Court File No. CV-15-530726

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and
CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

VERITAS INVESTMENT RESEARCH CORPORATION and
WEST FACE CAPITAL INC.

Defendants

COMPENDIUM OF THE RESPONDING PARTY THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

May 25, 2017

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Court File No. CV-15-530726

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Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

CLAIM

1. The Plaintiffs claim against the Defendants, on a joint and several basis:

   (a) A declaration that the Defendants defamed the Plaintiffs;

   (b) Damages in the amount of fifty million dollars ($50,000,000.00) for defamation, conspiracy and intentional interference with economic relations;

   (c) Punitive or aggravated damages in the amount of $5,000,000.00;

   (d) Prejudgment and postjudgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

   (e) The costs of this action, plus the applicable taxes; and

   (f) Such further and other relief as to this Honourable Court may seem just.

A. The Parties

2. The Plaintiff The Catalyst Capital Group Inc. ("Catalyst") is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

3. The Plaintiff Callidus Capital Corporation ("Callidus") is a corporation with its head office located in Toronto, Ontario. Callidus is a publicly traded asset-based lender that provides capital on a bridge basis to meet the financing requirements of companies that cannot access traditional lending sources.

4. Callidus engages in asset-based lending by lending to corporate businesses and taking security against the assessed or appraised value of working capital and an identifiable portfolio

of assets, which may included accounts receivable, inventory, equipment, real estate, and other assets.

5. In April 2014, Callidus made an initial public offering ("IPO") of approximately forty per cent of its issued and outstanding shares. Prior to the IPO, Callidus was wholly owned by Catalyst. Investment funds managed by Catalyst continue to own or control approximately sixty per cent of the issued and outstanding shares of Callidus.

6. The Defendant Veritas Investment Research Corporation ("Veritas") is an equity research company with its headquarters located in Toronto, Ontario. Veritas prepares and publishes investment research reports, which it distributes to its subscriber clients.

7. The Defendant West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. West Face competes with Catalyst in the special situations for control investment industry.

B. Background: Ongoing Litigation between Catalyst and West Face

8. In June 2014, Catalyst commenced an action against West Face and a former Catalyst employee Brandon Moyse ("Moyse"), for, among other things, misuse of confidential information.

9. On July 16, 2014, West Face and Moyse consented to an order (the "Interim Order") pursuant to which, among other things, Moyse agreed to preserve his records relevant to his activities since March 27, 2014 and to have his personal electronic devices, including his personal computer, forensically imaged pending further order of the Court.

20. In mid-October 2014, shortly after Catalyst amended its statement of claim in the Wind Action, West Face commenced a short-selling strategy against Callidus without conducting in-depth research to support the risks associated with such a strategy.

E. West Face and Veritas Conspire to Publish Defamatory Statements About Callidus

21. On or about December 17, 2014, three partners of West Face met with representatives of Veritas. The West Face partners in attendance were Greg Boland, West Face's CEO and co-Chief Investment Officer ("Boland"); Peter Fraser, West Face's other co-Chief Investment Officer; and Anthony Griffin. The Veritas representatives in attendance included Anthony Scilipoti, Veritas' President and CEO; Dimitry Khmelnitsky and Taso Georgopolous.

22. At this meeting, Boland informed the Veritas representatives that West Face had produced a negative report about Callidus and that West Face had engaged in a short selling strategy with respect to Callidus. Boland arranged for West Face to share its report with Veritas for the purpose of inducing Veritas into publishing a second negative report on Callidus.

23. At the December 17, 2014 meeting and/or in future communications and/or correspondence, made at times known only to the Defendants, the Defendants entered into a conspiracy to defame Callidus and Catalyst and to interfere with Callidus' economic relations by publishing false and defamatory statements about Callidus so as to induce a broad sell-off of Callidus shares (the "Conspiracy").

24. The Defendants' intended to create the impression that they had separately and independently publish negative reports about Callidus for the purpose of deceiving market participants into believing that a negative consensus was building regarding Callidus. In fact,

unbeknownst to the public, including market participants, the Defendants were acting jointly and in concert.

25. Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.

26. On or about April 16, 2015, Veritas published a report impugning Callidus and Catalyst to market participants (the "Veritas Report"). The Veritas Report was distributed to Veritas' subscribers and is available for download from its website by its customers.

F. The Defendants Defamed Catalyst and Callidus

27. The West Face Report makes the following false and defamatory statements about Callidus and Catalyst to the effect that:

(a) Callidus claims not to have realized losses on principal on Callidus-originated loans;

(b) Six of the loans Callidus has outstanding are in restructuring, bankruptcy or court proceedings;

(c) Callidus' loan book contained approximately $235 million in loan commitments that have undisclosed strong indicators of material impairment;

(d) Callidus secures its loans against undeveloped mining assets;

(e) Callidus' customers typically have negative cash flow, are in bankruptcy or are severely distressed;

(f) Callidus' public disclosure misstates the value of its loan impairment provisions;

(g) Callidus has misrepresented the quality of its loan book to its investors;

(h) Impairments in any single loan in Callidus' loan book would have a meaningful impact on its earnings and book value;

(i) Callidus is at risk of a 20% write-down of its "identified" loan book;

(j) Prior to and after the IPO, Catalyst increased the size of Callidus' loan book by taking on lower-quality loans;

(k) Callidus claims it can loan $1 billion to distressed borrowers without incurring any loan losses;

(l) Callidus is similar to a U.S. business development corporation ("BDC"); and

(m) West Face obtained its information from publicly available sources.

28. The Veritas Report makes the following false and defamatory statements about Callidus and Catalyst to the effect that:

(a) Eight of the loans Callidus originated since 2012 are in restructuring;

(b) Callidus' loan book contained approximately $235 million in loan commitments that have undisclosed strong indicators of material impairment;

(c) Callidus' customers typically have negative cash flow, are in bankruptcy or are severely distressed;

(d) Callidus' public disclosure misstates the value of its loan impairment provisions;

(e) Callidus has misrepresented the quality of its loan book to its investors;

(f) Callidus' auditors are unable to verify the fair value of loans at any given point in time and are unable to challenge its loan loss provisioning;

(g) Catalyst profited from its non-arm's length relationship with Callidus at the expense of Callidus' shareholders by, among other things, selling loans to Callidus at inflated values;

(h) Catalyst, as a "new" manager of Callidus, has increased the size of Callidus' loan book by taking on lower quality loans;

(i) Prior to and after the IPO, Catalyst increased the size of Callidus' loan book by taking on lower-quality loans;

(j) Callidus claims it can loan $1 billion to distressed borrowers without incurring any loan losses;

(k) Callidus is similar to a U.S. business development corporation ("BDC"); and

(l) Veritas obtained its information from publicly available sources.

G. Callidus Sought Retractions of the Reports

29. Between December 15, 2014 and January 28, 2015, outside counsel for Callidus and West Face exchanged correspondence regarding the West Face Report. In this exchange of correspondence, Callidus' counsel repeatedly asked to see a copy of the West Face Report because Callidus believed that the West Face Report contained false and defamatory statements about Callidus which required correction so as not to mislead the public market.

30. West Face's outside counsel refused Callidus' repeated requests for a copy of the West Face Report. Moreover, in his correspondence, West Face's outside counsel refused to confirm or deny that a report existed or had been shared with third parties, notwithstanding that this was the case.

31. By letters dated April 24 and 27, 2015, Callidus requested a retraction of the Veritas Report. Callidus informed Veritas that its report contained incorrect and/or misleading statements that, if left uncorrected, risked misleading investors in Callidus and Catalyst and the wider market.

32. Veritas refused to retract its report.

H. Damages Suffered by the Plaintiffs

33. The comments made by the Defendants as described above (the "Defamatory Comments") are defamatory, and the Defendants acted maliciously and with a reckless disregard for the truth. The West Face Report and the Veritas Report were published by the Defendants to harm Callidus and Catalyst by inducing market participants to sell their Callidus shares and/or lower their estimates of Callidus' future performance.

34. As a result of that activity, West Face profited through its short selling strategy, while Veritas sought to demonstrate to its subscribers that its research reports are capable of predicting future market activity.

35. These Defamatory Comments were not made for a proper purpose; the Defamatory Comments were made by the Defendants to gain financially from their conduct – West Face sought to profit from its short selling strategy and Veritas sought to gain financially by increasing its subscriber base through the publication of a seemingly "contrarian" report on a publicly traded company.

36. The Defendants published the Defamatory Comments in an attempt to bring Callidus' and Catalyst's reputations in the financial industry into disrepute.

37. In addition, without limiting the generality of the foregoing, Callidus has suffered damages in that its share price has been lower for a prolonged period of time than it otherwise would have been had the Defendants not made the Defamatory Comments.

I. Interference with Callidus' Economic Relations

38. By publishing the Defamatory Comments, the Defendants deceived third-party market participants into believing that Callidus' share price was overvalued and that Callidus was at risk of significant future losses. The Defamatory Comments were made to induce these market participants to sell their Callidus shares, thereby lowering its share price for a prolonged period of time.

39. In so doing, the Defendants interfered with Callidus' economic relations with its investors and caused harm to Callidus in the form of a lower share price. Callidus' ability to raise capital in future will be impaired by the Defendants' conduct. As a result, Callidus has suffered significant damages, full particulars of which will be provided prior to trial.

40. The Plaintiffs claim that an award of punitive damages is appropriate, having regard to the high-handed, wilful, wanton, reckless, contemptuous and contumelious conduct of the Defendants. Accordingly, the Defendants are liable, on a joint and several basis, to the Plaintiff for punitive damages as described in subparagraph 1(c) above.

41. The Plaintiffs propose that this action be tried at Toronto.

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Defendants

STATEMENT OF DEFENCE
OF THE DEFENDANT WEST FACE CAPITAL INC.

1. The Defendant West Face Capital Inc. admits the allegations contained in paragraphs 5, 8, 17, 18, and 21 of the Plaintiffs' Statement of Claim.

2. West Face denies all other allegations made in the Claim, except as expressly admitted below.

Overview

3. The Plaintiff, Callidus Capital Corporation, is a distressed lender that prior to April 2014 was wholly-owned by investment funds managed by the other Plaintiff, The Catalyst Capital Group Inc. After Catalyst made an initial public offering of approximately 40% of Callidus's shares in April 2014, Callidus's share price rose over 50% in the following months. Both before and after the IPO, Callidus made numerous representations of robust growth and performance of its loan book. Callidus's market capitalization was by late October 2014 over 2.5 times higher than the disclosed book value of its loans, which could only be justified economically if (a) the loans were all performing, and (b) Callidus could continue to grow its loan book without incurring higher repayment risk or lower interest rates.

12. Veritas is Canada's leading independent equity research company. Veritas provides information and advice to help its clients make investment decisions. It is not affiliated with any investment firms or dealers, and does not accept compensation from the companies it chooses to research. It does not sell securities and has no proprietary investments or underwriting operations, and is therefore able to provide conflict-free research (unlike, for example, research analysts who work for investment banks with securities underwriting and corporate advisory operations). Veritas's success depends on its reputation for providing reliable and accurate analysis to its clients.

Catalyst's Animus Towards West Face

13. The Plaintiffs alleged in their Statement of Claim that Catalyst's then-ongoing lawsuit against West Face gave West Face motive to defame, conspire against, and interfere with the Plaintiffs. These allegations are categorically false.

14. West Face's research into Callidus had nothing to do with Catalyst's lawsuit against West Face, and in fact West Face had been following Callidus since before Callidus's IPO, which occurred months before any litigation with Catalyst had arisen. West Face has a fiduciary duty to its clients to invest their funds wisely. West Face researched Callidus as an investment target, and not for any other reason. The end result of West Face's research represented West Face's best understanding of Callidus's underlying strengths and weaknesses. If Callidus's lofty share price in October 2014 had been justified by its underlying loan book and financial fundamentals, West Face's shorting of the stock would have accomplished nothing but lose money. West Face's short sale succeeded because ultimately the market concluded that Callidus was over-valued and Callidus's share price fell.

15. In fact, Catalyst's previous lawsuit against West Face was dismissed in its entirety by Justice Newbould following a trial in June 2016. It was Catalyst, not West Face, who persisted in a series of fruitless proceedings against West Face. To summarize these as briefly as possible:

Face for tactical reasons". Justice Newbould directed an expedited trial of the issue as to whether Catalyst was entitled to a constructive trust over West Face's interest in WIND Mobile for the end of February, 2016. His Honour's Reasons for Judgment are reported at 2016 ONSC 669.

(l) Shortly after Justice Newbould released his Reasons, Catalyst abandoned its claim for a constructive trust over West Face's WIND Mobile shares and consented to an Order approving the Plan of Arrangement. The parties subsequently agreed to a trial of the Moyse Action commencing on June 6, 2016.

(m) On May 31, 2016, six days before the trial of the Moyse Action began, Catalyst commenced an action for conspiracy, breach of confidence and inducing breach of contract against West Face and numerous other defendants in respect of the acquisition of WIND Mobile in September 2014. These allegations overlapped significantly with the allegations respecting WIND in the Moyse Action.

(n) The trial of the Moyse Action was ultimately heard by Justice Newbould for seven days commencing June 6, 2016. On August 18, 2016, Justice Newbould released his Reasons for Judgment dismissing Catalyst's claims against both West Face and Mr. Moyse in their entirety, with costs. In doing so, Justice Newbould made significant negative findings about the credibility of the Catalyst witnesses, particularly Mr. Glassman. Justice Newbould's Reasons are reported at 2016 ONSC 5271.

16. In sum, contrary to the allegations and insinuations in paragraphs 8 to 12, 20, and throughout the Claim, West Face does not have a history of wrongful conduct toward Catalyst, and it is not "out to get" Catalyst. Rather, Catalyst has a history of speculative, aggressive, and unsuccessful litigation against West Face. **The Moyse Action had no relevance to West Face's research into Callidus, or its decision to short-sell Callidus shares.** The only reason why the Moyse Action is at all relevant to Callidus is set out in the following section.

39. West Face specifically denies the allegations in paragraphs 23, 24, 33, 36 and 38 to 40 of the Claim that it had any intention to harm the Plaintiffs. Instead, as explained above, West Face's research into Callidus was conducted in good faith based on publicly-available information in order to support West Face's investment decisions. By short selling Callidus shares, West Face was essentially making a prediction that Callidus's share price would decline. That prediction turned out to be accurate.

West Face's Meeting with Veritas on December 17, 2014

40. West Face chose not to publish its Callidus Analysis, at least in part because it considered Catalyst and its founder Newton Glassman to be extremely litigious. West Face believed that if Catalyst obtained the Callidus Analysis, it would sue for defamation regardless of the merits of West Face's research. West Face does not know how the Plaintiffs first learned that West Face had created an internal report on Callidus. However, the Plaintiffs' letters threatening defamation proceedings in early December 2014 reinforced West Face's decision not to publish its Callidus Analysis. At this time, Callidus's share price was still over $20.

41. In early December 2014, West Face and Veritas arranged a meeting to exchange research, thoughts, and ideas (including but not limited to the subject of Callidus). West Face had considerable respect for Veritas (as Canada's leading independent research boutique in Canada), and was interested in finding out whether Veritas had conducted its own research on Callidus, and/or whether Veritas's views on Callidus corresponded with those of West Face.

42. On December 17, 2014, representatives of West Face met with representatives of Veritas for approximately an hour and a half (the "**December 17 Meeting**"). During the course of this meeting, West Face and Veritas discussed a number of topics, including Callidus. With respect to Callidus in particular, West Face told Veritas that it had been following Callidus's public disclosure and had also conducted its own research into Callidus's loan book. West Face advised Veritas that it had identified a number of Callidus's borrowers/loans, and that its research to date had raised concerns with some of the loans in Callidus's loan book.

43. Contrary to paragraph 22 of the Claim, West Face did not give Veritas a copy of the Callidus Analysis at the December 17 Meeting, or at any other time. Nor did West Face discuss any of the specific contents of its research, with the exception of a brief discussion of the public information that West Face had discovered about Xchange Technology.

44. Veritas advised West Face that it had not done any research into Callidus, but that it would consider whether to conduct its own research into Callidus. Veritas also said that if it did ultimately choose to research Callidus, it would not inform West Face of the results of any such research until it was published. The parties reached no agreement of any kind about Callidus – indeed, no agreement was ever discussed.

45. Toward the end of this meeting, Veritas asked West Face to provide it with the names of Callidus's borrowers that West Face had been able to identify through its research from public sources. West Face sent Veritas this list by email the following day. The list was titled "Estimated Partial Reconstruction of Callidus Loan Book from Public Information Sources", and contained only objective information about Callidus's loan book that West Face had been able to identify from public sources (the **"December 18 List"**). West Face also provided three links to public websites regarding bankruptcy and/or insolvency proceedings surrounding some of Callidus's loans.

46. West Face had minimal contact with Veritas after sending the December 18 List. The subsequent contact between the two firms primarily related to Veritas's soliciting West Face to become a client of its research product. As set out above, West Face never gave Veritas a copy of the Callidus Analysis. On the contrary, Veritas did its own research, independent of West Face.

Events Following December 18, 2014

47. On December 24, 2014, West Face ceased accumulating its short position in Callidus. By that time, Callidus's share price had dropped to approximately $18 per share (which was still well above book value).

48. As set out in detail above, in January 2015 Catalyst commenced a motion in the Moyse Action alleging, among other things, that West Face had obtained and misused confidential information about Callidus. West Face filed its responding motion materials on March 13, 2015. These materials included the then-current copy of West Face's Callidus Analysis, in order to demonstrate that it was based on public sources of information and not on confidential information obtained from Mr. Moyse.

49. West Face began closing out its short position beginning on March 19, 2015, and continued to do so until mid-June 2015. This involved West Face buying Callidus shares in the market in order to return shares that had previously been borrowed to be sold as part of the short-selling strategy. During that time period, when West Face was buying Callidus shares, Callidus's share price dropped from approximately $17 per share to just over $13 per share. However, on April 15, 2015, before Veritas published its report on Callidus, Callidus's share price closed at $16.82 per share.

50. On April 16, 2015, approximately one month after West Face began closing out its short position, Veritas published a report on Callidus (the "**Veritas Report**"). In the Veritas Report, Veritas highlighted various risks and concerns related to Callidus's business. However, Veritas did not provide an investment recommendation (that is, Veritas did not advise readers to buy, hold, or sell Callidus shares).

51. Veritas published the Veritas Report separately and independently of West Face. While Veritas had indicated to West Face that it was researching Callidus, West Face had no knowledge of what Veritas's research had revealed, no knowledge that Veritas was going to publish its research findings to the public nor when it would do so, and no involvement in the publication of the Veritas Report. Moreover, West Face had no knowledge that Veritas had reached similar conclusions as West Face had regarding Callidus's business and loan book.

West Face and Veritas Did Not "Conspire" to Defame Callidus or Interfere With Its Economic Relations

52. Contrary to paragraph 23 of the Claim, at no time, whether during the December 17 Meeting or at any other time, did West Face and Veritas "conspire" to defame the

(c) both Callidus and BDCs have portfolio monitoring policies and procedures in place.

(m) **"West Face Obtained Its Information From Publicly Available Sources"**

173. As set out above, West Face obtained all of its information about Callidus and its loan book from publicly available sources of information.

174. Moreover, as set out above, this Alleged Defamatory Statement does not refer to Callidus in any defamatory way.

Fair Comment

175. In the further alternative and in any event, any Alleged Defamatory Statement actually made by West Face to Veritas on or around December 17, 2014 was an honest opinion held by West Face having regard to the actual facts and information that it had discovered through its research, as described above. Any publication by West Face was a fair comment made honestly and without malice and on a matter of public interest. Callidus is a public company widely-covered by various analysts, and the quality of its loan book is of significant interest to the Canadian financial community.

West Face Did Not Intentionally Interfere with Callidus's Economic Relations

176. Contrary to paragraphs 38 and 39 of the Claim, West Face did not intentionally interfere with Callidus's economic relations with its investors.

177. Specifically, West Face did not "deceive" any of Callidus's shareholders into believing Callidus's share price was overvalued, and West Face puts the Plaintiffs to the strict proof thereof. As set out above, none of West Face's research was deceptive or false, nor was it published to any Callidus shareholder. To the extent that any of Callidus's shareholders retrieved or became aware of the version of the Callidus Analysis that West Face filed in response to Catalyst's allegations in the Moyse Action (as described above), that "publication" of the Callidus Analysis is protected by absolute privilege and cannot found an "unlawful act" for the purposes of the tort of intentional interference with economic relations. In any event, West Face filed the Callidus

Analysis in Court not to interfere with Callidus's relationship with its shareholders, but to respond to specific allegations made against it in litigation by Catalyst.

178. In any event, even if West Face's conduct did induce Callidus's then-existing shareholders to sell their Callidus shares, such conduct was not otherwise unlawful and West Face had no intention to harm the Plaintiffs.

The Plaintiffs Have Not Suffered Any Damages As a Result of West Face's Conduct

179. The Plaintiffs have suffered no damages as a result of the alleged defamation, conspiracy, and intentional interference with economic relations, and West Face puts the Plaintiffs to the strict proof thereof.

180. Contrary to paragraph 37 of the Claim, the drop in Callidus's share price was not caused by any alleged conduct by West Face. Rather, the drop in Callidus's share price (which continued to fall long after Veritas published the Veritas Report in April 2015) was a result of the issues and concerns with Callidus's business and loan book that both West Face and Veritas independently and correctly identified through their research.

181. Specifically with respect to defamation, the Plaintiffs' reputations in the financial industry were not lowered as a result of the alleged defamation. Moreover, even if the Plaintiffs could prove that any one or more of the above Alleged Defamatory Statements: (i) was published by West Face; (ii) was capable of a defamatory meaning; (iii) was not justified; and (iv) was not a fair comment by West Face; such statements did not materially injury the Plaintiffs' reputations in view of what facts, including any Alleged Defamatory Statements, are true.

182. Contrary to paragraph 37, neither Callidus nor Catalyst has suffered harm as a result of Callidus's share price being "lower" for a prolonged period of time.

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ONTARIO
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B E T W E E N :

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Plaintiff

- and -

VERITAS INVESTMENT RESEARCH CORPORATION and
WEST FACE CAPITAL INC.

Defendants

NOTICE OF MOTION
(West Face Capital Inc.'s Motion to Strike)

The Defendant West Face Capital Inc. will make a motion to a judge of the Superior Court of Justice as soon as the motion can be heard, at 393 University Avenue, Toronto.

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

THE MOTION IS FOR:

1. An Order pursuant to Rule 21.01(1)(b) striking out the Statement of Claim as against West Face, without leave to amend, on the grounds that it discloses no reasonable cause of action against West Face;

2. The costs of this motion; and

3. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

The Statement of Claim

1. On June 18, 2015, the Plaintiffs The Catalyst Capital Group Inc. and Callidus Capital Corporation issued a Statement of Claim against the Defendants Veritas Investment Research Corporation and West Face Capital Inc. alleging defamation, conspiracy, and intentional interference with economic relations;

2. The Plaintiffs have offered no particulars of West Face's alleged defamation. They have not pled when the libel was published; to whom it was published; how it was published; or the precise words published;

3. The remaining causes of action are derivative of and/or merge with the defamation pleading. As such, it is plain and obvious that the Statement of Claim discloses no reasonable cause of action against West Face;

The Claim Fails to Disclose a Cause of Action for Defamation

4. The elements of defamation must be pleaded with particularity. These elements include publication by the defendant; the words published; that they were published about the claimant; and that they reasonably bear a defamatory meaning;

5. Paragraph 25 of the Statement of Claim fails to plead the material facts necessary to constitute publication by West Face:

(a) the Statement of Claim fails to plead when the alleged defamatory statements were made or published (the Plaintiffs plead only that a report critical of the Plaintiffs (the "**West Face Report**") was distributed an unspecified number of times over a five month span on "specific dates known only to West Face");

(b) the Statement of Claim fails to plead where or how the alleged defamatory statements were made or published (the Plaintiffs plead only that the West Face Report was "distributed", without pleading where or how the alleged distribution took place);

(c) the Statement of Claim fails to plead to whom the alleged defamatory statements were made or published (the Plaintiffs plead only that the West Face Report was distributed to unspecified "third parties"); and

(d) the Statement of Claim fails to plead a coherent body of fact that shows not only that there was a defamatory utterance or writing emanating from West Face, but also that the emanation contained defamatory material of a defined character of and concerning Callidus;

The Claim Fails to Disclose a Cause of Action for Intentional Interference With Economic Relations

6. Paragraphs 38 and 39 of the Statement of Claim fail to disclose a cause of action for intentional interference with economic relations, and should be struck:

(a) the Statement of Claim fails to plead that West Face's actions were directed at a third party and that such actions were or would be actionable by that third party. The Plaintiffs have therefore failed to plead necessary elements of the cause of action for intentional interference with economic relations;

(b) in the alternative and in any event, the alleged false and defamatory statements cannot satisfy the "unlawful means" requirement of the tort because they are directly actionable by the Plaintiffs;

(c) in the further alternative and in any event, the allegation of intentional interference with economic relations is in essence a "dressed up" defamation claim;

The Claim Fails to Disclose A Cause of Action for Conspiracy

7. The pleading of conspiracy at paragraphs 21 to 24 of the Claim is premised on the torts of defamation and intentional interference with economic relations. As there is no reasonable cause of action pleaded in respect of those torts, there is no proper pleading of conspiracy;

8. In the alternative and in any event, the allegation of conspiracy to commit the other alleged torts is based on the same pleaded facts, adds nothing to the claim, and merges with the other torts. The allegation of conspiracy is another "dressed up" defamation claim. There is therefore no valid independent pleading of conspiracy and paragraphs 21 to 24 should be struck as redundant and frivolous;

Other Grounds

9. The Plaintiffs have alleged that the majority of the material facts are peculiarly within the knowledge of the Defendants. The Statement of Claim is a thinly-disguised "fishing expedition", and should be struck in its entirety;

10. The Plaintiffs are sophisticated commercial parties, represented by experienced commercial litigation counsel, who have been threatening to bring a defamation claim against West Face since December 2014 (see paragraph 29 of Statement of Claim);

11. As the Statement of Claim is still deficient, there is no reasonable ground to believe that the deficiencies in the Statement of Claim can be cured by allowing the Plaintiffs leave to amend. There are no further particulars and the pleading will not change;

12. Rules 1.04, 21.01 and 25.06 of the *Rules of Civil Procedure*; and

13. 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:

1. The Plaintiffs' Statement of Claim issued June 18, 2015; and

2. Such further and other materials as counsel may advise and this Honourable Court may permit.

CITATION: The Catalyst Capital Group Inc. v. Veritas Investment Research Corporation, 2016 ONSC 23
COURT FILE NO.: CV-15-530726
DATE: 20160105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION Plaintiffs	*Rocco DiPucchio and Andrew Winton*, for the Plaintiffs
– and –	
VERITAS INVESTMENT RESEARCH CORPORATION and WEST FACE CAPITAL INC. Defendants	*Matthew Milne-Smith and Andrew Carlson*, for the Defendant West Face Capital Inc. *Brendan Morrison and Julian Porter, QC*, for the Defendant Veritas
	HEARD: November 9, 2015

S.A.Q. AKHTAR J.

I. BACKGROUND AND OVERVIEW

The Factual Backdrop

[1] The defendants bring a motion to strike out the plaintiffs' claim as disclosing no reasonable cause of action.

[2] All parties to this motion are companies involved in the investment industry. The Catalyst Capital Group ("Catalyst") and West Face Capital Inc. ("West Face") compete for control and influence in the "special situations for control investment industry": a field of investments in distressed and undervalued Canadian companies. Veritas, on the other hand, is an equity research company located in Toronto which prepares and publishes investment research reports distributed to subscribers. Callidus Capital Corporation ("Callidus") is a publicly traded asset-based lender providing finance to companies unable to access more traditional methods of

(2) The proceeding is being undertaken in good faith and is not a "fishing expedition" i.e. something that would mandate the pleading of a "coherent body of fact" such as time, place, speaker and audience;

(3) The "coherent body of fact" demonstrates not only a defamatory utterance but one that contains material which defines the character of and concerns the plaintiff; and

(4) The exact words are not within the plaintiff's knowledge but are known to the defendant and will become available to be pleaded by discovery of the defendant or production of a document or by other defined means.

[18] An example of the *Magnotta Winery* approach is to be found in *Disruptive Strategies Inc. v. WorkOnce Wireless Corp,* 2007 CanLII 13704 (ON SC), where Patillo J. found that the pleadings did not contain a coherent body of fact because the time frame alleged in that case was too broad and there was insufficient detail in relation to the identity of the speaker of the words or to whom they were spoken.

Does the Statement of Claim Contain a "Coherent Body of Fact"?

[19] West Face takes aim at the pleadings, contained in paras. 21-25 of Catalyst's Statement of Claim, submitting that they are deficient in (a) identifying the parties to whom the defamatory statements were made, and (b) whether the alleged defamatory statements were ever published. West Face reserves particular ire for the allegation contained in para. 25 of the Statement of Claim which alleges that the West Face Report was distributed to unnamed third parties. West Face claims that Catalyst is simply conducting a fishing expedition to attempt to gain access to its reports through the mechanism of a defamation action.

[20] I reject West Face's argument that Catalyst's Statement of Claim does not disclose a coherent body of fact to establish a claim for defamation. Paragraphs 21-24 outline Catalyst's allegations that on 17 December 2014, members of West Face's management met with Veritas and "arranged for West Face to share its report" with Veritas to facilitate production of the Veritas Report. The disclosure of the West Fact Report to Veritas thus identifies both the recipients and the publication of the alleged defamation. Paragraph 27 sets out West Face's allegations of the defamatory content of the report. Reading these paragraphs together, I conclude that Catalyst has satisfied the *Magnotta Winery* criteria of detailing a coherent body of fact with respect to paras. 21-24 of their Statement of Claim.

The Allegations of Third Party Publication

[21] Paragraph 25 of the Statement of Claim, however, requires a different analysis. It reads as follows:

> Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.

hearsay or information from third parties which cannot be confirmed in an evidentiary manner. Put simply, if a party, at the pleading stage, does not possess the knowledge to clearly articulate an allegation of defamation, it should not make it: see *Metz*, at para. 10. It is impermissible for a plaintiff to use their pleadings to search for the source of their cause of action at the discovery stage: see *Dionisio*, at para. 5.

[26] I find that Catalyst to be in that very position. By its own admission, it has no knowledge of the identities of the third parties that were the recipients of the West Face Report. As para. 25 of its Statement of Claim declares: the identities of the third parties are known only to West Face. Catalyst cannot provide the "who, what and when" details of the alleged defamation and, as a result, fails to satisfy the necessity of pleading a coherent body of fact.

[27] I would also add that *Guergis* does not assist Catalyst in its argument. There the court, emphasised, at para. 52, that:

> The right to plead that a defamatory statement was made to certain unnamed persons is restricted to the case where a plaintiff has made out a prima facie case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons. [Emphasis added, citation omitted].

[28] Since Catalyst is unaware of the details of publication to any of the unnamed third parties, it is unable to produce any, let alone uncontradicted, evidence of publication, as stipulated in *Guergis*. Absent that evidence, Catalyst cannot group defendants together without clarifying what they actually said and did or hope that some liability might end up attaching to one or more of them: see *Hyprescon Inc. v. Ipex Inc.*, 2007 CanLII 11316 (ON SC).

[29] For the above reasons I find that para. 25 of Catalyst's Statement of Claim fails to disclose a reasonable cause of action and must be struck out. Further, I decline to grant leave to amend the pleadings as Catalyst themselves concede that they have no knowledge of any further particulars that could be provided to form the foundation for a proper claim.

III. SHOULD THE PLEADING OF INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS BE STRUCK?

The Test for Intentional Interference with Economic Relations

[30] The tort of intentional interference with economic relations is not commonly pleaded in the civil courts. In *A.I. Enterprises v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, Cromwell J. described it as a long standing tort surrounded by uncertainty and requiring clarification. A claim of intentional interference is founded on the following principles:

(1) The situational background involves three party situations;

(2) The defendant commits an unlawful act against a third party, i.e. an act that would be actionable by a third party or would be actionable if they had suffered loss as a result of it; and

(3) The act committed intentionally causes harm to the plaintiff.

The Competing Arguments

[31] Veritas and West Face contest the pleadings with respect to this allegation on the basis that it is simply a derivative of the defamation claim pleaded on the same facts. They allege that Catalyst is "dressing up" its defamation allegations to gain a tactical advantage by eliminating potential defences available in a defamation action.

[32] Catalyst insists that although there is a factual overlap between the allegations of defamation and intentional interference with economic relations, the two claims are founded on separate and independent wrongdoings. The defamation claim targets the defendants' actions in deprecating their reputation in the eyes of a reasonable person, whereas the intentional interference action is directed towards a different wrong: the publication of misleading facts to induce investors in Callidus to sell their shares.

The "Directly Actionable" Test

[33] There is no bar preventing a claimant from claiming defamation alongside additional torts: see *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108. The defendants, however, place great emphasis on the Court of Appeal decision in *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, which decided that, for intentional interference with economic relations to be properly pleaded, "the unlawful act" could not be actionable directly by the plaintiff. *Alleslev-Krofchak* also involved pleaded allegations of defamation, the substance of which formed the basis for the claim of intentional interference with economic relations. The court found that since all of the defamation claims were directly actionable by the plaintiff under the tort of defamation, she was prohibited from pursuing the tort of intentional interference with economic relations. The defendants submit that Catalyst is in exactly the same position.

[34] The *Alleslev-Krofchak* principle was followed in cases such as *Avalon Rare Metals Inc. v. Hykawy*, 2011 ONSC 5569, where the court struck out pleadings alleging intentional interference with economic relations because those pleadings' factual foundation was the same as the plaintiff's pleaded claim for defamation. Roberts J. held, at para. 36, that, "As those acts are directly actionable by the plaintiff and indeed form part of the plaintiff's Amended Statement of Claim as its defamation claim, all of the elements of the tort of intentional interference with economic relations cannot be satisfied." Similarly, in *Carbone et al. v. Michael DeGroote et. al.*, 2014 ONSC 6146, Firestone J., following *Alleslev-Krofchak* and *Avalon Rare Materials*, found that defamatory statements could not form the basis of an intentional interference with economic relations action.

[35] The defendant's submissions therefore carry some considerable force. However, in *AI Enterprises*, Cromwell J., writing for a unanimous court, took a different view. Reviewing *Alleslev-Krofchak* and other similarly decided cases, Cromwell J. concluded that the "unlawful means tort" was not limited to situations where a defendant's action is not otherwise actionable by the plaintiff. At paras. 77 and 78, he set out the law in the following way:

> The appellants urge us to hold that the unlawful means tort, because it has a gap-filling function, should only be available where the defendant's conduct does not provide the plaintiff with any other cause of action against the defendant. This was the view of the Court of Appeal in this case and this view has also been adopted by the Ontario Court of Appeal and followed by other Canadian courts. For example, in Correia, the unlawful means alleged by the plaintiff were directly actionable in negligence against one of the defendants and in *Alleslev-Krofchak*, the unlawful means were directly actionable in defamation and for this reason, the plaintiffs' claims for causing loss by unlawful means failed. [Citations omitted.]
>
> On this view, the tort exists "to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party": *Correia*, at para. 107. The question is whether we should accept this limitation on the scope of the unlawful means tort. My view is that, for several reasons, we should not.
>
> This limitation seems to me to be wrong in principle. The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party. It is that conduct by the defendant which gives rise to liability quite apart from conduct that may be otherwise actionable by the plaintiff. Moreover, general principles of tort liability accept concurrent liability and overlapping causes of action for distinct wrongs suffered by the plaintiff in respect of the same incident: see, e.g., *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. Finally, and as I explained earlier, this limitation is premised on an unduly narrow understanding of the "gap-filling" function of the tort. A gap need not be a void.

[36] In light of these comments, I can only conclude that the "directly actionable" principle approved of in *Alleslev-Krofchak* has been overruled. As a consequence, the plaintiffs are not precluded from advancing both the defamation and the intentional interference claims.

Is Intentional Interference Properly Pleaded?

[37] The defendants' alternative argument is that the Statement of Claim does not disclose a reasonable cause of action because it fails to provide any allegations of conduct which give rise to a cause of action by the third party or would give rise to a cause of action if the third party has suffered a loss because of its conduct. The entire claim, argues the defendants, is simply a re-pleading of the defamation allegations and should be struck.

[38] I disagree. Whilst defamation forms a substantial part of the intentional interference action, it is not the entire basis for the claim. The allegations of defamation concern conduct that directly targets the plaintiff by diminishing its reputation. The intentional interference claim, by contrast, focusses on third parties, i.e. the shareholders who, it is alleged, were deliberately misled by the defendants' publications and, as a result, were induced into selling their shares as a result of the deception. Ultimately, the defendants' conduct as pleaded is an actionable wrong committed against the shareholders.

> with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[44] These remarks formed the basis of Perrell J.'s conclusion in *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, 2014 ONSC 2244, 120 O.R. (3d) 43, that the merger doctrine no longer has any value when deciding the propriety of pleadings. After deciding that it was time to "jettison the merger principle" in the law of pleading, Perrell J. added, at paras. 80-83:

> The above is enough to decide that the principle of merger does not apply to the case at bar. However, I will go further and say that it is time to eulogize the passing of the merger principle as a basis to challenge a pleading.
>
> I would argue that *Hunt v. Carey Canada Inc.* did put an end to the merger principle at the pleadings stage of an action leaving intact the need to plead special damages to determine the scope of the tort of conspiracy.
>
> The merger principle can still apply at trial. That use of the merger principle would make sense and would occur naturally at trial. Lord Denning did not explain how redundancy by itself would justify striking out a cause of action without adjudication on its merits, and it is odd that he would think so, given that he was one of the champions of concurrent liability in tort and in contract.
>
> There is something to the idea that a cause of action merges into a judgment, which, of course, can only occur when there is a judgment, but it is odd to apply merger before judgment, which I think is a point that Justice Wilson was making in *Hunt v. Carey Canada Inc., supra.*

[45] There is much force in Perrell J.'s observations about the use and efficacy of the merger doctrine in a motion to strike pleadings. The abolition of the rule at this stage would not, as was observed in both *Hunt and Jevco*, prevent a party from arguing the merger doctrine at trial. At that point in the proceedings, a judge would be in full possession of the factual background, evidence and argument and, accordingly, would be far better situated to determine whether the conspiracy claim was redundant in the context of the entire action. I agree with Perrell J. that *Hunt v. Carey* signalled the end of the merger doctrine at the pleadings enquiry.

[46] In the circumstances of this case, no judicial economy is achieved by striking this part of the claim. The evidence relating to both the conspiracy and the other nominate torts may well be the same, in which case the presiding judge may well take the view that the conspiracy claim is redundant. On the other hand, if the conspiracy charge requires additional evidence causing further time to be consumed, that might be an indication that the claim is not subsumed into the

nominate torts. Dismissing the defendants' motion to strike the conspiracy pleading in this motion leaves the same avenue open to them at trial.

V. CONCLUSION AND COSTS

[47] For the above reasons, the following order is made:

1. The motion to strike out para. 25 of Catalyst's Statement of Claim is granted as it discloses no reasonable cause of action;

2. The motion to strike out the remainder of Catalyst's Statement of Claim is dismissed.

[48] With respect to costs, this is an unusual case. There were several legitimate arguments that required resolution and, in the result, there was a division of success between the parties. As a result, I find that this is one of the rare cases in which a costs order would not be appropriate. Accordingly, no order for costs is made.

S.A.Q. Akhtar J.

Released:

5 January 2016

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Veritas Investment Research Corporation, 2017 ONCA 85
DATE: 20170201
DOCKET: C61665

Weiler, Blair and van Rensburg JJ.A.

BETWEEN

The Catalyst Capital Group Inc. and Callidus Capital Corporation

Plaintiffs
(Appellants)

and

Veritas Investment Research Corporation and West Face Capital Inc.

Defendants
(Respondents)

Rocco DiPucchio and Andrew Winton, for the appellants

Brendan Morrison, for the respondent Veritas Investment Research Corporation

Matthew Milne-Smith and Andrew Carlson for the respondent West Face Capital Inc.

Heard: September 20, 2016

On appeal from the order of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated January 5, 2016, with reasons reported at 2016 ONSC 23.

R.A. BLAIR J.A.:

OVERVIEW

[1] The parties are all players in a highly-sophisticated field of the venture capital industry involving investments in distressed and undervalued Canadian companies. This action arises out of what the appellants allege was a wrongful and harmful "short selling" strategy conducted in concert by the respondents. Although the action is based on allegations of civil conspiracy and the tort of intentional interference with economic relations as well, the issue on this appeal concerns the plaintiffs' included claim in defamation.

[2] The appellants seek to set aside the order of Akhtar J. striking out a single paragraph in their Statement of Claim as disclosing no cause of action because it alleged publication of the defamatory statements by one of the respondents to unnamed third parties at unspecified times. They say the trial judge erred in this respect for a number of reasons, but primarily because they had already established a *prima facie* case of defamation by alleging publication to certain named persons (representatives of the other defendant) at a specified time and place. They submit that, in such circumstances, the failure to name all of the persons to whom publication was made and/or all the times and places of publication – when these particulars are unknown to them but known to the defendant – is not automatically fatal to a defamation claim.

[3] They also appeal from the motion judge's decision to make no order as to costs.

[4] The respondent, West Face Capital Inc., argues that the appellants seek to lower the bar for pleading to defamation so low as to provide no bar at all. Indeed – in the words of its factum – to leave the impugned paragraph in the Statement of Claim "would transform the action from one focussed narrowly on West Face's interaction with Veritas into an almost limitless Royal Commission of Inquiry into everything West Face has ever done, said or thought in respect of Callidus."

[5] In spite of this ringing admonition, however, I agree with the appellants in the circumstances of this case. For the reasons that follow, I would allow the appeal.

FACTUAL BACKGROUND

[6] The appellant, The Catalyst Capital Group Inc., and the respondent, West Face Capital Inc., compete in a sector of the investment industry involving control over distressed and undervalued Canadian companies. The appellant, Callidus Capital Corporation, is a publicly traded asset-backed lender that finances companies unable to access traditional lending facilities. Callidus was wholly owned by Catalyst prior to an Initial Public Offering of 40% of its shares in April 2014; it remains 60% controlled by investment funds managed by Catalyst.

[7] The respondent, Veritas Investment Research Corporation, is an equity research company that prepares and publishes investment research reports that are distributed to subscribers. One of those reports ("the Veritas Report"), and an earlier report prepared by West Face ("the West Face Report"), are alleged by the appellants to have contained false and defamatory statements about the appellants. The Reports are said to have been published in the following circumstances.

The Short Selling Strategy

[8] Catalyst alleges that in October 2014 West Face launched a short selling scheme targeting Callidus stock and later that year persuaded Veritas to join with it in a plan to deceive market participants into believing that Callidus was a poor investment, sullying the reputation of Catalyst along the way.

[9] "Short selling" is a risky investment strategy with the potential for either a highly profitable upside or an equally unprofitable downside, depending upon the performance of the targeted stock on the market. It involves the sale to a third party of shares in a publicly traded corporation that have been borrowed by the seller/investor from another party. The hope of the seller/investor is that the value of the shares will decline, at which point the investor will buy back the shares at the lower price and return them to the party from whom they were originally borrowed, taking the profit from the difference in price for its own benefit. The risk

is that if – instead of declining in value as anticipated – the shares appreciate in value the seller/investor must re-purchase them at the higher price and take the loss. Selling borrowed shares in this fashion is known as "selling short".

[10] The appellants allege that West Face launched its short selling strategy in retaliation against Catalyst for an earlier lawsuit Catalyst had commenced against it regarding the use of confidential information by an employee who had left Catalyst and joined West Face. They say that in order to advance its short selling strategy, West Face's chief executive officer and others met with named representatives of Veritas in December 2014 and that the joint plan was initiated at this meeting.

The Allegedly Defamatory Statements

[11] At that meeting, the West Face representatives disclosed to the Veritas representatives the details of the West Face Report – which were unfavourable to, and allegedly defamatory of, Catalyst and Callidus – and advised as well that West Face had embarked upon a short selling strategy with respect to Callidus. West Face is said to have encouraged Veritas to prepare a similarly negative report about Callidus and distribute it to their subscribers, thereby creating the impression that West Face and Veritas had independently and separately issued negative reports. This would have the effect of deceiving the market place into believing that a negative consensus was building against Callidus, and drive the

price of Callidus' stock downward which, in turn, would bolster West Face's short-selling strategy.

[12] The Veritas Report is alleged to have been prepared as a result of this meeting and published to Veritas' subscribers in April 2015. The appellants plead that both it and the West Face Report contained false and defamatory statements impugning the financial viability and conduct of both Callidus and Catalyst. These allegations are particularized in the Statement of Claim and their details are not important to the issue on this appeal.

[13] The Veritas Report is alleged to have been published to market participants and distributed to Veritas' subscribers, and to be available for download from the Veritas website by its customers. The West Face Report is alleged to have been published and distributed to the Veritas representatives attending the December 2014 meeting, and beginning in November 2014 and continuing to March 2015, to unknown third party market participants.

The Action and the Decision of the Motion Judge

[14] In the action, Catalyst and Callidus claim damages against West Face and Veritas for conspiracy to publish defamatory statements about Callidus and for intentional interference with the economic relations of Callidus, as well as for defamation in relation to both Catalyst and Callidus.

[15] West Face moved under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to strike the entire Statement of Claim as disclosing no reasonable cause of action. Veritas moved separately to strike the pleadings against it with respect to intentional interference with economic relations and conspiracy to defame. The motion judge dismissed Veritas' motion in its entirety. He dismissed West Face's motion except with respect to paragraph 25, which he struck without leave to amend. He awarded no costs of the motion.

[16] Paragraph 25 is contained in a part of the Statement of Claim under the heading "West Face and Veritas Conspire to Publish Defamatory Statements About Callidus". It states that:

> Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.

[17] The motion judge struck this part of the pleading on the basis that it contained an impermissible plea of publication to unnamed third parties at unspecified times. The appellants argue that he erred in doing so.

[18] They also argue that he erred in refusing to award them costs of the motion, given their substantial overall success.

THE APPEAL AGAINST THE ORDER STRIKING OUT PARAGRAPH 25

[19] After reviewing the authorities, I conclude, respectfully, that the motion judge erred in striking paragraph 25 of the Statement of Claim.

[20] I agree with the appellants that the failure to name all persons to whom publication was made and/or to specify all the times and places of publication is not automatically fatal. Those particulars are unknown to the appellants but known to West Face and form an integral part of what is said to be an overall scheme of conspiracy to injure, intentional interference with economic relations, and defamation. The appellants have otherwise properly pleaded a *prima facie* claim in defamation (including publication to named persons) against West Face. The Statement of Claim, read generously and as a whole, alleges material facts disclosing publication to unnamed third persons. Viewed in this overall context, the pleading that West Face distributed the allegedly defamatory statements to third party market participants, the identities of which are known to West Face, should stand.

The Jurisprudence

[21] No one contests that the bar for striking a pleading as disclosing no cause of action is very high – is it plain and obvious that the plaintiff cannot succeed? – or that the facts as alleged in the Statement of Claim are to be accepted as true for purposes of deciding the motion: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R.

959. No evidence is permissible on a rule 21.01(1)(b) motion: rule 21.01(2)(b). The statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting difficulties.

[22] An additional dimension to these principles arises in defamation cases because pleadings in such actions have traditionally been held to a higher standard than is the case with other types of actions, in terms of the precision with which the material facts must be pleaded. West Face relies on this higher standard – as did the motion judge – for the proposition that para. 25 of the Statement of Claim fails to disclose a cause of action. Modern authorities have adopted a somewhat more flexible approach to the assessment of defamation pleadings than older authorities that took a very strict approach, however.

[23] Like any pleading, a statement of claim in a defamation action must set out "a concise statement of the material facts on which the [plaintiff] relies": rule 25.06(1). And, of course, the material facts must be sufficient, if proved, to establish a cause of action. In libel actions (defamatory statements in writing, as in this case), the material facts to be pleaded are: (i) particulars of the allegedly defamatory words; (ii) publication of the words by the defendant; (iii) to whom the words were published; and (iv) that the words were defamatory of the plaintiff in their plain and ordinary meaning or by innuendo. See, generally, Alastair Mullis & Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London, U.K.: Sweet & Maxwell, 2013), at paras. 26-1 to 26-26; *Lysko v. Braley* (2006), 79 O.R.

(3d) 721 (C.A.), at para. 91; *Metz v. Tremblay-Hall* (2006), 53 C.C.E.L. (3d) 107 (Ont. S.C.), at para. 13.

[24] At one time, the weight of authority required the pleading of these essential elements with strict precision, including the exact wording complained of and the names of all persons to whom the words had been published. It was, and remains the case that pleadings in defamation actions attract a more critical evaluation than pleadings involving other causes of action; they require a more detailed outline of the material facts alleged in support of the claim. Courts are attentive to guard against "fishing expeditions" in such cases. This is because – given the serious nature of such allegations and the significance of context in assessing them – it is particularly important that the defendant know the case it has to meet.

[25] While the need for as much precision as possible and for enhanced judicial scrutiny continues, however, more recent authorities have applied greater flexibility in permitting defamation pleadings to stand in certain circumstances where the plaintiff is unable to provide full particulars of all allegations. These circumstances include situations where the plaintiff has revealed all the particulars within its knowledge, where the particulars are within the defendant's knowledge, and – importantly – where the plaintiff has otherwise established a *prima facie* case of defamation (including publication) in the pleading. See, for example, *Paquette v. Cruji* (1979), 26 O.R. (2d) 294 (H.C.), at p. 296-97;

Magnotta Winery Ltd. v. Ziraldo (1995), 25 O.R. (3d) 575 (C.J.), at pp. 583-84; *Lysko*, approving *Paquette* and *Magnotta Winery*, at paras. 93-95; and *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at para. 52.

[26] In *Paquette* (a case involving publication to named persons "and others") Grange J. described the more modern approach in the following terms, at pp. 296-97:

> It is true and has been said over and over again – see, for example, *Odgers Digest of the Law of Libel and Slander*, 6th ed. (1929), at p. 504, that pleadings in a defamation action are more important than in any other class of action. It is also generally true as put by *Gatley on Libel and Slander*, 7th ed. (1974), p. 422, para. 1015, that "... the defendant is entitled to particulars of the date or dates on which, and of the place or places where, the slander was uttered. The defendant is also entitled to be told the names of the person or persons to whom the slander was uttered ...", and that the Court will not permit the plaintiff to proceed to use discovery as a "fishing expedition" to seek out a cause of action: see *Gaskin v. Retail Credit Co.*, [1961] O.W.N. 171; *Collins v. Jones*, [1955] 2 All E.R. 145. <u>There are, however, limitations to the strictness of pleading. Our Courts have always refused to strike out a claim where the plaintiff has revealed all the particulars in his possession and has set forth a *prima facie* case in his pleading</u>: see *Winnett v. Appelbe et ux.* (1894), 16 P.R. (Ont.) 57, and *Lynford v. United States Cigar Stores Ltd.* (1917), 12 O.W.N. 68. In the latter case Falconbridge, C.J.K.B., refused to strike out a statement of claim wherein the plaintiff had been unable to set forth the exact words of an allegedly defamatory letter which had resulted in loss of employment quoting with approval [at p. 69] the words of *Odgers*, 5th ed. (1912), at p. 624:

> "If the plaintiff does not know the exact words uttered, and cannot obtain leave to interrogate before statement of claim, he must draft his pleading as best he can and subsequently apply for leave to administer interrogatories, and, after obtaining answers, amend his statement of claim, if necessary." [Emphasis added.]

[27] Applying those principles to the matter before him, Grange J. went on to state, at p. 297:

> The plaintiff maintains he was slandered by the defendant by communication to persons unknown (but associated with particular institutions) at times unknown (though within a specified time span). He sets forth the words used. He has stated everything he knows. If he proves the facts pleaded he will have established a prima facie case. The law will always protect a defendant from a frivolous action but it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant. If the plaintiff should fail to prove any of the 16 slanders specifically alleged there is always a remedy in costs. [Emphasis added.]

[28] This more flexible approach to defamation pleadings is reflected in the subsequent decision of Lane J. in *Magnotta Winery* (a case involving the plaintiff's inability to plead the exact wording of the allegedly defamatory statement[1]). After analysing many of the authorities relating to the strict requirements of pleading in defamation actions, Lane J. opted for a more flexible

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[1] The plaintiff was able to plead the substance of the defamatory words – that the defendant competitor's president had lodged a public complaint that the plaintiff's award-winning wine blend was not a "true product of Canada" – but not the exact wording.

approach. He did so recognizing the benefits to "fashioning a contemporary resolution of the tension between the need to prevent fishing expeditions, on the one hand, and the injustice of permitting defendants to escape liability for serious defamations on the other" (p. 582). At pp. 583-84, he concluded:

> On these authorities, it is open to the court in a limited set of circumstances to permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. The plaintiff must show:
>
> – that he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
>
> – that he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
>
> – that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff;
>
> – that the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.

[29] The more flexible approach was recognized by this Court in *Lysko* and, again, in *Guergis*. In *Guergis* the Court said that a plaintiff may plead that a defamatory statement was made to certain unnamed persons "where a plaintiff

has made out a *prima facie* case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons" (para. 52). See also, *Gatley on Libel and Slander*, at para. 26.7; *Jaffe v. Americans for International Justice Foundation*, [1987] O.J. N. 2370 (Ont. Master), at para. 10.

Analysis

[30] Here, although the motion judge recognized "that the old rule of specifically pleading the defamatory words has been relaxed", he declined to give effect to the *Paquette/Magnotta Winery/Guergis* line of authorities in the circumstances. He did so, essentially, because, in his view:

> (a) the vagueness of the pleading made it difficult for West Face to know the case it had to meet ("Catalyst [could not] provide the 'who, what and when' details of the alleged defamation and, as a result, fails to satisfy the necessity of pleading a coherent body of fact");
>
> (b) there was, of equal concern, "the additional potential [of] a procedural quagmire ... at the discovery stage" given that the plaintiff would be "question[ing] witnesses on an unacceptably broad basis, riding on the horse that

it requires information to support those vague pleadings"; and

(c) Catalyst had not "produced uncontradicted evidence of publication to other persons": *Guergis*, at para. 52.

[31] Respectfully, these criticisms are misplaced in the circumstances of this case. I say this for the following reasons.

The Pleading Is Not Unduly Vague And Pleads "A Coherent Body of Fact"

[32] First, this is not a case where the impugned pleading, read as a whole, is impermissibly vague, leaving West Face in the dark and unable to respond to the allegations of publication, albeit the third parties to whom publication is said to have been made remain unnamed. Nor is it a case – as the motion judge appears to have viewed it – where the plaintiffs are putting forward "allegations of defamation based on rumour, hearsay or information from third parties which cannot be confirmed in an evidentiary manner" or where they are engaging in a "fishing expedition" and attempting "to use their pleadings to search for the source of their cause of action at the discovery stage". The Statement of Claim sets out the material facts properly pleading a claim in civil conspiracy, intentional interference with economic relations and defamation. On the case as pleaded, these claims are intertwined and have common factual underpinnings. The Statement of Claim sets out a coherent body of facts in relation to them.

[33] West Face knows that it has to respond to an already properly pleaded case against it in defamation (including the allegation of publication to named persons). West Face knows that that properly pleaded case, and the allegation of additional publication by it to unnamed third parties, are made in the context of an alleged plan by it to work together with its co-defendant, Veritas, to publish separate reports to market participants in order to drive the price of Callidus' shares downwards thereby enhancing West Face's short selling scheme. West Face knows how and to whom it published its own report (the West Face Report) – those actions being a necessary part of the scheme. And West Face knows the time-frame within which the allegedly defamatory statements are said to have been made.

[34] Even if West Face were unable to determine the names of all third party market participants to whom the West Face Report was published, I would not strike out the pleading of publication of that report to unnamed market participants in this case. Widespread publication of the allegedly defamatory West Face and Veritas Reports to market participants is a central ingredient of the harmful scheme complained of. As noted above, the impugned paragraph is contained in the section of the Statement of Claim entitled "West Face and Veritas Conspire to Publish Defamatory Statements About Callidus" and the appellants have pleaded the material facts relating to this claim with the details they have in their possession.

[35] I do not see how West Face could legitimately expect to engage in a campaign designed to discredit the appellant's reputations in the eyes of market participants by circulating the aforementioned Reports (assuming that is proved at trial) and at the same time legitimately expect to escape liability simply because the appellants are unable to name all recipients of the allegedly defamatory material. To repeat the observation of Lane J. in *Magnotta Winery*, at p. 582, modern courts are called upon to "[fashion] a contemporary resolution of the tension between the need to prevent fishing expeditions, on the one hand, and the injustice of permitting defendants to escape liability for serious defamations on the other". Or, as Grange J. put it, in *Paquette*, at p. 297:

> The law will always protect a defendant from a frivolous action but it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant.

[36] That is the case here, in my view.

The Appellants Are Entitled To The Information On Discovery In Any Event

[37] Nor am I persuaded that the motion judge's second concern – "the additional potential [of] a procedural quagmire ... at the discovery stage" – is a valid concern here. I agree with counsel for the appellants that they will be entitled to seek the names of the recipients of the West Face and Veritas Reports on discovery in any event, given the nature of the overall claim as pleaded.

[38] The appellants' claims based in civil conspiracy and intentional interference with economic relations remain in place. Both claims are rooted in the allegation that the appellants suffered damages as a result of West Face's and Veritas' scheme to publish defamatory statements about Callidus by "deceiving market participants into believing that a negative consensus was building regarding Callidus" and "by inducing market participants to sell their Callidus shares and/or lower their estimates of Callidus' future performance" (para. 33). Both claims will be subject to the discovery process. With respect to both it will be open to the plaintiff appellants to seek information about the nature of the publication of the West Face and Veritas reports and about the identity of the recipients. Contrary to the motion judge's fears, this is not a case where the plaintiffs would be "question[ing] witnesses on an unacceptably broad basis, riding on the horse that it requires information to support those vague pleadings". They will be entitled to probe that information one way or another.

The Statement Of Claim Pleads Publication To Unnamed Third Parties As A Material Fact

[39] Finally, the motion judge erred in concluding that Catalyst had not "produced uncontradicted evidence of publication to other persons" (*Guergis*, at para. 52), and that:

> Absent that evidence, Catalyst cannot group defendants together without clarifying what they actually said and did or hope that some liability might end up attaching to

> one or more of them: see *Hyprescon Inc. v. Ipex Inc.*, 2007 CanLII 11316 (ON SC).

[40] There are at least two difficulties with this conclusion.

[41] First, the motion judge appears to have conflated problems relating to naming the defendants alleged to have made the defamatory publications (the grouping of defendants – not an issue here) with problems relating to naming the recipients of those publications. They are not necessarily the same. Here, the appellants have made out a *prima facie* case against West Face and Veritas, including publication to named persons. The issue is whether they should be permitted, additionally, to plead publication to persons unknown to them but known to West Face in the circumstances.

[42] Secondly, and more significantly, the motion judge appears to have overlooked the fact that "evidence" is not admissible on a rule 21.01(1)(b) motion to strike a claim as disclosing no reasonable cause of action: rule 21.01(2)(b). As noted above, the facts as alleged in a statement of claim must be taken as true unless they are patently ridiculous or incapable of proof (neither of which is the case here) and the pleading is to be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting difficulties: Hunt *v. Carey*.

[43] The statement in *Guergis* and other authorities to the effect that there must be "uncontradicted evidence of publication to other persons"[2] (emphasis added) must be applied with that consideration in mind. Indeed, as the older authorities demonstrate, the phrase itself, or similar language, was developed in the context of proceedings such as motions for interrogatories or motions for particulars, in which affidavit evidence is permitted and often required. That is not the case on a rule 21.01(1)(b) motion.

[44] Here, the Statement of Claim contains numerous allegations of the fact of publication to unnamed third parties. Paragraph 25 itself alleges distribution to market participants and to third parties, the identities of which are known to West Face. Paragraph 24 pleads that "[t]he [Defendants] intended to create the impression that they had separately and independently publish[ed] negative reports about Callidus for the purpose of deceiving market participants into believing that a negative consensus was building regarding Callidus." In paragraph 33, it is alleged that the West Face and Veritas Reports "were published by the Defendants to harm Callidus and Catalyst by inducing market participants to sell their Callidus shares and/or lower their estimates of Callidus' future performance." In paragraph 38, it is alleged that "[b]y publishing the

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[2] See, for example, *Gaskin v. Retail Credit Co.*, [1961] O.W.N. 171 (H.C.), at p. 173; *Jaffe v. Americans for International Justice Foundation* (1987), 22 C.P.C. (2d) 286 (Ont. S.C.); *Russell v. Stubbs*, [1913] 2 K.B. 200n; *Barham v. Huntingfield*, [1913] 2 K.B. 193; Gerald Osborne Slade & Neville Faulks, eds., *Fraser on Libel and Slander*, 7th ed. (London: Butterworth & Co., 1936), at pp. 250-52; *Gatley on Libel and Slander*, at para. 26.7 and cases cited therein at footnote 36.

Defamatory Comments, the Defendants deceived third-party market participants into believing that Callidus' share price was overvalued and that Callidus was at risk of significant future losses. The Defamatory Comments were made to induce these market participants to sell their Callidus shares, thereby lowering its share price for a prolonged period of time" (emphasis in the foregoing citations added).

[45] These allegations must be accepted as true for the purpose of the motion and this appeal. They are uncontradicted, of course, because no statement of defence has as yet been filed. As I read the Statement of Claim, they lead – at the very least – to the irresistible inference that such publication took place. This is sufficient to meet the *Guergis* test for these purposes, in my opinion.

[46] In view of the foregoing, I need not rely on an additional argument made by counsel for the appellants. He submitted that the motion judge erred in concluding the appellants were "unable to produce any, let alone uncontradicted, evidence of publication" to unnamed third persons because there were documents incorporated into the pleading by reference that could, at a later stage of the proceedings, be considered uncontradicted evidence of such publication.

[47] The documentation referred to was an exchange of correspondence between counsel for Callidus and counsel for West Face in which the former sought production of the West Face Report to confirm whether it contained incorrect or misleading information regarding Callidus. Counsel for West Face

replied in a letter dated January 6, 2015, by saying that he was not able to respond to such vague allegations without knowing more, but went on to add:

> That said, speaking generally, West Face is confident in the accuracy of its investment research. It does not discuss companies with third parties without extensive research to support its analysis. Should Callidus commence defamation proceedings against West Face, West Face will vigorously defend itself in its Statement of Defence and demonstrate the truth of any statements that it has made about Callidus. West Face is also confident that the discovery process in any litigation commenced by Callidus will vindicate West Face's research. [Emphasis added.]

[48] Although counsel for West Face took the position in subsequent correspondence that in the foregoing letter he had not confirmed distribution of a research report to third parties, the appellants contend that the letter provides proof on the record of such publication. They characterize it as West Face having "defended its conduct and essentially 'dared' Callidus to bring a defamation claim."

[49] I think that the motion judge may have overstated the case by concluding that the appellants were unable to produce "any" evidence of publication, in view of this material in the record. Whether it would be sufficient to satisfy the *Guergis* test may be another matter, however. Be that as it may, I need not resolve this issue. I am satisfied, for the other reasons outlined above, that – apart from the exchange of correspondence – there are sufficient facts pleaded in the Statement of Claim to constitute "uncontradicted evidence" of publication to

unnamed third persons, as that phrase must be understood for purposes of a rule 21.01(1)(b) motion.

Conclusion

[50] In conclusion, I return again to the language of Lane J. in *Magnotta Winery*, at p. 583-84. In my view, the appellants have demonstrated in the Statement of Claim that they are "proceeding in good faith with a *prima facie* case and [are] not on a 'fishing expedition'" (or, to put it another way, that there is a "coherent body of fact" of which they do have knowledge, that gives rise to the basis for a claim); they have "pleaded all of the particulars available to [them] with the exercise of reasonable diligence" and, although they do not have knowledge of the names of the additional third parties to whom publication has been made, that knowledge "will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which [they have] pleaded [the particulars of publication to unnamed third persons] consistent with the information then at [their] disposal."

[51] By "coherent body of fact" I take Lane J. to have meant no more than the need for the pleading to set out the essential facts required to establish at least a *prima facie* cause of action in defamation. The appellants have done that here. They have made out a *prima facie* cause of action in defamation against both West Face and Veritas.

[52] Veritas did not, and does not attack the plea in paragraph 26 of the Statement of Claim that:

> On or about April 16, 2015, Veritas published a report impugning Callidus and Catalyst to market participants (the "Veritas Report"). The Veritas Report was distributed to Veritas' subscribers and is available for download from its website by its customers.

[53] The motion judge refused to strike the plea that West Face published the West Face Report containing statements defamatory of the appellants to the representatives of Veritas. That plea in itself establishes a *prima facie* case of libel against West Face and the appellants will succeed in their defamation claim against West Face if they prove the facts underlying that claim at trial and the defendants are unable to offer a defence. All that remains in dispute is the plea that the defamatory statements were distributed as well to unnamed "third parties, the identities of which are known to West Face". For purposes of the defamation claim, this additional information is not necessary in order to establish liability – as publication to a single person is sufficient for that purpose – but the scale of publication will affect the quantum of damages: see *Gatley on Libel and Slander*, at para. 6.1.

[54] For the foregoing reasons, I am satisfied that the plea in paragraph 25 of the Statement of Claim should not have been struck.

THE COSTS APPEAL

[55] The appellants also seek to set aside the motion judge's decision to make no order as to costs on the motion. They acknowledge that a deferential standard of review applies to costs appeals, but submit that they were substantially successful on the motion – Veritas was entirely unsuccessful and most of West Face's motion was dismissed – and that they should not have been denied costs.

[56] West Face argues, on the other hand, that success was divided, that it was in fact successful on striking out the most significant and far-reaching paragraph in the appellants' claim, and that the motion judge was entitled in the exercise of his discretion to make a no-costs order in such circumstances.

[57] In view of my determination that paragraph 25 should not have been struck, however, the foregoing debate becomes somewhat academic. As the parties are now fully successful on the motion, the appellants are entitled to their costs both here and below.

DISPOSITION

[58] For the foregoing reasons, I would allow the appeal and set aside the order below striking out paragraph 25 of the Statement of Claim. I need not dispose of the costs appeal as it has become moot.

[59] I would grant the appellants their costs of the appeal, fixed in the amount of $13,000 inclusive of disbursements and HST, payable jointly and severally by the respondents.

[60] I would award the appellants their costs of the motion below, fixed in the amount of $11,500, inclusive of disbursements and HST, payable jointly and severally by the respondents.

Released: "RAB" FEB 01 2017

"R.A. Blair J.A."

"I agree K.M. Weiler J.A."

"I agree. K. van Rensburg J.A."

THE CATALYST CAPITAL GROUP INC. et al.
Plaintiffs

-and-

VERITAS INVESTMENT RESEARCH CORPORATION et al.
Defendants

Court File No. CV-15-530726

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

COMPENDIUM OF THE RESPONDING PARTY THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

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