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

STATEMENT OF DEFENCE
OF WEST FACE CAPITAL INC.

1. The Defendant, West Face Capital Inc. ("**West Face**"), admits the allegations contained in paragraphs 11, 13, 14 and 46 of the Statement of Claim (the "**Claim**").

2. West Face denies that the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), is entitled to any of the relief claimed in paragraph 1 of the Claim, denies all other allegations in the Claim except as expressly admitted herein, and puts Catalyst to the strict proof thereof.

Overview

3. This action represents the third proceeding in which Catalyst has attempted to challenge, or seek relief in respect of, West Face's participation in the

successful acquisition of WIND Mobile Corp. ("**WIND**") in September 2014. As described below, Catalyst is a disgruntled "bitter bidder" that failed to acquire WIND because of its own intransigence, as well as its tactical choices, errors in judgment and questionable conduct. Having failed in its efforts to acquire WIND, Catalyst is now engaged in serial, abusive litigation against West Face and others. Catalyst's Claim is entirely without merit and an abuse of the Court's processes.

4. With respect to the merits, there are at least four principal reasons why Catalyst's claims against West Face should be dismissed.

5. First, West Face and its co-investors did not have or misuse in any way Catalyst's confidential information. They acquired WIND from the Defendant VimpelCom Ltd. ("**VimpelCom**") not because of any confidential information of Catalyst, but because Catalyst was unable to meet VimpelCom's desire to minimize and/or mitigate risk of regulatory approval by the Government of Canada. By contrast, by August 2014 West Face and its co-investors were willing to buy VimpelCom's interest in WIND on an "as is, where is" basis without asking for or needing regulatory approval from the Government of Canada.

6. Catalyst's proposed transaction would also have failed in any event because Catalyst was determined to obtain regulatory concessions from the Government in a manner that gave rise to regulatory approval risks and was therefore inimical to the interests of VimpelCom. Most notably, those concessions included the irrevocable grant to Catalyst by the Government of Canada of the unrestricted right to

sell or transfer the wireless spectrum of WIND after five years to incumbent wireless carriers such as Rogers, Bell or Telus (the "**Spectrum Transfer Concession**").

7. Second, West Face did not conspire with any other party to induce VimpelCom to breach its exclusivity agreement with Catalyst regarding the potential sale of WIND. While West Face participated with the Defendants Tennenbaum Capital Partners LLC ("**Tennenbaum**") and LG Capital Investors LLC ("**LG Capital**", and together with West Face and Tennenbaum, the "**New Investors**"), in making an unsolicited offer to VimpelCom in August 2014 during the period that VimpelCom was engaged in exclusive negotiations with Catalyst, that offer was not unlawful, improper or actionable in any way. Neither VimpelCom nor Catalyst provided West Face with a copy of any exclusivity agreement they may have entered into, or advised West Face of the terms of that agreement. In any event, Catalyst's exclusivity arrangements with VimpelCom did not prohibit or preclude West Face or any other prospective purchaser from making unsolicited offers to acquire WIND.

8. Third, the unsolicited offer made by the New Investors had no effect on VimpelCom's decision not to enter into a Share Purchase Agreement with Catalyst. VimpelCom did not breach its exclusivity agreement with Catalyst, did not ask Catalyst to match or exceed the terms of the unsolicited offer of the New Investors, and did not discuss or negotiate the unsolicited offer with West Face or other New Investors during Catalyst's period of exclusivity. After enjoying almost a month of exclusive negotiations with VimpelCom, Catalyst failed to acquire WIND because it was unwilling to accept terms that VimpelCom requested concerning the payment of a break fee, even though Catalyst could easily have done so. Instead, Catalyst made the tactical choice to play

"hardball" with VimpelCom by rejecting VimpelCom's request out of hand, permitting its period of exclusivity with VimpelCom to expire, and encouraging VimpelCom to consider other offers for the acquisition of WIND. Catalyst made that choice based on the advice of its highly experienced legal and financial advisors.

9. Fourth, even if Catalyst had been willing and able to execute a Share Purchase Agreement with VimpelCom in August 2014 (which it was not), it would not have completed the transaction contemplated in that Agreement. The Share Purchase Agreement that Catalyst negotiated with VimpelCom expressly prohibited Catalyst from pursuing regulatory concessions from the Government of Canada, including the Spectrum Transfer Concession, in the period between signing the Agreement and closing (the "**Regulatory Concession Prohibition**"). However, Catalyst did not believe that WIND would be a viable investment unless the Government of Canada granted to Catalyst the Spectrum Transfer Concession. For this reason, the completion by Catalyst of its proposed acquisition of WIND turned on the grant to it by the Government of Canada of the very Concession the proposed Share Purchase Agreement precluded Catalyst from seeking.

10. By its own admission, Catalyst planned to breach the Regulatory Concession Prohibition immediately after entering into the proposed Share Purchase Agreement with VimpelCom by continuing to insist that the Government of Canada grant to it the Spectrum Transfer Concession during the period between the signing of the Agreement and closing. Moreover, Catalyst intended to prevent the completion of the transaction provided for in the Agreement if it was unable to obtain that Concession from the Government of Canada. In that regard, the Government made clear to

Catalyst and its advisors on a number of occasions that it would not grant to Catalyst the regulatory concessions Catalyst was seeking, including the Spectrum Transfer Concession. Even if Catalyst had been able to conclude a Share Purchase Agreement with VimpelCom, its continued pursuit of and inability to obtain that Concession would have placed Catalyst squarely in breach of its obligations to VimpelCom, and rendered Catalyst unwilling and unable to acquire WIND.

11. Catalyst's Claim should also be dismissed as an abuse of process, for numerous reasons.

12. Among other things, Catalyst's Claim constitutes litigation-by-installment, and a vehicle used by Catalyst to mount collateral attacks on rulings made by the Honourable Justice Newbould of the Commercial List in earlier litigation between West Face and Catalyst concerning the acquisition by West Face and other investors of WIND (the "**Moyse Litigation**", as described further below). Catalyst's Claim against West Face is also barred by the doctrines of issue estoppel and cause of action estoppel.

13. Catalyst was in possession of all material facts necessary to assert the causes of action set out in the Claim by as early as September 2014, or in the alternative by no later than March 2015. Catalyst could have added its additional claims and causes of action to the Moyse Litigation before that Litigation proceeded to trial in June 2016, but made the tactical choice not to do so. Moreover, Catalyst's Claim in these proceedings is flatly inconsistent with Catalyst's claims in the Moyse Litigation.

14. In the Moyse Litigation, Catalyst alleged that West Face acquired its interest in WIND because Brandon Moyse, a former junior analyst at Catalyst who was employed briefly by West Face over several weeks in June and July, 2014, provided to West Face confidential information of Catalyst concerning Catalyst's strategy to acquire WIND. The Moyse Litigation was decided by Justice Newbould in Reasons issued on August 18, 2016. After hearing evidence from multiple lay and expert witnesses, including Mr. Moyse, representatives of West Face, and all of the principals of Catalyst, Justice Newbould dismissed in their entirety all of Catalyst's claims against both West Face and Mr. Moyse. In doing so, Justice Newbould found as a fact that Mr. Moyse did not convey to West Face confidential information of Catalyst concerning WIND, either prior to, during or following his brief period of employment with West Face. Justice Newbould also found as a fact that: (i) the unsolicited offer made to VimpelCom by West Face and other investors in August 2014 played no role in VimpelCom's decision not to enter into a Share Purchase Agreement with Catalyst; (ii) Catalyst failed to complete its proposed acquisition of WIND because it refused to accept, or even to negotiate, VimpelCom's request for a break fee; and (iii) Catalyst would never have completed its proposed acquisition of WIND because it could not have obtained regulatory concessions from the Government of Canada that it required before doing so, including the Spectrum Transfer Concession.

15. Having failed entirely in the Moyse Litigation, Catalyst now asserts in these proceedings that it was UBS and VimpelCom that disclosed Catalyst's confidential information to West Face, rather than Mr. Moyse. Catalyst's attempt to raise inconsistent allegations and conflicting claims against West Face in this proceeding in

respect of the very same transaction that was the subject of the Moyse Litigation is manifestly unfair and an abuse of process. Catalyst's tactical maneuvering and repetitive claims give rise to a risk of inconsistent judicial decisions, are inimical to the bedrock principle of finality in litigation, and cast the administration of justice into disrepute. Catalyst's Claim against West Face should be dismissed or permanently stayed on that basis alone.

The Parties

16. West Face is an investment manager based in Toronto that has carried on business since 2006. West Face manages a number of funds and accounts covering a broad range of investment strategies. Its investments are in publicly traded as well as privately negotiated securities, and include positions in common equities, bonds, convertible debentures and distressed debt situations.

17. West Face's investment strategies are directed by its four Partners: Greg Boland, Tom Dea, Peter Fraser and Anthony Griffin. The four Partners have decades of experience in the investment industry.

18. West Face and its Partners also have long-standing experience and expertise in the telecommunications sector, having invested in Canadian and U.S. telecom companies prior to the events that are the subject of Catalyst's Claim.

19. Catalyst is also a Toronto-based investment firm. Catalyst's stated focus is on making investments in distressed and undervalued Canadian entities that it seeks to control or influence. Catalyst is largely dominated and controlled by its founder,

Newton Glassman. The three principals of Catalyst are Mr. Glassman, James Riley and Gabriel De Alba.

Background to WIND Mobile Transaction

20. WIND was founded in 2008 in anticipation of the federal auction of so-called "AWS-1" wireless spectrum that year, with the intention of becoming a new Canadian wireless carrier to challenge incumbents like Rogers, Telus, and Bell. Wireless spectrum is the medium through which wireless companies transmit voice and data signals for their customers, and is therefore the foundation of any wireless telecommunications company.

21. WIND was founded as a joint venture between AAL Corp. (now the Defendant Globalive Capital Inc., and referred to throughout this Defence as "**Globalive**"), a Canadian private equity firm, and Orascom Telecom Holding S.A.E., a large Egyptian multi-national telecommunications company. Globalive and Orascom held their interests in WIND indirectly through Globalive Investment Holdings Corp. ("**GIHC**").

22. To satisfy Canadian ownership requirements in place at the time, Globalive held two-thirds of the voting shares of GIHC. Orascom held 100% of the non-voting equity in addition to one-third of the voting equity, giving it two-thirds of the total equity in GIHC. Orascom also funded WIND's initial acquisition of wireless spectrum by making substantial shareholder loans. The CRTC initially blocked WIND's launch on the basis that its ownership structure did not satisfy Canadian ownership requirements.

WIND was only permitted to commence operations when the Federal Cabinet intervened and overruled the CRTC.

23. In 2011, VimpelCom acquired the majority shareholder of Orascom and, indirectly, Orascom's equity and debt interests in WIND. Regulatory approval was not required for this transaction because it did not trigger a change of control of WIND. Instead, majority voting control of WIND continued to rest with Globalive.

24. In 2012, regulatory changes modified or eliminated certain restrictions on the foreign ownership of smaller telecommunications service providers such as WIND. However, other restrictions remained, including restrictions under the *Investment Canada Act* on foreign investments perceived as being injurious to national security. The Minister of Industry retained the authority to veto any proposed transfer of WIND's wireless spectrum. Indeed, the spectrum transfer guidelines specifically stated that Industry Canada would not approve of transfers that would result in an "undue concentration" of spectrum.

25. Notwithstanding these changes to the regulatory regime, VimpelCom was unable to either acquire 100% ownership of WIND or divest its own shares. By November 2013, VimpelCom had become increasingly frustrated by the positions taken by the Government of Canada. By then, WIND's indebtedness to VimpelCom had ballooned to approximately $1.5 billion as a result of ongoing capital investments and operating losses of WIND that VimpelCom had funded.

26. Further complicating VimpelCom's position, approximately $150 million in debt owed by WIND to third parties that had supplied it with equipment used to build

and operate WIND's wireless network was scheduled to come due on April 30, 2014 (the "**Vendor Debt**"). WIND did not have the resources to repay the Vendor Debt, and VimpelCom had no interest in investing additional funds to re-pay this Debt on WIND's behalf.

27. West Face, as a Canadian investment firm with a particular interest in the telecommunications industry, had been following WIND for years and was therefore aware of the regulatory challenges faced first by Orascom and then by VimpelCom. West Face was also aware of the impending deadline for the repayment by WIND of the Vendor Debt.

West Face Approached About Investing in WIND

28. Contrary to the suggestion of Catalyst in paragraph 36 of the Claim, West Face's pursuit of an investment in WIND began in the Fall of 2013 when West Face was approached by Anthony Lacavera, the principal of Globalive and the CEO of WIND. West Face delivered an initial expression of interest to VimpelCom in November 2013. Shortly thereafter, in December 2013, West Face entered into a Confidentiality Agreement with VimpelCom, and commenced due diligence concerning the business and operations of WIND.

29. By contrast, Catalyst did not commence due diligence on WIND until May 2014, and had not engaged a financial advisor or conducted serious negotiations with VimpelCom before that time.

30. In the period from April to June 2014, West Face made a series of indicative offers to acquire some or all of VimpelCom's interests in WIND. None of

those offers was acceptable to VimpelCom. As a result of its discussions and negotiations with VimpelCom, however, West Face learned the principal terms on which VimpelCom was prepared to dispose of its interests in WIND:

(a) VimpelCom wanted to proceed on the basis of a total enterprise value for WIND of approximately $300 million (of which approximately $150 million was attributable to the repayment of WIND's Vendor Debt);

(b) VimpelCom wanted to sell 100% its debt and equity interests in WIND; and

(c) VimpelCom wanted to proceed quickly to complete a straightforward transaction with minimal conditions or risks associated with obtaining regulatory approval.

In short, VimpelCom wanted a clean and expeditious exit from its investment in WIND with minimal completion risk.

31. During this period in 2014, West Face also engaged in informal discussions with various parties, including Tennenbaum and LG Capital, about the possibility of working together to pursue an acquisition of WIND. However, West Face decided not to work with Tennenbaum or LG Capital at that time.

32. In June and July 2014, West Face engaged in discussions with a confidential strategic investor, not a party to this action, about co-operating to pursue a potential acquisition of WIND. Ultimately, this investor declined to proceed. West Face therefore re-engaged in discussions with Tennenbaum and LG Capital in mid-July 2014

to determine whether they were interested in participating in an offer to VimpelCom. All three parties (referred to herein as the New Investors) had previously entered into Confidentiality Agreements with VimpelCom. They therefore sought and obtained permission from VimpelCom to share with each other information concerning WIND that they had learned by conducting due diligence in the period after those Agreements were entered into.

33. Contrary to the allegations of Catalyst in paragraph 45 of the Claim, the New Investors were not collaborating then with the Defendants Serruya Private Equity Inc. ("**Serruya**") and Novus Wireless Communications Inc. ("**Novus**"). Rather, Serruya and Novus were brought to the deal by Globalive a month or so later, as described in more detail below. Globalive did not join with West Face to acquire WIND until after Catalyst's period of exclusive negotiations with VimpelCom expired on August 18, 2014.

West Face Did Not Conspire to Induce a Breach of Catalyst's Exclusivity Agreement with VimpelCom

34. On July 23, 2014, Catalyst entered into an exclusivity agreement with VimpelCom that prohibited VimpelCom from negotiating with any other party during the period of that agreement. Contrary to the allegations of Catalyst in paragraphs 49 and 50 of the Claim, West Face did not receive a copy of that agreement from VimpelCom, UBS, Globalive, Catalyst or from anyone else, and did not know at the time that Catalyst was party to an exclusivity agreement with VimpelCom. Nor did West Face know the terms of any such agreement. Rather, Catalyst only disclosed to West Face a copy of its exclusivity agreement with VimpelCom in March 2016 during the course of the Moyse Litigation.

35. West Face learned from another potential investor in late July 2014 that VimpelCom had entered into exclusivity arrangements with a potential purchaser of WIND. West Face believed, but did not know, that Catalyst was the party in exclusivity with VimpelCom. West Face reached that conclusion based on: (i) Catalyst's publicly-reported interest in WIND (including public statements made by Mr. Glassman); (ii) Catalyst's efforts to raise money in the financial markets; (iii) the fact that by then all other credible bidders had either dropped away or were co-operating with West Face; and (iv) the fact that Catalyst had disclosed to West Face in the Moyse Litigation that it was actively pursuing a distressed investment in the telecommunications industry.

36. In his Decision in the Moyse Litigation, Justice Newbould held that in the context of what was occurring in the marketplace at the time, this disclosure by Catalyst to West Face was "a very strong indication to West Face from Catalyst itself through its counsel that Catalyst had made a bid for Wind". In short, Catalyst supplied to West Face sufficient information to enable West Face to make an educated guess that Catalyst was very likely the party VimpelCom had entered into exclusivity arrangements with. As found by Justice Newbould, "there was sufficient information in the marketplace for West Face to put two and two together to believe or presume Catalyst was a bidder".

37. Well before Mr. Moyse commenced his brief period of employment with West Face in June 2014, West Face established an ethical wall that had the purpose and effect of ensuring that Mr. Moyse had no involvement whatsoever in West Face's efforts to acquire WIND. More generally, however, West Face was well aware of Catalyst's litigious reputation, was already embroiled in the Moyse Litigation with

Catalyst, and ensured that it did not receive confidential information of Catalyst from any source. West Face expressly denies the allegation of Catalyst in paragraph 75 of the Claim that West Face received or misused any confidential information of Catalyst, either from Mr. Lacavera or from anyone else.

38. During the period of Catalyst's exclusivity from July 23 to August 18, 2014, neither VimpelCom nor its advisors engaged in negotiations of any kind with West Face. Nor did VimpelCom or its advisors provide to West Face information concerning WIND or pertaining to offers made or positions taken by Catalyst in its discussions and negotiations with VimpelCom. Contrary to Catalyst's allegations in paragraphs 75 and 76 of the Claim, neither Mr. Lacavera nor anyone else communicated to West Face confidential information concerning the details or status of Catalyst's negotiations with VimpelCom.

39. Contrary to Catalyst's allegations in paragraphs 51 to 57 and 67 and 68 of the Claim, at no time did West Face participate in a conspiracy to induce VimpelCom to breach its exclusivity agreement with Catalyst. Indeed, to West Face's knowledge VimpelCom did not breach its exclusivity obligations to Catalyst in any way. VimpelCom certainly did not do so in its dealings with West Face.

40. The only substantive communications that West Face had or participated in with VimpelCom during Catalyst's period of exclusivity occurred on August 6 and 7, 2014. On August 6, the New Investors sent to VimpelCom an unsolicited, informal offer for WIND, followed the next day by a more formal unsolicited proposal. The New Investors' proposal was not based on or the product of confidential information

concerning Catalyst's discussions or negotiations with VimpelCom, or concerning Catalyst's regulatory strategy. In fact, neither West Face nor the other New Investors had information of that nature. Instead, their proposal was simple and straightforward, and was based on VimpelCom's previously expressed preference for a clean exit from its investment in WIND based on a $300 million enterprise value with minimal regulatory risk. Justice Newbould found as a fact that "the proposal was unsolicited and sent to VimpelCom without any substantive communciations with VimpelCom since the exclusivity period had commenced on July 23, 2014."

41. The New Investors offered to purchase only VimpelCom's debt and equity interests in WIND—not Globalive's majority voting equity position. By leaving majority voting control in Globalive's hands and avoiding a change of control of WIND, the offer of the New Investors made it unnecessary to obtain regulatory approval for their proposed transaction with VimpelCom, and gave VimpelCom the clean, low risk exit it was seeking. It would be up to the New Investors to negotiate an agreement with Globalive after acquiring VimpelCom's interests.

42. In the period before its exclusivity obligations to Catalyst expired on August 18, 2014, VimpelCom took no steps to negotiate with the New Investors. It did not make a counter-offer or give the New Investors any feedback on their offer whatsoever, other than to say that VimpelCom was still in exclusivity and could not communicate further with the New Investors unless and until exclusivity expired.

43. In or around September 2014, Catalyst was aware that the New Investors had made an unsolicited offer to VimpelCom, and that the offer was made during

Catalyst's period of exclusivity. It made no complaint to West Face, Tennenbaum or LG Capital. Nor did Catalyst amend its Claim against West Face in the Moyse Litigation to include claims or allegations concerning that offer, or pertaining to any alleged breach by VimpelCom of its exclusivity obligations to Catalyst.

44. As stated above, Globalive did not participate in the unsolicited offer of the New Investors. Instead, shortly after the New Investors made their offer to VimpelCom on August 7, 2014, Globalive informed the New Investors that it had entered into a Support Agreement with VimpelCom. Globalive had no further discussions or negotiations with the New Investors concerning WIND until after VimpelCom's period of exclusivity came to an end on August 18, 2014. Indeed, Justice Newbould found as a fact that "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."

The Failure of Catalyst's Negotiations With VimpelCom

45. The facts set out below were not known to West Face at the time of the events in question, but rather were learned by West Face during the course of the Moyse Litigation. These facts were explored in considerable detail, in open court, during the trial of the Moyse Litigation before Justice Newbould in June 2016.

46. Catalyst's negotiations with VimpelCom failed in August 2014 not because of anything said or done by West Face or the other Defendants, but because Catalyst was unwilling to satisfy, or even to negotiate, VimpelCom's request for a break fee during negotiations between those parties concerning the finalization of their proposed

Share Purchase Agreement. VimpelCom's request for a break fee stemmed from its concerns pertaining to regulatory risks.

47. There were two regulatory issues associated with a sale of WIND, but only one was ever in dispute between Catalyst and VimpelCom. The first, non-controversial issue, was that any sale of majority voting control of WIND (*i.e.*, including some or all of Globalive's voting equity) required regulatory **approval** by the Government of Canada. This was acknowledged and accepted both by Catalyst and by VimpelCom at all material times. Indeed, the first draft of a Share Purchase Agreement sent by VimpelCom to prospective purchasers (including both to Catalyst and to West Face) included a closing condition that the transaction receive the necessary regulatory approvals.

48. In addition to regulatory **approval**, however, Catalyst had been pursuing a series of regulatory **concessions** from the Government of Canada in respect of its proposed acquisition of WIND from as early as March 2014, including the Spectrum Transfer Concession. As described above, WIND was subject to a number of regulatory restrictions. One of those restrictions was that the Minister of Industry had to approve any transfer of WIND's wireless spectrum licenses. The Minister of Industry and, indeed, the Prime Minister of Canada, had taken the position repeatedly that the Government of Canada would not approve any transfer of wireless spectrum from WIND to any of Canada's three wireless incumbents, namely Rogers, Telus and Bell. The Government's longstanding and publicly stated policy was to encourage the development of a fourth national wireless carrier, and allowing WIND to sell or transfer

to an incumbent the wireless spectrum it had acquired at deeply discounted prices during the AWS-1 Spectrum Auction in 2008 was flatly inconsistent with that policy.

49. As stated above, Catalyst did not believe that WIND was a viable investment without first receiving an irrevocable commitment from the Government of Canada granting to Catalyst the unrestricted right to sell or transfer WIND's wireless spectrum licenses to an incumbent after five years. In the absence of such a commitment, Catalyst did not believe that WIND could raise sufficient financing to enable it to proceed with and complete an important capital investment project involving the conversion of WIND's wireless network from antiquated third generation or "3G" technology to the latest 4G, Long-Term Evolution ("**LTE**") standard. Catalyst believed that in the absence of such a conversion, WIND could not compete successfully with incumbent carriers and was doomed to fail.

50. Despite repeated requests by Catalyst during the period from March through August 2014, the Government of Canada refused repeatedly to even consider granting to Catalyst the regulatory **concession** it had sought regarding the ability to sell or transfer WIND's spectrum licenses to an incumbent. The Government's refusal was conveyed to Catalyst on a number of occasions in unmistakably clear terms, and was confirmed to Catalyst by its own legal and government relations advisors.

51. As described above, in the period prior to August 2014 VimpelCom had endured a series of regulatory challenges and was therefore intent on ensuring that no unnecessary risks were taken in securing regulatory **approval** of any transaction it might enter into with Catalyst concerning the sale of WIND. VimpelCom did not want

the pursuit by Catalyst of regulatory **concessions** to jeopardize or delay obtaining regulatory **approval**. VimpelCom therefore negotiated successfully with Catalyst for the inclusion in the draft Share Purchase Agreement between the parties of the Regulatory Concession Prohibition that expressly precluded Catalyst, during the period between signing the Agreement and completing the proposed sale, from seeking or even discussing with the Government of Canada regulatory **concessions** permitting the sale or transfer of WIND's wireless spectrum licenses to an incumbent. In fact, the draft Agreement prohibited Catalyst from even engaging in internal analysis relating to the sale of WIND's wireless spectrum licenses to an incumbent during the period between signing and closing.

52. Under the draft Share Purchase Agreement the outside date to complete the proposed transaction was November 30, 2014, with an automatic one-month extension if the only reason closing had not occurred by then was Catalyst's failure to obtain regulatory **approval**. The three principals of Catalyst (Messrs. Glassman, Riley and De Alba) were complicit in an undisclosed plan to execute the proposed Share Purchase Agreement with VimpelCom, and then promptly breach that Agreement by doing the very thing Catalyst had agreed it would not do. During the period between signing and closing: (i) Catalyst intended to insist that the Government of Canada grant to it the Spectrum Transfer Concession referred to above concerning the sale or transfer of WIND's wireless spectrum licenses to an incumbent; (ii) if the Government of Canada persisted in its refusal to grant to Catalyst the Spectrum Transfer Concession, Catalyst intended to take whatever steps were necessary to ensure that regulatory **approval** was not granted for the proposed transaction; and (iii) Catalyst intended to

rely upon the Government's failure or refusal to grant regulatory **approval** to terminate the Share Purchase Agreement with VimpelCom.

53. Although VimpelCom was unaware of Catalyst's undisclosed plan, it was unwilling to execute a Share Purchase Agreement with Catalyst that gave VimpelCom little or no downside protection if the regulatory approval process took longer than anticipated or was unsuccessful. As a result, in mid-August 2014 VimpelCom requested that Catalyst agree to pay a break fee of $5 to $20 million in the event that the parties were unable to close the proposed transaction within two months.

54. Shortly before VimpelCom made its request for a break fee Mr. Glassman had become upset and angry over delays associated with the completion of the proposed Share Purchase Agreement between Catalyst and VimpelCom. He was harshly critical not only of VimpelCom, but also of the deal team at Catalyst (led by Mr. De Alba) and of Catalyst's external legal and financial advisors. Mr. Glassman chastised them, and in doing so made it abundantly clear that he would not tolerate additional delays or demands by VimpelCom. Immediately thereafter, when VimpelCom made its request for a break fee, Catalyst's legal and financial advisors recommended that Catalyst reject VimpelCom's request without discussion or negotiation, permit Catalyst's period of exclusivity to expire and encourage VimpelCom to explore its options. Catalyst followed this advice, and did exactly that.

55. The position taken by Catalyst in respect of VimpelCom's request for a break fee was unrelated to anything done or said by the Defendants in general, or by West Face and the other New Investors in particular. Catalyst's negotiations with

VimpelCom failed because it was unwilling to accommodate or even address VimpelCom's concerns in a constructive manner, even though it could easily have done so.

Catalyst Exclusivity Expires and the Consortium Reaches Agreement with VimpelCom

56. Once Catalyst's period of exclusivity expired on August 18, 2014, the New Investors, Globalive, and two additional investors known to Globalive (Serruya and Novus) (together, the "**Consortium**") attempted to persuade VimpelCom to engage with them in negotiations concerning the sale of VimpelCom's interest in WIND. At the time, VimpelCom was considering taking the necessary steps to cause WIND to file for protection under the *Companies' Creditors Arrangement Act* in an effort to recover at least a portion of its investment in WIND through the related insolvency process. VimpelCom was initially resistant and not interested in entertaining the proposal of the Consortium. VimpelCom did not believe that members of the Consortium were credible bidders given their inability to put forward an acceptable proposal concerning the acquisition of WIND in the period before VimpelCom entered into exclusivity with Catalyst on July 23, 2014.

57. Ultimately, however, the members of the Consortium succeeded in persuading VimpelCom to negotiate with them. On August 25, 2014, VimpelCom granted members of the Consortium exclusive negotiating rights. Approximately three weeks later, on September 16, 2014, the parties signed and closed an agreement by which an acquisition vehicle created by the Consortium acquired VimpelCom's interests in WIND based on an enterprise value of $300 million. That transaction did not involve

a change of control of WIND, since Globalive continued to be the majority voting shareholder, and as a result did not require regulatory approval. Nor did it require or depend on the grant to members of the Consortium of regulatory concessions. In a subsequent transaction that did not involve VimpelCom, members of the Consortium agreed to restructure Globalive's ownership position to align their voting interests in WIND with their overall equity contributions. Members of the Consortium obtained regulatory approval before implementing that transaction.

58. During the period from the expiry of Catalyst's period of exclusivity on August 18 to the closing of this transaction with VimpelCom on September 16 – including during the period starting on August 25 when VimpelCom was engaged in exclusive negotiations with the Consortium – Catalyst continued to solicit VimpelCom to negotiate for the acquisition of WIND. Catalyst was well aware of VimpelCom's exclusivity arrangements with the Consortium, but proceeded on the basis that those arrangements did not bind Catalyst or fetter its ability to pursue a proposed acquisition of WIND. Catalyst was unable or unwilling to present a superior proposal to the one made by the Consortium, however, with the result that the Consortium acquired WIND, rather than Catalyst.

Catalyst Has Not Suffered Any Damages

59. Catalyst has not suffered any damages for which West Face is responsible, either in fact or in law. Further, and in any event, the damages claimed by Catalyst are excessive and remote, and not recoverable in law.

60. Contrary to Catalyst's allegations in paragraph 93 of the Claim, Catalyst suffered no detriment from the acquisition of WIND by the Consortium. For the reasons described above, Catalyst would not have acquired WIND even absent the involvement of members of the Consortium, including West Face. Catalyst was (and is) the author of its own misfortune, both in its dealings with the Government of Canada and in its dealings with VimpelCom. It made extraordinary and unwarranted demands of the Government that the Government refused repeatedly to accede to, and rejected outright a straightforward request of VimpelCom that Catalyst could easily have accepted. Catalyst made these decisions at the insistence of Mr. Glassman, and has only itself to blame for its failure to acquire WIND.

Abuse of Process

A. Litigation by Installment

61. This Claim against West Face amounts to litigation by installment, and is therefore an abuse of process. Catalyst's Claim is also precluded by the doctrine of cause of action estoppel. Catalyst was aware of the events on which it relies in asserting this Claim in September 2014, or in the alternative, by March 2015 at the latest. The events giving rise to Catalyst's Claim against West Face in these proceedings are largely identical to the events underlying its claims against West Face in the Moyse Litigation, and Catalyst made the tactical choice not to pursue all of its claims against West Face in the Moyse Litigation concerning its participation in the acquisition of WIND. The circumstances in which Catalyst became aware of the events that underlie its Claim are described below.

62. Contrary to the allegations of Catalyst in paragraphs 95 to 99 of the Claim, Catalyst did not first discover the circumstances by which West Face and other investors acquired WIND in January 2016 in connection with proceedings pertaining to approval by the Court of the Plan of Arrangement by which the Consortium sold WIND to Shaw Communications Inc.

63. Eighteen months earlier, in June 2014, Catalyst commenced the Moyse Litigation in connection with the hiring of Mr. Moyse by West Face. By September 2014 at the latest, Catalyst had been informed by VimpelCom's legal counsel, Bennett Jones LLP, that the New Investors had made an unsolicited offer to VimpelCom during Catalyst's period of exclusivity. In October 2014, Catalyst amended its pleadings in the Moyse Litigation to assert that West Face had acquired its interest in WIND by misusing confidential information of Catalyst allegedly provided to it by Mr. Moyse, concerning Catalyst's bidding strategy for WIND. In December 2014, Catalyst further amended its pleadings in the Moyse Litigation to seek relief in the form of a constructive trust over West Face's interest in WIND and/or an accounting of any profits West Face might receive on the sale or disposition of that interest.

64. On January 13, 2015, Catalyst served a Motion to enjoin West Face from participating in the management and/or strategic direction of WIND. In response to that Motion, on March 9, 2015, West Face delivered a detailed Affidavit sworn by its partner Anthony Griffin that explained West Face's participation in the acquisition of WIND, and that Mr. Moyse played no role whatsoever in that acquisition. Mr. Griffin's Affidavit made clear that:

(a) The New Investors worked together in July and August 2014 to prepare an offer that would be acceptable to VimpelCom;

(b) Representatives of Globalive, including Mr. Lacavera, had various communications with West Face and other New Investors before Globalive entered into a Support Agreement with VimpelCom on August 7, 2014;

(c) The New Investors made an unsolicited offer to VimpelCom on August 6 and 7, 2014; and

(d) After Catalyst's period of exclusivity expired on August 18, 2014, members of the Consortium proceeded to negotiate, sign and close an agreement with VimpelCom on September 16, 2014.

65. Contrary to the allegations of Catalyst in paragraph 98 of the Claim, the affidavits filed by West Face in connection with the Plan of Arrangement proceedings in January 2016 did not reveal any new or material information about the acquisition of WIND by the Consortium. On the contrary, those affidavits simply confirmed facts that had previously been described in detail in Mr. Griffin's Affidavit some ten months earlier, and had first been disclosed to Catalyst by Bennett Jones in September 2014. Catalyst initially opposed approval by the Court of the proposed Plan of Arrangement insofar as implementing the Plan might affect Catalyst's claim in the Moyse Litigation for a constructive trust over West Face's interest in WIND.

66. The allegations of Catalyst in paragraph 98 of the Claim in this proceeding regarding the timing of Catalyst's discovery of the circumstances by which West Face and other members of the Consortium acquired WIND are barred by the doctrines of issue estoppel, collateral attack and abuse of process. This issue has already been decided against Catalyst by Justice Newbould during the Plan of Arrangement proceedings referred to above, *Re. Mid-Bowline Group Corp*, Court File No. CV-15-11238-00CL. In his Reasons for Decision dated January 26, 2016, reported at 2016 ONSC 669, Justice Newbould held that Catalyst was aware of the facts underlying its claim for inducing breach of contract by no later than March 2015:

> [I]t is quite clear that the information regarding the unsolicited bid was known by [Catalyst] 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.
>
> …
>
> This intended action [for inducing a breach by VimpelCom of its exclusivity obligations to Catalyst] has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. **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.

67. Justice Newbould ordered an expedited trial of an issue in respect of the request for approval of the proposed Plan of Arrangement, and in doing so ordered that the hearing concerning approval of the Plan of Arrangement was not to consider any

claim by Catalyst for inducing breach of contract. That order was made for two reasons. First, the Plan of Arrangement approval hearing pertained to a pending, uncompleted commercial transaction and was scheduled to occur several weeks later, in February 2016, on an expedited basis. There was insufficient time to prepare and try the inducing breach claim in the Plan of Arrangement proceedings.

68. Second, Justice Newbould decided that it was unfair for Catalyst, in its efforts to derail approval by the Court of the proposed Plan of Arrangement, to lie in the weeds and only threaten at the last possible moment a possible inducing breach claim that it had been aware of for many months. There was no reason why Catalyst could not have asserted its inducing breach claim in September 2014 when the Consortium acquired WIND, or in March 2015 when Catalyst received Mr. Griffin's detailed affidavit describing how the Consortium had done so.

69. Significantly, Justice Newbould's Order in this regard was made in the Plan of Arrangement proceedings, rather than in the Moyse Litigation, and did not limit in any way the scope or content of claims that Catalyst could or should have asserted in the Moyse Litigation.

70. As it happened, no trial of an issue in relation to the approval by the Court of the proposed Plan of Arrangement was ever held. Instead, issues raised by Catalyst surrounding the approval of the Plan of Arrangement were resolved consensually. The proposed Plan of Arrangement was approved by Justice Newbould on February 3, 2016, and was implemented shortly thereafter.

71. In early February 2016 the parties to the Moyse Litigation agreed to a schedule of procedural steps leading up to the trial of that Litigation. The schedule provided that as the first step, Catalyst would deliver a Further Amended Statement of Claim setting out all of the claims Catalyst proposed to assert at trial. This occurred prior to documentary and oral discoveries in the Moyse Litigation, and gave Catalyst ample opportunity to plead any additional claims or allegations it may have had against West Face in respect of its participation in the acquisition of WIND, including claims of inducing breach.

72. Catalyst did, in fact, deliver a Further Amended Statement of Claim in the Moyse Litigation on February 25, 2016, but made the tactical choice not to assert additional claims against West Face at that time. Instead, Catalyst chose to lie in the weeds a second time, until it ultimately commenced its Claim in this proceeding four business days before the trial of the Moyse Litigation began in June 2016.

73. Catalyst's tactic of engaging in litigation by installment against West Face is unfair and prejudicial for a host of reasons, including because it permits Catalyst to advance mutually inconsistent claims against West Face in respect of the very same transaction. In the Moyse Litigation, Catalyst claimed unsuccessfully that West Face acquired WIND because of its misuse of confidential information about Catalyst's negotiating strategy that Brandon Moyse had allegedly obtained in his capacity as an employee of Catalyst before his departure from Catalyst in May 2014. In this litigation, Catalyst now claims that West Face acquired WIND because of its misuse of confidential information about Catalyst's exclusive negotiations with VimpelCom that only arose in July and August 2014, well after Mr. Moyse departed from Catalyst. It is

only by engaging in litigation by installment that Catalyst can advance these inconsistent claims in such a manner.

74. In the circumstances, Catalyst's conduct in commencing this Claim is seriously prejudicial to West Face and brings the proper administration of justice into disrepute. The Claim is an abuse of process, is also barred by the doctrine of action estoppel, and should be dismissed or permanently stayed.

B. Issue Estoppel and Collateral Attack

75. As noted above, on August 18, 2016, Justice Newbould released his Reasons for Decision in the Moyse Litigation. In rendering his Decision, Justice Newbould had the benefit of: (i) over 30 affidavits from 17 different affiants, including affidavits filed by way of evidence in chief; (ii) transcripts of pre-trial cross-examinations of many of those affiants; (iii) live examinations-in-chief and cross-examinations at trial of 13 lay and expert witnesses; (iv) hundreds of documents introduced as evidence at trial; and (v) detailed written and oral closing submissions. Justice Newbould dismissed in their entirety all of Catalyst's claims. In doing so, he made numerous findings against Catalyst that cannot be re-litigated or challenged in this proceeding as a result of the doctrines of cause of action estoppel, issue estoppel, collateral attack and abuse of process. Those findings are fatal to Catalyst's latest claims against West Face.

76. Two of Justice Newbould's findings are of particular significance to the claims asserted against West Face in this proceeding. First, Justice Newbould found that the unsolicited offer of the New Investors of August 6 and 7 did not affect

VimpelCom's negotiations with Catalyst in the period before Catalyst's period of exclusivity expired on August 18, 2014:

> [127] 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.
>
> [128] 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 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 [of Faskens, Catalyst's legal advisors] 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."
>
> [129] 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.

77. Second, Justice Newbould held that Catalyst had failed to establish that it suffered any damages arising from conduct engaged in by West Face because Catalyst would not have completed its proposed acquisition of WIND even if it had completed and executed a Share Purchase Agreement with VimpelCom:

> [130] 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.
>
> [131] 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.

78. These findings were based on Justice Newbould's assessment of the credibility of the witnesses that testified at trial in the Moyse Litigation, and cannot be challenged collaterally or re-litigated. They are fatal to Catalyst's claims against West Face in this proceeding. Because West Face's conduct had no effect on VimpelCom's

negotiations with Catalyst, and Catalyst would never have acquired WIND in any event, Catalyst cannot have suffered compensable loss or harm because of conduct of West Face complained of in this proceeding. Nor could West Face have induced a breach of VimpelCom's exclusivity obligations to Catalyst. For these reasons as well, Catalyst's Claim must be dismissed or permanently stayed against West Face.

Relief Requested

79. West Face requests that this action be dismissed or permanently stayed against it, with costs payable to West Face on a full or substantial indemnity basis.

September 30, 2016

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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