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

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

AND BETWEEN:

WEST FACE CAPITAL INC. AND GREGORY BOLAND

Plaintiffs by Counterclaim

- and -

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

Defendants

FACTUM OF THE PLAINTIFFS, RESPONDING PARTIES

Part I – Overview

1. Six separate motions have been brought in Action No. CV-17-587463-00CL (the "Conspiracy Action") arising from seven Demands for Particulars delivered over a seven month period ranging from a demand delivered on January 22, 2018 (the "Copeland Demand") to

August 7, 2018 (the "Anderson Demand"). In addition, three Defendants in Action No. CV-18-593156-00CL (the "Dow Jones Action") have also delivered a Demand for Particulars. The Moving Parties now seek an order striking the Plaintiffs' claims, or in the alternative, particulars.

2. It is noteworthy that the positions taken by virtually all of the Moving Parties all have a common element in that they state or argue that they are unable to plead to the Statements of Claim in issue. According to their facta,

(a) Anderson and Clarity do not understand the claims against them and cannot respond;[1]

(b) the Anson Defendants cannot or do not know what is meant by the pleading and are "shrouded in mystery" about what the action is all about;[2]

(c) it is impossible for Baumann to determine the allegations against any particular defendant;[3]

(d) Copeland does not understand the claim against them and cannot "meaningfully" respond;[4]

(e) Molyneux claims that he cannot "meaningfully" or "properly" respond.[5]

3. The second common element applicable to all of the Moving Parties is that not one of them has delivered an affidavit swearing that they do not understand, cannot answer , or are unable to meaningfully respond to the Statement of Claim.

4. Responses to all of the Demands have been delivered, including in respect of two parties (Molyneux and Levitt), where lengthy and extensive settlement discussions to resolve not just this motion but all of the issues involving them have recently failed.

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[1] Anderson Factum, paras. 2, 16
[2] Anson Factum, paras. 13, 14, 20.
[3] Baumann Factum, paras. 10 and 11.
[4] Copeland Factum, paras 2, 21.
[5] Dow Jones Factum, paras. 19 and 21.

Part II – Concise Factual Summary

5. The Plaintiffs' claims are contained two separate proceedings::

(a) In Action CV-17-586096,[6] the Plaintiffs seek damages based on allegations of wrongful conspiracy, defamation, and other causes of action ("Conspiracy Action"), and

(b) In Action CV-17-586094,[7] the Plaintiffs seek damages for libel against, inter alia, Dow Jones and two of its reporters, on the basis of an article published on or about August 7, 2017 (the "Dow Jones Action").

6. On a motion made under Rule 21, the facts alleged in the impugned pleading are deemed to be true, unless they are manifestly incapable of proof. On such motions, relief is granted sparingly and actions are dismissed only in the clearest of cases – to weed out obviously hopeless claims that have no reasonable prospect of success.

THE CONSPIRACY ACTION

The Material Facts Pleaded

7. Paragraphs 2-3 of the Statement of Claim in the Conspiracy Action ("Conspiracy SOC") identify the Plaintiffs: The Catalyst Capital Group Inc. ("Catalyst") is a leading Ontario based firm which invests in distressed and undervalued Canadian situations for control or influence, while Callidus Capital Corporation ("Callidus") is a publicly traded asset based lender that provides bridge financing to companies that cannot access traditional lending sources.

8. Paragraphs 4 – 6 of the Conspiracy SOC provide further detail as to the nature of the Plaintiffs' businesses and the relationship between them.

9. Paragraphs 7 – 33 of the Conspiracy SOC in this action identify each of the Defendants and their relationship to each other.

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[6] Commercial List File No. 17-587463-00CL
[7] Commercial List File No. 18-593156-00CL

10. Paragraphs 34 – 37 of the Conspiracy SOC explain the mechanics of "short selling" and summarize how the Defendants engaged in an unlawful conspiracy that culminated in an Article dated August 9, 2017.

11. Paragraphs 38 – 55 of the Conspiracy SOC identify several guarantors who were the subject of enforcement actions initiated by Callidus. These paragraphs also set out material facts regarding the plans and actions taken by the guarantors to coordinate allegations of fraudulent activity by Callidus, including the use of Twitter by the Defendant Levitt to publish false and statements to impugn both Callidus and Catalyst. Cumulatively, certain specified guarantors are alleged to be "Guarantor Conspirators."

12. Paragraphs 56 – 63 of the Conspiracy SOC plead material facts relating to the planned short selling attacks against Callidus by West Face, Boland, Anson, Kassam, Spears, Puri, Clarity and Anderson (all as defined therein). Cumulatively, these Defendants are alleged to be the "Wolfpack Conspirators."

13. Paragraphs 61 – 63 of the Conspiracy SOC plead material facts as to the date of the "Conspiracy" which is at the root of the claim advanced by the Plaintiffs, as well as the motive and opportunity applicable to the two groups of Conspirators.

> 61. In or about December 2016, the Wolfpack Conspirators and the Guarantor Conspirators entered into a conspiracy with the intention to cause economic harm to Callidus and Catalyst (the "Conspiracy").
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> 62. For the Wolfpack Conspirators, the Conspiracy presented an opportunity to continue their short attacks against Callidus, which would allow them to make risk-free profits and, in the process, damage Catalyst and Callidus.
>
> 63. For the Guarantor Conspirators, the Conspiracy presented an opportunity to cause serious economic harm to Callidus and Catalyst through trying to frustrate the enforcement of substantial personal guarantees against each of them. Additionally, the Wolfpack Conspirators and others, the identity of whom the

Plaintiffs are currently unaware, offered to (and did) fund the Guarantors' defences in the Guarantee Actions.

14. Paragraph 64 of the Conspiracy SOC summarizes the key elements of the Conspiracy alleged to have been entered into:

> "64. The Wolfpack Conspirators and Guarantor Conspirators agreed that, in furtherance of the Conspiracy, they would execute the following plan of action: first, they spread false information through the Bay Street rumour mill. Second, certain of the Guarantor Conspirators filed false "whistleblower" complaints against Callidus through the Ontario Securities Commission ("OSC") to "confirm" the rumours. Third, once the false whistleblower complaints were filed, the Conspirators worked together to leak the allegations contained in the complaints to the media in order to generate media interest. Fourth, the Conspirators, either directly or indirectly, took short positions in Callidus Shares. Fifth, the Conspirators timed a media report about the complaints to be released near the end of a trading day, which caused the price of Callidus Shares to rapidly decline. Finally, the Conspirators closed out their naked or other short positions at a substantial profit, all at the expense of Callidus' market value and its shareholders."

15. Paragraphs 67 -72 of the Conspiracy SOC contain specific pleadings of material facts relating to the initial stages of the Conspiracy, including:

(a) the identity of persons who filed false "whistleblower" complaints with the Ontario Securities Commission ("OSC") (para. 68);

(b) that the "complainants" (or "whistleblowers") disclosed the false whistleblower complaints, or the substance of those complaints to the Wall Street Journal in New York and Toronto;

(c) the substance of the false whistleblower complaints, i.e., that Catalyst and Callidus were guilty of fraud (para. 69 (ii)), had conflicts of interest and had engaged in illegal accounting practices (para. 70), and (para. 71) that:

> 71. The Complaints were defamatory. They falsely and maliciously state or imply that:
>
> (i) Callidus misled its shareholders;
>
> (ii) Callidus and Catalyst conduct business for nefarious purposes and do not have integrity in their business dealings; and
>
> (iii) Callidus and Catalyst are not reputable and do not conduct business in an ethical manner.

(d) that the sole motivation of the whistleblower complainants was in furtherance of the Conspiracy alleged by the Plaintiffs, and that the Complainants disclosed their whistleblower complaints or the substance thereof knowing and intending that,

> "69. The "complainants" disclosed the Complaints, or the substance of the Complaints, to WSJ reporters in New York and Toronto. They did so knowing and intending that: (i) the Complaints were false; (ii) the fact and nature of the Complaints alleging fraud by Callidus and Catalyst would immediately be published and given widespread publicity; (iii) the publication of the existence and substance of the Complaints (falsely) alleging fraud would injure Callidus and Catalyst; (iv) the effect of such widespread publicity would immediately cause a significant drop in the price of Callidus Shares; and (v) these steps, events and consequences would give them or their co-Conspirators an opportunity to engage in profitable short selling of Callidus Shares, all which was in furtherance of the Conspiracy."

16. Paragraph 73 of the Conspiracy SOC alleges that whistleblower Complainants intended to spread rumours within the financial community that Callidus and Catalyst were the subject of *bona fide* whistleblower complaints and were under investigation by the authorities, in order to undermine confidence in both firms.

17. Paragraphs 75 – 83 of the Conspiracy SOC plead material facts regarding the initial steps taken by the Guarantor Conspirators and the Wolfpack Conspirators to contact journalists to leak the existence and details of the false whistleblower complaints, prior to the contacts with the journalists in August 2017 that led to the article giving rise to the defamation action against Dow Jones.

18. The material facts pleaded in these paragraphs include the initial means by which these efforts were made (by engaging Bruce Livesey) (para. 76); the news outlets initially approached in furtherance of the scheme (Canadian Business and the Globe & Mail) (para. 78); and approaches to Reuters in 2017 and attempts to enlist other news organizations, known to the Conspirators (paras. 81-82).

19. Paragraphs 84 – 93 of the Conspiracy SOC describe in detail the steps leading up to the defamatory article published by Dow Jones on August 9, 2017. The material facts contained in these paragraphs include allegations regarding contacts between the Defendant Rob Copeland (para 84), the existence of a prior relationship between Copeland and the Defendant Nathan Anderson and Anderson's recruitment of Copeland to join the Conspiracy (paras. 84-85), and details of a meeting with the Plaintiffs on August 8, 2017 (paras. 89-90). They also detail additional steps taken by Copeland leading up to the publication of the defamatory article published on August 9, 2017, including Copeland's disclosure to other members of the Conspiracy that the Article about whistleblower complaints was about to be published late on August 9, 2017 (paras. 91-93).

20. Paragraphs 94 – 111 of the Conspiracy SOC details the material facts relating to the last stage of the Conspiracy. They allege that the Wolfpack Conspirators took short positions in publicly traded shares of Callidus (para. 94); plead the role of the Defendant Langstaff in assisting the Conspirators to take short positons (paras. 95-97); the nature of the "short" positions taken (paras. 97-100); the details of the trading activity in Callidus stock leading up to August 8, 2017 (para. 101); the timing and details of the publication of the Article written and published by Copeland and the Walls Street Journal (paras. 102-104); the publication of the Article through the Dow Jones wire (para. 105); the details of the trading activity surrounding the publication of

the Article; the actions of the Wolfpack Conspirators (para. 110), and the impact of the short attack upon Callidus's shares (para. 111).

21. Paragraphs 113 and 13 of the Conspiracy SOC define the "Defamatory Words" specifically relied upon by the Plaintiffs as well as the plain meaning of those words.

22. In addition, paragraphs 114 – 117 of the SOC allege material facts as to how the conduct of the Defendants was intended to and did drive down the price of Callidus's publicly traded stock (para. 114); refer to and plead the applicable sections of the *Securities Act* (paras. 115 and 116), and allege that the breaches of the Act constitute wrongful means (para. 117).

23. The remaining paragraphs of the Conspiracy SOC plead material facts in relation to additional causes of action relied upon and claims advanced by the Plaintiffs, namely:

(a) damages for losses caused by unlawful means (paras. 118-120);

(b) the personal liability of the Individual Defendants (paras. 121-122), including, inter alia, that they completely dominated and controlled the corporate defendants, caused them to engage in the unlawful and tortious conduct pleaded by the Plaintiffs, and obtained personal benefits;

(c) claims against the John Doe Defendants (paras. 123-124);

(d) unjust enrichment (paras 123-126), including that the Defendants had been unjustly enriched by the receipt of a benefit from the improper short selling scheme alleged, that that benefit was at Callidus's expense, and that there was no juristic reason for the enrichment;

(e) damages for injury to the Plaintiffs' character and good reputation and the results thereof (para. 127), and

(f) punitive damages (para. 128).

24. Measured against the legal principles generally applicable to pleadings, and to the causes of action relied upon by the Plaintiffs, summarized in Part III of this factum, it is respectfully submitted that the above pleadings comply with all of the applicable requirements and that there is no basis to strike out any of the aforementioned paragraphs or clauses.

THE DOW JONES ACTION

The Material Facts Pleaded

25. Paragraphs 2 – 9 of the Dow Jones SOC identify the Defendants and in the case of the Defendant McFarlane, his connection to certain activities referred to elsewhere in the pleading.

26. Paragraphs 10 – 12 of the Dow Jones SOC contain detailed pleadings of material facts regarding the timing of McFarlane's contact with the Defendant Copeland (para. 10), the subsequent meeting among McFarlane, Copeland and the Defendant McNish (para. 12), and details of the statements and allegations made by McFarlane at that meeting (para. 12(a)-(i)).

27. Paragraphs 13 – 14 allege that the statements made by McFarlane were false and made with the express purpose of harming Callidus and Catalyst. Paragraph 14 further alleges that McFarlane was motivated by an animus against Catalyst and Callidus and that his actions were part of a broader conspiracy against those parties (i.e., the conspiracy alleged in the Conspiracy Action).

28. Paragraphs 16 – 25 of the Dow Jones SOC plead material facts regarding the decision made by the Defendants Copeland and McNish following their meeting with McFarlane (para. 15), the steps they took or failed to take (paras. 17 and 18), and their meeting with representatives of Catalyst on August 8, 2017 (paras. 19-21), and the information provided by

Catalyst at that meeting which explained and established the falsity of McFarlane's allegations (para. 22).

29. Paragraphs 26 – 30 of the Dow Jones SOC plead the material facts relating to the submission of the First Article for publication and the omission of the information provided by Catalyst (para. 26), the falsity of the article and the additional sources of information available (paras. 27 and 28).

30. Paragraph 31 of the Dow Jones SOC identifies and defines the defamatory words. Paragraph 34 alleges the ordinary meaning and/or legal inferences arising from the words complained of.

31. Paragraphs 36 – 39 of the Dow Jones SOC plead material facts relating to Copeland's use of tweets to further circulate the First Article.

32. Paragraphs 40 – 43 of the Dow Jones SOC plead the material facts relating to the Second Article published on August 10, 2017, the knowledge of the Defendants regarding its falsity, and the "Defamatory Words" complained of.

33. Paragraphs 44 – 46 of the Down Jones SOC plead the ordinary meaning and inferences to be drawn from the Defamatory Words contained in the Second Article.

34. Paragraphs 50 – 52 of the Dow Jones SOC contain pleadings of material facts regarding the failure of Dow Jones, Copeland and McNish to act in a reasonable and appropriate manner and the a breach of duty of care owed to the Plaintiffs.

35. Paragraphs 53 – 59 contain the damage claims being advanced.

Part III – The Law and Concise Argument

THE CONSPIRACY ACTION

(a) Basic Principles of Pleading – Conspiracy and Defamation

36. A statement of claim must set out "a concise statement of the material facts on which the plaintiff relies". The material facts must be sufficient, if proved, to establish a cause of action. Pleadings are not supposed to include evidence or argument.

> *Rules of Civil Procedure,* Rule 25.06(1)
>
> *The Catalyst Capital Group et al. v Veritas Investment Research et al.,* 2007 ONCA 85, para 23

37. Pleadings in a conspiracy action should describe who the parties are, their relationship to each other, their agreement, the objects and purposes of the alleged conspiracy, the overt acts which are alleged to have been done and the damages or injury caused by the defendants.

> *H.A. Imports of Canada Ltd. v. General Mills, Inc. et al.,* [1983] O.J. No. 3128, para 8
>
> *Chrysler LLC v. Transcast Precision Inc.,* [2009] O.J. No. 4746, (S.C.J.), paras 24-26
>
> *Chrysler LLC v. Syndicorp Capital Inc.,* [2009] O.J. No. 4745, paras 32-35
>
> *General Motors Corp. v. Transcast Precision Inc.,* [2009] O.J. No. 4756, (S.C.J.), paras 34-36

38. The courts allow flexibility in the amount of detail that a plaintiff must provide in setting out the material facts of a conspiracy. This is in acknowledgement of the practical reality that conspiracies by their nature are planned in secret and may involve clandestine conduct. As Perell J. wrote in EnerWorks:

> I appreciate that a plaintiff should be given some slack in how much detail he or she must provide in setting out the material facts of a conspiracy. It is interesting to note that rule 25.06 (8) specifies that where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading must include full particulars but rule 25.06 (8) does not include conspiracy, save insofar as a conspiracy involves an intent to injure or knowledge that injury is likely to occur. This omission may reflect the practical reality that conspiracies

> by their nature are planned behind closed doors and may involve clandestine conduct. That said, it is not good enough to allege a conspiracy and then use an action and its examinations for discovery to confirm one's suspicions or to find a cause of action.
>
> *EnerWorks Inc. Glenbarra Energy Solutions Inc.,* 2012 ONSC 414 (S.C.J.), para 78 (emphasis added)

39. An allegation of conspiracy made against groupings of defendants is sufficient to give notice to each defendant of his role in the conspiracy. In Jevco Insurance, Perell J. wrote:

> 58 In the case at bar, the allegations of conspiracy are made against various groupings of defendants and there is no pleading of what each individual defendant in each grouping did in particular. However, the particulars of the conspiracy alleged against each group are sufficient to give notice to each individual defendant of what their role was in the conspiracy. They are all in a position to admit or deny their role in the alleged conspiracy.
>
> 59 The pleadings principle that it is improper to lump the defendants together must be applied in a way that respects the underlying principle that the pleading must disclose to each individual defendant the case being made against them. Thus, in a given case, it may not be inappropriate to group the defendants. In my opinion, in the case at bar, the approach of Jevco of grouping the Defendants while not eloquent was adequate.
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> *Jevco Insurance Co. v. Pacific Assessment Centre Inc.,* [2014] O.J. No. 1704, 2014 ONSC 2244, 120 O.R. (3d) 43 (S.C.J.), paras 56-59

40. It is submitted that the Statement of Claim sets out the elements and material facts of conspiracy sufficient for the defendants to plead. The Claim identifies named defendants and describes their relationship to each other, the agreement alleged, the objects and purposes of the conspiracy, the overt acts of the defendants in furtherance of the scheme and the damages and injury caused by the defendants. As would be expected in a case of this nature, the claim states that certain of the overt acts are known only to the defendants.

41. It is respectfully submitted that the conspiracy pleading is in accordance with the above principles.

42. It is respectfully submitted that the conspiracy pleading is adequate.

43. Pleadings in a defamation action should describe the particulars of the allegedly defamatory words, the publication of the words by the defendants, to whom the words were published and that the words were defamatory of the plaintiff in their plain and ordinary meaning or by innuendo.

> *The Catalyst Capital Group et al. v Veritas Investment Research et al.*, 2007 ONCA 85, para 23

44. In recent years, the courts have also applied a more flexible approach to pleading in defamation. In a case similar to the herein action, *Catalyst Capital Group Inc. et al. v. Veritas*, Blair J.A., described the modern approach to pleading in defamation as follows:

> 22 An additional dimension to these principles arises in defamation cases because pleadings in such actions have traditionally been held to a higher standard than is the case with other types of actions, in terms of the precision with which the material facts must be pleaded. West Face relies on this higher standard -- as did the motion judge -- for the proposition that para. 25 of the statement of claim fails to disclose a cause of action. Modern authorities have adopted a somewhat more flexible approach to the assessment of defamation pleadings than older authorities that took a very strict approach, however.
>
> .....
>
> 25 While the need for as much precision as possible and for enhanced judicial scrutiny continues, however, more recent authorities have applied greater flexibility in permitting defamation pleadings to stand in certain circumstances where the plaintiff is unable to provide full particulars of all allegations. These circumstances include situations where the plaintiff has revealed all the particulars within its knowledge, where the particulars are within the defendant's knowledge and -- importantly -- where the plaintiff has otherwise established a *prima facie* case of defamation (including publication) in the pleading. See, for example, *Paquette v. Cruji* (1979), 26 O.R. (2d) 294, [1979] O.J. No. 4395(H.C.J.), at pp. 296-97 O.R.; *Magnotta Winery Ltd. v. Ziraldo* (1995), 25 O.R. (3d) 575, [1995] O.J. No. 2619 (Gen. Div.), at pp. 583-84 O.R.; *Lysko*, approving *Paquette* and *Magnotta Winery*, at paras. 93-95; and *Guergis v. Novak* (2013), 116 O.R. (3d) 280, [2013] O.J. No. 2975, 2013 ONCA 449, at para. 52.
>
> 26 In *Paquette* (a case involving publication to named persons "and others"), Grange J. described the more modern approach in the following terms, at pp. 296-97 O.R.:
>
> It is true and has been said over and over again -- see, for example, *Odgers Digest of the Law of Libel and Slander*, 6th ed. (1929), at p. 504, that pleadings in a defamation action are more important than in any other class of action. ... *There are, however, limitations to the strictness of pleading. Our Courts have always refused to strike out a claim where the plaintiff has revealed all the particulars in his possession and has set forth a prima*

facie case in his pleading: see *Winnett v. Appelbe et ux.* (1894), 16 P.R. (Ont.) 57, and *Lynford v. United States Cigar Stores Ltd.* (1917), 12 O.W.N. 68. In the latter case Falconbridge, C.J.K.B., refused to strike out a statement of claim wherein the plaintiff had been unable to set forth the exact words of an allegedly defamatory letter which had resulted in loss of employment quoting with approval [at p. 69] the words of *Odgers*, 5th ed. (1912), at p. 624:

> "If the plaintiff does not know the exact words uttered, and cannot obtain leave to interrogate before statement of claim, he must draft his pleading as best he can and subsequently apply for leave to administer interrogatories, and, after obtaining answers, amend his statement of claim, if necessary." (*emphasis added*)

27 Applying those principles to the matter before him, Grange J. went on to state, at p. 297 O.R.:

> The plaintiff maintains he was slandered by the defendant by communication to persons unknown (but associated with particular institutions) at times unknown (though within a specified time span). He sets forth the words used. *He has stated everything he knows. If he proves the facts pleaded he will have established a prima facie case. The law will always protect a defendant from a frivolous action but it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant.* If the plaintiff should fail to prove any of the 16 slanders specifically alleged there is always a remedy in costs. (*emphasis added*)

....

50 In conclusion, I return again to the language of Lane J. in *Magnotta Winery*, at pp. 583-84 O.R. In my view, the appellants have demonstrated in the statement of claim that they are "proceeding in good faith with a *prima facie* case and [are] not on fishing expedition'" (or, to put it another way, that there is a "coherent body of fact" of which they do have knowledge, that gives rise to the basis for a claim); they have "pleaded all of the particulars available to [them] with the exercise of reasonable diligence" and, although they do not have knowledge of the names of the additional third parties to whom publication has been made, that knowledge "will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which [they have] pleaded [the particulars of publication to unnamed third persons] consistent with the information then at [their] disposal".

51 By "coherent body of fact", I take Lane J. to have meant no more than the need for the pleading to set out the essential facts required to establish at least a *prima facie* cause of action in defamation. The appellants have done that here. They have made out a *prima facie* cause of action in defamation against both West Face and Veritas.

The Catalyst Capital Group et al. v Veritas Investment Research et al., 2007 ONCA 85, paras 22, 25- 29, 50, 51 (emphasis added)

45. This flexible approach to defamation pleadings has been applied, inter alia, in situations in which the plaintiff was unable to plead the exact wording of the alleged defamatory statements or the names of all the parties to whom the statement was published.

> *The Catalyst Capital Group et al. v Veritas Investment Research et al.*, 2007 ONCA 85, paras 28, 29, 35

46. It is submitted that the Statement of Claim sets out the elements and material facts of defamation sufficient for the defendants to plead. In the case at bar, the Conspiracy SOC defines the "Defamatory Words" as being the August 9, 2017 Article and the contents of the false whistleblower complaints. It is respectfully submitted that the pleading is sufficient in respect of these allegations and words. It quotes or describes the words spoken by identified defendants, the publication of the words and to whom they were published and that the words were defamatory of the plaintiffs in their plain and ordinary meaning. The Claim states that certain the words and the facts of publication are known only to the defendants, and makes it clear that the Defamatory Words formed part of the implementation of the overall Conspiracy, known to and agreed to by all of the Conspirators, whose identities are defined.

47. Further, in respect of the issue of malice, it is respectfully submitted that malice has been sufficiently pleaded. Allegations of spite or ill will and that the statements that were made were false and were known to be false have been pleaded.

> Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes ... "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. ...Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.
>
> *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, [1995] 2 R.C.S. 1130, [1995] S.C.J. No. 64, [1995] A.C.S. no 64, para 145

(b) Unlawful Means Tort

48. The Moving Parties argue that the alternative claim of unlawfully interfering with economic relations has not been properly pleaded.

49. The leading case which sets out the constituent elements of this tort is *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*, [2014] S.C.C. 12.

50. This case establishes that in order to satisfy the "unlawful means" test, the conduct complained of must support or be capable of supporting a court action for damages or compensation by a third party, or would do so except for the fact that the third party did not suffer any loss as a result of the defendant's acts.

A.I. Enterprises Ltd. v. Bram Enterprises Ltd, supra at paragraph 86.

51. In the case at bar, Catalyst and Callidus have continual relationships with each other. Catalyst also has relationships with investors in the funds managed by Catalyst and Callidus has relationships with its shareholders. The consequences of the wrongful actions pleaded in this case impairs and damages those relationships.

52. However, there must also be a third party who could maintain a civil action for damages. Who is that third party in this case?

53. It is respectfully submitted that there is more than one third party who fit this analysis:

(a) Dow Jones Inc. is a third party whose actions harmed the Plaintiffs. If the allegations in the Conspiracy Action are true (as must be assumed at this stage of the case) Dow Jones would have an action against the Conspirators for knowingly communicating false information to Dow Jones which exposed Dow Jones to liability. Whether asserted by Dow Jones or not, Dow Jones is a third party within the *Bram* analysis.

(b) Newton Glassman is another third party. He is a senior executive of both Callidus and Catalyst whose reputation has been harmed and whose ability to manage Callidus and Catalyst has been adversely impacted. Clearly, one element of the conduct complained of is the repetition and publication of false and defamatory statements about Glassman, which would be actionable by him in his own right. He too fits the analysis in *Bram*.

54. Consequently, the unlawful means component required by *Bram* is satisfied.

55. It is respectfully submitted that the motion to strike this part of the Statement of Claim should be dismissed, or if greater clarity is required in the pleading to articulate the above relationships and third parties, leave to amend should be granted.

(c) Whistleblower Complaints – Alleged Absolute Privilege

56. Anderson and Clarity submit that the claims based upon the "Whistleblower" complaints should be struck out and dismissed as a matter of law. According to this argument, such complaints are absolutely privileged.

57. The Whistleblower regime at the Ontario Securities Commission is an established mechanism by which *confidential* complaints in respect of potential securities law violations can be made to the regulator. Complaints filed pursuant to this system have been held to be subject to absolute privilege.

Fraleigh v. RBC Dominion Securities Inc., 2009 CarswellOnt 9155
Sussman v. Eales, 1986 CarswellOnt 529 at 1 (ONCA)
Said v. University of Ottawa, 2013 ONSC 7186 at 41

58. These principles do not apply to the factual circumstances alleged in the case at bar and the argument advanced by Anderson and Clarity extends the scope of absolute privilege well beyond what the authorities support.

59. None of the authorities apply to a situation where the whistleblower has communicated the contents of a knowingly false complaint to a third party, such as (in this case) the media. Similarly, none of the cases support the conclusion that absolute privilege attaches to a whistleblower complaint when the whistleblower has acted for an ulterior and predominant purpose to further an improper objective.

60. The loss of absolute privilege in relation to Whistleblower complaints accompanied by the above circumstances is confirmed by the case law dealing with the absolute privilege that attaches to statements made in court proceedings and filings. Normally, such statements are absolutely privileged and immune from suit.

61. However, the law recognizes an exception to absolute immunity in respect of court filings and statements, based on the tort of abuse of process. That tort is made out—even in the case of otherwise absolutely privileged court proceedings—when the following elements exist:

> There are four elements to the tort of abuse of process: (1) the plaintiff is or was the subject of a lawsuit initiated by the defendant; (2) the defendant's predominant purpose in initiating the lawsuit was to further some improper purpose collateral or outside the ambit of the legal process; (3) the defendant performed a definite act or threat in furtherance of that improper purpose; and (4) the plaintiff was caused to suffer some special damages or losses unique to him or her.
>
> P.M. Perell, "Tort Claims for Abuse of Process" (2007), 33 Adv. Q. 193 at 193-194
>
> *Harris v. GlaxoSmithKline Inc.,* 2010 ONCA 872 at para. 27 – 31
>
> *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297 (Commercial List) at para. 409 – 412
>
> *Jacobson v. Skurka,* 2015 ONSC 1699 (S.C.J.) at para. 72 – 91

62. In addition, when a person communicates the contents of an otherwise absolutely privileged court document to a third party absolute privilege is lost—even without the aforementioned elements of abuse of process.

> *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at paras. 149 – 156
> *Astley v. Verdun,* [2007] O.J. No. 1872 (S.C.J.) at paras. 17 – 25
> *Hains Marketing Associates Ltd. v. Canadian Olympic Assn.,* [2000] O.J. No. 973 (S.C.J.) at paras. 19 – 20

63. It is respectfully submitted that the case at bar falls squarely within the above exception. Here, the Plaintiffs are not suing simply because knowingly false whistleblower complaints were filed. Rather, they are suing because the false complaints were filed as part of a scheme to circulate and publish the contents of the false complaints to the media and third parties, and whose predominant, if not sole, purpose was to harm the Plaintiffs and to enable improper short selling to occur as a result of such actions. This conduct, if proved at trial, falls squarely within the exceptions referred to above.

64. There is no basis in law to strike any claim based upon the whistleblower complaints in the circumstances of this case.

(d) Additional Causes of Action

65. It is respectfully submitted that the material facts pleaded in respect ot the claim for unjust enrichment and in support of personal liability of the Individual Defendants plead the necessary constituent elements of those claims and, read together with the remainder of the Conspiracy SOC, are adequate.

66. There is no basis to strike these claims.

(e) Particulars – Alleged inability of the Defendants to plead

67. An order for particulars is a discretionary order and the court must be satisfied that the order is just in the circumstances of each case.

Obonsawin (c.o.b. Native Leasing Services) v. Canada, [2001] O.J. No. 369, para 42

68. Particulars are required when they are necessary to plead for the party demanding them. They are not required when they are within the knowledge of the Defendants and therefore not necessary to enable the moving party to plead.

Physician's Services Inc. v. Cass, [1971] 2 O.R. 626 (C.A.)
General Motors Corp. v. Transcast Precision Inc., [2009] O.J. No. 4756 , para 26
Obonsawin (c.o.b. Native Leasing Services) v. Canada, [2001] O.J. No. 369, para 33

69. The onus is on the party requesting the particulars to satisfy the court that particulars are necessary in order to plead. An affidavit is required from the party attesting to the necessity of particulars. Failure to provide such evidence is fatal to the relief sought.

Physician's Services Inc. v. Cass, [1971] 2 O.R. 626 (C.A.)
Obonsawin (c.o.b. Native Leasing Services) v. Canada, [2001] O.J. No. 369, para 36 – 37
Sears Canada Inc. v. Pi Media Ltd., 2011 ONSC 2625 (Master) paras 42 - 46

70. It is respectfully submitted that the moving parties have provided no evidence to support a finding that particulars are required for them to plead. Not one of the moving parties has delivered an affidavit swearing that the particulars they demand are not within their knowledge and without them they cannot respond to the Statement of Claim. Statements in facta are not evidence on which to satisfy the onus that the requested particulars are necessary to plead to the Statement of Claim.

71. There may be instances where a supporting affidavit is unnecessary to support a request for particulars. Justice Epstein in *Obonsawin*, using the words of Justice Lerner in *Steiner v Lindson et al (1979),* 14 O.R. (2d) 122 at p. 129, described such an instance as were the pleading is so "general that particulars are manifestly necessary, or so bald as to be recognized as a pleading of which particulars should be given without a supporting affidavit".

Obonsawin (c.o.b. Native Leasing Services) v. Canada, [2001] O.J. No. 369, para 36

72. It is submitted that this is not such a case. The elements of conspiracy have been sufficiently pleaded in the Statement of Claim. The Claim describes who the parties are, their relationship to each other, their agreement, the objects and purposes of the alleged conspiracy, and the overt acts which are alleged to have been done and the damages or injury caused by the defendants. The elements of defamation have also been sufficiently pleaded. The Statement of Claim describes the alleged defamatory words, the publication of the words by the defendants, to whom the words were published and that the words were defamatory of the plaintiff.

73. It is submitted that in reality what the defendants seek in this motion is that evidence be ordered to be pleaded in support of the material fact allegations in the Statement of Claim. This is neither necessary nor appropriate.

THE DOW JONES ACTION

74. The Dow Jones Defendants recognize the test applicable to motions under rule 21 and then argue that the Dow Jones SOC fails to comply with the rules of pleading.

75. It is respectfully submitted that the complaints and arguments advanced by the Dow Jones Defendants constitute a series of uncounted and unwarranted conclusions.

76. The Dow Jones SOC does contain a concise pleading of material facts. It identifies ll of the requisite elements of the defamation claims being advanced, and provides proper particulars which ae more than sufficient to enable the Defendants to plead.

77. As in the case of the Defendants in the Conspiracy Action, none of the Down Jones Defendants who seek relief (McFarlane has not made any demand for particulars nor initiated any motions) have filed affidavits stating that they are unable to plead.

78. The Plaintiffs rely upon the legal principles set out in relation to the Conspiracy SOC section of this factum.

Part IV – Order Sought

79. Fort the foregoing reasons, it is respectfully submitted that all of the motions should be dismissed with costs.

October 25, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David C. Moore - LSO # 16996U

Kenneth G. G. Jones - LSO# 29918I

Counsel for the Plaintiffs

Schedule A

1. *The Catalyst Capital Group et al. v Veritas Investment Research et al.*, 2007 ONCA 85
2. *H.A. Imports of Canada Ltd. v. General Mills, Inc. et al.*, [1983] O.J. No. 3128
3. *Chrysler LLC v. Transcast Precision Inc.*, [2009] O.J. No. 4746, (S.C.J.)
4. *Chrysler LLC v. Syndicorp Capital Inc.*, [2009] O.J. No. 4745
5. *General Motors Corp. v. Transcast Precision Inc.*, [2009] O.J. No. 4756, (S.C.J.)
6. *EnerWorks Inc. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414 (S.C.J.)
7. *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, [2014] O.J. No. 1704, 2014 ONSC 2244, 120 O.R. (3d) 43 (S.C.J.)
8. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, [1995] 2 R.C.S. 1130, [1995] S.C.J. No. 64, [1995] A.C.S. no 64
9. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*, [2014] S.C.C. 12.
10. *Fraleigh v. RBC Dominion Securities Inc.*, 2009 CarswellOnt 9155
11. *Sussman v. Eales*, 1986 CarswellOnt 529 (ONCA)
12. *Said v. University of Ottawa*, 2013 ONSC 7186
13. P.M. Perell, "Tort Claims for Abuse of Process" (2007), 33 Adv. Q. 193
14. *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872
15. *Husky Injection Molding Systems Ltd. v. Schad*, 2016 ONSC 2297 (Commercial List)
16. *Jacobson v. Skurka*, 2015 ONSC 1699 (S.C.J.)
17. *Astley v. Verdun*, [2007] O.J. No. 1872 (S.C.J.)
18. *Hains Marketing Associates Ltd. v. Canadian Olympic Assn.*, [2000] O.J. No. 973 (S.C.J.)
19. *Obonsawin (c.o.b. Native Leasing Services) v. Canada*, [2001] O.J. No. 369
20. *Physician's Services Inc. v. Cass*, [1971] 2 O.R. 626 (C.A.)
21. *General Motors Corp. v. Transcast Precision Inc.*, [2009] O.J. No. 4756
22. *Sears Canada Inc. v. Pi Media Ltd.*, 2011 ONSC 2625 (Master)

Schedule B

1. *Rules of Civil Procedure, Rule 25.06*

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

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. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

Condition Precedent

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence. R.R.O. 1990, Reg. 194, r. 25.06 (3).

Inconsistent Pleading

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative. R.R.O. 1990, Reg. 194, r. 25.06 (4).

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. R.R.O. 1990, Reg. 194, r. 25.06 (5).

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material. R.R.O. 1990, Reg. 194, r. 25.06 (6).

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material. R.R.O. 1990, Reg. 194, r. 25.06 (7).

Nature of Act or Condition of Mind

(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. O. Reg. 61/96, s. 1.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. R.R.O. 1990, Reg. 194, r. 25.06 (9).

2. *Securities Act,* RSO 1990, Chapter S.5 sections 126.1 and 126.2

Fraud and market manipulation

126.1 (1) A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or

(b) perpetrates a fraud on any person or company. 2010, c. 26, Sched. 18, s. 33.

Attempts

(2) A person or company shall not, directly or indirectly, attempt to engage or participate in any act, practice or course of conduct that is contrary to subsection (1). 2013, c. 2, Sched. 13, s. 3.

Misleading or untrue statements

126.2 (1) A person or company shall not make a statement that the person or company knows or reasonably ought to know,

(a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and

(b) would reasonably be expected to have a significant effect on the market price or value of a security, derivative or underlying interest of a derivative. 2002, c. 22, s. 182; 2004, c. 31, Sched. 34, s. 4 (1); 2010, c. 26, Sched. 18, s. 34.

Same

(2) A breach of subsection (1) does not give rise to a statutory right of action for damages otherwise than under Part XXIII or XXIII.1. 2004, c. 31, Sched. 34, s. 4 (2).