

Court File No. CV-17-587463-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)

BETWEEN:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL  
CORPORATION

Plaintiffs

- and -

WEST FACE CAPITAL INC., GREGORY BOLAND, MSV ADVISORS INC. C.O.B.  
ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES  
LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS  
MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP,  
MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CALRITYSPRING INC.,  
NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN  
BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX  
and JOHN DOES #1-10

Defendants

AND BETWEEN:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

- and -

THE CATALYST GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON  
GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON,  
EMMANUEL ROSEN, B.C. STRATEGY LTD. d/b/a BLACK CUBE, B.C.  
STRATEGY UK LTD. d/b/a BLACK CUBE and PSY GROUP INC.

Defendants by Counterclaim

**NOTICE OF MOTION**  
**(Motion to Strike Counterclaim)**

The Defendants by Counterclaim, The Catalyst Capital Group Inc., Callidus Capital Corporation, Newton Glassman, Gabriel De Alba and James Riley (collectively, the "Catalyst

Defendants”), will make a motion to the Court on a date to be fixed by the Court at 10:00 a.m., or soon after that time as the motion can be heard at 330 University Avenue, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** The motion is to be heard

in writing under subrule 37.12.1(1) because it is unopposed;

in writing as an opposed motion under subrule 37.12.1(4);

orally.

1. **THE MOTION IS FOR:**

- (a) an Order striking out the Counterclaim of West Face and Boland on the grounds set out below without leave to amend, or with leave to amend on such terms as this Honourable Court considers just and appropriate;<sup>1</sup>
- (b) costs of this motion on an appropriate scale; and
- (c) such other relief as this Honourable Court considers just and necessary.

2. **THE GROUNDS FOR THE MOTION ARE:**

*Overview*

- (a) On November 7, 2017, Catalyst and Callidus commenced a claim against West Face and Boland, among others, claiming damages of \$450 million, and punitive damages of \$5 million, for defamation, injurious falsehood, the tort of unlawful means, civil conspiracy and unjust enrichment;

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<sup>1</sup> Unless defined otherwise, capitalized terms used in this Notice of Motion have the same meanings ascribed to them by West Face and Boland in the Statement of Defence and Counterclaim.

- (b) On December 29, 2017, West Face and Boland issued a Statement of Defence and Counterclaim claiming damages of \$500 million, and punitive damages of \$50 million, for defamation, conspiracy, breach of confidence, inducing breach of confidence, inducing breach of fiduciary duty and the tort of unlawful means. The counterclaim is asserted not just against Catalyst and Callidus (original plaintiffs in this action), but also against three individual officers or directors of those two companies (Glassman, De Alba and Riley), and against five persons unaffiliated to Catalyst;
- (c) The Counterclaim is retaliatory and frivolous. Despite its length, the Counterclaim is devoid of material facts necessary to support the claims or damages alleged. The Counterclaim is instead replete with hollow conclusory allegations, repeated *ad nauseam*, and dramatic storytelling that serves no purpose other than to tarnish Catalyst;
- (d) The Counterclaim violates the *Rules of Civil of Procedure* both in form and substance. In form, the Counterclaim repeatedly fails to comply with the rules of pleading under rule 25.06, and contains allegations that are properly struck as scandalous under rule 25.11. In substance, the Counterclaim fails to plead the material facts necessary for establishing the causes of action pleaded, and contains claims properly struck under rule 21.01(1)(b);

#### *Formal Defects in Counterclaim*

- (e) The Counterclaim is not constrained to a concise statement of the material facts on which West Face and Boland rely for their claims. It is predominated by allegations that do not contribute materially to establishing the claims asserted, and are included only for prejudicial effect. These include:

- (i) lengthy “background” allegations whose only purpose appears to be to proclaim the merits of West Face’s position in other court proceedings;
  - (ii) allegations relating to a purported interview with retired judge Frank Newbould (colourfully dubbed a “sting” by West Face and Boland), which are not material to any cause of action being asserted by West Face or Boland; and
  - (iii) allegations of “attempted” or “failed” acts by the Counterclaim Defendants that are not alleged to have caused any damage to either West Face or Boland. If relevant at all, these constitute evidence rather than material facts;
- (f) The Counterclaim contains inconsistent allegations, which are not pleaded as being in the alternative. For example, the Counterclaim is inconsistent in identifying the parties to the alleged conspiracy. Several persons alleged in one place to have “acted in concert with” all other Counterclaim Defendants are alleged elsewhere to have acted on his/her “own behalf” and on behalf of certain other Counterclaim Defendants and on behalf of all other Counterclaim Defendants. These allegations are mutually exclusive and have materially different implications in the context of a conspiracy claim;
- (g) The Counterclaim includes bald allegations of fraud, misrepresentation, malice and intent, which are unsupported by full particulars;
- (h) The Counterclaim sets out a single amount claimed on behalf of West Face and Boland for all causes of action, rather than separately identifying the amounts claimed by each counterclaimant in respect of each counterclaim;
- (i) The Counterclaim does not specify whether the damages claimed are special or general.

To the extent special damages are claimed, the Counterclaim does not state the amounts and particulars of such damages to the extent they are known by West Face and Boland;

*Substantive Defects in Counterclaim*

- (j) The Counterclaim indiscriminately lumps together West Face and Boland as having identical claims and damages and indiscriminately lumps together the Counterclaim Defendants as co-conspirators equally and jointly liable for every claim. The Counterclaim does not allege material facts capable of supporting this indiscriminate treatment. It is plain and obvious that the claims, as made, would fail. For example:
  - (i) There is no basis pleaded for piercing the corporate veil to name Catalyst's and Callidus's individual officers and directors as defendants. The pleaded acts of Glassman are no more than the acts of Catalyst. De Alba and Riley are not pleaded to have done anything whatsoever, other than be officers or directors of Catalyst and Callidus;
  - (ii) There is no basis pleaded, other than conspiracy, for holding the Catalyst Defendants liable for the torts allegedly committed by the other Counterclaim Defendants (i.e., Jamieson, Rosen, Black Cube and Psy Group);
  - (iii) Further to paragraph (g) above, the allegation of a conspiracy among all of the Counterclaim Defendants is incapable of proof, as the Counterclaim does not allege facts, circumstances or particulars from which a trier of fact would be able to infer that all of the Counterclaim Defendants intended or desired to inflict injury upon West Face. The alleged retaliatory motives of the conspiracy,

even if assumed to be true, apply exclusively to Catalyst and (to a more limited extent) Callidus. It is patently ridiculous, for example, that a hired private investigator would have been motivated to “retaliate” against either West Face or Boland;

- (iv) Further to paragraph (f) above, the allegation that Jamieson, Rosen, Black Cube or Psy Group were co-conspirators is contradicted by mutually exclusive allegations that their involvement was the result of their being “retained” by the Catalyst Defendants (rather than acting further to a common purpose and intent);
- (v) The Counterclaim alleges no facts, circumstances or particulars from which a trier of fact would be able to infer that any of the Counterclaim Defendants intended to injure Boland, as distinct from West Face;
- (vi) Each of the allegedly defamatory Internet Postings is alleged to have been published “by or at the request of the Counterclaim Defendants, directly or indirectly”. It is not sufficient to simply lump a number of defendants together and say they all made false statements. Paragraph 158 of the Counterclaim implies that West Face and Boland are simply guessing at the involvement of the Catalyst Defendants; and
- (vii) The allegedly defamatory statements set out in the Counterclaim are alleged to have had the “purpose and effect” of damaging the reputation of West Face and Boland, even though most of the allegations plainly do not concern Boland at all;

- (k) West Face and Boland have not pleaded the necessary elements of each cause of action relied on for their claims. In particular:
- (i) West Face and Boland have not pleaded the necessary elements of the tort of unlawful means. The purported “unlawful means” pleaded at paragraphs 168 and 169(b) and (c) are causes of action that West Face would hold directly against Black Cube (if properly pleaded), rather than causes of action held by a third party against Black Cube. Paragraph 169(a) pleads a claim of fraud by a third party as against Black Cube, but such allegation is not causally linked to any alleged damages suffered by either West Face or Boland (an inducement to attend an interview is not the same as an inducement to divulge confidential information);
  - (ii) West Face and Boland have not pleaded the necessary elements of inducing breach of contract or inducing breach of fiduciary duty. In particular, they did not plead that Black Cube had knowledge of the contractual confidentiality obligations, or had knowledge of the existence of a fiduciary duty, or that Black Cube specifically intended to induce a breach of the confidentiality/fiduciary obligations, or that any damages flowed specifically from the alleged inducement;
  - (iii) West Face and Boland have not pleaded the necessary elements of a claim for “breach of confidence”. None of the Counterclaim Defendants are alleged to have owed either West Face or Boland a duty of confidence;
  - (iv) West Face and Boland have not pleaded any elements of a cause of action for

“inducing breach of confidence”, as distinct from the claims for inducing breach of contract or inducing breach of fiduciary duty;

- (v) Paragraph 108 of the Counterclaim alleges that Glassman “impugned the conduct, business integrity and ethics of Boland and his partners and colleagues at West Face”. No particulars of the allegedly defamatory statement(s) are pleaded; and
- (vi) Paragraphs 161-162 of the Counterclaim allege the publication of edited interview transcripts that gave certain “false impressions”. The particulars of the actual statements and of the purported edits that were made are not pleaded;
- (l) The necessary elements of the counterclaims, where pleaded at all, depend on hollow conclusory allegations unsupported by material facts capable of supporting those conclusions. For example:
  - (i) As described above, the Counterclaim indiscriminately lumps together the Counterclaim Defendants without an adequately pleaded basis for doing so. The particulars pleaded in support of each counterclaim implicate, at most, only certain of the Counterclaim Defendants, and fail to disclose a cause of action in the form they are pleaded (i.e., by both Boland and West Face as against every Counterclaim Defendant);
  - (ii) The failure to plead a common intent and purpose that could plausibly apply to all Counterclaim Defendants is fatal to the claim of conspiracy;
  - (iii) The allegations that the Post-Judgment Comments, October 2016 Press Release



and Investor Letter are defamatory of West Face and Boland are predicated on allegations as to the “plain and ordinary meaning” of the statements made, which are patently ridiculous and incapable of proof. Among other things, the alleged “plain and ordinary meanings” conflate the statements actually made with the allegations made by Catalyst in the Moyse Action. Statements made in the course of a legal proceeding are protected by an absolute privilege and cannot form the basis of a defamation action; and

- (iv) Even if West Face and Boland had otherwise pleaded the requisite elements of inducing breach of contract or inducing breach of fiduciary duty, the characterization of information as “confidential” or “privileged” is a legal conclusion, which West Face and Boland have not pleaded material facts to support;
- (m) West Face and Boland’s claim for a declaration that each of the Catalyst Defendants are vexation litigants is improperly made in the context of an action. Orders under Section 140 of the *Courts of Justice Act* may only be sought in an application. Additionally, it is plain and obvious that this claim is unfounded as it relates to Glassman, De Alba and Riley, who were not even litigants in this proceeding (much less vexatious litigants) until West Face and Boland added them as Counterclaim Defendants; and
- (n) Even if it were possible to selectively assemble allegations from the Counterclaim into narrower and more viable claims, it is not the responsibility of the Counterclaim Defendants or of this Honourable Court to do so. As drafted, the Counterclaim is fatally defective and should be struck, either without leave to amend, or with leave to

amend on such terms as this Honourable Court considers appropriate.

*Other Grounds*

- (o) Rules 21.01(1)(b) and 25.06, 25.11 and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
- (p) Section 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- (q) Such further and other grounds as counsel shall advise and this Honorable Court may permit.

3. THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) Statement of Defence and Counterclaim of West Face and Boland issued December 29, 2017; and
- (b) Such further and other material as counsel may require and this Honourable Court may permit.

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March 27, 2018

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THE CATALYST CAPITAL GROUP INC., et al.  
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-and-

WEST FACE CAPITAL INC., et al.  
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(COMMERCIAL LIST)  
PROCEEDING COMMENCED AT TORONTO

**NOTICE OF MOTION**  
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