

**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

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

May 25, 2017

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PART I - INTRODUCTION

1. The Defendant, West Face Capital Inc. (“West Face”), requests a transfer of this matter to the Commercial List. West Face’s motion is a thinly veiled attempt to forum shop after it lost a bid to strike the entire action on the regular Civil List.

2. There is no reason to transfer this defamation action to the Commercial List. Callidus Capital Corporation (“Callidus”) and The Catalyst Capital Group Inc. (“Catalyst”) allege that West Face and the Defendant Veritas Investment Research Corporation (“Veritas”) defamed Catalyst and Callidus by publishing “research reports” that contained false and misleading statements. The Plaintiffs also allege that Veritas and West Face engaged in a conspiracy and unlawfully interfered with their economic relations.

3. The Commercial List is not West Face’s private forum for litigation. This action was commenced two years ago. In July, 2015, West Face and Veritas brought Rule 21 motions on the regular Civil List to strike the claim. They did not believe then that the action required the special expertise of a “commercially-savvy” judge. Only after losing their Rule 21 motions, and in the wake of their success in a separate proceeding on the Commercial List did West Face decide that this matter should be on the Commercial List.

4. This matter is entirely unaffected by the outcomes in the Moyse Action, the Mid-Bowline Plan of Arrangement Application and VimpelCom Action (the only active proceeding on the Commercial List). There is no procedural advantage or efficiency to having both this action and the VimpelCom Action on the Commercial List.

5. West Face claims it will require case management given that it expects “significant issues”. West Face has not made any efforts to avail itself of case management on the regular Civil List. In fact, the regular Civil List affords the parties the same special procedures available on the Commercial List and there is no advantage to a transfer.

PART II - SUMMARY OF FACTS

(A) CALLIDUS AND CATALYST

6. Callidus is a publicly traded asset-based lender that, *inter alia*, 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.

7. 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.¹

8. Catalyst is widely recognized as the leading investment fund management firm in distressed and undervalued Canadian situations for control or influence, known as “special situations investments for control”.²

(B) WEST FACE AND VERITAS CONSPIRE TO HARM CALLIDUS AND CATALYST

9. In mid-October 2014, West Face stated short-selling Callidus.³

¹ Claim, ¶4.

² Claim, ¶2.

³ Claim, ¶20.

10. In December 2014, West Face met with Veritas. West Face told Veritas it had produced a negative report about Callidus and was short-selling it. West Face shared the report with Veritas.⁴

11. At the meeting or not long after, the Defendants conspired to defame Callidus and Catalyst and to interfere with Callidus' economic relations by publishing false and defamatory statements about Callidus (the "Conspiracy").⁵

(C) VERITAS AND WEST FACE DISTRIBUTE DEFAMATORY REPORTS

12. Starting in November 2014, West Face widely distributed a report that contained a number of false and defamatory statements about Callidus and Catalyst (the "West Face Report").⁶

13. Around April 16, 2015, Veritas distributed its own report that a report that contained a number of false and defamatory statements about Callidus and Catalyst (the "Veritas Report").⁷

(D) CATALYST AND CALLIDUS STATEMENT OF CLAIM

14. In the claim, Catalyst and Callidus plead that:

- (a) The Defendants acted maliciously and with a reckless disregard for the truth;
- (b) The West Face Report and the Veritas Report were published by the Defendants to harm Callidus and Catalyst;

⁴ Claim, ¶22.

⁵ Claim, ¶23.

⁶ Claim, ¶27.

⁷ Claim, ¶28.

- (c) The defamatory statements 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 increase its subscriber base;
- (d) The Defendants published their reports in an attempt to bring Callidus’ and Catalyst’s reputations in the financial industry into disrepute;
- (e) The Defendants deceived the market into believing that Callidus’ share price was overvalued and that Callidus was at risk of significant future losses; and
- (f) The Defendants’ interference with Callidus’ economic relations with its investors impaired Callidus’ ability to raise capital.⁸

(E) **PROCEDURAL HISTORY**

(i) West Face and Veritas Bring Rule 21 Motions

15. West Face and Veritas brought separate Rule 21 motions to strike all or part of the claims against them. West Face sought to strike the claim against it in its entirety, whereas Veritas sought only to strike the conspiracy and interference with economic relations claims. Veritas did not seek to strike the defamation claim against it.⁹

16. The motions were heard on the regular Civil List. The hearing was scheduled and heard without incident or any suggestion that the motions required the expertise of the Commercial List.

17. The Motions Judge dismissed both of the motions to strike the conspiracy and interference with economic relations claims in their entirety. With respect to the defamation claim against West

⁸ Claim, ¶¶33-39.

⁹ Veritas’ Notice of Motion, West Face’s Notice of Motion.

Face, the Motions Judge rejected West Face's argument that the Claim does not disclose a coherent body of fact to establish a claim for defamation. In particular, the Motions Judge held that the Claim satisfied the accepted criteria for pleading a claim for defamation.¹⁰

18. The Motions Judge struck one paragraph in the claim relating to publication of the West Face Report to unnamed third parties.¹¹

(ii) Callidus and Catalyst Appeal Motion Judge's Decision to Strike Part of Claim

19. The Plaintiffs successfully appealed the Motions Judge's decision to strike a paragraph from the claim. The Court of Appeal restored the paragraph which pleads that West Face distributed the West Face Report to market participants (the identities of which only West Face knows).

20. The Court of Appeal agreed that the claim contained pleadings that, if true, establish a *prima facie* case of libel against both West Face and Veritas.¹²

(iii) No Steps Taken In the Action Since February 1, 2017

21. The Court of Appeal released its decision on February 1, 2017. No party has taken any steps in the action since the Court of Appeal released its decision. Veritas has not yet filed a statement of defence.

22. West Face suddenly indicated that it wanted to transfer this matter to the Commercial List on May 8. Prior to that, neither West Face nor Veritas saw fit to bring a motion to transfer this

¹⁰ Reasons for Judgment of Justice Akhtar dated January 5, 2016 ("Reasons"), ¶20.

¹¹ Reasons, ¶25-28.

¹² *The Catalyst Capital Group Inc. et al v. Veritas Investment Research Corporation et al*, 2017 ONCA 85.

action to the Commercial List. Both West Face and Veritas were more than willing to have a judge of the regular Civil List hear their Rule 21 motions.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

(A) ACTION DOES NOT MEET THE CRITERIA FOR THE COMMERCIAL LIST

23. This is an action for defamation, conspiracy, and interference with economic relations. All of these causes of action are regularly heard on the Civil List.

24. The subject matter of this action does not fall under sub-paragraphs 1(a) through (l) of the Commercial List Practice Direction.

25. This matter does not fall within the traditional boundaries of the “basket clause”. The subject matter of this case is not a *specialized* commercial matter and does not require a trier of fact with any special expertise in commercial matters.

26. The straightforward primary issue in this case is whether the West Face and Veritas Reports were false and defamatory. West Face claims that the defence of justification will require the Court to assess whether West Face’s research was accurate. This determination does not require any specialized knowledge.

27. Simply because the subject matter involves a particular publically traded stock and the deception of the stock market does not mean that this case requires a trier of fact with specialized knowledge. The regular Civil List has regularly heard and determined numerous cases that raise similar issues:

- (a) *Fuda v. Conn*: a defamation case concerning a defamatory management information circular distributed at a shareholders meeting¹³;
- (b) *Gould v. Western Coal Corp.*: Justice Strathy heard a certification motion concerning a complicated action where the plaintiff alleged the defendants fabricated a financial crisis in order to depress its stock to enhance the defendants' shareholdings at a fraction of the cost.¹⁴
- (c) *Vipond v. AGF Private Investment Management*: an action by an investor against a stock brokerage for failing to diversify the investor's portfolio and breaching fiduciary duties, breach of contract and negligence.¹⁵
- (d) *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*: a certification motion concerning an action over whether an insurance company had negligently overexposed itself and failed to hedge prudently to avoid excessive risk to prevent its stock from dropping dramatically.¹⁶
- (e) *820823 Ontario Ltd. v. Kagan*: an action to recover stock market losses caused by negligence, breach of contract and breach of fiduciary duty.¹⁷

¹³ 2009 CarswellOnt 224 (SCJ).

¹⁴ 2012 ONSC 5184.

¹⁵ 2012 ONSC 7068.

¹⁶ 2013 ONSC 4083.

¹⁷ 2003 CarswellOnt 3320 (SCJ).

(B) **UNRELATED TO OTHER PROCEEDINGS ON THE COMMERCIAL LIST**

28. West Face claims that there is a “nexus between this action and the three proceedings between Catalyst and West Face”.

29. There is only one other active proceeding that involves Catalyst and West Face on the Commercial List. In May 2016, Catalyst commenced a suit against West Face and nine other defendants for, *inter alia*, inducing breach of contract (the “VimpelCom Action”). The VimpelCom Action is entirely unrelated to this action, both factually and legally.

30. There is no nexus between the proceedings and there is no efficiency gained by having this matter and the VimpelCom Action together on the Commercial List.

31. The other two proceedings that West Face argues create a “nexus” with this action are completed. Mid-Bowline Group Corp.’s (“Mid-Bowline”) application for approval of a plan arrangement was a *CBCA* matter and fell within the enumerated categories of matters properly on the Commercial List. The Plan of Arrangement was approved in 2016. This is not an active proceeding.

32. The other proceeding, the Moyse Action, was only transferred to the Commercial List after Justice Newbould ordered an expedited trial because Catalyst’s claim for a constructive trust over certain proceeds affected the approval of Mid-Bowline’s Plan of Arrangement. Absent the intervening Plan of Arrangement and Justice Newbould’s order, the Moyse Action would not have been on the Commercial List as it had been proceeding on the regular Civil List for 18 months prior to the transfer.

33. West Face fails to explain why reference to the Moyse Action in the pleadings in this matter justifies a transfer to the Commercial List. It does not. The Moyse Action is mentioned in the claim as providing background context to this matter. If any background information about the Moyse Action is required to understand this matter, the parties can refer to the record in the Moyse Action.

(C) REQUESTED TRANSFER IS FORUM SHOPPING

34. West Face's motion to transfer this matter is not-so-thinly veiled forum shopping.

35. It is more than passing strange that West Face waited until Tuesday of this week to file its motion to transfer, especially when it received the Court of Appeal's decision almost four months ago.

36. As discussed above, West Face and Veritas are seeking to have this matter heard in what they perceive to be a friendlier forum because they received an unfavorable result in their Rule 21 motions. Before they knew the result of their Rule 21 motions, neither West Face nor Veritas sought to transfer this matter. Only after the Motions Judge refused to strike most of the claim and the Court of Appeal allowed the Plaintiffs' appeal, did West Face and Veritas suddenly decide that this was a complex commercial matter in need of the expertise of the Commercial List.

37. Nothing has changed in this case to explain the need for a sudden transfer other than West Face's success on the Commercial List in the Moyse Action and its failure in this action on the regular Civil List. Permitting a transfer at this time rewards West Face for engaging in procedural gamesmanship.

(D) NO BENEFIT TO BEING HEARD ON THE COMMERCIAL LIST

38. West Face claims that it anticipates “significant issues” that will benefit from active case management. There is no basis for this submission. The parties are represented by responsible and cooperative counsel. It is not clear what these “significant issues” are. The Court of Appeal heard a similar hyperbolic argument from counsel for West Face and utterly rejected it.


39. Importantly, at no point in this litigation has West Face ever requested case management on the regular Civil List. It is fully entitled to do so and has simply chosen not to avail itself of that opportunity.

40. The Civil List offers parties 9:30 appointments like the Commercial List to resolve scheduling issues and uncontested matters. There are no procedural advantages to transferring this matter to the Commercial List.

PART IV - ORDER REQUESTED

41. Catalyst respectfully requests that West Face’s motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2017.

for: 
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SCHEDULE “A”

LIST OF AUTHORITIES

- 1 *Fuda v. Conn*, 2009 CarswellOnt 224 (SCJ)
- 2 *Gould v. Western Coal Corp.*, 2012 ONSC 5184
- 3 *Vipond v. AGF Private Investment Management*, 2012 ONSC 7068
- 4 *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083
- 5 *820823 Ontario Ltd. v. Kagan*, 2003 CarswellOnt 3320 (SCJ)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

N/A

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Plaintiffs

-and- VERITAS INVESTMENT RESEARCH CORPORATION et al.
Defendants

Court File No. CV-15-530726

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PROCEEDING COMMENCED AT
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