Court File No. CV-17-587463-00CL
Court File No. CV-17-586096

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V 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, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX and JOHN DOES #1-10

Defendants

A N D B E T W E E N:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

and

THE CATALYST CAPITAL 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 to the Counterclaim

# BLACK CUBE'S FACTUM

May 25, 2018

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Defendant to the Counterclaim

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Defendants to the Counterclaim

# BLACK CUBE'S FACTUM

## PART I - OVERVIEW

1. The Black Cube Defendants by Counterclaim ("Black Cube") move under Rule 25.11 to strike two groups of allegations from West Face's counterclaim: (1) the allegations related to Harvey Weinstein (the "Weinstein Allegations"); and, (2) the allegations related to Justice Frank Newbould (the "Newbould Allegations").

2. Rule 25.11 provides in relevant part that a pleading or portion thereof may be struck on the ground that the pleading:

(a) may prejudice or delay the fair trial of the action; and,

(b) is scandalous, frivolous, or vexatious.

3. The Weinstein Allegations ought to be struck as scandalous and vexatious. The essence of the Weinstein Allegations is that West Face learned of Black Cube's involvement with their current/ former employees through media reports concerning Black Cube's retainer by disgraced Hollywood executive Harvey Weinstein. It is clear that the Weinstein Allegations have been included purely for colour, because the manner in which West Face learned of Black Cube's involvement is irrelevant.

4. The Newbould Allegations ought to be struck for three reasons. First, they are improper in that they have also been inserted purely for colour. Second, the prejudicial effect of the allegations far outweighs any probative value. Third, they will open up areas of inquiry that will prejudice the fair and expeditious trial of the counterclaim, and do nothing more than embarrass all concerned.

5. Black Cube respectfully submits that one must in considering these allegations ask the simple question, "to what end"? These allegations serve no purpose. Permitting them to stand will not assist the trier of fact in resolving any issues in dispute; it will accomplish nothing more than embarrassing the parties, process, and witnesses.

## PART II - SUMMARY OF FACTS

### *The Counterclaim*

6. The counterclaim seeks damages of $500 million for defamation, conspiracy, breach of confidence, inducing breach of confidence, inducing breach of contract, inducing breach of fiduciary duty, and the tort of unlawful means.

**Reference** West Face counterclaim, para. 25(b); Black Cube's Motion Record, Tab 2

7. The pith and substance of the counterclaim is the allegation that the counterclaim defendants engaged in a campaign of defamation and economic interference against the West Face parties as retribution for various events with which Catalyst took umbrage:

> 27. The Catalyst Defendants, and in particular Glassman (who was the self-proclaimed "architect" of Catalyst's failed strategy to acquire WIND) refused to accept responsibility for these failures. Instead, Glassman and the other Catalyst Defendants blamed West Face and Boland for the woes suffered by Catalyst and Callidus, and decided to retaliate in an effort to shroud West Face and Boland in contention and controversy. They were well aware, and indeed intended, that doing so would deter investors and other participants in the capital markets from doing business with West Face and Boland, thereby causing them harm. That is precisely what has happened. The Catalyst Defendants and other Counterclaim Defendants acted with malice, and with contumelious disregard for the rights and interests of West Face and Boland, in orchestrating the campaign of defamation and harassment described below. They

> sought to inflict as much harm as possible on West Face and Boland by engaging in the conduct at issue in this Counterclaim, including by disseminating their false and defamatory statements concerning West Face and Boland not only to investors in or with Callidus and Catalyst, but also to current and potential investors with West Face and Boland. The Catalyst Defendants and other Counterclaim Defendants conspired together and with one another to defame and interfere with the economic interests of West Face and Boland in order to punish, embarrass, discredit and harm them, and to deter them and others from crossing the Catalyst Defendants.
>
> 28. This conspiracy was also intended to divert the attention of investors, and the financial community at large, from the Catalyst Defendants' own failures, as well as from allegations of misconduct and "whistleblower" complaints made against Callidus and other Catalyst Defendants (including Glassman and Riley) by parties unrelated to West Face.

**Reference** West Face counterclaim, paras. 27-28; Black Cube's Motion Record, Tab 2

8. The counterclaim pleads that the purpose of the alleged campaign/ conspiracy was to harm West Face's business interests and reputation.

**Reference** West Face counterclaim, para. 32; Black Cube's Motion Record, Tab 2

***The Weinstein Allegations***

9. West Face pleads that it only learned of Black Cube's involvement with its employees through media coverage of the firm's retainer by Harvey Weinstein:

> 92. West Face only uncovered the Black Cube Campaign as a result of widespread media coverage in the United States and globally concerning Black Cube because of its involvement in a public scandal. In particular, West Face learned through the mainstream and on-line media that:
>
> (a) Hollywood producer Harvey Weinstein is alleged by numerous women to have engaged in outrageous predatory and criminal behaviour, including sexual harassment and assault;

> (b) Weinstein, through counsel, hired Black Cube to investigate both women and journalists who were about to disclose Weinstein's actions; and
>
> (c) Operatives of Black Cube acted under false pretences to insinuate their way into the lives and confidences of Weinstein's victims in order to extract information that could potentially be used against them. One of Black Cube's investigators who played an active role in the Weinstein matter was identified publicly as "Stella Penn Pechanac". Media coverage and coverage over the Internet concerning the involvement of Black Cube in the Weinstein scandal included photographs and at least one video of Ms Penn Pechanac.
>
> 93. West Face only learned of the conduct of Black Cube complained of in this proceeding in November 2017 when this media coverage resulted in West Face employees, who had been targeted by operatives of Black Cube, recognizing Stella Penn Pechanac as one of the individuals who had solicited and met with them under what turned out to be false pretences. Widespread media coverage pertaining to the prominent role played by Black Cube in the Weinstein scandal led directly to the discovery by West Face and Boland of the Black Cube Campaign against them [emphasis added].
>
> **Reference** West Face counterclaim, para. 92-93; Black Cube's Motion Record, Tab 2

***The Newbould Allegations***

10. West Face alleges that Justice Newbould was one of the targets of the "Black Cube Campaign", in which Black Cube allegedly targeted current and former West Face employees with a view to obtaining West Face's privileged and confidential information.

> **Reference** West Face counterclaim, para. 33(a); Black Cube's Motion Record, Tab 2

11. These unlawful activities were allegedly carried out in order to retaliate against, punish, and embarrass West Face because Catalyst was upset about West Face's courtroom and boardroom success.

**Reference** West Face counterclaim, para. 35; Black Cube's Motion Record, Tab 2

12. The Newbould Allegations are substantively distinct from the rest of the allegations that comprise the "Black Cube Campaign". While the campaign allegedly targeted West Face employees in order to elicit confidential information, the "sting" allegedly conducted upon Justice Newbould is said to have been part of Catalyst's conduct of the Moyse litigation, and specifically directed at discrediting Mr. Newbould with a view to obtaining fresh evidence in the Moyse action appeal:

> 90. Remarkably, one of the targets of the Black Cube Campaign was Justice Newbould, who, as stated above, rendered the trial judgment in favour of West Face in the Moyse Action in August 2016. One of the central goals of the "sting" perpetrated against Justice Newbould was to entrap him into making anti-Semitic comments, thus insinuating that Justice Newbould decided the Moyse Action in the way that he did because he was biased against Glassman, who is Jewish. The Counterclaim Defendants intended to use the results of the sting against Justice Newbould to attack and discredit him and his Decision in favour of West Face in the Moyse Action, both in Catalyst's appeal to the Court of Appeal for Ontario from the Decision of Justice Newbould dismissing Catalyst's claims against West Face in the Moyse Action and in the VimpelCom Action. The ultimate targets of this orchestrated attack on Justice Newbould were West Face and Boland. While Black Cube's effort to elicit anti-Semitic remarks from Justice Newbould failed, the purpose and effect of this and other elements of the Black Cube Campaign was to delay the hearing of Catalyst's appeal in the Court of Appeal in the Moyse Action, to delay the outcome of the Defendants' motions to strike in the VimpelCom Action, to cast a cloud of doubt and uncertainty over West Face's victory in the Moyse Action, and to shroud West Face and Boland in contention and controversy.

**Reference** West Face counterclaim, para. 90; Black Cube's Motion Record, Tab 2

## PART III - LAW & ARGUMENT

***Governing Legal Principles***

13. Rule 25.11 provides:

> **STRIKING OUT A PLEADING OR OTHER DOCUMENT**
>
> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.
> R.R.O. 1990, Reg. 194, r. 25.11.

14. There are three principles arising from the Rule 25.11 jurisprudence that are relevant to this motion.

15. First, allegations that are included in a claim purely for colour are irrelevant, and ought to be struck.

> **Reference** *Burrell v. Peel (Regional Municipality) Police Services Board*, [2006] O.J. No. 5009 at para. 18 (S.C.J.); Black Cube Book of Authorities, Tab 1
>
> *Wolker v. Ogilvie Realty Ltd.*, [2006] O.J. No. 381 at paras. 11-12 (S.C.J.); Black Cube Book of Authorities, Tab 2

16. Second, allegations that have marginal relevance will nonetheless be struck where their prejudicial effect outweighs their probative value, though this discretion ought to be

exercised with care, and the motion judge should consider whether a pleadings motion is the appropriate stage for determining issues of probative value and prejudicial effect.

**Reference** *Quizno's Canada Restrauant Corp. v. Kileel Developments Ltd.*, [2008] O.J. No. 3674 at paras. 15-16 (C.A.); Black Cube Book of Authorities, Tab 3

17. Third, the question of proportionality is relevant to a consideration of whether particular aspects of a pleading offend Rule 25.11(a) by prejudicing the fair trial of a claim.

**Reference** *Javitz v. BMO Nesbitt Burns* (2011), 105 O.R. (3d) 279 at para. 29 (S.C.J.) ; Black Cube Book of Authorities, Tab 4

***Weinstein Allegations Should Be Struck***

18. The Weinstein Allegations have been inserted purely for colour, and as such ought to be struck. It matters not how West Face learned of Black Cube's involvement in the West Face / Catalyst dispute. What matters is whether Black Cube's conduct, either alone or in conjunction with that of other defendants to the counterclaim, gives rise to a cause of action and damages.

19. The most that could be said about the Weinstein Allegations is that they form part of the narrative. However, that could be pleaded without offending Rule 25.11. For example, if paragraph 92 simply pleaded that West Face learned of the Black Cube Campaign as a result of media coverage of Black Cube on an unrelated matter, it would be

unobjectionable. However, paragraphs 92-93 go far beyond that, pleading specifically that the unrelated matter was the Harvey Weinstein scandal, and alleging particulars of Black Cube's involvement in that matter.

20. If the Weinstein Allegations are allowed to stand, then Black Cube's involvement with Mr. Weinstein will be the subject of productions, discovery, and potentially evidence at trial. None of that will assist the trier of fact, and including those allegations is contrary to the principle of proportionality. This case is not about Black Cube's other engagements or conduct.

***The Newbould Allegations Should Be Struck***

The Newbould Allegations Are Scandalous

21. The Newbould Allegations should be struck because they too were inserted purely for colour, in order to tarnish Black Cube and turn the court against it. The allegations are scandalous, contrary to Rule 25.11(b).

22. The Newbould Allegations are similar in principle to the allegation in *Burrell v. Peel Police* that the Peel police engaged in an unwritten practice of "apartheid". The court struck those allegations on the basis that they were irrelevant, inserted for colour, and designed to inflame.

**Reference** *Burrell*, *supra* at para. 18; Black Cube Book of Authorities, Tab 1

Probative Value/ Prejudicial Effect

23. The Newbould Allegations stand on a different footing from the rest of the Black Cube Campaign, and therefore have little if any probative value. The Black Cube "Campaign" allegedly consists of conduct that could directly harm West Face's economic interests, being the soliciting of privileged and confidential information from current and former employees.

24. The Newbould Allegations, in contrast, involve an alleged attack on the integrity of Justice Newbould with a view to obtaining information that might be used as fresh evidence on the Moyse action appeal. While that alleged "sting" may have had the effect of harming West Face's *litigation position*, the information Black Cube allegedly sought to uncover was not proprietary to West Face or in any way related to West Face's business.

25. The Newbould Allegations do not support nor are they legally relevant to any of the causes of action identified in paragraph 25(b) of the counterclaim, being: defamation; conspiracy; breach of confidence; inducing breach of confidence; inducing breach of contract; inducing breach of fiduciary duty; or, the tort of unlawful means.

26. In contrast, the Newbould Allegations carry substantial prejudicial effect.

27. Including the Newbould Allegations in the litigation will embarrass all concerned, from the parties, to the court, to the witnesses. A trial of those allegations will add nothing

to West Face's substantive case, but will bring the administration of justice into disrepute. Justice Newbould will have to testify, and every word His Honour is alleged to have exchanged with Black Cube's personnel will be scrutinized (note here that West Face's counterclaim in para. 25(e) seeks disclosure of every piece of paper or piece of data related to the Newbould Allegations).

28. All of this will accomplish nothing. Whatever Black Cube did or did not do in its interactions with Justice Newbould, and whatever His Honour said or did not say, will have no bearing on the causes of action West Face has asserted in the counterclaim.

Prejudice to Fair and Expeditious Trial

29. The other significant prejudice is with respect to the fair and expeditious trial of the counterclaim. Including the Newbould Allegations is disproportionate and will prejudice and delay a fair trial because they will considerably expand the scope of the proceeding, without any corresponding benefit to the trier of fact. The Newbould Allegations raise very complex and difficult questions of litigation privilege and absolute immunity that will result in interlocutory motions and appeals therefrom *ad infinitum*.

30. This court has addressed the problems that such pleadings create on many occasions, including in *CNR v. Brant*, where the court wrote:

> A pleading must contain a "concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved": rule 25.06; *Davis v. Canada (Attorney General)* 2004 NLSCTD 153, 240 Nfld. &

> P.E.I.R. 21, [2004] N.J. No. 274. Unnecessary paragraphs should be struck so as to refine and focus the pleading…
>
> 28 A pleading of fact will be struck if it cannot be the basis of a claim or a defence in the action and is designed solely for the purpose of atmosphere: *Wilson v. Wilson*, [1948] O.J. No. 62 (H.C.J.). If the only purpose of the pleading is to cast the opposing party in a bad light, it will be struck.
>
> 29 One of the reasons for this rule is that the pleadings define the issues in the action. If a party is required to respond to irrelevant facts, inquire into those facts on discovery, and respond to evidence of those facts at trial, the litigation and trial will be diverted by inquiries into facts that have no connection to the real issue before the court [emphasis added].

**Reference** *Canadian National Railway Co. v. Brant*, [2009] O.J. No. 2661 at paras. 27-29 (S.C.J.); Black Cube Book of Authorities, Tab 5

31. If the Newbould Allegations had some meaningful relevance, then the court and parties would have to accept the embarrassment and added complexity. However, the allegations are of such marginal relevance that their prejudicial effect outweighs their probative value, and they ought to be struck.

## PART IV - ORDER SOUGHT

32. The Black Cube defendants respectfully request an order striking out the Weinstein Allegations and the Newbould Allegations in the manner indicated in Schedule "A" to the Amended Notice of Motion, without leave to amend, as well as granting the moving parties their costs of this motion on a partial indemnity scale.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25th day of May, 2018.

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## SCHEDULE "A"

## LIST OF AUTHORITIES

1. *Burrell v. Peel (Regional Municipality) Police Services Board*, [2006] O.J. No. 5009 (S.C.J.)

2. *Wolker v. Ogilvie Realty Ltd.*, [2006] O.J. No. 381 (S.C.J.)

3. *Quizno's Canada Restrauant Corp. v. Kileel Developments Ltd.*, [2008] O.J. No. 3674 (C.A.)

4. *Javitz v. BMO Nesbitt Burns* (2011), 105 O.R. (3d) 279 (S.C.J.)

5. *Canadian National Railway Co. v. Brant*, [2009] O.J. No. 2661 (S.C.J.)

## SCHEDULE "B"

## TEXT OF STATUTES, REGULATIONS & BY - LAWS

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R.R.O. 1990, Reg. 194, r. 25.11.

| | | |
|---|---|---|
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PROCEEDING COMMENCED AT
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