

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC.,
c.o.b. as ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC,
FRIGATE VENTURES LP, ANSON CAPITAL LP, ANSON INVESTMENTS
MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP,
ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, BRUCE
LANGSTAFF, ROB COPELAND, NATHAN ANDERSON, KEVIN
BAUMANN, RICHARD MOLYNEUX, JEFFREY MCFARLANE, DARRYL
LEVITT and JOHN DOES #1-10

Defendants

MOVING PARTY'S FACTUM

October 26th, 2018

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Defendant herein

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Defendant

AND TO: **JEFFREY MCFARLANE**

Defendant

AND TO: **JOHN DOES #1-10**

defendant

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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC.,
c.o.b. as ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC,
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LEVITT and JOHN DOES #1-10

Defendants

MOVING PARTY'S FACTUM

PART I - OVERVIEW

1. The plaintiffs commenced this action on November 7, 2017 against 32 defendants, ten of whom are unknown. The Statement of Claim (the "Pleading") is a lengthy, 132 paragraph pleading that alleges approximately six causes of action against all of the defendants. The plaintiffs claim general, special, aggravated and punitive damages jointly and severally against all of the defendants on the basis of each cause of action.
2. The Pleading, which makes claims involving fraud, intent and knowledge, requires full particulars with regard to each element of each cause of action alleged.

3. On May 18th, 2018, the defendant, Darryl Levitt (“Levitt”) delivered a Demand for Particulars (the “Demand”). The plaintiffs were ordered by the Honourable Justice Hainey on May 23, 2018 to provide a response to the Demand. No such response has been received.

PART II - SUMMARY OF FACTS

4. In the Pleading, the defendant Darryl Levitt (“Levitt”) is identified as one of four “Guarantor Conspirators”, as one of 24 “Conspirators”, and as one of six “Guarantors” (as therein defined). The factual allegations against the defendants are made against various groupings defendants. As such, the Pleading fails to disclose the case being made against Levitt as an individual defendant.

5. The plaintiffs broadly allege the following causes of action collectively against each defendant in the action: (i) defamation; (ii) injurious falsehood; (iii) intentional interference with economic relations; (iv) civil conspiracy; and, (v) unjust enrichment in the first paragraph of the Pleading.

6. The Pleading fails to comply with the rules of pleading for the causes of action asserted, pleads them with insufficient particularity

7. On May 18, 2018, Levitt delivered a Demand for Particulars with regard to the Statement of Claim. On May 23, 2018, Levitt, other defendants, and the plaintiffs appeared before the Honourable Justice Hainey at a 9:30 a.m. hearing.

8. At the hearing, the Honourable Justice Hainey ordered that the plaintiffs respond to the demand for particulars made by one defendant by June 1, 2018, and the demands for particulars by Levitt and other defendants by June 15, 2018.

9. Between June 4, 2018 and June 26, 2018 counsel exchanged emails regarding the plaintiffs' failure to comply with His Honour's order. Despite these efforts, no response to the defendants' respective Demands for Particulars was received.

10. As of June 29, 2018, the plaintiffs have not delivered a response to Levitt's demand for particulars. In doing so, the plaintiffs have failed to comply with a timetable as ordered by a Judge and have breached an interlocutory order of this Court.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

11. The issues before this Honourable Court are:

(a) The Pleading discloses no reasonable cause of action as against Levitt and should be struck pursuant to Rule 21.09(1)(b) of the *Rules of Civil Procedure*;

(b) In the alternative, this Honourable Court should order that the plaintiffs provide full particulars with respect to each cause of action alleged against Levitt in accordance with Rule 25.06(8) of the *Rules of Civil Procedure*.

Motion to Strike

12. Counsel for Levitt has had the opportunity to review the Factum delivered by Linda Plumpton, and adopts the legal principles as set out in paragraphs 17-52 therein.

In the alternative, Motion for Particulars

13. Rule 25.06(8) requires that allegations of fraud, breach of trust, malice or intent be pleaded with full particulars.

14. The Honourable Justice Morgan in *Economical Insurance Co. v. Fairview Assessment Centre*, [2013] O.J. No. 2734 (S.C.J) held, at paragraph 6:

“Rule 25.06(8) specifically requires full particulars of each allegation of fraud made in the Statement of Claim. “[T]he Plaintiffs must set out precisely what each allegation of misrepresentation or defamation is, when the particular incident occurred, what was alleged to have been said, by whom and to whom.”

15. The Pleading does not contain this detail, therefore the claims as against Levitt should be struck, or particulars ordered.

16. Furthermore, the plaintiffs alleged conspiracy based on unlawful conduct of Levitt and the other defendants. The Pleading does sufficiently plead that Levitt engaged in unlawful conduct. This Court has determined that failure to properly plead the unlawful conduct element of conspiracy is fatal to a claim in conspiracy. Pleadings of conspiracy, although not expressly stated in Rule 25.06(8), require full particulars, as stated by this Court in *Enerworks Inc. v. Glenbarra Energy Solutions Inc.*, [2012] O.J. No. 2272 (S.C.J), at paragraphs 65 and 76:

“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, 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.”

PART IV - ORDER REQUESTED

17. Levitt requests the following relief:

(a) An Order striking out the Statement of Claim and dismissing this action as against the defendant, Darryl Levitt;

(b) In the alternative, an Order for particulars of the following paragraphs of the Statement of Claim in this proceeding in accordance with the Demand for Particulars delivered on May 18, 2018: Paragraphs 1(a); 1(b); 1(c); 1(d); 1(e); 1(f); 1(g); 37; 41, 43, 51; 57; 58; 59; 61; 63; 64; 65; 66; 68; 69; 70; 74; 75; 76; 77; 78; 79; 81; 82; 84; 86; 87; 89; 92; 93; 101; 103; 104; 114(a); 115; 116; 117; 119; 120; 121; 122; 125; 127; 128; and, 129;

(c) The costs of this motion on a substantial indemnity basis; and,

(d) Such further and other Relief as to this Honourable Court may seem just.

All of which is respectfully submitted this 26th day of **October 2018**.



Darryl Levitt

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Defendant herein

CALLIDUS CAPITAL CORPORATION

-and-

**OPES RESOURCES INC., RICHARD GEORGE
MOLYNEUX AND DARRYL LEVITT**
Defendants/Plaintiffs by Counterclaim

Plaintiff/Defendant by Counterclaim

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at **TORONTO**

MOVING PARTY'S FACTUM

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