avenue, Toronto, Ontario.

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

THE MOTION IS FOR:

1. An Order transferring this action to the Commercial List.

2. An Order dismissing or permanently staying this proceeding against the U.S. Investor Defendants, or in the alternative, striking out the Statement of Claim (the **"Claim"**) of the plaintiff

The Catalyst Capital Group Inc. (**"Catalyst"**) as against the U.S. Investor Defendants on the grounds that:

(a) the Claim against the U.S. Investor Defendants is an abuse of process;

(b) the Claim against the U.S. Investor Defendants is barred by the doctrines of *res judicata*, cause of action estoppel and issue estoppel;

(c) the Claim against the U.S. Investor Defendants constitutes a collateral attack; and

(d) the Claim against the U.S. Investor Defendants is frivolous, vexatious, or otherwise would bring the administration of justice into disrepute.

3. To the extent necessary, leave to admit into evidence the record in Court File No. CV-16-11272-00CL in the Superior Court of Justice (Commercial List) (the **"Moyse Litigation"**).

4. To the extent necessary, an Order striking the Jury Notice served by Catalyst in this case.

5. The costs of this motion, and this proceeding, on a substantial indemnity basis.

6. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. OVERVIEW

7. Catalyst has already brought, litigated, and lost the Moyse Litigation concerning the alleged misuse by West Face Capital Inc. (**"West Face"**) of confidential information belonging to Catalyst. The Moyse Litigation related to West Face's participation in the acquisition of WIND Mobile Inc. (**"WIND"**) in September 2014 as a member of a consortium of investors together with

the U.S. Investor Defendants, Globalive Capital Inc., Novus Wireless Communications Inc. and Serruya Private Equity Inc. (collectively, the **"Consortium"**).

8. The claims asserted by Catalyst in this proceeding (the **"New Litigation"**) overlap considerably with those asserted by Catalyst in the Moyse Litigation. Both concern the successful acquisition of WIND by the Consortium, and Catalyst's allegation that misuse of Catalyst's confidential information by the Consortium is to blame for Catalyst's failure to do so.

9. The U.S. Investor Defendants and West Face were united in their interests in the merits of the Moyse Litigation as a finding that confidential information had been misused by the Consortium would directly affect all of the members of the Consortium, including the U.S. Investor Defendants. Moreover, the U.S. Investor Defendants participated in the Moyse Litigation by providing evidence and testifying at trial.

10. In Reasons for Judgment rendered on August 18, 2016 (the **"Reasons for Judgment"**), following the completion of a trial on the Commercial List, Justice Newbould dismissed all of the claims asserted by Catalyst against West Face in the Moyse Litigation in their entirety. In doing so, Justice Newbould made a series of findings that cannot be re-litigated or attacked collaterally in these proceedings, and are fatal to Catalyst's latest Claim against the U.S. Investor Defendants concerning the acquisition of WIND. Catalyst's attempt to re-litigate the issues raised in its Claim is an abuse of process.

B. THE MOYSE LITIGATION

(i) Background

11. In 2014, Catalyst commenced an action against West Face and Brandon Moyse, claiming, among other things, that Mr. Moyse had misappropriated confidential information of Catalyst for use by West Face. Catalyst amended its statement of claim in the Moyse Litigation three times, the last of which took place on or around February 25, 2016.

12. Catalyst tactically chose not to assert claims of inducing breach of contract and/or conspiracy and chose not to add the U.S. Investor Defendants to the Moyse Litigation despite being aware of the pleaded facts underlying such a claim since September 2014. Catalyst was also explicitly given the opportunity to assert such a claim subsequent to the outcome of the application approving a plan of arrangement (the **"Plan of Arrangement"**), when it amended its statement of claim for the final time.

13. In the Plan of Arrangement proceedings the U.S. Investor Defendants presented evidence by way of affidavit from two representatives:

(a) Michael Leitner, Managing Partner of Tennenbaum; and

(b) Hamish Burt, a member of 64NM GP, the general partner of 64NM, the special-purpose investment vehicle created by LGCI to participate in the acquisition of WIND.

14. In his reasons for judgment approving the arrangement dated January 26, 2016, Justice Newbould rejected Catalyst's allegations opposing the Plan of Arrangement and held that Catalyst was not acting in good faith.

15. In paragraphs 98 to 99 of its Claim in the New Litigation, Catalyst alleges that Catalyst only learned of the New Investors' efforts to acquire WIND in January 2016 (mistakenly stated as January 2015). This allegation is precluded by Justice Newbould's finding in the Plan of Arrangement proceedings that an action for inducing breach of contract "could have been started in March, 2015 when the facts were disclosed and known to Catalyst." Catalyst's attempt to re-litigate this issue is a collateral attack and an abuse of process.

(ii) The Trial of the Moyse Litigation

16. The Moyse Litigation proceeded to trial before Justice Newbould in June 2016.

17. The U.S. Investor Defendants were deeply involved in the Moyse Litigation proceedings. The U.S. Investor Defendants retained their own counsel and representatives of the U.S. Investor Defendants provided extensive and exhaustive evidence on the matter. Both Mr. Leitner and Mr. Burt provided evidence and testified at trial, where they were cross-examined by Catalyst's counsel.

18. In the Reasons for Judgment, Justice Newbould found that both Mr. Leitner and Mr. Burt were impressive and reliable witnesses and he accepted their evidence. The U.S. Investor Defendants had a meaningful voice in the Moyse Litigation proceedings and Catalyst had the opportunity to cross-examine the U.S. Investor Defendants' witnesses on the very same issues Catalyst now wishes to raise in the New Litigation (and in fact did so).

19. If this proceeding is permitted to continue against the U.S. Investor Defendants, there can be little doubt that Mr. Leitner and Mr. Burt will be called to testify again on issues that have already been heard and determined by Justice Newbould. This re-litigation of issues will result in

duplication of expense and use of court resources, and the possibility of inconsistent conclusions on these issues would undermine the credibility of the judicial process.

(iii) The Reasons for Judgment

20. On August 18, 2016, Justice Newbould released his Reasons for Judgment in the Moyse Litigation, in which he dismissed Catalyst's action against West Face and Mr. Moyse "in its entirety". Justice Newbould found as a fact that Catalyst had failed to establish any of the elements of its claim for breach of confidence:

(a) Mr. Moyse did not convey any confidential information of Catalyst to West Face;

(b) *even if* Mr. Moyse had communicated confidential information of Catalyst to West Face, such information was not misused in any way by the Consortium in its acquisition of an interest in WIND; and

(c) *even if* Mr. Moyse had communicated confidential information of Catalyst to West Face, and *even if* the Consortium had misused such confidential information in its acquisition of an interest in WIND, this could not have caused any harm to Catalyst, for two reasons: (i) it was Catalyst's refusal to agree to the $5 to 20 million break fee requested by Vimpelcom Ltd. (**"Vimpelcom"**), and not the August 7 Proposal, that caused Catalyst to fail in its negotiations with Vimpelcom; and (ii) *even if* Catalyst had been able to finalize and enter into a Share Purchase Agreement with Vimpelcom to acquire WIND, Catalyst would never have closed such a transaction because it required, but could not obtain, regulatory concessions from the Government of Canada.

21. The last of these three central findings of Justice Newbould is equally applicable to the U.S. Investor Defendants in the New Litigation. If Catalyst would never have acquired WIND regardless of what members of the Consortium did – which Justice Newbould has now found – then Catalyst's claims in the New Litigation must fail.

22. Justice Newbould made a number of specific findings that supported this conclusion, and are fatal to Catalyst's accusation in the New Litigation that the U.S. Investor Defendants conspired to misuse its confidential information and induce Vimpelcom to breach its exclusivity agreement with Catalyst:

(a) "The strategy of the winning bid for WIND by the consortium was not the sole work of West Face and required input from all the consortium members who were making sizeable investments. In fact, the evidence makes clear that the idea for the structure of the ultimately successful bid for VimpelCom's interest in WIND was that of Mr. Guffey of LG Capital, a man who had a very long history of successful involvement in the telecommunications business." [para. 87];

(b) "There is no direct evidence that West Face or its consortium members knew that Catalyst was a bidder. Their evidence, which I accept, is that they thought from what they knew that Catalyst was a bidder but they never knew for sure." [para. 89];

(c) "Regarding the offer made by the consortium to acquire WIND based on an enterprise value of $300 million, this price was made known to the marketplace by VimpelCom as early as April, 2014" [para. 94];

(d) "There was [a] reason why the structure of the agreement made by the consortium that succeeded in the acquisition of WIND did not contain a clause requiring Government concessions to permit spectrum acquired by WIND to be sold to an incumbent. Neither West Face nor the other consortium members held the view of Mr. Glassman that WIND would need such concessions to survive." [para. 96];

(e) "The parties knew from UBS that VimpelCom had entered into a period of exclusivity with a party, which was believed by them to be Catalyst, and the proposal was unsolicited and sent to VimpelCom without any substantive communications with VimpelCom since the exclusivity period had commenced on July 23, 2014… neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014." [paras. 104-105];

(f) "In his affidavit, Mr. Leitner stated that the "advantage" of their August 7, 2014 proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. It was put to him on cross-examination that he was referring to an advantage of the proposal over the Catalyst offer that was being dealt with by VimpelCom and the consortium knew from Mr. Moyse that Catalyst could not waive regulatory approval. Mr. Leitner denied this and said the advantage referred to was an advantage over the earlier proposal made by Tennenbaum with Oak Hill Capital and Blackrock that was for control of WIND that would require Government approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted a deal with no risk of Government rejection and it was an advantage to VimpelCom to have an offer without such a condition." [para. 108];

(g) "I accept the evidence of Mr. Leitner that the proposal made by him to VimpelCom on behalf of the consortium on August 7, 2014 and the ultimate deal made with VimpelCom was not based on anything that Catalyst was doing but rather was based on what Tennenbaum had concluded from its own due diligence and understanding of WIND and its prospect and of the lack of regulatory risk to what it was proposing. I accept his evidence that the lack of a need for regulatory concessions, and the lack of a need for a condition in the offer to VimpelCom of Government regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or Catalyst's regulatory strategies." [para. 114];

(h) "Mr. Burt's evidence was that LG Capital had no knowledge of the details of Catalyst's offer or negotiations with VimpelCom. They assumed, but did not know that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. I make the same findings regarding 64NM as I do with respect to Mr. Leitner." [para. 116]

(i) "The price of the bid by West Face and the consortium with an enterprise value of $300 million was based on what VimpelCom and its advisor UBS had made clear to West Face and others as to the amount that VimpelCom required" [para. 121];

(j) "The basic strategy of Catalyst was based on its belief that WIND could not survive without Government concessions that would allow WIND to sell its spectrum to an incumbent by the end of five years. Even had West Face or its consortium members been told of this strategy by Mr. Moyse or anyone else, it played no part in the reasoning of West Face to bid as it did by itself and later with the consortium. West Face did not hold the same view regarding the need for concessions and held the view that so long as WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network, which was made clear by the Industry Canada announcement on July 4, 2014, WIND would be a viable business. The other consortium members held the same view." [para. 122];

(k) “Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government.” [para.124];

(l) “Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.” [para. 127];

(m) “On August 11, 2014 the Chairman of the Board of VimpelCom advised Mr. De Alba that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman was furious and told his people on August 11, 2014 as well as Mr. Levin of Faskens who was advising Catalyst that VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated "I am fed up. I do not want to hear a single more excuse from them". On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin advised that VimpelCom was "out to lunch and I think we should tell them". Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."” [para. 128];

(n) “Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that VimpelCom and the consortium, including West Face, concluded a deal. Mr. Glassman acknowledged in his evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.” [para. 129]

(o) “For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.” [para. 130];

(p) “There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the

> exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom." [para. 131]

23. Each of these findings was fundamental or necessarily incidental to Justice Newbould's holding that Catalyst's action in the Moyse Litigation should be dismissed.

C. THE NEW LITIGATION CONSTITUTES AN ABUSE OF PROCESS AND COLLATERAL ATTACK AND IS PRECLUDED BY *RES JUDICATA* AND ISSUE ESTOPPEL

24. As described above, Justice Newbould has made numerous factual findings in the Moyse Litigation that are fatal to Catalyst's claims in the New Litigation. These findings cannot be re-litigated in these proceedings.

25. The U.S. Investor Defendants are privies in interest to West Face in the Moyse Litigation by virtue of their shared interests as well as their presence and direct involvement in the prior proceedings. As described above, Mr. Leitner and Mr. Burt were witnesses at trial where they provided testimony with respect to the same issues which Catalyst seeks to re-litigate in this action.

26. Catalyst had an opportunity in the Moyse Litigation to add the U.S. Investor Defendants to that action and assert its Claim. Since at least March 2015, Catalyst was aware of any and all alleged facts upon which the New Litigation is based. Catalyst's tactical decision not to do so and then commence this action amounts to litigation by installment and is an abuse of process.

27. This Court has the inherent jurisdiction to prevent an abuse of its processes. Re-litigation of issues which were already determined in the Moyse Litigation is an abuse of process that carries

serious detrimental effects, including the unnecessary waste of judicial resources and unnecessary expense for the parties, and undermines the certainty and credibility of the judicial system. Allowing the Claim to proceed would create a risk of inconsistent judgments as between the New Litigation and the Moyse Litigation.

D. THE NEW LITIGATION SHOULD BE TRANSFERRED TO THE COMMERCIAL LIST

28. The New Litigation involves complex legal and factual issues of a commercial nature.

29. In particular, the New Litigation involves a $750 million claim for misuse of confidential information, conspiracy, breach of contract, and inducing breach of contract, made by a Toronto-based multi-billion dollar investment management firm. The eleven Defendants are located around the globe, and include other multi-billion dollar investment management firms, an international telecommunications giant, a multi-national investment bank, and numerous other private equity firms, funds, and special-purpose vehicles.

30. The New Litigation raises complex issues concerning the interpretation of a web of commercial relationships, dealings, and negotiations between the various commercial parties involved in the acquisition of Vimpelcom's interests in WIND by the Consortium in September 2014.

31. This subject-matter was already before the Commercial List in the Moyse Litigation. Indeed, while the Moyse Litigation began on the regular list, it was transferred to the Commercial List in January 2016 by Order of Justice Newbould. Catalyst did not oppose the transfer of the Moyse Litigation to the Commercial List.

32. Catalyst's assertion in the New Litigation that it only learned of the facts giving rise to its claim for inducing breach of contract during the Plan of Arrangement proceedings also overlaps with findings made by Justice Newbould in the Plan of Arrangement proceeding, which also proceeded on the Commercial List.

33. The other Defendants to the New Litigation consent to the transfer of this proceeding to the Commercial List.

E. THE JURY NOTICE SHOULD BE STRUCK OUT

34. For many of the same reasons, this matter cannot be fairly tried by a jury.

35. The Court has the discretion to strike a jury notice in the appropriate case.

36. Specifically, there are cogent reasons to strike the jury notice, including the considerable complexity of the New Litigation and the questions of fact, law, and mixed fact and law that must be decided, particularly given that many factual findings and issues will have to be decided following a proper application of the legal principles of *res judicata*, issue estoppel, collateral attack, and abuse of process.

37. Justice to the parties will be better served by the striking of the jury notice.

38. In the alternative, the pith and substance of Catalyst's claims of misuse of confidential information by the U.S. Investor Defendants is a claim for equitable damages for breach of the equitable duty of a third party recipient of confidential information to not use that information. As such, the New Litigation must be tried without jury.

39. The Jury Notice is inappropriate and should be struck out.

F. OTHER GROUNDS

40. Multiplicity of legal proceedings should be avoided.

41. The New Litigation is frivolous, vexatious, and an abuse of the processes of the Court.

42. The Consolidated Practice Direction Concerning the Commercial List, effective July 1, 2014.

43. Rules 1.04, 21.01(3)(d), 25.11, 37, 38 and 47 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

44. Sections 106, 108, and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

45. The inherent jurisdiction of the Court.

46. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

47. The Reasons for Judgment of Justice Newbould dated August 18, 2016 in Court File No. CV-16-11272-00CL, reported at 2016 ONSC 5271.

48. The Reasons for Judgment of Justice Newbould dated January 26, 2016 in Court File No. CV-15-11238-00CL, reported at 2016 ONSC 669.

49. The Trial Record from the Moyse Litigation.

50. The materials filed in the Plan of Arrangement proceedings.

51. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

October 7, 2016

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Plaintiff

-and-

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Defendants

Court File No. CV-16-553800

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PROCEEDING COMMENCED AT Toronto

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