

Court File No.: CV-16-553800

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

**STATEMENT OF DEFENCE OF THE DEFENDANT,
SERRUYA PRIVATE EQUITY INC.**

1. The defendant, Serruya Private Equity Inc. ("Serruya"), admits the allegations contained in paragraph 2 of the Amended Statement of Claim.
2. Serruya is generally aware of the parties described in paragraphs 2-7 and 9-11 of the Amended Statement of Claim, but has no particular knowledge thereof.
3. Except as expressly admitted herein, Serruya denies each and every other allegation in the Amended Statement of Claim and puts the plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), to the strict proof thereof.
 - A. **Serruya Private Equity Inc.**
4. Serruya is a family-managed private equity investment fund with offices located in Markham, Ontario. Serruya engages in a broad range of activities including asset

management, equity investment and lending in a variety of industries including retail, franchising, licensing, electronics and real estate.

B. Background

5. This action arises out of Catalyst's failed attempt to purchase a majority interest in WIND Mobile Corp. ("WIND") from VimpelCom Ltd. ("VimpelCom") in 2014.

6. WIND was a Canadian telecommunications provider that was established in 2008 in response to a Canadian government initiative to introduce new entrants into a wireless communications sector that was dominated by incumbents like Rogers, Bell and TELUS.

7. At the time of the transaction described herein, equity ownership of WIND was held indirectly by VimpelCom and Globalive Capital Inc. ("Globalive") through Globalive Investment Holdings Corp. ("GIHC"), with Globalive holding the majority of voting shares of GIHC.

8. By 2013, VimpelCom began exploring opportunities to divest itself of its equity and debt interests in WIND. In furtherance of that objective, VimpelCom engaged UBS Securities Canada Inc. to find a suitable purchaser.

9. A number of potential purchasers expressed an interest in WIND, but on July 23, 2014, VimpelCom entered into an Exclusivity Agreement with Catalyst that prohibited VimpelCom from negotiating with any other party during the period of the agreement, which was eventually extended to August 18, 2014. On August 7, 2014, VimpelCom and Globalive entered into a Support Agreement, whereby Globalive agreed to sell its

interests in WIND to a buyer of VimpelCom's choosing, or alternatively to support VimpelCom in putting WIND into insolvency in the event a sale did not proceed.

10. Catalyst's bid to purchase VimpelCom's interest in WIND failed. As was revealed in the context of *Catalyst Capital Group Inc. v. Moyses* (court file no. CV-16-11272-00CL) ("Moyse Action"), Catalyst withdrew from negotiations after it refused to agree to a break fee that VimpelCom had requested to protect itself from the regulatory risk that existed under the proposed transaction with Catalyst.

11. On August 7, 2014, an investor group comprised of Tennenbaum Capital Partners, LLC ("Tennenbaum"), West Face Capital Inc. ("West Face") and LG Capital Investors LLC ("LG Capital") (collectively, the "New Investors") had delivered an unsolicited proposal (the "Unsolicited Proposal") to VimpelCom to purchase its interest in WIND, but that proposal was ignored by VimpelCom as it was still subject to the Exclusivity Agreement with Catalyst and therefore prohibited from negotiating with the New Investors.

12. After Catalyst's period of exclusivity ended on August 18, 2014, and with Catalyst having withdrawn from negotiations after rejecting VimpelCom's request that Catalyst agree to a break fee, VimpelCom explored other options, including a sale of WIND's assets through a process under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

13. Eventually, VimpelCom began negotiations with a consortium of investors, which by the end of August 2014 was comprised of the New Investors, Globalive, Novus Wireless Communications Inc. ("Novus") and Serruya (together, the "Consortium").

14. On August 25, 2014, VimpelCom granted members of the Consortium exclusive negotiating rights. Ultimately, VimpelCom reached an agreement with the Consortium to purchase its interest in WIND, and the transaction closed on September 16, 2014.

C. Serruya's Involvement in the Acquisition of WIND

15. Prior to August 2014, Anthony Lacavera ("Lacavera"), the principal of Globalive, had informed Serruya that there may be an opportunity to participate in an investment involving the purchase of WIND, but there were no significant discussions beyond the fact that Lacavera may be looking for potential investors and that Serruya had capital that it might be willing to invest.

16. At the request of West Face, on or about August 9, 2014, Lacavera sent an email connecting Serruya to West Face.

17. Contrary to what is alleged in the Amended Statement of Claim, Serruya had no contact with the other defendants or their representatives (other than Lacavera, in the manner described above) regarding an acquisition of VimpelCom's interest in WIND prior to August 9, 2016. Specifically,

- (a) no representatives of Serruya were aware of or attended the August 1, 2014 conference call alleged in paragraph 68 of the Amended Statement of Claim;
- (b) no representatives of Serruya were aware of or attended the August 4, 2014 meeting alleged in paragraph 75 of the Amended Statement of Claim;

- (c) Serruya did not participate in the preparation of the Unsolicited Proposal that was delivered to VimpelCom on August 7, 2014, and, in fact, had no knowledge of the Unsolicited Proposal until August 9, 2014; and
- (d) Serruya did not participate in and had no knowledge of any alleged call between West Face and VimpelCom on August 8, 2014.

18. Serruya's first discussions with any of the New Investors about a potential investment with respect to WIND occurred during a call between representatives of West Face and Serruya on August 10, 2014. During that call, West Face advised Serruya that the New Investors were raising capital for a potential acquisition of VimpelCom's interest in WIND. However, at that point, it was unclear whether the New Investors were seeking additional partners or lenders.

19. The nature and scope of Serruya's potential participation was more particularly explored during the period between August 10 and 18, 2014 in discussions with the New Investors. However, no agreement relating to Serruya's participation was reached during that period. Throughout that period, Serruya remained undecided as to whether it wanted to proceed with the investment.

20. After Catalyst's period of exclusivity expired on August 18, 2014, Globalive began working with the New Investors to persuade VimpelCom to negotiate with them on a potential acquisition of VimpelCom's interest in WIND. It was only after Globalive (and Lacavera) joined the New Investors following the expiry of Catalyst's period of exclusivity, that Serruya agreed to participate in the newly formed Consortium.

D. No Liability

21. Serruya denies any and all allegations of wrongdoing in the Amended Statement of Claim.

22. At no time did Serruya owe any obligation or duty to Catalyst to not use any confidential information belonging to Catalyst. Even if Serruya had such an obligation or duty, which is denied, at no time did Serruya receive (and therefore had no opportunity to use) any confidential information belonging to Catalyst, including but not limited to any confidential information regarding Catalyst's regulatory strategy or its negotiating positions with VimpelCom. Serruya first learned about Catalyst's regulatory strategy and negotiating positions in 2016, as facts relating thereto were revealed in the context of the Moyse Action.

23. Serruya denies the allegation that it, either alone or in furtherance of a conspiracy with the other Consortium members, induced or attempted to induce VimpelCom to breach any agreement it had with Catalyst. As set out herein, Serruya did not participate in and had no knowledge of any of the acts of inducement alleged in the Amended Statement of Claim.

E. No Damages

24. Catalyst has not suffered any of the loss or damage alleged in the Amended Statement of Claim. To the extent that Catalyst suffered any loss or damage, which is denied, such loss or damage was not caused or contributed to by any act or omission on the part of Serruya, but rather by positions voluntarily taken by Catalyst in the context of its failed attempt to acquire WIND. As Justice Newbould found in the Moyse

Action, Catalyst could never have acquired WIND given Catalyst's demands for regulatory concessions from the Government of Canada, and its refusal to agree to a break fee that was requested by VimpelCom. As a result, Catalyst would not have successfully negotiated a purchase of WIND, even absent the involvement of the Consortium.

25. In the alternative, if Catalyst suffered any of the loss or damage claimed, such loss or damage is excessive, too remote, and unrecoverable at law. Also, Catalyst failed to take any reasonable steps to mitigate its damages.

26. Serruya denies that there is any factual or legal basis for any award of punitive damages.

F. Abuse of Process

27. This action should be dismissed on the basis of abuse of process, collateral attack, issue estoppel and cause of action estoppel.

28. In a decision released on August 18, 2016 in the Moyse Action, Justice Newbould dismissed all of Catalyst's claims and made the following findings, among others:

- (a) the Unsolicited Offer sent by the New Investors to VimpelCom on August 7 did not affect VimpelCom's negotiations with Catalyst prior to the expiry of Catalyst's period of exclusivity on August 18, 2014;
- (b) Catalyst did not suffer any damages as a result of any misuse of its confidential information;

- (c) Catalyst would not have closed a deal for the acquisition of WIND because VimpelCom would never have agreed to a deal that was conditional on Catalyst receiving Government of Canada approval of its regulatory concessions; and
- (d) The reason the deal between Catalyst and VimpelCom fell through was because Catalyst terminated negotiations after VimpelCom requested that Catalyst agree to a break fee.

29. Catalyst is bound by these and other findings of Justice Newbould, which are determinative of the liability and damages issues raised in this action. Catalyst is barred from relitigating those issues in this action.

30. The issues in this action arise in the same circumstances as the issues that were raised and determined by the Court in the Moyse Action. By March 2015, Catalyst was aware of any and all alleged facts upon which its current claim is based. Catalyst elected not to add Serruya to the Moyse Action and assert its claims in that action. This action amounts to litigation by instalment and is an abuse of process.

31. Serruya requests that his action be dismissed as against it, with costs.

December 15, 2016

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THE CATALYST CAPITAL GROUP INC. VIMPELCOM LTD., ET AL.
Plaintiff and Defendants

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Proceeding commenced at TORONTO

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