

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

FACTUM OF THE MOVING PARTIES
(Plaintiffs' Motion to Amend the Amended Amended Statement of Claim)

July 9, 2019

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PART I – OVERVIEW

1. The Plaintiffs, The Catalyst Capital Group Inc. ("**Catalyst**") and Callidus Capital Corporation ("**Callidus**"), seek an Order granting leave to amend the Amended Amended Statement of Claim to substitute Gerald Duhamel ("**Duhamel**"), Andrew Levy ("**Levy**"), George Wesley Voorheis ("**Voorheis**"), Bruce Livesey ("**Livesey**") and Canaccord

Genuity Corp. (“**Canaccord Genuity**”) for John Does #1-5 based on facts that are relevant to the matters in issue in the action (the “**Action**”).

PART II – SUMMARY OF FACTS

A. Procedural History of the Action

2. By Statement of Claim issued on November 7, 2017, the Plaintiffs plead that the Defendants are liable for acts and omissions relating to the short selling shares in Callidus as well as spreading negative rumors and publishing a defamatory article in a coordinated effort to harm the Plaintiffs. The Plaintiffs claim damages in the Action for civil conspiracy, defamation, injurious falsehood, intentional interference with economic relations, and unjust enrichment.¹

3. At paragraph 85 of the Amended Amended Statement of Claim, the Plaintiffs allege, *inter alia*, that the Wolfpack Conspirators,² the Guarantor Conspirators,³ Langstaff and Copeland entered into a conspiracy to harm Catalyst and Callidus by:

- (a) spreading false information by rumours through the Bay Street rumour mill;
- (b) filing false “whistleblower” complaints against Callidus with the Ontario Securities Commission and the United States Securities and Exchange

¹ Affidavit of Gretel Best, affirmed July 4, 2019 (“**Best Affidavit**”) at para 3, Motion Record of the Moving Parties (“**MMR**”) Tab 2 at p. 97

² Paragraph 23 of the Amended Amended Statement of Claim identifies the “Wolfpack Conspirators” as West Face, Gregory Boland, the Anson Defendants, Clarityspring Inc. and Nathan Anderson: Amended Amended Statement of Claim, Exhibit A to the Best Affidavit, MMR Tab 2A at p. 116

³ Paragraph 31 of the Amended Amended Statement of Claim identifies the “Guarantor Conspirators” as Kevin Baumann, Jeffrey McFarlane, Darryl Levitt and Richard Molyneux: Amended Amended Statement of Claim, Exhibit A to the Best Affidavit, MMR Tab 2A at p.117

Commission by certain of the Guarantor Conspirators to “confirm” the rumours;

- (c) disclosing the existence and substance of the allegations contained in the complaints to the media and to the police to generate media interest;
- (d) taking short positions, directly or indirectly, in the common shares of Callidus (the “**Callidus Shares**”);
- (e) publishing a false and defamatory article in the Wall Street Journal on August 9, 2017, 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
- (f) closing out of their naked short positions at the expense of the market value of Callidus.⁴

4. A motion to strike has been decided in this Action (discussed in more detail below). Otherwise, the Defendants who have not delivered a defence in the main Action have not yet been noted in default and documentary discovery and examinations for discovery have not taken place.⁵

B. The Motion to Strike

5. On October 29, 2018, Justice Wilton-Siegel heard a motion by the Anson Defendants, Richard Molyneux (“**Molyneux**”), Darryl Levitt (“**Levitt**”), Clarityspring Inc.

⁴ Best Affidavit, para 4, MMR Tab 2 at p. 97

⁵ Best Affidavit, para 25-26, MMR Tab 2 at p. 104

(“**Clarity**”) and Nathan Anderson (“**Anderson**”), Rob Copeland, and Kevin Baumann (collectively, the “**Moving Defendants**”) brought motions to strike the Statement of Claim and, in the alternative for particulars.⁶

6. By reasons for decision dated January 9, 2019, Justice Wilton-Siegel dismissed the Moving Defendants’ motion in part. Justice Wilton-Siegel did not strike the Plaintiffs’ pleading of civil conspiracy, but did strike the following parts of the Plaintiffs’ claim:

- (a) defamation, intentional interference with economic relations, and unjust enrichment as against the Moving Defendants; and
- (b) civil conspiracy against the Moving Defendant Moez Kassam.⁷

7. A dispute arose with the Moving Defendants as to whether the Plaintiffs were entitled to amend the Statement of Claim in respect of those claims that were struck by Justice Wilton-Siegel.⁸

8. Justice Wilton-Siegel subsequently confirmed at a 9:30 Chambers Appointment on May 15, 2019 that leave to amend the claims that had been struck was granted and also directed the Plaintiffs to deliver their amended claim within 30 days.⁹

⁶ Best Affidavit, para 4, MMR Tab 2 at p. 99

⁷ Reasons for Decision of Wilton-Siegel J. dated January 9, 2019, Exhibit B to the Best Affidavit, MMR Tab 2B

⁸ Best Affidavit, para 9, MMR Tab 2 at p. 99

⁹ Best Affidavit, para 18, MMR Tab 2 at p. 102

C. The Levitt Documents

9. On January 18, 2016, Callidus commenced an action to enforce a personal guarantee against Levitt and Molyneux in respect of a loan to Fortress Resources LLC (the “**Guarantor Action**”).¹⁰

10. In the Guarantor Action, Callidus brought a motion for summary judgment. On June 21, 2018, Callidus cross-examined Levitt on his affidavit sworn May 11, 2017, delivered in response to the summary judgment motion.¹¹

11. On October 19, 2018, Callidus brought a motion for an Order directing, *inter alia*, Levitt to respond to certain of the undertakings given, questions taken under advisement, and questions refused on his cross-examination held on June 21, 2018.¹²

12. By orders dated January 7 and February 12, 2019, Justice Chiappetta ordered Levitt to, *inter alia*, respond to certain undertakings given and questions refused on his cross-examination, including producing all correspondence between himself, Jeffrey McFarlane, Kevin Baumann, and Gerald Duhamel.¹³

13. In purported compliance with the orders of Justice Chiappetta, Levitt produced approximately 2,600 pages of documents (the “**Levitt Documents**”).¹⁴

¹⁰ Best Affidavit, para 10, MMR Tab 2 at p. 100

¹¹ Best Affidavit, para 11, MMR Tab 2 at p. 100

¹² Best Affidavit, para 12, MMR Tab 2 at p. 100

¹³ Best Affidavit, para 13-14, MMR Tab 2 at p. 100-101

¹⁴ Best Affidavit, para 16, MMR Tab 2 at p. 101-102

14. On April 18, 2019, the Plaintiffs amended the statement of claim to plead further facts particularizing the conspiracy claim based in part on the facts revealed in the Levitt Documents. The Plaintiffs did not amend their claims for defamation or any other parts of the claim that had been struck by Justice Wilton-Siegel, until the dispute over whether his Honour granted leave to amend was resolved.¹⁵

D. The Langstaff Documents

15. On October 25, 2018, Justice Hainey ordered that the Plaintiffs and Defendant Bruce Langstaff (“**Langstaff**”) deliver affidavits of documents restricted to documents specific to Langstaff, within 60 days of the close of the pleadings in the Langstaff aspect of the case.¹⁶

16. In accordance with Justice Hainey’s Order, the Plaintiffs delivered their list of documents and productions relevant to Langstaff on January 30, 2019.¹⁷

17. On May 14, 2019, Langstaff delivered his Affidavit of Documents, sworn April 1, 2019, and Schedule “A” productions, which consist of approximately 330 pages of documents (the “**Langstaff Documents**”).¹⁸

18. On June 14, 2019, in accordance with Justice Wilton-Siegel’s direction, the Plaintiffs delivered an Amended Amended Statement of Claim to plead further facts

¹⁵ Best Affidavit, para 17, MMR Tab 2 at p. 102

¹⁶ Order of Justice Hainey dated October 25, 2018, Exhibit H to the Best Affidavit, MMR Tab 2H

¹⁷ Best Affidavit, para 21, MMR Tab 2 at p. 103

¹⁸ Best Affidavit, para 23, MMR Tab 2 at p. 102

particularizing the defamation claim and other claims that had been struck by Justice Wilton-Siegel.¹⁹

PART III – LAW AND ARGUMENT

A. Issue to be Determined

19. The issue to be determined on this motion is whether this Court ought to grant leave to the Plaintiffs to amend the Amended Amended Statement of Claim to substitute Duhamel, Levy, Voorheis, Livesey and Canaccord Genuity for John Does #1-5.

B. The Test to be Applied

20. Rule 5.04(2) of the *Rules of Civil Procedure* permits a court “by order to add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.”²⁰

21. The test for adding or substituting a party under Rule 5.04(2) is:

- (a) The proposed amendment must meet all of the tests under Rule 26.01 (namely the amendment must, *inter alia*, disclose a reasonable cause of action and the other party must not suffer non-compensable prejudice);
- (b) Joinder should be appropriate under Rule 5.02(2) or required under Rule 5.03. The addition of the parties should arise out of the same transaction or

¹⁹ Best Affidavit, para 19, MMR Tab 2 at p. 102

²⁰ *Rules of Civil Procedure*, Rule 5.04(2), Schedule “B” below

occurrence, should have a question of law or fact in common, or the addition of the party should promote the convenient administration of justice;

- (c) Joinder should not be inappropriate under Rule 5.03(6) or 5.05. The addition of a party should not unduly delay or complicate a hearing or cause undue prejudice to the other party; and
- (d) Addition of a party will not be permitted if it is shown to be an abuse of process. Abuse of process will exist where the addition of a party is for an improper purpose such as solely to obtain discovery from them, to put unfair pressure on the other side to settle, to harass the other party or for purely tactical reasons.²¹

C. The Test Under Rule 26.01 is Satisfied

22. Rule 26.01 provides that, on a motion, the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. Under Rule 26.01, the court will grant the motion to amend unless:

- (i) The responding party would suffer non-compensable prejudice;
- (ii) The amending pleading is scandalous, frivolous, vexatious or an abuse of the court's process; or

²¹ *Steel Tree Structures Ltd v Gemco Solar Inc*, 2016 ONSC 955 (Div Ct) at para 23-24 Book of Authorities of the Moving Parties (“**MBOA**”) Tab 11, citing *Plante v Industrial Alliance Life Insurance Co*, [2003] OJ No 3034 (Master) MBOA Tab 7; *WCL Capital Group Inc v Google LLC*, 2019 ONSC 947 at para 17 MBOA Tab 12

(iii) The pleading discloses no reasonable cause of action.²²

(i) **Proposed Amendments do not Result in Non-Compensable Prejudice**

23. There is no evidence of any prejudice, let alone non-compensable prejudice, arising from the proposed amendments to the Amended Amended Statement of Claim

24. The onus lies upon the defendant to show non-compensable prejudice under the rules. Under Rule 26, it is an error in principle for the court to refuse an amendment in the absence of prejudice that could not be addressed with costs or an adjournment.²³

25. The Court of Appeal in *Schembri v Way* has made it clear that the usual time and expense involved in litigation procedures do not constitute non-compensable prejudice.²⁴

26. Delay without more is not prejudicial.²⁵

²² *Rooplal v Fodor*, 2018 ONSC 399, at para 41 MBOA Tab 8 citing *Plante v Industrial Alliance Life Insurance Co*, [2003] OJ No 3034 (Master) MBOA Tab 7

²³ *Steel Tree Structures Ltd v Gemco Solar Inc*, 2016 ONSC 955 (Div Ct) at para 23 MBOA Tab 11

²⁴ *Schembri v Way*, 2012 ONCA 620 at para 44 MBOA Tab 9

²⁵ Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 1st ed (Markham, ON: LexisNexis Canada Inc., 2010) at 360 MBOA Tab 13

(ii) **Proposed Amendments Disclose Reasonable Causes of Action**

27. Moreover, the pleadings proposed as against Duhamel, Levy, Voorheis, Livesey and Canaccord Genuity disclose tenable causes of action.

28. Because this is a motion to amend pleadings, the allegations in the pleading are taken to be true and provable.²⁶

(a) *Conspiracy*

29. Justice Wilton Siegel has already determined that viable conspiracy claims have been advanced against the Defendants. The proposed Fresh as Amended Statement of Claim pleads that Duhamel, Levy, Voorheis, Livesey, and Langstaff / Canaccord Genuity were part of the group that engaged in this same conspiracy to cause injury to the Plaintiffs and destroy their business, including by causing the stock price of Callidus to drop.

30. ***Duhamel:*** Further particulars of Duhamel's participation in the conspiracy, where Duhamel is named individually (as opposed to collectively as one of the Guarantor Conspirators), are described in the proposed Fresh as Amended Statement of Claim,²⁷ including at paragraphs 48, 69(c), 74, 77, 80, 85, 102, 106, 108(a), 121(c), 127(a), 154. As pleaded, Duhamel joined and carried out acts in furtherance of the conspiracy, including,

²⁶ *Schembri v Way*, 2012 ONCA 620 at para 27 MBOA Tab 9; *Seaway Trust Co. v. Markle*, 1988 CarswellOnt 343 (Master) at para 51 MBOA Tab 10

²⁷ Fresh as Amended Statement of Claim, Schedule "A" to the Notice of Motion, MMR Tab 1A

- (a) providing approval to Levitt to advise Senior Litigation Counsel in the Enforcement Branch of the OSC that the Plaintiffs and their principal had been guilty of serious offences, including but not limited to fraudulent business and lending practices, penal offences in respect of Callidus's financial affairs, and other criminal or quasi-criminal misconduct; and
- (b) using the allegations of misconduct and impropriety made by Boland and West Face in communications with the OSC and JSOT to cause those bodies to institute an investigation and commence proceedings against the Plaintiff.

31. **Levy:** Further particulars of Levy's participation in the conspiracy, where Levy is named individually (as opposed to collectively as one of the Guarantor Conspirators), are described in the proposed Fresh as Amended Statement of Claim,²⁸ including at paragraphs 46, 55, 69(b), 72, 74, 75, 78, 79, 80, 106, 107(b), 121(b), 123, and 154. As pleaded, Levy joined and carried out acts in furtherance of the conspiracy, including

- (a) spreading false and disparaging allegations of misconduct and impropriety about the Plaintiffs which was used to fabricate allegations to the OSC and the SEC;
- (b) having discussions with Copeland during which he made false and defamatory statements about the Plaintiffs and their business practices.

32. **Voorheis:** Further particulars of Voorheis' participation in the conspiracy, where Levy is named individually (as opposed to collectively as one of the Wolfpack Conspirators), are described in the proposed Fresh as Amended Statement of Claim,²⁹

²⁸ Fresh as Amended Statement of Claim, Schedule "A" to the Notice of Motion, MMR Tab 1A

²⁹ Fresh as Amended Statement of Claim, Schedule "A" to the Notice of Motion, MMR Tab 1A

including at paragraphs 71, 77, 79, 80, 81, 83, 84, 102, 108(a) 121, and 124. As pleaded, Voorheis joined and carried out acts in furtherance of the conspiracy, including by,

- (a) informing Levy that Voorheis intended to strike about at the Plaintiffs and their principal Newton Glassman;
- (b) agreeing with the other conspirators to make allegations to file false complaints with the OSC alleging fraud and other similar quasi-criminal conduct;
- (c) encouraging the Anson Defendants to support the planned short attack;
- (d) contacting Anderson and Clarity and encouraging them to participate in the conspiracy and in the upcoming wave of short attacks against Callidus;
- (e) short selling stock in Callidus.

33. **Livesey:** Further particulars of Levy's participation in the conspiracy, where Livesey is named individually (as opposed to collectively as one of the Wolfpack Conspirators), are described in the proposed Fresh as Amended Statement of Claim,³⁰ including at paragraphs 66, 67, 68, 89, 108(a), 138, 139, 140, 144, and 182. As pleaded, Livesey joined and carried out acts in furtherance of the conspiracy, including

- (a) frequently communicating with the other Guarantor Conspirators and Wolfpack Conspirators to provide his support, assistance, encouragement and advice to them in their concerted action against the Plaintiffs;
- (b) writing a false and disparaging article about the Plaintiffs and Glassman;
- (c) offering to be a source to provide false information about Catalyst; and

³⁰ Fresh as Amended Statement of Claim, Schedule "A" to the Notice of Motion, MMR Tab 1A

- (d) continuing his efforts to publish false and disparaging articles about the Plaintiffs following the short attack.

34. ***Canaccord Genuity / Langstaff***: Particulars of Canaccord Genuity's participation in the conspiracy, through its employee Langstaff, are described in the proposed Fresh as Amended Statement of Claim,³¹ including at paragraphs 197 to 198. As pleaded, Canaccord Genuity, through its employee Langstaff:

- (a) falsely alleged that,
 - (i) Catalyst and Callidus had circulated false valuations about their assets and were guilty of fraud by selling assets at inflated prices;
 - (ii) Callidus engaged in an undisclosed related party transaction to hide losses; and
 - (iii) independent appraisers of Callidus were "on the take";
- (b) gave advice to one of the Wolfpack Conspirators to "short" Callidus (for which he was reprimanded by Canaccord Genuity); and
- (c) facilitated and executed the short selling trading to the harm of the Plaintiffs.

³¹ Fresh as Amended Statement of Claim, Schedule "A" to the Notice of Motion, MMR Tab 1A

(b) *Defamation*

35. The requirements for a pleading of defamation were addressed in *Lysko v Braley* as follows:

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.³²

36. Paragraphs 153 to 154 and 183 to 190 of the proposed Fresh as Amended Statement of Claim particularize the false and defamatory statements (the “**Defamatory Words**”) including but not limited to the following:

- (a) Catalyst and Callidus were under active investigation by the Toronto police department and various regulators, including the OSC and the Alberta Securities Commission, regarding accounting irregularities, securities fraud and other criminal misconduct;
- (b) Callidus and Catalyst failed to decrease the valuations of their loan collateral when companies in the Callidus portfolio ceased making interest payments or only made partial payments.
- (c) Callidus and Catalyst engaged in fraud by misleading borrowers about deal terms in order to withhold funds from borrowers at critical times and to allow

³² *Lysko v Braley*, 2006 CarswellOnt 1758 (CA) at para 91 MBOA Tab 5

the debt to balloon in order to assume control and ultimately ownership of borrowers.

- (d) Catalyst misled its investors about the valuation of assets held in Catalyst's investment portfolios to collect fees and other payments to which it was not entitled and that Callidus had misled its borrowers about loans extended to them by Callidus.
- (e) Callidus and Catalyst falsely certified that their financial statements were prepared in accordance with IFRS and, in particular, that they failed to conduct an appropriate impairment analysis on the assets of the Callidus borrowers and Catalyst funds despite disclosures in their financial statements that such analysis had been done.

37. The proposed Fresh as Amended Statement of Claim alleges the Defamatory Words were uttered by or with the active encouragement and support of Duhamel and Levy, and other Guarantor Conspirators, to Copeland, at the direction of the Wolfpack Conspirators (including Voorheis and Livesey). The proposed pleading also sets out the meaning of the words and the manner in which the words were understood to mean.

38. As pleaded, Voorheis, Livesey and the other Wolfpack Conspirators, as well as Levy and Duhamel and the other Guarantor Conspirators, and Langstaff / Canaccord Genuity participated in a common design to publish the Defamatory Words.

(c) *Intentional Interference with Economic Relations*

39. Intentional interference with economic relations is a tort available in three-party situations in which a defendant commits an unlawful act against a third party with the intention of causing economic harm to the plaintiff.³³

40. Paragraph 203 to 206 of the proposed Fresh as Amended Statement of Claim plead material facts identifying (i) the proposed Defendants' intentional unlawful acts in deceiving the third parties by conspiring to publish and in fact publishing the Defamatory Words; (ii) the identity of the affected third parties; and (iii) the harm suffered as a result of the Defendants' acts.

41. The third parties affected, as pleaded in paragraph 203 of the proposed Fresh as Amended Statement of Claim were, (i) investors in funds managed by Catalyst that held Callidus shares whose stock depreciated as a result of the Defendants' conduct; (ii) investors that sold shares in Callidus as a result of reading the Defamatory Words or in response to the resulting sell-off of Callidus shares; (iii) service providers such as appraisers engaged to appraise and alleged to have falsely valued borrowers' assets for the benefit of Callidus and Catalyst; and (iv) auditors, audit committee members and the independent directors of Callidus and Catalyst that are responsible for and allegedly failed to detect the supposed fraudulent activities carried out by the Plaintiffs.

³³ *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 5 MBOA Tab 1

(d) *Breach of Duties by Canaccord Genuity / Langstaff*

42. Specific causes of action are advanced in the proposed Fresh as Amended Statement of Claim against Canaccord Genuity for:

- (a) vicarious liability for the acts and omissions of the Defendant Langstaff, an employee of Canaccord Genuity, who carried out acts harmful to the Plaintiffs in the course and scope of his employment;³⁴
- (b) breach of duties of loyalty, honesty and fair dealing as well as fiduciary duties to the Plaintiffs in Canaccord Genuity's roles, *inter alia*, as advisors and consultants for the Plaintiffs and "market maker" for the trading in Callidus publicly traded shares;³⁵ and
- (c) negligence for failing to properly supervise and monitor Langstaff and implement effective measures and safeguards to ensure that he complied with Canaccord Genuity's policies to not engage in any communication or activity harmful to the Plaintiff.³⁶

43. As pleaded in paragraphs 195 to 196 of the proposed Fresh as Amended Statement of Claim, it is alleged that Canaccord Genuity owed duties to the Plaintiffs, including duties to

- (a) Act honestly, in good faith and in the best interests of the Plaintiffs;

³⁴ *Bazley v Curry*, [1999] 2 SCR 534 at para 41 MBOA Tab 3

³⁵ *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paras 27-36 MBOA Tab 2; *Hunt v TD Securities Inc*, 2003 CarswellOnt 3141 (CA) at para 40, leave to appeal to SCC refused 2004 CarswellOnt 1610 (SCC) MBOA Tab 4

³⁶ *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3 MBOA Tab 6

- (b) Avoid any conflict of interest between the Plaintiffs and Canaccord Genuity or between the Plaintiffs and other clients of Canaccord Genuity;
- (c) Refrain from preferring or acting in the interests of Canaccord Genuity or its other clients over the interests of and to the harm of the Plaintiffs;
- (d) Refrain from engaging in or agreeing, assisting or encouraging others to engage in activities that were intended to harm the Plaintiffs;
- (e) Refrain from disparaging the business and affairs of the Plaintiffs; and
- (f) Not to falsely allege that Callidus business was a fraud and to advise that short-selling of Callidus shares should be undertaken on the strength of this allegation.

44. As pleaded in paragraphs 197 and 198 of the proposed Fresh as Amended Statement of Claim, Canaccord Genuity breached these duties, and is vicariously liable for Langstaff's conduct, *inter alia*, making false and harmful allegations about the Plaintiffs, giving advice to "short" Callidus stock, and facilitating and executing the short selling campaign to the detriment of the Plaintiffs,

45. In addition, as pleaded in paragraphs 199 to 202 of the proposed Fresh as Amended Statement of Claim, Canaccord Genuity breached its independent duty of care in negligence by failing to properly supervise Langstaff and implement effective safeguards to ensure that he did not engage in any communication or activity harmful to the Plaintiffs while employed by Canaccord Genuity.

D. Discretion Under Rule 5.04(2) is Satisfied

46. Amendments to add parties should be presumptively approved, unless there is an abuse of the court process or non-compensable prejudice.³⁷

47. While under rule 5.04(2), the court has the discretion to deny the amendment in the absence of non-compensable prejudice, such discretion should not be invoked often. Added complication to the action and increased work and legal expense is not the type of non-compensable prejudice envisioned by rules 26 and 5.04(2).³⁸

48. Absent an abuse of the court process or non-compensable prejudice, it is preferable to add parties rather than commence a new action against the proposed defendants and then seek to join the actions together. Litigants ought to avoid such costly and time consuming processes.

E. Joinder is Necessary and Appropriate

49. The claims against the proposed new Defendants involve the same questions of fact and law as those involving the current Defendants. As pleaded in the proposed Fresh as Amended Statement of Claim, the proposed Defendants are plead to have engaged in the same conspiracy to harm the Defendants and participated in the same common design to defame and disparage the Plaintiffs.

³⁷ *Schembri v Way*, 2012 ONCA 620 at para 25 MBOA Tab 9

³⁸ *Steel Tree Structures Ltd v Gemco Solar Inc*, 2016 ONSC 955 (Div Ct) at para 24 MBOA Tab 11; *Schembri v Way*, 2012 ONCA 620 at para 44 MBOA Tab 9

50. Similarly, with respect to Canaccord Genuity, the proposed amendments plead that Canaccord Genuity's duties overlap with those owed by Langstaff, both independently and based in vicarious liability.

51. Consequently, in order to adjudicate effectively and completely on the issues, it is appropriate and necessary to include the proposed Defendants as parties.

PART IV – ORDER REQUESTED

52. The Plaintiffs therefore respectfully request that leave to amend the Amended Amended Statement of Claim be granted, with costs payable to the Plaintiffs by any responding Defendant opposing the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of July, 2019.

"Benjamin Na"

Benjamin Na

"Matthew Karabus"

Matthew Karabus

Lawyers for the Plaintiffs

SCHEDULE “A” – LIST OF AUTHORITIES

Primary Sources

1. *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12
2. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24
3. *Bazley v Curry*, [1999] 2 SCR 534
4. *Hunt v TD Securities Inc*, 2003 CarswellOnt 3141 (CA), leave to appeal to SCC refused 2004 CarswellOnt 1610 (SCC)
5. *Lysko v Braley*, 2006 CarswellOnt 1758 (CA)
6. *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27
7. *Plante v Industrial Alliance Life Insurance Co*, [2003] OJ No 3034 (Master)
8. *Rooplal v Fodor*, 2018 ONSC 399
9. *Schembri v Way*, 2012 ONCA 620
10. *Seaway Trust Co. v Markle*, 1988 CarswellOnt 343 (Master)
11. *Steel Tree Structures Ltd v Gemco Solar Inc*, 2016 ONSC 955 (Div Ct)
12. *WCL Capital Group Inc v Google LLC*, 2019 ONSC 947

Secondary Sources

13. Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 1st ed (Markham, ON: LexisNexis Canada Inc., 2010)

SCHEDULE “B” – STATUTES AND REGULATIONS

Courts of Justice Act, R.S.O. 1990, c. C.43

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided.

Rules of Civil Procedure, RRO 1990, Reg 194

INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

...

JOINDER OF PARTIES

...

Multiple Defendants or Respondents

- 5.02** (2) Two or more persons may be joined as defendants or respondents where,
- (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
 - (b) a common question of law or fact may arise in the proceeding;
 - (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
 - (d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or
 - (e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

JOINDER OF NECESSARY PARTIES

General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

...

Power of Court to Add Parties

5.03 (4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

MISJOINDER, NON-JOINDER AND PARTIES INCORRECTLY NAMED

...

Adding, Deleting or Substituting Parties

5.04 (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

...

HOW PROCEEDINGS COMMENCED

By Issuing Originating Process

14.01 (1) A proceeding shall be commenced by the issuing of an originating process.

...

14.01 (4) A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact.

...

RULE 26 AMENDMENT OF PLEADINGS

GENERAL POWER OF COURT

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

WHEN AMENDMENTS MAY BE MADE

26.02 A party may amend the party's pleading,

- (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
- (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
- (c) with leave of the court.

THE CATALYST CAPITAL GROUP INC. et al
Plaintiffs

and

WEST FACE CAPITAL INC. et al.
Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE MOVING PARTIES

**(Plaintiffs' Motion to Amend the Amended Amended
Statement of Claim)**

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