CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2019 ONSC 128
COURT FILE NO.: CV-17-587463-00CL
DATE: 20190109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Catalyst Capital Group Inc. and Callidus Capital Corporation

AND:

West Face Capital Inc., Gregory Boland, M5V Advisors Inc. C.O.B. Anson Group Canada, Admirality 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

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Linda Plumpton* and *Leora Jackson*, for the Applicants the Anson Defendants

Brian Radnoff, for the Applicants Nathan Anderson and ClaritySpring Inc.

Nancy Tourgis and *Melvyn Solmon*, for the Applicant Richard Molyneux

Darryl Levitt, Self-Represented, Applicant

David Moore, Ken Jones and Matthew Karabus, for the Respondents Catalyst Capital Group and Callidus Capital Corporation

HEARD: October 29, 2018

ENDORSEMENT

[1] On these motions, various defendants in this action (the "applicants") seek an order striking the statement of claim dated November 7, 2017 (the "Statement of Claim") and dismissing the action against them under Rules 21, 25.06(1) and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

The Parties

[2] The following sets out the parties in the action and the defined terms in the Statement of Claim that are relevant for the present motions.

The Plaintiffs

[3] The plaintiff The Catalyst Capital Group Inc. ("Catalyst") is a corporation with its head office located in Toronto, Ontario. Catalyst describes itself as a firm in the field of investments in distressed and undervalued Canadian situations.

[4] 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.

[5] The common shares of Callidus (the "Callidus Shares") are listed on the Toronto Exchange. Catalyst owns approximately 40 percent of the outstanding shares of Callidus.

[6] Catalyst and Callidus are herein collectively referred to as the "plaintiffs".

The Anson Defendants

[7] The defendant M5V Advisors Inc. is a hedge fund incorporated in Ontario that carries on business as Anson Group Canada.

[8] The defendant Frigate Ventures LP ("Frigate") is a limited partnership organized pursuant to the laws of Texas. At all relevant times, Frigate was a registered investment fund manager with the Ontario Securities Commission (the "OSC"). The defendant Admiralty Advisors LLC ("Admiralty") is a limited liability company organized pursuant to the laws of Texas that is the general partner of Frigate.

[9] The defendants Anson Investments LP and Anson Capital LP are limited partnerships organized under the laws of Texas.

[10] The defendant Anson Investments Master Fund LP is a limited partnership organized under the laws of Texas. The defendant AIMF GP is the general partner of Anson Investments Master Fund LP.

[11] The defendant Anson Catalyst Master Fund LP is a limited partnership organized under the laws of Texas. The defendant ACF GP is the general partner of Anson Catalyst Master Fund LP.

[12] The parties described in the preceding five paragraphs are a family of hedge funds that carry on business as the "Anson Group". All of them engage in securities transactions on public markets. They are collectively referred to herein as the "Anson Corporate Defendants".

[13] The defendants Moez Kassam ("Kassam") and Adam Spears ("Spears") are principals of the Anson Corporate Defendants. The defendant Sunny Puri ("Puri") is an analyst employed by the Anson Corporate Defendants. Kassam, Spears and Puri are collectively referred to herein as the "Anson Individual Defendants".

[14] The Anson Corporate Defendants and the Anson Individual Defendants are herein collectively referred to as the "Anson Defendants".

The Wolfpack Conspirators

[15] 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. One of the principals of West Face is the defendant Gregory Boland ("Boland").

[16] The defendant ClaritySpring Inc. ("Clarity") is a Delaware corporation that is based in New York. Clarity's principal is the defendant Nathan Anderson ("Anderson").

[17] In the Statement of Claim and herein, the Anson Defendants, West Face, Boland, Clarity and Anderson are collectively referred to as the "Wolfpack Conspirators".

The Guarantor Conspirators

[18] The defendant Jeffrey McFarlane ("McFarlane") is an individual residing in North Carolina, in the United States of America.

[19] The defendant Darryl Levitt ("Levitt") is an individual residing in Toronto, Ontario.

[20] The defendant Richard Molyneux ("Molyneux") is an individual residing in Toronto, Ontario.

[21] The defendant Kevin Baumann ("Baumann") is an individual residing in Red Deer, Alberta.

[22] Baumann, McFarlane, Levitt and Molyneux are collectively referred to in the Statement of Claim and herein as the "Guarantor Conspirators".

The Remaining Defendants

[23] The defendant Bruce Langstaff ("Langstaff") is a former employee of Canaccord Genuity.

[24] The defendant Rob Copeland ("Copeland") is a reporter with The Wall Street Journal (the "WSJ") who resides in New York, New York.

[25] The Wolfpack Conspirators, the Guarantor Conspirators, Langstaff and Copeland are collectively referred to in the Statement of Claim and herein as the "Conspirators".

[26] The Statement of Claim also uses the defined term "Defendants" to include both the Conspirators and John Doe defendants who are alleged to have participated in the Conspiracy (as defined below) and whose identities are presently unknown.

The Pleadings and the Plaintiffs' Responses to the Applicants' Demands for Particulars

[27] In the Statement of Claim, the plaintiffs plead that, in response to actions commenced to enforce personal guarantees of the Guarantor Conspirators and certain other parties (the "Guarantors") in respect of loans made by Callidus to certain borrowers, the Guarantor Conspirators coordinated their actions. In particular, it is alleged that they decided to defend the actions against them by filing spurious counterclaims against Callidus and by alleging claims of "fraudulent inducement". It is also alleged that certain of the Wolfpack Conspirators funded the Guarantor Conspirators in these actions through one or more of the Guarantor Conspirators.

[28] It is further alleged in paragraph 61 of the Statement of Claim that the Wolfpack Conspirators and the Guarantor Conspirators then entered into a conspiracy to harm Callidus and Catalyst (herein the "Conspiracy"). The Conspiracy took the form of an agreement to a plan of action described in paragraph 64 of the Statement of Claim having the following elements (the "Plan"):

(1) The spreading of false information by rumours;

(2) The filing of false "whistleblower" complaints against Callidus with the OSC by certain of the Guarantor Conspirators to "confirm" the rumours;

(3) The leaking of the allegations contained in the complaints to the media to generate interest;

(4) The Conspirators taking short positions, directly or indirectly, in the Callidus Shares;

(5) The publication of a report in the Wall Street Journal, timed to be released near the end of the trading day, in order to cause a rapid decline in the price of the Callidus Shares; and

(6) The closing out of their naked short positions by the Conspirators to their profit and at the expense of the market value of Callidus.

[29] Each of these alleged steps in the Conspiracy is the subject of specific pleadings in paragraphs 67-111. Paragraphs 67-74 set out allegations regarding the filing of "false and defamatory whistleblower complaints" with the OSC relating to Callidus and Catalyst by Bauman, McFarlane, Levitt (or Molyneux) and Clarity (or Anderson) (the latter being incorrectly referred to as one of the Guarantor Conspirators) (the "Complaints"). The plaintiffs allege that the Complaints were defamatory and that the sole motivation for filing the Complaints was the furtherance of the Conspiracy. Bauman, McFarlane, Levitt (or Molyneux) and Clarity (or Anderson) are collectively referred to as the "Complainants" in the Statement of Claim.

[30] In paragraph 69, the plaintiffs allege that the Complainants disclosed the Complaints, or the substance of the Complaints, to WSJ reporters. I note that this paragraph appears to do no more than anticipate the allegations in paragraphs 84-93. However, insofar as the pleadings say

that the Complainants disclosed the Complaints, rather than the existence and substance of the Complaints, the pleadings are in error given the definition of "Complaints". The plaintiffs say that the error will be corrected.

[31] In paragraphs 75-82, the pleadings allege that the Conspirators contacted journalists in an effort to leak the existence of the Complaints and other false allegations about them. The pleadings refer first to the engagement of a journalist, Bruce Livesey ("Livesey"), and then to an approach to Reuters, both of which are addressed further below.

[32] The pleadings allege in paragraphs 84-93 that the Conspirators then approached Copeland who authored an article that was published in the WSJ (the "Article") after meetings between Copeland and each of the Guarantor Conspirators, at the urging of Anderson, and a meeting between Copeland and representatives of Callidus and Catalyst.

[33] In paragraphs 94-100, the pleadings allege that the Wolfpack Conspirators and one or more of the John Doe Defendants took naked short positions, and other positions to simulate short positions, in Callidus Shares, either directly or indirectly, on or about August 9, 2017. The Article was released at 3:29 p.m. on August 9, 2017. The plaintiffs say the Conspirators encouraged Copeland to release the Article at that time in order that Callidus would not be able to make normal course issuers bid purchases of Callidus Shares in the last 30 minutes of trading on that day. They say the Wolfpack Conspirators thereby profited in the significant drop in the value of Callidus Shares between August 9 and August 14, 2017.

[34] The plaintiffs allege that the Article and the Complaints made false and defamatory statements about Callidus and Catalyst and caused them loss. They also say that the Defendants' actions constituted breaches of the *Securities Act*, R.S.O. 1990, c. S.5, in particular ss. 126.1 and 126.2.

[35] The principal claim of the plaintiffs against the Defendants is a claim for damages based on the tort of conspiracy, both predominant purpose conspiracy and unlawful means conspiracy. The plaintiffs also assert claims for damages based on defamation and the tort of intentional interference with contractual relations, in each case based on the alleged defamatory statements in the Article and the Complaints, as well as unjust enrichment. They seek disgorgement of the profits made by the Conspirators.

[36] The Anson Defendants delivered a Demand for Particulars dated January 12, 2018. Molyneux delivered a Demand for Particulars dated May 15, 2018. Levitt delivered a Demand for Particulars dated May 16, 2018. Clarity and Anderson delivered a Demand for Particulars dated August 7, 2018.

[37] The plaintiffs delivered a Response to Demand for Particulars on October 22, 2018 which responded to each of the foregoing Demands for Particulars. The plaintiffs further supplemented their Response to Demand for Particulars with an addendum dated October 23, 2018 (the "Addendum").

Applicable Legal Principles on a Motion to Strike

[38] The following provisions of the *Rules of Civil Procedure* are applicable in respect of these motions:

> 21.01 (1) A party may move before a judge, ...
>
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
> ...
>
> 25.06 (1) Every pleading shall 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. ...
>
> (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. ...
>
> 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.

[39] The principles pertaining to a motion to strike a claim under r. 21.01(1)(b) are well established. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, the Supreme Court articulated the applicable test as follows:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim

> be struck out under [the counterpart under the British Columbia rules of civil procedure to r. 21.01(1)(b)].

[40] More recently, in *Catalyst Capital Group Inc. et al v. Veritas Investment Research et al.*, 2017 ONCA 85, 136 O.R. (3d) 23, at para. 21, the Court of Appeal set out the following principles that apply on a motion under r. 21.01(1)(b):

> 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.

Preliminary Matter

[41] Before addressing the applicants' motions in respect of the specific claims asserted against them, it is necessary to address certain issues pertaining to the pleadings in respect of the plaintiffs' defamation claims that also have implications for a number of the plaintiffs' other claims.

[42] As currently drafted, the allegations in the Statement of Claim give rise to considerable confusion regarding the extent to which the plaintiffs are grounding a separate defamation claim in the Complaints, in addition to their defamation claim based on the Article. In this regard, the following provisions of the pleadings are relevant.

[43] First, at paragraph 68, "Complaints" is defined as "false and defamatory whistleblower complaints" filed by the Complainants with the OSC relating to Callidus and Catalyst. The term "Complaints" therefore does not include any statements made to parties other than the OSC regarding the existence, or content, of the Complaints.

[44] Second, at paragraph 112, the plaintiffs allege that the "Article, read as a whole and the Complaints make false and defamatory statements (the "Defamatory Words") ... about Callidus and Catalyst". This definition of "Defamatory Words" is effectively confirmed in the statement at paragraph 11 of the Addendum that "[c]urrently, the only specific defamation claim pleaded in the [Statement of Claim] relates to the 'Defamatory Words' as stated in the [Statement of Claim]." This suggests that the plaintiffs base their defamation claim on "false and defamatory statements" in the Complaints as well as in the Article.

[45] Third, there are a number of vague allegations made in the Statement of Claim to disclosure of the existence of the Complaints, or the substance of the Complaints, to various parties other than the OSC. These allegations include the references in paragraphs 64 and 73 to spreading "false information through the Bay Street rumour mill" and spreading "rumours within

the financial industry". They also include the allegations in paragraphs 75-78 regarding the Conspirators' contact with, and engagement of, Livesey to write a negative story targeting the plaintiffs, as well as the allegations in paragraphs 79 and 81-83 that the Conspirators approached Reuters and "other reputable news organizations" in 2017 and encouraged them to publish a negative story about the plaintiffs.

[46] As a result of these pleadings, a reasonable reader of the pleadings would be confused as to: (1) whether the plaintiffs are asserting defamation claims based on statements made regarding the existence of, or substance of, the Complaints in circumstances other than the preparation and publication of the Article; and (2) whether the plaintiffs are asserting defamation claims based on the content of the Complaints themselves as made to the OSC.

[47] The applicants proceeded on the basis that the answer to both these questions was in the affirmative and argued that such claims should be struck for various reasons, in particular that they fail to set out the necessary facts to establish a claim against them, individually. At the hearing, however, the plaintiffs confirmed that, in fact, with one qualification addressed below, they are not asserting either of the claims described in (1) and (2) above. I will address each in turn.

[48] First, the plaintiffs say that their defamation claims are based solely on the publication of the Article and, to the extent that it is relevant, the statements of the Complainants to Copeland regarding the existence, and the alleged content, of the Complaints. The plaintiffs do not allege defamation based on any of the other alleged communications to third parties regarding the existence or content of Complaints, including to Livesey or Reuters. Instead, they say they rely on these allegations as further improper means for the purposes of their conspiracy claims as well as their claims of intentional interference with economic relations and unjust enrichment.

[49] Second, the plaintiffs also do not assert that the statements allegedly made by the Complainants to the OSC pursuant to the OSC's "whistleblower" programme are the subject of defamation claims, subject to the issue of the applicability of the tort of abuse of process discussed below. It is acknowledged that statements made to the OSC in such circumstances are entitled to absolute privilege: see *Fraleigh v. RBC Dominion Securities Inc.* (2009), 99 O.R. (3d) 290 (S.C.), at paras. 31-35; *Hung v. Gardiner*, 2003 BCCA 257, 13 B.C.L.R. (4th) 298, at paras. 30-37. This immunity applies not only to the making of statements to the OSC staff performing investigatory functions but also to all causes of action that may be based on those statements. In any event, in the present circumstances, the actual content of the Complaints remains unknown and is not pleaded.

[50] As mentioned, the plaintiffs have, however, suggested that the tort of abuse of process may apply to exclude the availability of absolute privilege in respect of the Complaints. The tort of abuse of process entails the following four elements as confirmed by the Court of Appeal in *Harris v. Glaxosmithkline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, at para. 27:

> (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted. [Citations omitted.]

[51] The plaintiffs suggest that a "whistleblower" complaint to the OSC is analogous to the commencement of legal proceedings, and, therefore, the tort of abuse of process should be applicable in respect of the communication of knowingly false complaints to the OSC for an ulterior and predominant purpose to further an improper objective. They do not, however, provide any case law to support this proposition.

[52] In my view, the plaintiffs have failed to establish a reasonable cause of action for abuse of process on the facts of this case for the reason that they have failed to plead facts that establish the first element of the tort. The making of a complaint to the OSC under its "whistleblower" programme does not constitute the commencement of legal proceedings for the purposes of the tort of abuse of process.

[53] There is a significant distinction between the communication of a "whistleblower" complaint in confidence to OSC staff and the commencement of legal proceedings. Among other things, the communication of a complaint does not involve any publication to third parties of the allegedly false complaint. The complaint remains a matter of confidential disclosure to the OSC staff, who then determine whether or not to investigate the complaint. Further, if a decision is taken to commence legal proceedings after any such investigation, it is the OSC, rather than the "whistleblower" that takes that decision. Moreover, any public documents released in connection with such action will reflect the view of the OSC staff of the relevant events, which may not necessarily be the same as the view of the "whistleblower". Accordingly, the making of a complaint does not entail the publication of any documents by the "whistleblower" whose publication could cause special loss or damage to a defendant.

[54] There is, therefore, a causation problem in respect of complaints to the OSC, unlike the commencement of legal proceedings. In the latter case, the defendant's action in commencing litigation proceedings is a direct cause of any loss suffered by a plaintiff. In the former case, as mentioned, the independent action of the OSC in deciding to commence legal proceedings after conducting its own investigation is the cause of any loss suffered by a plaintiff.

[55] Lastly, it is inherent in any "whistleblower" programme that a party making a "whistleblower" statement to a regulatory authority may have a questionable purpose in mind in doing so. However, the fact that a "whistleblower" may have the furthering of an improper object as his or her predominant purpose does not mean that the subject matter of his or her communication would not be of legitimate concern from a regulatory perspective. There are therefore compelling policy reasons why the tort of abuse of process should not apply in the case of "whistleblower" complaints to the OSC.

[56] The plaintiffs' counsel advised the Court at the hearing of these motions that the plaintiffs would amend the pleadings to make the basis of their defamation claims clear if the Court found that, as currently drafted, the pleadings were confusing. Based on the foregoing, I find that the pleadings should be struck: (1) under r. 25.11, insofar as they suggest that the plaintiffs assert defamation claims in respect of statements made to third parties regarding the existence, or content of, the Complaints, other than statements made to WSJ reporters in respect of the Article; and (2) under r. 21.01(1)(b), insofar as they suggest that the plaintiffs assert a claim of defamation based on the assertion that the making of the Complaints was an abuse of process.

Analysis and Conclusions Regarding the Applicants' Motions to Strike

[57] I propose to address the motions to strike of the various applicants by grouping them according to the plaintiffs' claims in the Statement of Claim.

Defamation

[58] The plaintiffs allege that the Article was defamatory in respect of each of them. They assert a defamation claim against each of the applicants in these motions for loss arising from the publication of the Article. Based on the discussion above, it is my understanding that the plaintiffs' defamation claims against the applicants are based on the allegations in paragraphs 84-93. These pleadings pertain to Copeland's publication of the Article and to alleged conversations between McFarlane, Bauman, Molyneux, Levitt and Anderson with Copeland that formed the information upon which he based the Article.

[59] The requirements for a pleading of defamation were addressed in *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at para. 91:

> Both courts and leading authors on the law of defamation repeatedly state that pleadings in defamation cases are more important than in any other class of actions. The statement of claim must contain a concise statement of the material facts. A summary of the necessary material facts to allege a complete cause of action for defamation is found in Patrick Milmo and W.V.H. Rogers, ed., Gatley on Libel and Slander, 10th ed. (London: Sweet & Maxwell, 2003) at p. 806:
>
> > These facts are the publication by the defendant, the words published, that they were published of the claimant, (where necessary) the facts relied on as causing them to be understood as defamatory or as referring to the claimant and knowledge of these facts by those to whom the words were published, and, where the words are slander not actionable per se, any additional facts making them actionable, such as that they were calculated to disparage the

> plaintiff in an office held by him or that they have caused special damage.

[60] In *Catalyst Capital Group Inc.* at para. 23, the Court of Appeal addressed the requirements for a pleading of libel as follows:

> 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 and Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013), at paras. 26-1 to 26-26; *Lysko v. Braley* (2006), 79 O.R. (3d) 721, [2006] O.J. No. 1137 (C.A.), at para. 91; *Metz v. Tremblay-Hall*, [2006] O.J. No. 4134, 53 C.C.E.L. (3d) 107 (S.C.J.), at para. 13.

[61] Each of the applicants seeks an order striking the plaintiffs' defamation claims against them, but on different grounds. I will address the position of each of the applicants in turn.

The Anson Defendants

[62] The Anson Defendants move to strike the claim of defamation against them on the basis that the plaintiffs have failed to plead any facts regarding the involvement of the Anson Defendants in the publication of the Article, including any particulars of any instances of publication of the Defamatory Words by the Anson Defendants.

[63] The plaintiffs make three principal arguments. First, they argue that the defamation claim is part of the conspiracy claim. They say that, to the extent that the Anson Defendants participated in the Conspiracy, they also participated in the publication of the Article, even if they took no specific actions in furtherance of the publication of the Article. I do not think that this is correct.

[64] I accept that a party who participates in the publication of a defamatory expression in furtherance of a common design will be liable to the plaintiff: see *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 75-76. However, for such purposes, the common design must pertain to the publication of the defamatory statement.

[65] In *Botiuk*, the issue concerned the liability of certain parties who participated in the publication of one of three documents that were treated collectively as a single libel. The Supreme Court upheld the lower court decisions that found these parties liable for all damages flowing from the publication of the three documents as a single libel. At para. 75, the Supreme Court expressed its finding as follows:

> The appellants' actions bring them within the third category of joint tortfeasors so well described by Fleming. In the context in which the text writer has utilized the word conspiracy, it refers to the design or agreement of persons to participate in acts which are tortious, even though they did not realize they were committing a tort.

[66] In *Botiuk*, the Supreme Court therefore held that these parties were joint tortfeasors with the author and publisher of the two other articles. Not only are the facts in *Botiuk* significantly different from the present situation but there is also nothing in the decision of the Supreme Court that would attract liability to persons who did not participate in some manner in furtherance of the actual tortious act of libel of or slander upon which a plaintiff bases its claim of defamation.

[67] In the present case, therefore, the plaintiff must plead facts that would support a finding that the Anson Defendants participated in the tortious act of publication of the Article in order to plead a viable cause of action in defamation against them. A pleading that the Anson Defendants participated in the Conspiracy, in furtherance of which certain of the other participants are alleged to have published the Article, is not sufficient to sustain a claim for defamation against the Anson Defendants.

[68] Second, the plaintiffs say that the pleading is sufficient to permit the Anson Defendants to plead a simple denial of any involvement in the preparation or publication of the Article. This argument proceeds on an inadequate view of the purpose of pleadings. Under r. 25.06(1), the plaintiff has the obligation to plead facts upon which it relies and which, if proven, would ground a viable cause of action. In addition, a plaintiff is not entitled to plead a bald allegation and rely on the possibility that new facts might turn up that would support the allegation: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22. Further, as mentioned in *Catalyst Capital Group Inc.* at para. 22, pleadings in defamation cases have traditionally been held to a higher standard, in terms of the precision with which the material facts must be pleaded, than is the case with other types of actions. More generally, in the absence of such particulars, a party should not be forced to bear the cost of an action for defamation in respect of a publication in which it took no part.

[69] Third, the plaintiffs rely on the more flexible approach to pleadings of defamation in recent case law. In particular, they rely on the statements of Blair J.A. in *Catalyst Capital Group Inc.* at paras. 23 and 25. This principle has been applied in situations in which the plaintiff was unable to plead the exact wording of allegedly defamatory statements or the names of all of the parties to whom an allegedly defamatory statement was published.

[70] In this case, however, apart from bald statements regarding the Conspirators collectively, the plaintiffs plead no details whatsoever regarding any involvement of the Anson Defendants in the preparation or publication of the Article. Moreover, there is no logical basis on which one could infer that they might have had knowledge of, and therefore been in a position to, participate in the preparation or publication of the Article. The plaintiffs' pleadings are therefore more properly regarded as bald allegations against the Anson Defendants for the purpose of a

fishing expedition to determine whether or not the Anson Defendants played any role in the preparation and publication of the Article.

[71] Accordingly, I agree with the Anson Defendants that the defamation claim against them does not disclose a reasonable cause of action for the purposes of r. 21.01(1)(b) in that it fails to plead that the Anson Defendants participated in the publication of the alleged defamatory expression. This claim should therefore be struck.

Clarity/Anderson

[72] Clarity and Anderson also move to strike the claim of defamation against them on the basis that the plaintiffs have failed to plead any facts regarding the involvement of either of them in the publication of the Article including any particulars of any instances of publication by either of them. In opposition to the motion of Clarity and Anderson, the plaintiffs make the same three principal arguments discussed in respect of the Anson Defendants.

[73] In the present circumstances, there is no basis in the pleadings for the defamation claim asserted against Clarity in its own right. The plaintiffs do not plead any actions by Clarity, in its own right, in respect of the preparation or publication of the Article. Clarity's position in respect of the plaintiffs' defamation claim against it is therefore substantially the same as that of the Anson Corporate Defendants with one qualification.

[74] To the extent that there is a basis for asserting a claim against Anderson acting on behalf of Clarity, the plaintiffs' claim against Anderson would also constitute a claim against Clarity. Accordingly, any claim against Clarity requires the assertion of facts that would establish a viable claim based on actions of Anderson in his capacity as a representative of Clarity.

[75] In paragraph 86 of the Statement of Claim, as mentioned, the plaintiffs plead that McFarlane told Copeland that "Callidus and Catalyst were engaged in allegedly nefarious accounting practices concerning a loan that Callidus had extended to XTG." The pleadings allege that Copeland had "similar conversations" with Anderson.

[76] As literally drafted, the paragraph suggests that Anderson had a conversation or conversations with Copeland regarding the matters raised by McFarlane pertaining to XTG. It is understood, however, that the plaintiffs intended to plead that Anderson told Copeland the substance of his own Complaint to the OSC. I have therefore proceeded on this basis in analyzing the defamation claim against Anderson.

[77] Neither Clarity nor Anderson was in litigation with Callidus, as were the Guarantor Conspirators. It is therefore unclear what Anderson is alleged to have said to Copeland in respect of his own position, or that of Clarity, that was defamatory of the plaintiffs. Moreover, the pleadings do not allege that the Article refers to the substance of any Complaint of Clarity or Anderson. It is therefore not possible to infer any defamatory statements to Copeland based on the pleadings regarding the content of the Article. Accordingly, Anderson cannot know the case that he has to meet and cannot plead otherwise than by way of a blanket denial that he made any defamatory statement to Copeland.

[78] In my view, in the absence of a pleading regarding the substance, even if not the details, of a defamatory statement made by Anderson to Copeland, the pleadings fail to disclose a reasonable cause of action against Anderson and Clarity for the purposes of r. 21.01(1)(b). In addition, the plaintiffs have failed to plead the material facts upon which they base their claim that Anderson's alleged conversation with Copeland was actionable in view of the text of the Article. Accordingly, the plaintiffs' defamation plea against both Clarity and Anderson is also struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claim based on the Article.

Molyneux and Levitt

[79] Molyneux and Levitt also move to strike the defamation claims against them.

[80] Both Molyneux and Levitt are in litigation with Callidus and are attempting to enforce their personal guarantees in respect of a loan made by Callidus to an entity referred to as "Fortress Resources" in the Statement of Claim. However, there is no pleading that the Article refers to Fortress Resources nor is there a pleading regarding what either Molyneux or Levitt is alleged to have said to Copeland. There is therefore no pleading as to what either Molyneux or Levitt communicated to Copeland that was defamatory of the plaintiffs.

[81] Further, Molyneux and Levitt could possibly be liable in defamation if they pursued a "common design" with McFarlane to publish a defamatory article concerning the plaintiffs. However, the plaintiffs' pleading does not plead facts that would establish such a common design, as opposed to an agreement for a larger conspiracy, which is discussed below.

[82] In my view, therefore, the positions of Anderson, Molyneux and Levitt on this issue are substantially similar. On this basis, the defamation claims against each of Molyneux and Levitt should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action and, in addition, should be struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claims based the Article.

Intentional Interference with Economic Relations

[83] The plaintiffs assert claims of intentional interference with economic relations against all of the applicants.

[84] The elements of this tort were addressed by the Supreme Court in *A. I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177. In that decision, Cromwell J. concluded at para. 5 that the tort was available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. He also concluded that, for the purposes of the tort, conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it. At para. 45, Cromwell J. went on to state that "[t]he two core components of the unlawful means tort are ... that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of the unlawful means." For

this purpose, breaches of criminal or regulatory law do not satisfy the criteria for "unlawful means".

[85] The plaintiffs' claims for damages for intentional interference with economic relations against all of the applicants in these motions should be struck for two reasons.

[86] First, given the determinations above that the plaintiffs' defamation claims against the applicants should be struck, the plaintiffs' claims against the applicants for intentional interference with economic relations cannot survive. These claims are based on "unlawful means" in the form of actionable defamation of the plaintiffs. As the plaintiffs' defamation claims have been struck, the plaintiffs' claims for interference with economic relations fail to plead an essential element of the tort.

[87] Second, with respect to the element of third-party involvement, the pleadings state simply that the Defendants "deceived third-party market participants into believing that Callidus and Catalyst were engaged in fraudulent activity and were subject to 'investigation' by the OSC and the Toronto police." The plaintiffs further plead that the Defamatory Words were published to induce these market participants to sell their Callidus Shares, thereby lowering the Callidus share price for a prolonged period of time.

[88] The plaintiffs have therefore failed to identify the third party or third parties against whom the applicants are alleged to have committed an unlawful act. They have also failed to plead facts that establish the commission of an unlawful act that constitutes unlawful means, as understood for the purposes of this tort, directed against such third party or third parties. Specifically, they have failed to identify a claim of any third-party market participant against the applicants arising out of the publication of the Defamatory Words by the applicants.

[89] Counsel for the plaintiffs conceded that if a plaintiff asserting a claim of intentional interference with economic relations must plead facts that identify a third party against whom the defendant has committed an unlawful act, and the actionable claim of such third-party against the defendant that arose as a result of the applicants' actions, the claim is deficient. As I find that such pleadings are required, the pleadings against the applicants fail to disclose a reasonable cause of action.

[90] Accordingly, this claim should be struck under r. 21.01(1)(b) as against all of the applicants.

Unjust Enrichment

[91] The plaintiffs assert a claim for unjust enrichment against all of the applicants.

[92] In order to succeed in a claim for unjust enrichment, a plaintiff must prove three matters: (1) an enrichment of or benefit to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: see *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305, 125 O.R. (3d) 561, at para. 20, referring to *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 32.

[93] The plaintiffs plead that the applicants have been unjustly enriched through their participation in an unlawful short selling attack. Read generously, this is understood to proceed on the basis that the publication of the Defamatory Words rendered unlawful the Conspirators' short sales of Callidus Shares that would otherwise have been lawful. The pleading alleges that the applicants received a benefit in the form of their profit made on the short sales, that "the benefit was at Callidus's expense, as it corresponded to a decline in Callidus's market capitalization, which constitutes an injury to Callidus", and that there was no juristic reason for the enrichment. The plaintiffs seek an order requiring the applicants to pay over their profits on the sale of Callidus Shares to the plaintiffs.

[94] There are two problems with this pleading.

[95] First, given the determination above that the defamation pleading must be struck, the pleading that there was no juristic reason for the applicants' profits from their short sales cannot stand. In the absence of a further act that vitiates the applicants' sales activity, there is nothing improper or illegal about the applicants' actions in taking short positions in the Callidus Shares that would support a claim for unjust enrichment.

[96] Second, as was observed in *Apotex Inc. v. Eli Lilly and Company* at para. 43, there must be a reciprocal relationship between the defendant's benefit and the plaintiff's deprivation for a claim of unjust enrichment to succeed, that is, the defendant's gain must correspond to the plaintiff's loss:

> The Supreme Court of Canada recently discussed the elements of unjust enrichment in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at paras. 148-158. With respect to the first and second elements, the enrichment and the corresponding deprivation, the court explained, at para. 151, that they are "the same thing from two different perspectives" or "two sides of the same coin." These elements are "properly understood to connote a transfer of wealth": at para. 152. Since "the purpose of the doctrine of unjust enrichment is to reverse unjust transfers of wealth", the first question the court asked in that case was whether the government was enriched at the plaintiffs' expense. The court affirmed that the government's gain had to correspond to the plaintiffs' loss for the unjust enrichment claim to succeed.

[97] This requirement for a claim of unjust enrichment was confirmed in the recent decision of the Supreme Court in *Moore v. Sweet*, 2018 SCC 52. In that decision, Côte J. for the majority noted at para. 43 that "the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two."

[98] In this case, there is no reciprocal relationship between the applicants' alleged gain, being profits from their short selling activity, and the plaintiffs' alleged deprivation, being the decline

in Callidus' market capitalization. While the triggering event may have been the same – the publication of the Article – the alleged gains of the Conspirators and the losses suffered by the plaintiffs do not exhibit a reciprocal relationship, and are not causally related, as understood for the purposes of a claim of unjust enrichment.

[99] The losses that corresponded to the applicants' gains from their short selling activity were transferred from the holders of Callidus Shares who sold their shares in the market to the Conspirators who acquired such shares for the purpose of covering their naked short positions. Neither Callidus nor Catalyst was a seller of Callidus Shares. The loss suffered by Callidus was a reduction in its ability to raise additional capital as a result of a lowered market capitalization. The loss suffered by Catalyst was a reduction in the market value of its investment in Callidus. However, the decline in Callidus's market capitalization was not a loss that was transferred from Callidus to the applicants nor was the decline in the market value of Catalyst's investment in Callidus.

[100] In this regard, the pleadings in this case raise a similar issue to that which was presented in *Apotex Inc. v. Eli Lilly and Company*, although in a very different context. The following reasoning of the Court of Appeal at para. 55 of that case is equally applicable in the present case:

> This is not a bilateral context where Apotex is the only party that has been wronged by Lilly. Effectively, Apotex is asking the court to designate it as the de facto beneficiary of the wrongfully-obtained monopolistic profits despite recognizing in its pleadings that it was the public that suffered actual deprivation as a result of the monopolistic pricing. Unlike the plaintiffs in the "profiting from wrong" cases discussed above, Apotex is not positioned as the sole party with a legitimate right to "enforce" or "deter" the underlying wrong. The pecuniary interests of consumers, and potentially other generic companies, are also implicated. Lilly did not owe Apotex an equitable duty, nor is this case akin to the "exceptional" breach of contract cases where courts award restitution damages to a plaintiff in order to prevent a defendant from exploiting a bilateral agreement to its advantage.

[101] Accordingly, the plaintiffs' claims for unjust enrichment should be struck under r. 21.01(1)(b) as against all of the applicants.

Conspiracy

[102] The plaintiffs' principal claim in the Statement of Claim is its claim of conspiracy against the Defendants. As discussed above, the pleadings allege that, in or about December 2016, the Wolfpack Conspirators and the Guarantor Conspirators entered into the Conspiracy with the intention of causing economic harm to the plaintiffs. The elements of the plan to be implemented in furtherance of the Conspiracy are set out in paragraph 64 of the Statement of Claim.

[103] In *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.), at paras. 21 and 22, the Court of Appeal approved the following statement of the pleading requirements for a civil conspiracy claim which is quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975) at pp. 646-47:

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[104] In this action, the essence of the conspiracy claim is that the Conspirators agreed to a plan whereby a defamatory article would be published and the Conspirators would profit from the decline in the value of the Callidus Shares by covering short positions put in place shortly prior to publication of the article. For clarity, while the plaintiffs also alleged that the Guarantors co-ordinated their responses to the litigation commenced by Callidus against them and, in that connection, asserted allegedly spurious defences and counterclaims, these allegations do not form part of the conspiracy claim. They are instead alleged to be events that prompted the Guarantor Conspirators to enter into the Conspiracy with the Wolfpack Conspirators. Similarly, as mentioned, while the Conspirators are alleged to have communicated with certain parties, in addition to Copeland, with a view to publication of an article negative to Callidus and Catalyst, these efforts were not successful and were not directly part of the implementation of the Conspiracy as described in paragraph 64.

[105] In the Addendum, the plaintiffs say that each of the Conspirators were aware of and agreed to participate in the Conspiracy and that each benefitted from and intended to unlawfully harm the plaintiffs through the Conspiracy. Significantly for present purposes, they also say that, because all of the Defendants were party to the common design shared by the Conspirators, each Defendant is liable for the damages caused, irrespective of whether such Defendants participated in each specific act constituting the Conspiracy.

Anson Defendants

[106] I propose to consider the conspiracy pleadings relative to the Anson Defendants by first describing their alleged involvement in the Conspiracy and then addressing the claims against the Anson Corporate Defendants and the Anson Individual Defendants separately in turn.

The Conspiracy Pleadings and Particulars in Respect of the Anson Defendants

[107] In the Statement of Claim, the plaintiffs plead that in late 2016 West Face encouraged Anson "to support its planned short attack" and disclosed to the Anson Defendants the identity of the Guarantors and its knowledge of co-ordination between the Guarantors. The pleadings

further allege that in or about December 2016, the Wolfpack Conspirators, which includes the Anson Defendants, and the Guarantor Conspirators entered into the Conspiracy.

[108] In the Addendum, by way of particulars, the plaintiffs allege that in February 2017 Spears and Puri discussed and agreed to a plan with Langstaff to work up false fraud complaints against the plaintiffs. They also say that, at or after this time, all of the Anson Defendants were in contact, directly or indirectly, with the other Conspirators and agreed to become part of the Conspiracy described in paragraph 64 of the Statement of Claim. In addition, the plaintiffs say that, from and after this time, Spears, Puri and the other Anson Defendants communicated directly or indirectly with the other Conspirators in furtherance of the Conspiracy. These communications, which the plaintiffs say are generally unknown to them but known to the Anson Defendants, are alleged to have included meals in June 2017 at a particular restaurant.

Disposition of the Motions of the Anson Corporate Defendants

[109] The Anson Corporate Defendants argue that the pleadings fail to plead sufficient facts to disclose a claim of conspiracy against them in that there is no pleading of any specific action on the part of the Anson Defendants in respect of the Conspiracy. In particular, they say that the plaintiffs have failed to plead any particulars that enable the Anson Defendants to understand the steps comprising the plan described in paragraph 64 in which they are alleged to have participated. In this regard, it is not disputed that the plaintiffs do not allege that the Anson Defendants made any of the Complaints to the OSC or had any conversations with Copeland.

[110] The Anson Corporate Defendants also suggest that, insofar as the pleadings plead any facts, they are inconsistent with, if not actually contradicted by, the particulars set out in the Addendum. In particular, they say that the timing of the alleged entering into of the Conspiracy by the Anson Defendants in or about February 2017 is inconsistent with, and excludes the Anson Defendants' participation in, the entering into of the Conspiracy by the other Conspirators in December 2017.

[111] There are clearly difficulties with the pleadings in the Statement of Claim insofar as they address the involvement of the Anson Corporate Defendants in the Conspiracy. As noted, the particulars in the Addendum contradict the pleading that the Anson Defendants entered into the Conspiracy in December 2017. Further, Langstaff is not a Defendant and his only involvement, as pleaded in paragraphs 95 and 96 of the Statement of Claim, was to assist the Wolfpack Conspirators to put short positions in place. Therefore, the allegation in the Addendum that the Anson Defendants and Langstaff were involved in a plan to work up false complaints against the plaintiffs has no connection to the Conspiracy claim as currently pleaded. Moreover, there is no suggestion in the Addendum that Langstaff was the means of the alleged "indirect" communication between Spears, Puri and the Anson Corporate Defendants, on the one hand, and the other Conspirators, on the other hand.

[112] Taking the foregoing into consideration, the allegations pertaining to the Anson Corporate Defendants can be summarized as follows on a generous reading. The Anson Corporate Defendants, as represented by Spears and Puri, agreed with the other Conspirators to

become part of the Conspiracy in or after February 2017 and communicated with the other Conspirators after this time, including at meals in June 2017 involving Spears and Puri. The purpose of the Conspiracy was to harm Catalyst and thereby to profit to the detriment of the plaintiffs. The Anson Corporate Defendants were therefore aware, among other things, of the intention of the other Conspirators to implement the Plan, and in particular to cause an article to be published that was defamatory to Callidus. In anticipation of the publication of this article, the Anson Defendants put short positions in the Callidus Shares in place and profited from the decline in the Callidus Shares after publication of the Article at the expense and to the detriment of Callidus and Catalyst.

[113] The issue for the Court is whether these spare pleadings, together with the pleadings regarding the involvement of the other Wolfpack Conspirators and the Guarantor Conspirators, are sufficient to satisfy the requirements of r. 21.01(1)(b). I conclude that these allegations are sufficient to establish a viable claim of conspiracy against the Anson Corporate Defendants in that they address each of the requisite elements of the civil conspiracy claim as set out above.

[114] Further, insofar as the Anson Defendants say that the pleadings do not allow them to know the case against them, I do not agree for the following reasons. The Anson Defendants are in a position to plead with respect to each of the matters referred to above as constituting the requisite elements of a civil conspiracy claim.

[115] In particular, the issues of whether Spears and Puri agreed to the Conspiracy and whether they had the alleged communications with the other Conspirators are factual matters within the knowledge of the Anson Defendants. Insofar as it is necessary to establish knowledge of the Conspiracy on the part of the Anson Corporate Defendants, the plaintiffs' pleadings, together with the particulars in the Addendum, allege that the Anson Corporate Defendants became aware of the Conspiracy and agreed to it through the involvement of Spears and Puri described above. Further, the Anson Corporate Defendants are alleged to have participated by putting short positions in place to benefit from the anticipated market consequences of the Article and to have profited therefrom. These are also purely factual matters to which the Anson Corporate Defendants are in a position to plead. Conversely, given the allegation of a conspiracy, it is not reasonable to expect that the plaintiffs would necessarily know the specific communications among Spears, Puri and the other Conspirators in respect of the Conspiracy or the extent of the short positions of the Anson Corporate Defendants, if any, in the Callidus Shares.

[116] Based on the foregoing, I conclude that the plaintiffs' pleadings of conspiracy against the Anson Corporate Defendants disclose a reasonable cause of action for the purposes of r. 21.01(1)(b).

Enterprise Liability

[117] As an alternative argument, the Anson Corporate Defendants say that paragraph 20 of the Statement of Claim should be struck in respect of the Anson Corporate Defendants because it alleges liability on an enterprise-wide basis, rather than against individual corporations. As I

understand this argument, the Anson Defendants say that such a pleading fails to assert a viable cause of action against any of them individually for the purpose of r. 21.01(1)(b).

[118] Paragraph 20 of the Statement of Claim alleges, in effect, that the Anson Individual Defendants and the entities that comprise the Anson Corporate Defendants at all material times operated, acted, and marketed themselves as a single entity. Accordingly, this pleading in paragraph 20 would treat all of the Anson Corporate Defendants as a single entity for the purposes of the conspiracy claim. It is also alleged in paragraph 20 that the Anson Individual Defendants and the Anson Corporate Defendants are vicariously liable for the acts and omissions of one another or alternatively that they acted as agent for the other Anson Defendants. These latter pleadings of vicarious liability and agency are not at issue in this section.

[119] The Anson Corporate Defendants say that courts have struck pleadings that are drafted on the "enterprise liability" approach. They refer to and rely on *Hughes v. Sunbeam Corp. (Canada)* (2000), 11 B.L.R. (3d) 236 (Ont. S.C.) at paras. 48-49, varied on other grounds, 61 O.R. (3d) 433 (C.A.); and on *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, 27 C.P.C. (7th) 32, at para. 120, affirmed, 2013 ONSC 1169 (Div. Ct.). However, these cases exhibited compelling reasons on the facts as pleaded for excluding particular corporate entities from potential liability.

[120] In the present case, it is alleged that Spears and Puri are respectively a principal of, and an analyst at, all of the Anson Corporate Defendants. Their actions and their knowledge are, therefore, the actions and knowledge of all of the Anson Corporate Defendants. Further, each of the Anson Corporate Defendants is alleged to trade in securities. There are no facts before the Court that would narrow the class of Anson Corporate Defendants who could have participated in the Conspiracy by putting short positions in place to profit from the decline in the market price of the Callidus Shares. Nor is there any basis for excluding the possibility that a short position of one of the Anson Corporate Defendants was taken on behalf of one or more other Anson Corporate Defendants – that is, was allocated among the Anson Corporate Defendants.

[121] Accordingly, I do not accept the argument that paragraph 20 of the Statement of Claim should be struck by virtue of the pleading therein of liability on an "enterprise liability" basis.

Disposition of the Motions of the Anson Individual Defendants

[122] The Anson Individual Defendants also submit that the conspiracy claim against them should be struck on the basis that the plaintiffs have failed to plead any particulars of their involvement that satisfy the requirements of r. 25.06(1).

[123] Given the conclusion above that the conspiracy claim should not be struck in respect of the Anson Corporate Defendants because, in part, of the actions of Spears and Puri in agreeing to the Conspiracy on behalf of the Anson Corporate Defendants and the allegation that, as Defendants, Spears and Puri took short positions in the Callidus Shares or otherwise benefitted from such trading, there is no basis for striking out the claims against them. The pleadings in respect of these parties are essentially the same as the pleadings against the Anson Corporate

Defendants. For the reasons discussed above, such pleadings satisfy the requirements for a civil conspiracy pleading.

[124] However, in my view the claim of conspiracy against Kassam must be struck for want of any pleading of any overt act on his part pertaining to his involvement in the Conspiracy. The pleadings in respect of Kassam therefore fail to plead an essential requirement for a claim of civil conspiracy. Based on the pleadings, and the Addendum, Kassam also cannot know the case against him that he has to meet. He is therefore not in a position to plead in any meaningful way based on the plaintiffs' pleadings in respect of him.

[125] Accordingly, the conspiracy claim against Kassam should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action against him.

Clarity/Anderson

[126] I will deal in turn with the conspiracy claims against Clarity and Anderson after first setting out the pleadings and particulars of the plaintiffs in respect of these claims.

The Conspiracy Pleadings and Particulars in Respect of Clarity/Anderson

[127] In the Statement of Claim, the plaintiffs plead that West Face contacted Clarity and "encouraged it to participate in the upcoming wave of short attacks against Callidus". Clarity and Anderson are included in the Wolfpack Conspirators and, as such, are included in the pleading that alleges that, on or about August 9, 2017, the Wolfpack Conspirators took naked short positions in the Callidus Shares and covered those positions later to their profit.

[128] The pleadings further allege that Clarity and Anderson entered into the Conspiracy in or about December 2017. Thereafter, in paragraph 68 the plaintiffs allege that Clarity or Anderson agreed to file, and did file, false "whistleblower" complaints with the OSC in coordination with the other Complainants in order to portray different alleged issues with Callidus' continuous disclosure and with matters relating to Catalyst.

[129] In addition, the pleadings allege that Anderson, who had a prior relationship with Copeland, recruited Copeland to write the Article to further the Conspiracy. The Statement of Claim alleges that Copeland was directed by the Conspirators to "interview" McFarlane. It also alleges that Copeland had a conversation with Anderson that was "similar" to his conversation with McFarlane.

[130] In the Response, the plaintiffs provide, by way of particulars, that Anderson and Clarity communicated frequently with the other Conspirators from and after January 2017 and agreed to join and participate in the Conspiracy prior to June 2017.

Disposition of the Motions of Clarity/Anderson

[131] Clarity and Anderson say that the pleadings fail to identify their actual involvement in the Conspiracy. In particular, they rely upon the inconsistencies between the Statement of Claim and the particulars in the Response.

[132] There is a clear inconsistency between the timing of the alleged agreement of Clarity and Anderson to enter into the Conspiracy as pleaded in the pleadings and as provided in the particulars in the Response. Further, insofar as the plaintiffs allege that Clarity and Anderson did not agree to participate in the Conspiracy until sometime in 2017 prior to June, the allegation that Clarity and Anderson filed a false "whistleblower" complaint to the OSC in furtherance of the Conspiracy cannot stand. This timing is contradicted by the pleadings in the Statement of Claim that the Complaints were filed with the OSC in late 2016 or early 2017.

[133] In addition, I have dealt earlier with the issues of the substance of McFarlane's alleged conversation with Copeland in the context of the defamation claims against Anderson and Clarity. For present purposes, the allegation in paragraph 86 regarding Anderson's communication with Copeland is deficient in failing to set out the subject matter of such conversation. As mentioned earlier, Anderson was not the subject of a guarantor action by Callidus. There is also nothing in the Article that has been attributed to Anderson, whether pertaining to any alleged "whistleblower" complaint by him or otherwise.

[134] Taking the foregoing into consideration, the pleadings pertaining to Clarity and Anderson are substantially similar to the pleadings in respect of the Anson Defendants. The plaintiffs allege that Clarity and Anderson agreed to participate in the Conspiracy by June 2017 and that the purpose of the agreement was to harm Catalyst and thereby to profit to the detriment of the plaintiffs. As a result, Clarity and Anderson were aware, among other things, of the intention of the other Conspirators to implement the Plan, and in particular to cause an article to be published that was defamatory to Callidus. In anticipation of the publication of this article, Clarity and Anderson put short positions in the Callidus Shares in place and profited from the decline in the Callidus Shares after publication of the Article at the expense and to the detriment of Callidus and Catalyst.

[135] The issue for the Court is whether these pleadings, together with the pleadings regarding the other Wolfpack Conspirators and the Guarantor Conspirators, are sufficient to satisfy the requirements of r. 21.01(1)(b). I conclude that these allegations are sufficient to establish a viable claim of conspiracy against Clarity and Anderson in that they address each of the requisite elements of a civil conspiracy claim as set out above.

[136] Further, insofar as Clarity and Anderson say that the pleadings do not allow them to know the case against them, I do not agree. Clarity and Anderson are in a position to plead with respect to each of the matters referred to in the preceding paragraph as constituting the requisite elements of a civil conspiracy claim for the same reasons that I concluded that the Anson Defendants were in a position to plead with respect to the civil claim against them.

[137] Accordingly, I conclude that the plaintiffs' pleadings of conspiracy against Clarity and Anderson disclose a reasonable cause of action for the purposes of r. 21.01(1)(b).

Molyneux/Levitt

[138] I propose to treat the plaintiffs' pleadings of conspiracy against Molyneux and Levitt together as, for present purposes, the claims against each of them are virtually identical.

The Conspiracy Pleadings in Respect of Molyneux and Levitt

[139] In the Statement of Claim, Molyneux and Levitt are included as Guarantors and Guarantor Conspirators. Their involvement in the activities preceding the alleged agreement regarding the Conspiracy in December 2016, and its significance for the plaintiffs' conspiracy claim, has been described above. With respect to the Conspiracy, the pleadings allege that Molyneux and Levitt entered into the agreement to implement the Plan in December 2016. The pleadings further allege that Levitt or Molyneux filed a false "whistleblower" complaint with the OSC in late 2016 or early 2017 relating to Callidus and Catalyst in furtherance of the Conspiracy. In addition, in paragraph 86 of the Statement of Claim, it is alleged that both Molyneux and Levitt had conversations with Copeland "similar" to the conversation between Copeland and McFarlane. Lastly, Molyneux and Levitt are included in the Wolfpack Conspirators who are alleged to have taken short positions, directly or indirectly, in the Callidus Shares on or about August 9, 2017 and to have profited therefrom.

Disposition of the Motions of Molyneux and Levitt

[140] Molyneux and Levitt submit that, even with the particulars provided in the Response, they do not know the case they have to meet. There are two principal aspects to this position to be addressed.

[141] First, Molyneux and Levitt argue that, to the extent they are alleged to have participated in the Conspiracy by making false statements to Copeland regarding Callidus and Catalyst, there is no pleading that states what they are alleged to have said.

[142] I have dealt with this issue in the context of the defamation claims against Molyneux and Levitt. For this purpose, Molyneux and Levitt are in essentially the same position as Anderson, notwithstanding that, unlike Anderson, each is the subject of litigation by Callidus on their guarantees. Moreover, there is no pleading that the Article refers to any of Fortress Resources, Molyneux or Levitt, nor is there any pleading attributing any particular statements in the Article to Molyneux or Levitt or any pleading regarding any alleged defamatory statements made by Molyneux or Levitt to Copeland.

[143] However, setting aside the aforementioned pleadings, the pleading of conspiracy that remains alleges that Molyneux and Levitt entered into the Conspiracy, and were therefore aware of the elements of the Plan to be implemented, were aware that the purpose of the Conspiracy was to harm Catalyst and thereby to profit to the detriment of the plaintiffs, took short positions in the Callidus Shares, and profited therefrom by covering those positions after the market

decline that followed the release of the Article. While these assertions may well be factually incorrect, the Court is required to assume the truth of the pleadings for the purposes of these motions to strike. The proper means of addressing any factual inaccuracies is a summary judgment motion.

[144] For the reasons set out above in respect of the other applicants on these motions, I am of the opinion that the foregoing pleadings of conspiracy against Molyneux and Levitt, together with the pleadings regarding the Wolfpack Conspirators and the other Guarantor Conspirators, disclose a reasonable cause of action for the purposes of r. 21.01(1)(b) in that they address each of the requisite elements of a civil conspiracy claim against Molyneux and Levitt as set out above.

Conclusion

[145] Based on the foregoing, the plaintiffs' claims of defamation, intentional interference with economic relations, and unjust enrichment are struck in respect of each of the Anson Defendants, Clarity, Anderson, Molyneux and Levitt. In addition, the plaintiffs' claim of civil conspiracy against Kassam is also struck.

Costs

[146] The applicants were partially but not completely successful on these motions. While most of the plaintiffs' claims against them have been struck, the principal claims of conspiracy have not been. In these circumstances, I think that the applicants should be entitled to a portion of their costs respecting an appropriate allocation between the claims struck and the conspiracy claims. For this purpose, I find the appropriate allocation to be 2/3 : 1/3 based on a combination of the relevant portions of the parties' facta and the time required for submissions on the hearing of these motions. Further, I see no basis in the plaintiffs' conduct in respect of these motions to support costs on a substantial indemnity.

[147] The Anson Defendants seek total costs of $37,467.86 on a partial indemnity basis. They took the primary responsibility for these motions. Given the importance of these motions to the Anson Defendants, and to the other applicants, the relative complexity of the motions, and the relative seniority of counsel, I find this aggregate amount to be reasonable. Accordingly, I fix fair and reasonable costs of the Anson Defendants at $25,000 on an all-inclusive basis.

[148] Clarity/Anderson seek costs of $7,8436.90 on a partial indemnity basis. This is reasonable, given the issues affecting them and the time spent on this motion by their counsel. Accordingly, I find fair and reasonable costs of these applicants to be $5,230.

[149] Molyneux seeks costs of $11,685.45. However, given the extent of his involvement in this motion, and the relative complexity of his arguments, neither of which exceeded that of Clarity/Anderson, I think that fair and reasonable costs would be the same amount as awarded to these other applicants. Accordingly, I find fair and reasonable costs to be $5,230.

[150] Levitt did not provide a costs submission as he had left the hearing for a medical appointment before this matter was addressed by the Court. If Levitt wishes to make a costs submission, he will have thirty days to make written submissions not exceeding five pages in length together with a costs outline in the form required by the *Rules of Civil Procedure*.

Wilton-Siegel J.

Date: January 9, 2019