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 Defendant, West Face Capital Inc. ("**West Face**"), 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 West Face, or in the alternative, striking out the Statement of Claim of the Plaintiff The Catalyst Capital Group Inc. ("**Catalyst**") as against West Face on the grounds that:

(a) the Claim against West Face is an abuse of process;

(b) the Claim against West Face is barred by the doctrines of *res judicata*, cause of action estoppel, issue estoppel, and collateral attack; and

(c) the Claim is frivolous, vexatious, or otherwise would bring the administration of justice into dispute.

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 of confidential information belonging to Catalyst. The Moyse Litigation related to West Face's participation in the acquisition of WIND Mobile Corp. ("**WIND**") in September 2014 as a member of a consortium of investors. Catalyst commenced the Moyse Litigation against West Face in June 2014, and amended its

Statement of Claim in October 2014 to assert claims and allegations in respect of the acquisition of an interest in WIND by West Face.

8. The claims asserted by Catalyst in these proceedings (the "**New Litigation**") overlap considerably with those asserted by Catalyst in the Moyse Litigation. Both concern West Face's participation in the successful acquisition of WIND, and Catalyst's allegation that West Face is to blame for Catalyst's failure to do so.

9. Catalyst was aware of the material facts underlying its claims against West Face in the New Litigation when it amended its claim in the Moyse Litigation in October 2014 to assert claims and allegations concerning the participation by West Face in the acquisition of WIND. Catalyst made tactical decisions in the Moyse Litigation not to assert against West Face the various causes of action it now advances in the New Litigation, and it must now live with the consequences of those decisions.

10. In Reasons for Decision rendered on August 18, 2016, 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 claims against West Face concerning the acquisition of WIND.

A. A BRIEF HISTORY OF WIND

11. WIND is a Canadian wireless telecommunications provider. At the end of 2013, the majority of its voting shares were held by the Defendant Globalive Capital Inc. ("**Globalive**"), while a majority of the total equity was held by the Defendant VimpelCom

Ltd. ("**VimpelCom**"). VimpelCom is headquartered in the Netherlands and controlled by Russian shareholders.

12. Foreign ownership of the wireless industry in Canada has at all times been heavily regulated.

13. By the end of 2013, VimpelCom had become frustrated by the regulatory hurdles it faced in Canada that had prevented it from either acquiring Globalive's interest in WIND, or selling VimpelCom's interest. VimpelCom had engaged the Defendant UBS Securities Canada Inc. ("**UBS**") to assist it in its efforts to find a purchaser for its debt and equity interests in WIND or for WIND in its entirety.

14. Catalyst and West Face both participated in negotiations with VimpelCom in the first half of 2014. Both parties' interest in WIND was discussed in the business media during the course of VimpelCom's efforts to sell WIND in 2013 and 2014.

15. Catalyst was not willing to purchase WIND unless it obtained regulatory concessions from Industry Canada granting to Catalyst the unrestricted right to sell or transfer WIND's wireless spectrum to one of the incumbent wireless carriers (Rogers, Telus or Bell) after five years. Catalyst believed that this regulatory concession was necessary in order for WIND to succeed as a business.

16. Catalyst was advised categorically and repeatedly by the Government of Canada and by Catalyst's own expert advisers that such a concession would not be granted. Catalyst intended not to close any transaction to acquire WIND from VimpelCom if such a concession could not be obtained.

17. On July 23, 2014, VimpelCom entered into exclusive negotiations with Catalyst concerning the negotiation of a Share Purchase Agreement for the acquisition of WIND. This period of exclusivity was extended several times, ultimately to August 18, 2014.

18. On August 7, 2014 the Defendants West Face, Tennenbaum Capital Partners LLC ("**Tennenbaum**"), and the principals of the Defendants 64NM Holdings GP LLC ("**64NM GP**"), 64NM Holdings LP ("**64NM LP**") and LG Capital Investors LLC ("**LG Capital**") (West Face, Tennenbaum and LG Capital, together, the "**New Investors**") made an unsolicited offer to VimpelCom to purchase its interests in WIND (the "**August 7 Proposal**"). The August 7 Proposal was not unlawful or improper in any way.

19. Moreover, Catalyst was aware of the August 7 Proposal in or around August or September, 2014, but made no complaint or claim concerning that Proposal. That is so even though Catalyst was already embroiled in the Moyse Litigation with West Face.

20. On or around August 15, 2014, VimpelCom requested that Catalyst agree to a $5 to $20 million break fee if regulatory approval of the potential sale of WIND to Catalyst was not granted within 60 days following execution of the Share Purchase Agreement then being negotiated.

21. Upon consulting with Catalyst's legal and financial advisors as well as with Catalyst Partner Gabriel de Alba, Catalyst's founder and Managing Partner Newton Glassman decided to reject outright VimpelCom's request for a break fee, without discussion or negotiation. Rather than attempt to satisfy VimpelCom's concerns, Catalyst rejected VimpelCom's request for a break fee, cut off further communications with VimpelCom, let its period of exclusivity expire, and encouraged VimpelCom to explore its

options. VimpelCom did so in the period after its exclusivity obligations to Catalyst came to an end on August 18. One of those options involved VimpelCom selling its interests in WIND to a consortium that included the New Investors, Globalive, Novus Wireless Communications Inc. ("**Novus**"), and Serruya Private Equity Inc. ("**Serruya**") (Globalive, Novus, Serruya, and the New Investors collectively, the "**Consortium**").

22. On September 16, 2014, VimpelCom and members of the Consortium announced that they had reached an agreement whereby the Consortium would acquire all of VimpelCom's debt and equity interests in WIND.

23. In November 2014, the ownership structure of WIND was reorganized so that WIND became an indirect wholly-owned subsidiary of the Defendant Mid-Bowline Group Corp. ("**Mid-Bowline**"), with the various members of the Consortium holding voting shares in proportion to their equity contributions.

B. THE MOYSE LITIGATION

(i) The Commencement of the Moyse Litigation

24. In May 2014, Brandon Moyse, a 26 year-old analyst at Catalyst, decided to resign his position at Catalyst and accept a job offer from West Face. Mr. Moyse began working at West Face on June 23, 2014. Before he did so, in response to concerns expressed by Catalyst through its counsel, West Face erected an ethical wall that expressly precluded Mr. Moyse from sharing with anyone at West Face confidential information of Catalyst concerning WIND, and from playing any role whatsoever in West Face's efforts to acquire WIND. That ethical wall was complied with assiduously.

25. On June 25, 2014, Catalyst issued the Statement of Claim in the Moyse Litigation against West Face and Mr. Moyse. Among other things, Catalyst alleged that Mr. Moyse had misappropriated unspecified confidential information of Catalyst for use by West Face.

26. On July 16, 2014, West Face and Mr. Moyse consented to an Interim Order placing Mr. Moyse on indefinite leave from West Face. Ultimately, Mr. Moyse never returned to work at West Face.

27. On October 9, 2014, following the acquisition of WIND by the Consortium, Catalyst amended its pleading in the Moyse Litigation to allege explicitly that: "West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyse, to obtain an unfair advantage over Catalyst in its negotiations with [WIND]. But for the transmission of Confidential Information concerning [WIND] from Moyse to West Face, West Face would not have successfully negotiated a purchase of [WIND]". Those allegations were invented from whole cloth, and are completely devoid of merit.

28. As described above, at the time this amendment was made, Catalyst was aware that West Face had participated in an unsolicited offer to VimpelCom on August 7, during Catalyst's period of exclusivity. Catalyst chose, however, not to assert any claims or causes of action against West Face or any of the other Defendants associated with the alleged breach by VimpelCom of its exclusivity obligations to Catalyst.

29. On December 16, 2014, Catalyst further amended its Statement of Claim in the Moyse Litigation to seek: (i) a constructive trust over West Face's interest in WIND; and (ii) an accounting of profits earned by West Face with respect to its investment in WIND

as a result of the alleged misuse of Catalyst's confidential information. Again, Catalyst chose not to assert any claims or causes of action associated with the alleged breach by VimpelCom of its exclusivity obligations to Catalyst.

(ii) The Injunction Motion Before Glustein J.

30. In January 2015, Catalyst commenced a motion for, among other things, an injunction restraining West Face from "[p]articipating in the management and/or strategic direction of [WIND]" (the "**Injunction Motion**").

31. On March 9, 2015, West Face filed voluminous evidence responding to the Injunction Motion, including an Affidavit of Anthony Griffin sworn March 7, 2015. Mr. Griffin is one of West Face's four Partners, and was the Partner who had primary responsibility for West Face's pursuit of WIND during most of the period in question.

32. In his March 7, 2015 affidavit, Mr. Griffin provided extensive evidence concerning the participation by West Face in the acquisition of WIND, including a detailed description of the August 7 Proposal, and how the Investors ultimately reached an agreement with VimpelCom to acquire WIND.

33. On May 13, 2015, counsel to West Face cross-examined James Riley, one of Catalyst's three Partners and its Chief Operating Officer, and Catalyst's principal affiant in support of the Injunction Motion. Mr. Riley admitted that Catalyst had considered asserting claims against West Face for inducing breach. These are the very claims that lie at the heart of the New Litigation.

34. By May 2015 *at the latest*, Catalyst knew the facts necessary to amend its Claim in the Moyse Litigation to assert the claims that it now belatedly brings against West Face.

35. Catalyst's Injunction Motion was heard and dismissed in its entirety by Justice Glustein in July 2015. Justice Glustein's Reasons are reported at 2015 ONSC 4388.

36. Catalyst's subsequent attempt to appeal the dismissal of the Injunction Motion to the Court of Appeal was quashed in early November 2015.

37. Catalyst's subsequent motions for an extension of time to seek leave to appeal and for leave to appeal the dismissal of the Injunction Motion to the Divisional Court were dismissed by Justice Swinton in January 2016. Justice Swinton's Reasons are reported at 2016 ONSC 554.

(iii) The Plan of Arrangement Application

38. In January 2016, Mid-Bowline (the entity through which the Consortium held their interests in WIND) brought an application for an order approving a plan of arrangement (the "**Plan of Arrangement**") pursuant to which the shares of Mid-Bowline were to be transferred to Shaw Communications Inc. ("**Shaw**") for approximately $1.6 billion.

39. The Plan of Arrangement provided that the shares of Mid-Bowline were to be transferred to Shaw free and clear of the constructive trust over West Face's indirect interest in WIND that Catalyst had asserted in its Amended Amended Statement of Claim dated December 16, 2014.

40. Catalyst was given notice of Mid-Bowline's Application in late December, 2015. The hearing of the Plan of Arrangement was scheduled for January 25, 2016.

41. In support of the Application, on January 8, 2016, Mid-Bowline served on Catalyst a four-volume Application Record that included, *inter alia*, affidavits of:

(a) Mr. Griffin, on behalf of West Face;

(b) Hamish Burt, on behalf of LG Capital;

(c) Michael Leitner, on behalf of Tennenbaum; and

(d) Simon Lockie, on behalf of Globalive.

42. These four affidavits confirmed the previous evidence of Mr. Griffin in his March 7, 2015 affidavit (described above) concerning the manner in which the Consortium came to acquire WIND, and contained no new or material information in that regard.

43. Catalyst opposed the Plan of Arrangement on the basis that it was not fair and reasonable in light of Catalyst's claim in the Moyse Litigation for a constructive trust over West Face's interest in WIND. West Face therefore asked the Court to order an expedited trial of Catalyst's claim. On January 25, 2016, during oral argument concerning the approval by the Court of the proposed Plan of Arrangement, Catalyst expressed for the first time its intention to assert claims of inducing breach of the Catalyst-VimpelCom exclusivity agreement against West Face and other members of the Consortium.

44. Catalyst's claim for inducing breach was premised explicitly on the unsolicited August 7 Proposal, which Catalyst had been aware of since no later than September, 2014.

45. Catalyst claimed that the facts giving rise to its purported "new" claim for inducing breach (the very same claim now asserted by Catalyst in the New Litigation) were first disclosed to Catalyst in the materials filed by Mid-Bowline in the Application for approval of the Plan of Arrangement. Catalyst claimed that it had not previously been aware of the participation of others besides West Face (*i.e.*, the Defendants Tennenbaum and LG Capital) in the unsolicited August 7 Proposal.

46. In Reasons for Judgment delivered the following day (January 26, 2016), Justice Newbould rejected the position of Catalyst. In doing so, he made the following findings.

(a) "[It] is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking interlocutory relief against West Face";

(b) "On his cross-examination on May 13, 2015 Mr. Riley … discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity agreement between VimpelCom and Catalyst…"; and

(c) "Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week [January 25, 2016] that anything was first said by Catalyst about that".

47. Justice Newbould held that Catalyst's threatened claim for inducing breach of contract "could have been started in March, 2015 when the facts were disclosed and known to Catalyst". He further held that Catalyst had not acted in good faith:

> *To lie in the weeds* until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and *not acting in good faith*. Waiting and seeing how things are going in the litigation process before *springing a new theory at the last moment is not to be encouraged*. Apart

> from the statement of Mr. Riley that the information was first learned in the material in this application, *which was not true*, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner.

48. Justice Newbould's decision is final, and his findings cannot now be re-litigated or attacked collaterally in this proceeding. Paragraphs 98 to 99 of Catalyst's Claim in the New Litigation allege 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 findings in the Plan of Arrangement proceedings, and barred by the doctrines of issue estoppel, collateral attack, and abuse of process.

49. In his Reasons, Justice Newbould also ordered an expedited trial of an issue in respect of Catalyst's constructive trust claim that had previously been asserted in the Moyse Litigation. This trial of an issue in the Plan of Arrangement proceeding was scheduled for late February. Catalyst was directed not to raise its inducing breach claim in this mini trial because it had not acted in good faith.

50. Shortly after Justice Newbould released his Plan of Arrangement Reasons, Catalyst consented to an Order approving the Plan of Arrangement, thereby agreeing that it would not pursue a claim for a constructive trust over the shares of Mid-Bowline to be transferred to Shaw. The Plan of Arrangement transaction closed shortly thereafter with no need for an expedited trial of Catalyst's constructive trust claim. The late February trial date was abandoned.

51. In light of the approval of the Plan or Arrangement, Catalyst was given another opportunity to further amend its Statement of Claim in the Moyse Litigation, including to

assert a claim for inducing breach, and the trial was scheduled for May 2016 (later postponed to June). Examinations for Discovery had not occurred at that point, and Catalyst had yet to deliver an Affidavit of Documents.

52. On February 25, 2016, Catalyst delivered an Amended Amended Amended Statement of Claim in the Moyse Litigation. While Catalyst deleted its claim for a constructive trust, and added new allegations of spoliation against Mr. Moyse, it again made the tactical choice not to assert claims of inducing breach and/or conspiracy against West Face. Nor did Catalyst seek to add as parties any of the other Defendants to the New Litigation.

(iv) The Trial of the Moyse Litigation

53. The Moyse Litigation proceeded to trial before Justice Newbould in June, 2016. There were six extended hearing days of evidence and one full day of closing submissions.

54. The parties called a total of 13 witnesses to give live testimony at trial, as follows:

(a) Catalyst called four witnesses at trial:

(i) Newton Glassman, Catalyst's CEO and Managing Partner;

(ii) Gabriel De Alba, Catalyst's Managing Director and the lead Partner of Catalyst on the deal team that negotiated with VimpelCom for the purchase of WIND;

(iii) James Riley, Catalyst's COO, a lawyer, and the lead Partner of Catalyst managing the Moyse Litigation; and

(iv) Martin Musters, a forensic expert.

(b) West Face called seven witnesses at trial:

(i) Mr. Griffin, West Face's Partner with initial primary responsibility over the WIND deal;

(ii) Tom Dea, West Face's Partner with primary responsibility for the hiring of Mr. Moyse;

(iii) Mr. Burt, a member of 64NM GP, the general partner of 64NM LP, the special-purpose investment vehicle created by LG Capital to participate in the acquisition of WIND;

(iv) Mr. Leitner, a Managing Partner of Tennenbaum;

(v) Mr. Lockie, the Chief Legal Officer of Globalive and former Chief Regulatory Officer of WIND;

(vi) Supriya Kapoor, West Face's Chief Compliance Officer; and

(vii) Yu-Jia Zhu, West Face's Vice-President who worked on the WIND deal and interviewed Mr. Moyse.

(c) Mr. Moyse called two witnesses:

(i) himself; and

(ii) Kevin Lo, a forensic expert.

55. For efficiency, the parties' evidence in chief in the Moyse Litigation was primarily put in by way of detailed pre-trial affidavits, with exhibits. In addition, the parties agreed that all of the evidence from multiple interlocutory motions that preceded trial, including dozens of affidavits, hundreds of exhibits, and thousands of pages of cross-examination transcripts, were to be treated as having been admitted at trial and could be relied upon in the parties' closing submissions.

56. The parties' written closing submissions totalled close to 500 pages.

57. If this proceeding is permitted to continue against West Face, there can be little doubt that many of the very same witnesses that testified about the WIND transaction in the Moyse Litigation will be again called at the trial of the New Litigation to testify about the same transaction. These include: Messrs. Glassman, De Alba, Riley, Griffin, Burt, Leitner, Lockie, and Zhu. This will result in duplication of expense, and use of court resources, that could have been avoided had Catalyst asserted the causes of action raised in the New Litigation in a timely manner.

(v) The Reasons for Judgment

58. On August 18, 2016, Justice Newbould released his Reasons for Judgment in the Moyse Litigation (the "**Trial Reasons**"), in which he dismissed Catalyst's action "in its entirety". Justice Newbould found as a fact that:

(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 West Face 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* West Face 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, 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, the regulatory concessions that it deemed necessary from the Government of Canada.

59. The last of these three central findings of Justice Newbould is equally applicable to the New Litigation. If it was Catalyst's refusal to agree to a break fee that caused Catalyst to fail to acquire WIND, and if Catalyst would never have acquired WIND in any event and regardless of what members of the Consortium did – which Justice Newbould has already found – then Catalyst's claims in the New Litigation must also fail.

60. Justice Newbould made a number of specific findings that supported this conclusion, and that are fatal to Catalyst's accusation in the New Litigation that certain

Defendants conspired to misuse its confidential information and induce VimpelCom to breach its exclusivity agreement with Catalyst:

(a) "…there are explanations for West Face's conduct other than the use of confidential Catalyst information" [para. 73];

(b) "Mr. Leitner of Tennenbaum, a most impressive witness and the senior partner leading Tennenbaum's technology/media/telecom business, testified that neither West Face nor Mr. Moyse nor anyone else ever communicated to Tennenbaum anything about Catalyst's involvement with WIND or Catalyst's regulatory strategy, that no such information was discussed among the investors and that until he read Mr. Glassman's affidavit he did not have any understanding of what that regulatory strategy of Catalyst was. Mr. Leitner also testified that no one at Tennenbaum knew the details of any offer made by Catalyst to VimpelCom during the period of exclusivity of Catalyst to negotiate with VimpelCom. Mr. Leitner's evidence was not shaken at all and I accept it" [para. 85];

(c) "The evidence of Hamish Burt, a member of 64NM, also an impressive witness, was to the same effect as that of Mr. Leitner. His evidence was not shaken and I accept it as well" [para. 86];

(d) "…If West Face was acting on confidential Catalyst information in the formulation of the final bid to VimpelCom, the reason for having a bid unconditional on Governmental concessions would obviously have been discussed with the partners. The fact that there was no discussion about any Catalyst information is a strong indication that West Face did not have any such information" [para. 87];

(e) "Regarding West Face's view that Catalyst was a bidder for WIND, there was sufficient information in the marketplace for West Face to put two and two together to believe or presume that Catalyst was a bidder" [para. 89];

(f) "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];

(g) "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];

(h) "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" [para. 104];

(i) "…neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period with Catalyst expired on August 18, 2014" [para. 105];

(j) "Of course, the issue of requiring regulatory approval is not the same as requiring concessions from the Government permitting the transfer of spectrum to an incumbent after five years. There is no evidence at all that West Face thought there was any serious issue about obtaining Government regulatory approval to the transaction. There was no need for such a condition in the August 7, 2014 proposal to VimpelCom because no regulatory approval was required for that transaction. The transaction was structured that way because of the clear message from UBS that VimpelCom wanted a clean exit without regulatory issues getting in the way. It was not structured that way because of some knowledge allegedly obtained from Mr. Moyse that Catalyst had such a condition in its offer to VimpelCom. Moreover, Catalyst's argument that the [August 7] proposal did not contain such a condition because [West Face] knew that Catalyst had such a condition and knew that Catalyst could not waive it makes little sense. If West Face had thought that regulatory approval was a concern, it would make no sense to ignore it just because Catalyst had such a condition, assuming it knew of that condition in the Catalyst bid. To do so to have a leg up on Catalyst and then acquire WIND with a concern that in the second step the Governmental regulatory approval might not occur would make little sense for the size of the investment made" [para. 109];

(k) "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… 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 of Catalyst's regulatory strategies" [para. 114];

(l) "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. Even if Mr. Moyse had known and told West Face of the intention of Catalyst to bid at an enterprise value of $300 million, West Face made no use of such information" [para. 121];

(m) "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]

(n) "For the same reason, even if Mr. Moyse disclosed to West Face the views of Mr. Glassman that the potential litigation by some other party against the Government would force the Government to grant concessions and that the Government was therefore softening its position on concessions, that disclosure played no part in the decision of West Face to make the bids that it did" [para. 123]

(o) "I accept the evidence of Mr. Griffin that West Face would never have based its strategy on the litigation that Mr. Glassman believed some unnamed party other than Catalyst would have pursued against the Federal Government over the regulatory restrictions that limited transferability of the 2008 spectrum licenses. His evidence was that based on its own discussions with Industry Canada, including during the May 21 meeting with Industry Canada, West Face believed that the Government was going to continue to maintain the existing restrictions on transfers of spectrum to incumbents. West Face never understood the Government's policy stance to be a bluff. Nor did Globalive, who told West Face on April 21, 2014 of its view that the Government would not change its policy. In spite of what Mr. Glassman asserted was his view of the potential litigation against the Government and the softening of the Government's position on concessions, the actions of Catalyst in its bid for WIND did not reflect a view that the Government's knowledge of the threat of litigation and the Government's body language demonstrating that it was softening its position regarding concessions would massively mitigate, if not entirely eliminate, the financial risk in bidding. 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]

(p) "In summary, if Mr. Moyse provided to West Face any confidential Catalyst information, I find that such information was not used by West Face in its acquisition from VimpelCom of its interest in WIND or of its later acquisition of its shareholding in WIND. For this reason too, the action for breach of confidence against West Face must fail" [para. 125]

(q) "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]

(r) "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]

(s) "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]

(t) "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]

(u) "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]

C. DUPLICATIVE EFFORTS

61. In total, West Face incurred more than $2 million in legal fees and expenses defending Catalyst's allegations in the Moyse Litigation. This included significant costs for documentary production, examinations for discovery, and trial.

62. In the Moyse Litigation, West Face made considerable efforts and incurred significant expense to search for, collect, identify, and produce all relevant, non-privileged documents within its possession, power or control.

63. West Face's counsel reviewed over 10,000 emails and other documents and ultimately produced over 2,800 documents in the Moyse Litigation. A first tranche of over 1,500 documents was produced on March 13, 2015, a second tranche of over 300 additional emails was produced on January 9, 2016, and a third tranche of **[over]** 1,000 additional documents was produced on April 25 and 26, 2016 in response to a request from Catalyst.

64. In total, the parties' documentary productions in the Moyse Litigation totalled more than 7,300 documents. Catalyst produced approximately 3,400 documents, West Face produced over 2,800 documents, and Mr. Moyse produced over 1,100 documents. Oral examinations for discovery were also conducted.

65. If the New Litigation is permitted to proceed, West Face will be required to re-incur significant additional expenses in searching for, collecting, and identifying a highly

overlapping set of documents; conducting examinations for discovery; and proceeding to trial.

D. THE NEW LITIGATION IS PRECLUDED BY CAUSE OF ACTION ESTOPPEL, ISSUE ESTOPPEL AND/OR ABUSE OF PROCESS

66. As described above, Justice Newbould has made numerous findings in the Moyse Litigation that are fatal to Catalyst's claims in the New Litigation.

67. Justice Newbould's Decision is final and binding on West Face and Catalyst, subject only to Catalyst's appeal in the Moyse Litigation. They cannot be re-litigated in these proceedings, or collaterally attacked.

68. This Court has the inherent jurisdiction to prevent an abuse of its processes. Allowing the New Litigation to proceed amounts to re-litigation of the Moyse Litigation, would risk inconsistent judgments, and bring the administration of justice into disrepute.

E. THE NEW LITIGATION SHOULD BE TRANSFERRED TO THE COMMERCIAL LIST AND THE JURY NOTICE SHOULD BE STRUCK OUT

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

70. 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.

71. 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. 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.

72. 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.

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

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

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

76. 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 cause of action estoppel, issue estoppel, collateral attack, and abuse of process.

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

78. In the alternative, the pith and substance of Catalyst's claims of misuse of confidential information by West Face 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.

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

F. OTHER GROUNDS

80. Multiplicity of legal proceedings should be avoided.

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

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

83. 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.

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

85. The inherent jurisdiction of the Court.

86. 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:

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

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

89. The Trial Record from the Moyse Litigation.

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

91. The Affidavit of Andrew Carlson to be sworn.

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

September 30, 2016

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TO: **SEE SERVICE LIST**
(Service List attached)

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

Court File No. CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT Toronto

NOTICE OF MOTION

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